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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1925, AND JANUARY AND SEPTEMBER TERMS, 1926

VOLUME CXIV

HENRY P. STODDART,

OFFICIAL REPORTER

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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

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IN MEMORIAM

JOHN J. SULLIVAN

At the session of the Supreme Court of the State of Nebraska, September 20, 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:

May it Please the Court:

Your committee to draft resolutions in memory of Honorable John J. Sullivan reports:

John J. Sullivan was born in Harvard, in McHenry county, Illinois, on April 11, 1855, and passed from this life on the 17th day of February, 1926, at San Diego, California. Both his parents were born in Ireland, whence they emigrated to the United States in their early years. His mother, Margaret Meskill, was married to his father, John Sullivan, in Boston.

Judge Sullivan was educated in the ungraded country schools of Illinois, where the tuition was chiefly reading, writing, arithmetic, and grammer. At the age of 18 years, he taught country school for several terms, and, with his earnings, attended the Metropolitan Business College in Chicago for several months. He then worked in a store in Chicago for about one year, after which he became a student in the law office of John B. Lyon, of Harvard, Illinois. His preliminary reading there enabled him to graduate from the University of Iowa, at Iowa City, with the degree of Bachelor of Laws, after one year's attendance there.

He then opened a law office in Harvard, where he remained for about a year and a half, but with little success.

Meanwhile, his brother, William Sullivan, had located

near Columbus, in Platte county, Nebraska, and in the fall of 1879, Judge Sullivan came to Columbus and opened a law office in partnership with the late William M. Cornelius, who had recently come to Columbus.

In 1883, he was elected county judge of Platte county and held that office for a single two-year term, not being a candidate for re-election. He was elected representative from Platte county to the legislature in 1886, but was not a candidate for re-election. In 1891, he was elected judge of the district court for the sixth judicial district of Nebraska, and was re-elected in 1895. In 1897, he was elected judge of the supreme court and became chief justice in January, 1902, serving for two years. He was defeated for re-election in 1903.

In January, 1904, he resumed the practice of law in Columbus and, about the 1st of January, 1909, moved to Omaha, where he continued in the practice of law until the time of his last illness. In the latter part of 1908, he was appointed as judge of the supreme court by Governor Sheldon, qualified and served one day, and then reconsidered the matter and resigned. In 1915, on the death of Chief Justice Conrad Hollenbeck, he was tendered the position of chief justice of the supreme court, which he refused.

On the 17th day of April, 1881, Judge Sullivan was married to Katherine Landers, who still survives him.

The foregoing are the outstanding facts, but they are wholly inadequate to express the significance or worth of his life.

John J. Sullivan was an able and upright lawyer and judge, whose integrity and sincerity were never questioned. In his relations with his fellows, he personified courtesy, fairness, and magnanimity. To the younger members of the bar, he exhibited a special friendliness, generously aiding them with his fraternal counsel and encouragement. Many of them, now grown to riper years, can testify that he pointed a way out of their difficulties and inspired hope in the place of despair.

At the bar and on the bench, he observed the best traditions and finest proprieties of both. He considered the

administration of law without the accompaniment of justice to be a vain and empty thing. He recognized settled principles of law as necessary to maintain civic order and stability and for the security of personal and property rights, but would not permit outworn and purely technical rules to defeat the purposes of these principles.

He knew no intolerance save the intolerance of hypocrisy, chicanery, injustice, and wrong. He set no sails to catch the varying breeze of popular prejudice or passion. He stood for raising humankind to a higher level of hope and faith and courage and nobility of action. And so broadly tolerant was he that his thought excluded no means by which those results might be achieved. He was modest to the point of timidity, but, where a question of right or wrong was involved, he promptly championed the right with signal ability and unsurpassed courage.

His service as a nisi prius judge was marked by patient hearing and strict impartiality of decision. But his talents and character are best revealed by his written opinions preserved in the reports of this court, which are a valuable contribution to the jurisprudence of Nebraska. In them, he appears at his best, and it may truly be said that he touched no problem that he did not elucidate, and no complexities he did not clarify. His judicial mind removed the mask from pretense and made fraud stand naked and abhorrent. His influence upon the law of this state will be a perpetual memorial. He lived a good life, performing his duties with fidelity, and meeting obstacles with courage. So, by a true paradox, he is dead but yet lives, he is gone but still abides.

We recommend that this testimonial be ordered spread upon the journal of this court, and that a copy, certified under the seal of this court, be sent to Mrs. Sullivan.

H. M. SINCLAIR
F. A. WRIGHT
W. F. GURLEY
LOUIS LIGHTNER
W. M. CAIN
Committee

Honorable H. M. Sinclair:

May it Please the Court: It is not a pleasing exaction to mourn the dead; but, if the departed be one that you have loved, honored, and esteemed, it becomes a pleasant duty to revere his memory.

Judge Sullivan was one that we loved, honored, and esteemed. We first met and became acquainted in the year 1885, and for 40 years there existed a friendship unbroken, unmarred, and unalloyed. In the vigor of mature manhood he was called with eyes undimmed by age and with mental power unabated. Perhaps it is best to go before old age wrecks the body or warps the mind. "For him who burns the candle to the stick, the sputtering socket yields but little light."

His high standing as a lawyer and a jurist is a part of the history of this state within the common knowledge of its people; and we can but iterate that, as a lawyer, he adorned his profession, as a judge, he held the scales of justice with a firm, just, and impartial hand—the acme of juridical justice.

It has been truly said: "Whoever labors on the edifice of justice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself in name and fame and character with that which is and must be as durable as the frame of human society." This Judge Sullivan did by his judicial service, and his name and fame are entwined therein and will endure and live as long as law and jurisprudence are administered to the frame of human society in this commonwealth. Yet it is not of his legal attainments as a lawyer, nor of his judicial service to the state, that at this hour invocate our reverence; but that of man and friend. We knew him best and revered him most as such. There are treasures laid up in the heart that never perish. These treasures a man takes with him beyond death. For true friendship between man and man is infinite and immortal.

It is as the shadow of the evening which strengthens with the setting sun of life.

In private life Judge Sullivan was a man of many pleasing attributes. His sociability was predominant. His bent of mind was broad and tolerant. It was many-sided. It not only responded to the harp that rang though Tara's Hall, but also to the humbler emotions that characterize the life of all. His racial endowments gave to him deep and sincere sympathy for the unfortunate and oppressed, and also strong and loyal attachment to his friends. He never saw and realized the faults and shortcomings of his friends. It was the grandeur and nobility only that he saw, felt, and appreciated. He was an ardent student. There was not a secret of nature that he did not seek out and contemplate with profound and earnest thought. And the insolvable problem of existence and its final ego were to him subjects of unending interest. But, above all, he loved to contemplate the beauty, rythm, and harmony of nature's living life. To him it was as a beautiful poem set to sweet and entrancing music that charmed and cheered the soul. In his boundless love of nature and of nature's God he visioned immortality. But—

Our friend is gone. His work was not done, but his column is broken. He is dead. Shall we meet again?

In the beautiful drama of Ion, the instinct of immortality, so eloquently uttered by the death of the devoted Greek, finds a deep response in every thoughtful soul. When about to yield his young existence, a sacrifice to fate, his beloved Clemantha asks if they should not meet again; to which he replies:

"I asked that dreadful question of hills that seemed eternal—of clear streams that flow forever—of the stars among whose fields of azure my raised spirit had walked—as I look upon thy living face I feel that there is something in thy love that cannot really perish. We shall meet again, Clemantha." We shall meet again. Yes, we shall meet again.

With grateful hearts and loving hands we lay our promise as a chaplet on his tomb.

Honorable F. A. Wright:

May it Please the Court: Few, if any, have contributed more to the welfare of Nebraska than Judge Sullivan. He came to the state in its early development and, almost immediately, became an active factor in its growth, constantly, day by day, adding his benign influence, not only to its laws, but to its social and moral growth as well.

His name first appears in the fifteenth volume of the reports of this court and is found, either as an attorney or judge of the district or this bench, in all but two of the succeeding volumes.

As a lawyer, he was able, resourceful and fearless. No client ever lost through his neglect. As a judge, he was fair, upright, painstaking, and learned. While considerate of the opinions of others, having reached his conclusions, he never doubted nor wavered. He has contributed much to the literary excellence of the opinions of this court, and his analytical reasoning and broad learning have had much to do in moulding the law, not only of Nebraska, but throughout the nation, where his judgments have stood as precedents.

As a man, he was honest and upright, simple and guileless, yet wise and sagacious, gentle and retiring almost to timidity, yet bold and courageous, above most men. He loved and trusted men and feared none. Slow to arouse, he never shirked a duty nor left an adversary without having given good account of himself. He loved frankness and sincerity, and, like Ithurial's spear, at his touch, sham, fraud and deceit were revealed in their true shapes.

Indelibly fixed in my mind is the picture as he stood in his office, the fire of battle in his eye, beside a towsle headed serious faced fourteen-year old boy, and announced that we had taken this boy's case. The boy had worked a week; a dollar and a half of his wages was wrongfully withheld. He came to the judge, busy with important affairs, who promptly took his case and collected the debt; in that instance without a suit. The wronged or oppressed never appealed to him in vain. The young lawyer who came to him in doubt, and there were many of them, always

went his way, comforted by his kindly advice and shrewd deductions.

Simple in his habits, kind in his dealings, honest to himself and all with whom he came in contact, it is only natural that he finished his life, one of the most respected and beloved members of the bar of this state.

He has loved and been loved, lived and passed on. His activities are closed, but, while he lived, he so breathed his spirit into the law of our land that he will still live as long as that law stands.

We have lost a kind and indulgent friend; society has lost a learned member, and the state has lost a just and upright man. While Judge Sullivan is gone, he yet lives.

Honorable William F. Gurley:

May it Please the Court: John J. Sullivan came to the bar before it became commercialized. As a lawyer and a judge he conformed to the best traditions of a bar which is rapidly losing its individual character. Lawyers, especially in large centers, are being succeeded by "legal organizations," and the old traditions are well nigh forgotten by the practitioner of the present day. The ambition of the present day lawyer is to become a "promoter and organizer." The trial of lawsuits has fallen into disrepute, and the "office manager" has taken the place of the old time "Giant of the Bar."

Judge Sullivan was a philosophical lawyer who never allowed a technical barrier to foreclose his thought, although he could interpose a technical objection in the pathway of an opponent, when so inclined, much to the annoyance of the opponent. He had a keen wit and a genial humor, two weapons which are not often at the disposal of the same person. He had wisdom, which I think can best be defined as intellect plus character. He was intensely human, and frequently under cover of a simulated cynicism he revelled in many a jocular tirade upon human frailties. Yet at heart he was one of the kindliest men I ever knew.

He came from the practice of law in a country town to the practice of law in a large city, and immediately took his place as one of the leaders of the metropolitan bar. No organization, however large or important, could ever have subdued or secreted that wonderful personality. He was exceedingly popular with his brother lawyers, although making no attempt to court popularity. Gentle, modest, able, courageous, honest, tolerant, his memory will long be treasured by the profession which he so signally honored.

Judge Louis Lightner:

May it Please the Court: My first meeting with Judge Sullivan was while I was still a boy, and must have been during the 80's or early 90's. At that time the local justices of the peace still held court in the various townships, and Judge Sullivan came out to try a case where a neighbor had refused to properly support his aged mother. He had dinner at our place and I, an inexperienced country boy of ten or twelve, was very much charmed by his gracious and kindly manner and easy bearing. I did not hear the plea in the case referred to, but it is said that there was not a dry eye in the room.

My next meeting with Judge Sullivan was in June, 1904, when, through the influence of an uncle, an arrangement was made for me to come into his office. Judge Sullivan had come off the supreme bench the January before and his work had already increased to such an extent that he required help. He was living in Columbus at that time, and I remained with him there until January, 1909, when he moved to Omaha. Our association was very pleasant. He always paid me more than I earned and advanced me more rapidly than I deserved. The three things that most impressed me in his character and method of doing business during those years was his industry, his accuracy, and his humanity. He worked during the day, nearly every evening until 9 and 10 o'clock, and very often on Sunday forenoon. Every piece of work that passed through

the office had to be exactly right so far as he could make it so, whether it was important or unimportant. No letter with a misspelled word or with a word that did not express his exact meaning was permitted to leave the office. However, the work was not simply a business. He saw the human side of every case and of every client. No matter how busy he was, he enjoyed visiting with his old friends. I think the impression people got who called at the office was that they were meeting a kindly, shrewd, and not overly busy man. Judge Sullivan once said that the one thing above all others that is indispensable to make a successful lawyer is an analytical turn of mind; that next to that comes industry. Another thing in connection with his law practice that impressed me was that it was never simply a question of winning. He seemed to feel that the main work of a lawyer is to promote justice. He seldom considered the mere commercial side of the profession, and he never, on any occasion, considered his own welfare, financial or otherwise, in advising a client. As has been seen from the resolutions, Judge Sullivan was not highly educated in the sense that he had attended college. But he was highly educated in the reading and study which he had done by himself. He was very familiar with Shakespeare, Milton, and other English classics, and could and did often quote from them. He had evidently made a life study of the use of words and was very careful to use words to express the exact shade of meaning which he had in mind. I think a few quotations from his letters, briefs, and opinions might be of interest, although I will not have time to give them in their setting, which would add considerable to them. Some which I have selected at random follow:

"Great naked truths jut out of it on every side like granite crags."

"Even the right of the tithe proctor to his tithe and the gleanor to his gleanings was ignored."

"The fragrance of flowers along life's pathway is better by far than crimson chaplets when one is cold."

"There is about this evidence an aroma of evil that gives a charm to sin."

"Service of process was made upon the astral body winging its glad way across stellar space to the psychic sea."

"In his view, it would seem that title is an impalpable entity, elusive as a leprechaun, which, at the death of the last owner, goes out with the disembodied spirit to find lodgment elsewhere."

"The first low-wash of the tragic tide of events."

"The letters reek with amatory suggestions; they have the tang and flavor of passion."

"It has upon it the suggestion and dank odor of tyranny."

"If this statute is sustained, it will be a sort of fatuous denkmal that will, in the far future, excite the wonder of Patagonian travelers who come from their own enlightened land to study the ancient legislative monstrosities and view the broken temples and fallen fanes of North America."

"Truth may not always flame with fire, but it is never chilled slag."

"The teeming, whirring, smoking, shrieking potash life."

"Time changes even anomaly into system and the doubtful precedents of one generation become the fundamental maxims of another."

"Plaintiffs were wolf-brother, whose moral sense is blunted by greed of property."

"Age does not always chasten the soul, nor does devotion to country in time of peril insure obedience to her laws in times of peace."

"Wealth and culture do very little to quicken the conscience and to mellow and warm the soul."

"The sum and substance of the defense is that time has transmuted a broken contract into an equitable shield."

I have been asked if Judge Sullivan was a religious man. It is difficult for me to answer this question, since ideas of what constitutes a religious man differ. Judge Sullivan

was deeply religious in the sense that he believed in a supreme being and had faith amounting to moral certainty in the immortality of the soul. On the other hand, he was not religious in the sense of being a regular attendant at church, although I believe that he fully approved not only the Christian life as he led it, but also the Christian life as led by those who were able to take a more active part in religious worship. My thought is that Judge Sullivan believed that in standing against all temptation, for honesty of purpose, and for moral courage, and in using his profession—which was almost a religion with him—for the advancement of justice and right, he was promoting, to the extent he was able, the work of God and the Christian church in the world. He once said that Christianity is greater than creed, and on another occasion said that God, in the plenitude of his gifts, has not bestowed upon man a nobler attribute than moral courage. Judge Sullivan lived a very unusual life—one that was maintained at all times far above the commonplace. His mind was filled with thoughts of kindness toward all, his life was based on sincerity and truth, it was exalted by moral courage and sanctified by Christian faith.

Honorable Arthur F. Mullen:

May it Please the Court: For nearly thirty years Judge Sullivan and I were intimate, personal friends. Part of that time we were office partners. We were associated in important litigation. During the last ten years of his life hardly a day passed that we did not meet and visit with each other. These things are mentioned for the reason that I consider it a rare privilege to have had such intimate fellowship with this wonderful man. I am his debtor in many ways.

In the more than five hundred opinions that appear in the records of this court, he has left a lasting monument to his memory. He made an important and permanent contribution to our jurisprudence. His opinions, written in

a lucid, direct, and forceful style, are adorned with epigrams, apt illustrations, subtle humor, and good natured wit. They reflect his high sense of duty as a judge; they show his ability, candor, honesty, and passion for justice; they record his pure and generous thoughts, and are examples of his moderation, kindness, and good sense; they explain why his genial and kindly nature endeared him to all who knew him; they illustrate that—

> "The work that men do is not the best alone,
> The love they win is far the better part."

Judge William H. Thompson:

My first meeting with John J. Sullivan, as I now recall, was in 1881 or 1882 at a session of the district court then being held at Scotia, Greeley county, the then county seat. Among the attorneys in attendance were the following: James N. Paul, of St. Paul, afterwards for many years district judge; William Kelly, then of Lincoln, afterwards chief attorney for the Union Pacific; John G. Higgins, afterwards county judge; and our lamented John J. Sullivan, then of Columbus. This meeting and greeting ripened into an unending friendship as to each and all. These men each added luster to the bar and honor to our state. It was my esteemed privilege to appear as an advocate before Judge Sullivan when on the district bench, as well as when sitting as a member of this court. He was of such pleasing nature as to impel one to feel at ease in his presence, hence the youngest and most timid of the bar entered the court of which he was a member with pleasure and free from embarrassment. Such pleasing presence, coupled with his witticisms, kindly suggestions, and mannerism, drew one to him as brother to brother. This sense of relationship grew closer and closer as the years passed. It may be said of him that he was of such a mold as to attract and hold each member of the bar as a tree the clinging vine. While personally he is with us no more, the life that he lived, as he lived it, will ever remain an uplifting force.

Judge John C. Martin:

If it Please the Court: I am deeply impressed with the propriety of having this memorial presented some time after the death of Judge Sullivan, as it has given the kindly hand of time an opportunity to remove from our eyes the mist of sorrow and permits of our calmly and deliberately, as becomes a court, considering the life and service of our friend.

At the request of the memorial committee, that I speak at this memorial on account of my long and close association with the deceased, I gladly comply with the request. I first became acquainted with the departed jurist in 1883 when he commenced the practice of the law in this state at the city of Columbus, Nebraska, being encouraged to enter the practice by the deceased. At that time, strange as it may seem, there were more lawyers engaged in the active practice of the law in that city than there are so engaged at the present time. All of them were struggling for an existence and very little of the law in this state was settled. For 43 years I have enjoyed a close association and unbroken friendship with the deceased, and have been requested by your committee to say something about his character, as well as his public record, as a lawyer and judge.

None knew him but to love him, and he loved his fellow men. A spirit of kindness marked his every act and expression. In his practice as a lawyer he treated every one interested in the litigation with the utmost kindness, but never at any time deprived any client of loyal service. He possessed a keen sense of humor, which was of great service to him in the practice, but he never permitted any expression of his humor to hurt the feelings of another.

In his work on the district court bench he was always pleasant and particularly kind to the younger attorneys, and loved to associate with the attorneys for the purpose of getting in touch with their difficulties, relieving their burdens, and learning their true character. His work while on the supreme court of this state speaks for itself in his opinions, and is an abiding memorial, establishing his clear

judicial mind, with a fine literary style of expression, and always with an expression of sympathy for the weak, together with mercy toward the unfortunates.

"Men live in deeds, not years,
In thoughts, not breaths,
In feelings, not in figures on a dial.
Time should be measured by heart-throbs.
He lives most who thinks most,
Acts the noblest, feels the best."

This standard of a man fits the life and service of our departed friend and brother.

If I were preparing an epitaph for his tombstone it would consist of three sentences. First, "The memory of the just is blessed." Second, he did justly, he loved mercy, and walked humbly before his God. Third, "He loved his fellow men." I take this sentence from the beautiful poem "Abou Ben Adhem," with which you are no doubt all familiar. It speaks of the visit of the recording angel to Abou Ben Adhem with a scroll of those who loved the Lord, and Abou Ben Adhem's name was not upon the list. Abou Ben Adhem requested that his name appear as one who loved his fellow men. The angel returned the next night and presented the scroll of those who loved the Lord and Abou Ben Adhem's name lead all the rest. He was my friend.

I am deeply impressed with the thought expressed so beautifully by Oliver Wendell Holmes, regarding abiding friendship:

"Fast as the rolling seasons bring
The hour of fate to those we love,
Each pearl that leaves the broken string
Is set in Friendship's crown above.
As narrower grows the earthly chain,
The circle widens in the sky;
These are our treasures that remain,
But those are stars that beam on high."

Chief Justice Andrew M. Morrissey:

The memorial presented is a true portrayal of our departed friend. He was respected as a lawyer and honored

as a judge because of his keen intellect and irreproachable character. He was loved because of a charm of personality that defies description. He ever kept the milk of human kindness sweet and mixed wit and humor with the logic of his brilliant mind. He is gone and his professional brethren who were privileged to know him will soon follow him into the mysterious vale, but his judicial opinions will remain to strengthen and embellish the law of the state that honored him, and that he so ably served.

It is ordered that the memorial presented and the addresses delivered be spread upon the journal and printed in the reports.

During the period covered by these reports, in addition to the cases reported in this volume, there were 157 cases affirmed by the court without opinion.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1925.

HENRY W. WINKELMANN v. STATE OF NEBRASKA.

FILED OCTOBER 26, 1925. No. 24473.

1. **Information.** Where a crime created by statute may be committed by any of several methods set forth in the statute, the information may charge in a single count that it was committed by any or all of the enumerated methods if they are not inconsistent with or repugnant to each other.
2. ———: EMBEZZLEMENT. Where, under section 9638, Comp. St. 1922, a bank cashier is charged in one count of an information with embezzling, abstracting and misapplying $1,000 of the bank's funds, and all the acts charged relate to a single transaction, only one offense is charged.
3. ———: DUPLICITY. Where a count in an information is seemingly faulty because of duplicity, and, on defendant's application, a bill of particulars is furnished showing that a single, specific offense is relied on for a conviction, it is not prejudicial error for the trial court to overrule a motion to quash the information on grounds of duplicity, or to refuse to require an election by the state as to which of the offenses it will rely on for a conviction.

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

J. F. Ratcliff and *Scott & Scott,* for plaintiff in error.

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

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

GOOD, J.

On an information which charges that he, "then and there being the cashier of the Farmers State Bank of Culbertson, Nebraska, a banking corporation, organized and doing business under the laws of the state of Nebraska, did, then and there, wilfully and feloniously embezzle, abstract and misapply the sum of $1,000, being the moneys, funds and credits of said banking corporation, with the intent to injure and defraud said banking corporation," defendant was convicted and sentenced to a term in the penitentiary. As plaintiff in error, he presents to this court for review the record of his conviction.

The propositions relied on for reversal are: (1) That the trial court committed prejudicial error in overruling defendant's motion to quash, and in overruling the motion to require the state to elect on which charge of the information it would rely for a conviction; that is, whether for abstraction or embezzlement or misapplication of the funds of the bank; (2) that error was committed in permitting Walter D. James to appear as an attorney for the state, over objection of the defendant.

The prosecution is brought for a violation of section 9638, Comp. St. 1922. That portion of the statute applicable to the instant case is as follows:

"Every * * * cashier * * * of any banking company, who shall embezzle, abstract or wilfully misapply any of the moneys, funds or credits of such company, * * *with an intent in either case to injure or defraud such company, * * * shall be confined to the penitentiary not less than one year nor more than ten years."

It will be observed that the information is in the language of the statute, except that the several acts are charged conjunctively, instead of disjunctively. Defendant insists that the information charges him: First, with embezzlement of the moneys of the bank; second, with abstraction of the funds of the bank; and, third, with misapplication of the funds of the bank, with an intent, in each case, to defraud.

Counsel for defendant cite and rely upon a number of decisions rendered by the circuit and district courts of the United States, which construe and interpret the meaning of section 5209, Revised Statutes of the United States. That statute is very similar to section 9638 of the Nebraska statutes. The cases referred to seem to hold that embezzlement, abstraction and misapplication of funds of a national bank by one of its officers are three separate and distinct offenses, and that they may not be joined in one count of an indictment. The supreme court of Texas, in *Todd v. State,* 89 Tex. Cr. Rep. 99, construes a similar statute, as do the federal courts. Were the question an open one in this state, we might look with favor on defendant's contention. In this state, however, it has long been the rule, supported by numerous decisions of this court, that a statutory offense may be charged in an information in the language of the statute, and that, where a statute creates a crime and enumerates a number of ways in which it may be violated, the information may charge that it was committed by all the enumerated ways, provided they are not inconsistent with or repugnant to each other.

Among the decisions of this court supporting the rule are *Brown v. State,* 107 Neb. 120; *Smith v. State,* 109 Neb. 579; *State v. Leekins,* 81 Neb. 280; *Hase v. State,* 74 Neb. 493; *Bartley v. State,* 53 Neb. 310; *Mills v. State,* 53 Neb. 263. Authorities from other jurisdictions supporting the rule are *State v. Montgomery,* 109 Mo. 645; *State v. Hogle,* 156 Mo. App. 367; *State v. King,* 81 Ia. 587; *People v. Frank,* 28 Cal . 507. See, also, 31 C. J. 764, sec. 325.

We are of the opinion that the different acts alleged as constituting the offense, viz., embezzlement, abstraction and misapplication of the bank's funds, are not inconsistent with or repugnant to each other. It may be fairly said that the term "embezzlement" includes the idea of abstracting and misapplying the funds of another. Moreover, in the instant case, at the outset of the trial the state, on defendant's application, was required to and did furnish the defendant with a bill of particulars of the facts relied upon

for a conviction. The bill of particulars clearly shows with what facts the defendant would be confronted in court, and, in this case, fully apprised him that embezzlement of the bank's funds would be proved, or attempted to be proved. The reason for the rule against duplicity in a count of a criminal information is that such an information does not fairly apprise the defendant of the offense he is required to meet in court. Since the defendant was fully apprised, there was no occasion to apply the rule.

Under all the circumstances in this case, the overruling of the motion to quash the information and the overruling of the motion to require the state to elect on which charge in the first count of the information it would rely for a conviction was not prejudicial to the defendant.

With respect to the appearance of Mr. James as an attorney in the case, the record fails to disclose that Mr. James in any manner took any part in the trial or had anything whatever to do with the presentation of the case. At one stage of the proceeding, an objection was made to his appearing in the case, and the court ruled that he would not be permitted to take any active part as an attorney, but that counsel in charge for the state would not be barred from consulting with him, or with any other person, as to knowledge of facts or information in the trial of the case. The record, however, does not even show that counsel for the state consulted or conferred with Mr. James about any facts. This assignment is wholly without merit.

No prejudicial error has been shown. The judgment of the district court is therefore

AFFIRMED.

JACK KILLIAN V. STATE OF NEBRASKA.

FILED OCTOBER 26, 1925. No. 24935.

1. **Criminal Law: APPEAL.** The provisions of section 1, ch. 113, Laws 1923, regulating appeals from an inferior court in misdemeanor cases are mandatory. One who has been convicted of a misdemeanor in an inferior court, in order to effect an appeal

to the district court must enter into a recognizance that complies substantially with all of the conditions of said section.

2. ———: ———: RECOGNIZANCE. A recognizance, given to effect an appeal by a defendant who has been convicted of a misdemeanor in the county court, and which is conditioned for his appearance at the district court on the first day of the next term, instead of forthwith, as the statute requires, is invalid and confers no jurisdiction on the district court.

ERROR to the district court for Colfax county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Garlow & Long, for plaintiff in error.

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

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

GOOD, J.

Plaintiff in error (hereinafter referred to as defendant) was convicted in the county court of a statutory misdemeanor, and attempted to appeal to the district court, where the appeal, on motion of the state, was dismissed because the recognizance for the appeal was not in conformity with statutory requirements. Defendant brings the record to this court to review the judgment of dismissal.

Chapter 113, Laws 1923, regulates appeals from county courts in misdemeanor cases. Section 1 of that chapter provides, in substance, that no appeal shall be granted or proceedings stayed unless the appellant shall enter into a written recognizance, conditioned for his appearance forthwith, and without further notice, to the district court for such county, and from day to day thereafter until the final disposition of such appeal, to answer the complaint against him and to abide the judgment of the district court. The recognizance given in the instant case was conditioned for the appearance of defendant before the district court in and for Colfax county, on the first day of the next term

thereafter and from time to time and from term to term, as may be ordered by said court, until final determination of the aforesaid cause, and not depart the court without leave.

It will be observed that the recognizance is not strictly in accord with the requirements of the statute. Instead of requiring defendant to appear forthwith, it requires him to appear on the first day of the next term, and does not bind him to abide the judgment of the court, as provided by statute. Because of this departure from the statutory requirements, the state contends that the recognizance is void and conferred no jurisdiction on the district court, and that the appeal was properly dismissed.

Defendant contends that the recognizance, though defective in form, was sufficient to confer jurisdiction on the district court, and that his request for leave to file an amended and substituted recognizance, which would strictly conform to the requirements of the statute, should have been allowed. He further argues that the recognizance is sufficient if it appears from the tenor thereof at what court the defendant was bound to appear, and that the court or officer before whom it was taken had the power to require and take such recognizance. In support of his contention he cites section 10043, Comp. St. 1922, and *Shupe v. State*, 40 Neb. 524.

Section 10043, *supra*, provides: "No action brought on any recognizance shall be barred or defeated, nor shall judgment thereon be reversed, by reason of any neglect or omission to note or record the default, nor by reason of any defect in the form of the recognizance if it sufficiently appears from the tenor thereof at what court the party or witness was bound to appear and that the court or officer before whom it was taken was authorized by law to require and take such recognizance."

We think the purpose of the statute was to prevent a defense in an action on a recognizance when it had accomplished its purpose and the party giving it had received and enjoyed the benefits of the recognizance. It is in the nature

of an estoppel against setting up a defense to an instrument which the parties themselves have tendered as valid, and which has served the same purpose as though it had been in strict conformity with the statute.

In *Shupe v. State, supra,* the recognizance was signed by the parties, which was not required by the statute, and the court held that the signatures might be treated as surplusage. In the course of the opinion, language in the nature of dictum is used, which tends to support defendant's position. Defendant cites and relies on a number of cases dealing with appeal bonds in civil actions, but they are based on a different statute and have no application to the question under consideration. He also cites *Holmes v. State,* 17 Neb. 73. In that case the recognizance required defendant to appear on a day named, which was, in fact, the first day of the next term of the district court. The statute then in force provided that recognizances should require the defendant to appear on the first day of the next term. It was very properly held that the recognizance was a sufficient compliance with the statute then in force.

Section 1, ch. 113, Laws 1923, is mandatory in its terms and is but an amendment of section 9999, Comp. St. 1922, which has been frequently held by this court to be mandatory. In construing section 9999, this court has held that a defendant in a misdemeanor case, desiring to appeal from an inferior court to the district court, must substantially comply with the statute in order to give the latter court jurisdiction. *Pill v. State,* 43 Neb. 23; *Kazda v. State,* 52 Neb. 499; *Zobel v. State,* 72 Neb. 427; *Whetstone v. State,* 109 Neb. 655.

In *Zobel v. State, supra,* the recognizance was in the form required by statute, except that it was executed by defendant without a surety. It was there held that the recognizance was insufficient to give the court jurisdiction. In the course of the opinion it was said:

"The provisions relating to appeals in misdemeanor cases are doubtless for the benefit and advantage of those convicted of offenses of a minor character and, in order to

perfect a valid appeal as contemplated by statute, there must be a compliance in all substantial particulars with the conditions upon which the right of appeal may be exercised. * * * The holdings of the courts and in this jurisdiction especially are to the effect that such provisions are mandatory, and a failure to follow them in any material respect forfeits one's right to an appeal which, otherwise, he is entitled to. * * * If one of the provisions may be departed from or ignored, then why not either of the others?"

In *Whetstone v. State, supra,* a recognizance was given, in form complying with the statute, but with only one surety, while the statute required "sureties." It was there held that the recognizance was fatally defective and that no jurisdiction was conferred on the district court.

In the instant case the recognizance departs from the requirements of the statute, in that it required defendant to appear on the first day of the next term, instead of "forthwith." In amending section 9999, Comp. St. 1922, changing the time for appearance from the first day of the next term to "forthwith," the legislature doubtless had in mind that in many of the counties of the state but two terms of court are held in a year, and that a defendant under the old statute might take his appeal in January and not be required to appear in court to answer the charge against him until the next September. It therefore changed the statute, requiring that the recognizance should be to appear forthwith, so that such delays might not occur in the enforcement of the law. It is argued that to appear on the first day of the next term is a substantial compliance with the statute, but if the statute may be departed from to the extent of requiring the defendant to appear on the first day of the next term, why not on the first day of the second or third term? If such a recognizance were given and the defendant secure his liberty thereon, and if held valid when attacked, it would mean that a defendant in a minor criminal action could unduly delay and prolong the time when his appeal might be heard in the district court.

The ruling of the trial court in dismissing the appeal is

in strict accord with the rule heretofore established and long followed in this court. The judgment of the district court is

AFFIRMED.

Note—See Criminal Law, 16 C. J. sec. 678.

STEPHEN O'DONNELL, APPELLANT, V. BAKER ICE MACHINE COMPANY ET AL., APPELLEES.

FILED OCTOBER 26, 1925. No. 23048.

Master and Servant: WORKMAN'S COMPENSATION ACT: ACTION AGAINST THIRD PARTY. Section 18 of the workmen's compensation act (Laws 1913, ch. 198), being section 3041, Comp. St. 1922, construed, and *held*, that the right to bring an action against the third party rests with the employer until such time as the employee can allege and prove that his employer has neglected or refused to institute the action.

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

Bigelow & LaViolette, for appellant.

Kennedy, Holland, DeLacy & McLaughlin, Brogan, Ellick & Raymond, Byron G. Burbank and *Dressler & Neely, contra.*

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

THOMPSON, J.

This case was considered by us and opinion rendered. Motion for rehearing filed and hearing had thereon. The action is one brought in the district court for Douglas county against the answering defendants, jointly, to recover damages for an injury received by the plaintiff in the course of his employment while working for the defendant Omaha Steel Works, hereinafter called the Steel Works, which injury is alleged to have been caused by the joint negligence

of the other defendants. At the close of plaintiff's case, motions were interposed by the answering defendants for an instructed verdict in their favor, or that the court discharge the jury and enter judgment in their behalf of dismissal of the action at plaintiff's costs, which motion, together with the challenge to the petition lodged in the respective answers, were considered by the court and sustained, and the case dismissed. Motion for a new trial overruled, and case appealed.

The undisputed facts as disclosed by the record are, in substance, that the Baker Ice Machine Company, hereinafter called the Machine Company, desiring to erect a building in the city of Omaha, entered into a contract with defendant Busk for the erection thereof, requiring Busk to take out workmen's compensation insurance; that Busk sublet a portion of the work to the Steel Works, requiring it to provide itself with such insurance, and thereafter the Steel Works employed plaintiff as a day laborer to assist in the furtherance of such enterprise; that he entered upon such employment; that defendant Power Company owned and operated a system of electric lines in such city generally, and especially along an alley in such city, where, in the furtherance of such construction, defendant Steel Works and its employees, including plaintiff, were, with machinery and men, at a point upon such alley adjoining the premises where the building was being constructed; that while thus employed, and in the line of his duty, plaintiff received a severe electric shock which seriously injured and disabled him, to his great damage; that for such injury he sought and received, and was continuing to receive, compensation from the defendant Steel Works, as by the workmen's compensation act provided, and this without opposition from it or the other defendants, or either thereof.

The petition is rather voluminous, and it would not serve the purposes of this opinion to set it out at length. However, in it plaintiff nowhere alleges facts showing his right to maintain this action under section 18 of the workmen's compensation act, which is section 3041, Comp. St. 1922,

in that he does not allege that his employer, the Steel Works, has refused or neglected to bring the action. This defect in the petition is challenged by the answers as follows:

"Plaintiff's petition does not state facts sufficient to constitute a cause of action. * * * If any one has a right to bring an action against this defendant by reason of said injury so sustained it is plaintiff's employer, the said Omaha Steel Works; that under and by virtue of the workmen's compensation act of the state of Nebraska the right to maintain said action is wholly and exclusively in the Omaha Steel Works; that said Omaha Steel Works has not refused to bring said action, nor has it assigned to any one its rights therein and thereto, but on the contrary said Omaha Steel Works has brought an action against this defendant in the district court of the United States for the district of Nebraska, Omaha division, to recover for the same identical injury for which damages are sought to be recovered in this action, and that by reason of the foregoing the plaintiff is barred and estopped to bring this action and to recover against the defendant herein."

The answers also contain a charge of negligence on the part of plaintiff, and a general denial.

To the respective answers interposed, no reply was filed, notwithstanding an order permitting replies to be filed at any time during the trial was entered at plaintiff's request by the trial court. Thus, every material, affirmative fact in such answers well pleaded stands admitted, including the pendency of the action in the federal court; that the Steel Works had not refused or neglected to prosecute an action against the Power Company, seeking to recover full damages with which to recoup itself to the extent of its loss under the compensation act, and the remainder to be paid to plaintiff. This latter fact was also admitted by the respective counsel at the hearing in open court.

The controlling question to be determined is: Does the petition state a cause of action? Section 18, *supra*, provides:

"Where a third person is liable to the employee or to the

dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employees or to the dependents, and shall be treated as an advance payment by the employer, on account of any future instalments of compensation."

This question was before us in *Muncaster v. Graham Ice Cream Co.*, 103 Neb. 379, in which it was said in the majority opinion: "The Baker Ice Machine Company (contractor) is simply subrogated to the position of the plaintiff (employee) herein, and in case the Baker Ice Machine Company, after having settled with the employee under the workmen's compensation act, refuses to go ahead any further, and washes its hands of the whole proceeding, then plaintiff should not be prevented from proceeding under the provisions of this act, as he has done in this case." And Judge Letton, in his concurring opinion on page 381, in referring to the same section, uses the following language: "If the employer, after paying the amount of the statutory compensation, refuses or neglects to bring his action against the negligent third party, this does not deprive the injured person of his right of action against the wrongdoer."

In *Murphy Construction Co. v. Serck*, 104 Neb. 398, we said: "When the accident happened the employer became liable to the employee for compensation to be paid according to the provisions of the statute. The employer also was subrogated to the right to recover from the negligent third party the full amount of damage suffered by the injured workman. The amount which the employee was entitled to receive from the employer was in a large degree fixed by statute, but the amount which the employer might in turn

recover from the wrongdoer is to be determined either by settlement satisfactory to the three parties concerned or by the ordinary process of litigation in an action for damages."

As we construe this act, when the employer and employee are operating under and within its provisions, and while in the line of his duty the employee is injured through the wrongful or negligent act or omission of a third party, as charged in this case, the employer is subrogated to the rights of such employee, or those of his dependents, against such third person, and that until the employer neglects or refuses to bring an action against such third party his right to do so is exclusive. If the employee must allege and prove that his employer has refused or neglected to bring the action, as we have repeatedly held, it follows that he cannot take the initiative until he can meet this condition.

The trial court did not err in taking the case from the jury and dismissing the action at plaintiff's costs. This conclusion renders unnecessary a consideration of other points raised.

Our former opinion is withdrawn, and the judgment of the district court

AFFIRMED.

GOOD, J., dissents.

Note—See Workmen's Compensation Acts, C. J. sec. 169.

WALTER POINTER V. STATE OF NEBRASKA.

FILED OCTOBER 26, 1925. No. 24581.

1. **Burglary:** PROOF. To sustain a verdict of guilty of the crime of burglary, it is unnecessary that the owner of the property stolen testify directly that he did not consent to the taking, if, as in this case, the facts and circumstances surrounding such taking clearly and unequivocally prove nonconsent.
2. ———: INFORMATION. An information which charges one with feloniously, wilfully, maliciously and forcibly entering a building with intent to steal property is not defective in omitting to allege that such property was of some value.
3. **Criminal Law:** MISCONDUCT OF OFFICERS. Ordinarily, side remarks of the sheriff or county attorney made at a trial in a

criminal case, in the hearing of the jury, will not cause a reversal of the judgment, where the trial court admonishes the jury to in no manner consider the same.

4. **Burglary**: SENTENCE. Instructions given and sentence imposed by the trial court examined and *held* to be free from reversible error.

ERROR to the district court for Jefferson county: WILLIAM J. MOSS, JUDGE. *Affirmed.*

Grant G. Martin and *Bartos & Bartos*, for plaintiff in error.

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

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

THOMPSON, J.

The state prosecutes Walter Pointer on the charge of aiding and abetting one William Saunders in the perpetration of a burglary on the 9th day of December, 1924, in Jefferson county. Case tried to a jury, verdict of guilty. Motion for new trial overruled, judgment entered committing him to be imprisoned in the state reformatory for a term of from two to seven years, to reverse which the case is brought to this court.

The information is one covering every material fact necessary to be pleaded and proved to sustain a conviction for unlawfully aiding and abetting a burglary. This information was set out in full in the first instruction given by the court on its own motion, amplified as follows: "To this information the defendant in open court has entered a plea of not guilty, and the information and the plea of not guilty form the issue now submitted to you for your decision." In instruction No. 2 the court quoted section 9623, Comp. St. 1922, defining the crime of burglary, and in instruction No. 3 quoted section 9541, Comp. St. 1922, as amended by Laws 1923, ch. 89, defining aiding and abetting.

These were followed by one clearly stating the law as to the burden of proof, and proof necessary for a conviction. This was all the case required to clearly state the issues and proof necessary to convict.

The court closed an instruction (No. 8), wherein only a part of the elements of the crime charged was set out, with: "If you believe from the evidence beyond a reasonable doubt that the defendant did aid or abet or procure William Saunders to break and enter into the Mary Etta pool hall on or about the 9th day of December, 1924, feloniously and unlawfully, with intent to steal the property of W. J. Hogan, in said building, then you will find defendant guilty." Such ending of an instruction so limited as to facts is not to be commended. Yet, taking this with the other instructions given, we conclude that the jury were properly instructed, both as to the facts and proof, and the burden thereof, and this ending did not give rise to reversible error.

The testimony of the owner of the property stolen shows that the circumstances, in a detailed and concise manner, were laid before the jury in his examination, clearly and unequivocally proving that the entry into the building was without his consent or connivance, or of those in charge. This was sufficient. *Johns v. State,* 88 Neb. 145. This holding is affirmed in *Nixon v. State,* 89 Neb. 109.

It is also contended that in such case the information must charge, and the proof must show, that the property which the one charged intended to steal possessed some value. In this defendant relies upon *Bergeron v. State,* 53 Neb. 752, overlooking that the holding therein to that effect has been overruled by us in *Schultz v. State,* 88 Neb. 613, wherein we held: "One who unlawfully, wilfully, maliciously and forcibly breaks and enters a mill building with the intent to steal property of any value is guilty, although there is no personal property therein. The third paragraph of the syllabus in *Bergeron v. State,* 53 Neb. 752, overruled." The record discloses, also, that at the time William Saunders broke and entered the building there was much personal property therein of different kinds, among

which was some money, which money was found in the possession of Saunders at the time of his arrest, which of itself is sufficient evidence of value.

As to the charge of misconduct on the part of the sheriff and county attorney: We realize that the delicate position occupied by each should impel them to follow a line of neutrality, and to aid the court in every way to insure all parties to the litigation a fair and impartial hearing. Side remarks which might in any way defeat this aim should not be indulged in by any of those engaged in the trial. Each and all should aid in the due and orderly administration of the law. However, as the court promptly cautioned them, and forbade a continuance of such conduct, the rights of defendant were in no manner jeopardized.

As to the sentence running from two to seven years: Section 9623, *supra*, after defining the crime of burglary, prescribes the penalty as follows: "Shall be punished by imprisonment in the penitentiary not more than ten years nor less than one year, or by a fine not exceeding five hundred dollars, or imprisonment in the jail of the county not exceeding six months." Section 10248, Comp. St. 1922, provides that in such case as this the trial court may, in its discretion, fix an indeterminate sentence: "Provided the minimum term fixed by the court shall not be less than the minimum term provided by law for the crime for which the person was convicted, nor the maximum term be greater than the maximum term provided by law for the crime for which the person was convicted." It will be seen that the minimum and maximum sentence imposed upon defendant was within the minimum and maximum term provided by section 10248, *supra*. The trial court did not abuse its discretion in sentencing defendant to from two to seven years in the reformatory.

The record is without reversible error, and the judgment of the district court is in all things

AFFIRMED.

Note—See Burglary, 9 C. J. secs. 74, 134, 151, 156.

EDGAR BELL V. STATE OF NEBRASKA.

FILED OCTOBER 26, 1925. No. 24714.

1. Criminal Law: INSTRUCTIONS. Ordinarily, error cannot be predicated on an instruction given, which is a duplicate of one asked by the complaining party.
2. ———: ———. The refusal to give an instruction which is without competent evidence to support it is not error.
3. Evidence examined, and *held* ample to support the judgment.

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

Andrew P. Moran and *D. W. Livingston,* for plaintiff in error.

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

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

THOMPSON, J.

The state charges Edgar Bell, hereinafter called defendant, with unlawfully making an assault upon William Lackenby with intent to inflict great bodily injury, in Otoe county. Case tried to a jury, verdict of guilty. Motion for a new trial overruled, and judgment entered sentencing defendant to imprisonment in the state penitentiary for a period of one year, and to pay costs of prosecution. From this judgment defendant prosecutes error, and challenges the judgment for the following reasons, among others: The court erred in giving certain instructions on its own motion, and in refusing to give certain ones offered by defendant; misconduct on the part of the county attorney; the verdict is without evidence to sustain it.

As to the instructions given which are complained of: The part of instruction No. 8 which is objected to is in the exact language of instruction No. 12 requested by defendant; hence, defendant is in no position to urge the giving thereof as error. Instructions No. 11 and No. 13 offered

and refused were those ordinarily applicable to a case where the quarrelsome character of the injured party is an issue. However, as the record is without competent evidence calling for these instructions, or either thereof, it was not error to refuse them. Other instructions offered and refused were, in substance, embodied in those given; hence, the challenge as to them, respectively, is without merit.

As to the alleged misconduct of the county attorney: During his closing argument to the jury, objections were interposed at different times to statements made and conclusions announced, sometimes as facts, and sometimes as deductions. As we view the record, taking the presentation as made in conjunction with the prompt admonitions of the court, and the evidence, reversible error was not thus committed.

Relative to the alleged insufficiency of the evidence: While the record discloses that, on a number of the issues presented, the testimony given by witnesses examined on the part of the state was flatly contradicted by some of the witnesses examined on the part of defendant, yet the jurors in such a case are the triers of fact, the judges of the credibility of the witnesses, and the weight to be given to their testimony in the light of the court's instruction. *Carson v. State,* 80 Neb. 619. The record discloses ample evidence to support the verdict.

The assignment of other errors considered, and found to be without merit. The judgment is

AFFIRMED.

REINOLDT KLATTENBURG, APPELLEE, V. OLAF QUALSETT, APPELLANT: AUGUSTA ANDERSON, APPELLEE.

FILED OCTOBER 26, 1925. No. 24421.

Interest. The provisions of section 8, art. I of the Constitution of the United States, that "Congress shall have power * * * to coin money," and "regulate the value thereof," do not forbid a state from legislating within its discretion on the subject of rates of interest, nor are contracts for the payment of interest invalidated thereby.

APPEAL from the district court for Boone county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Willis E. Reed and *F. A. Bald,* for appellant.

Vail & Flory and *Williams & Williams, contra.*

H. Halderson, A. H. Murdock and *Moyer & Moyer, amici curiæ.*

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

EBERLY, J.

This is an ordinary action for the foreclosure of certain real estate mortgages. The pleadings of the appellees in the court below set forth the note and mortgages sought to be foreclosed and are in the customary form. The answer of the appellant thereto in effect admits all the essential averments of the opposing pleadings, but challenged the right of appellees to recover any interest whatsoever, although the instruments in suit contain express provisions for the payment thereof, because it is alleged by appellant that sections 2834-2837, Comp. St. 1922, are repugnant to that portion of section 8, art. I of the federal Constitution, which provides that "Congress shall have power to coin money, regulate the value thereof, and of foreign coin," etc., and also repugnant to certain other sections of the Constitution referred to in appellant's answer, because of the nature of the business carried on by appellant. To this answer a reply was filed by appellees, in effect, a general denial.

On the hearing of this cause in the court below evidence was introduced by appellant. After hearing the evidence the district court entered a decree finding generally in favor of the appellees and against the appellant, and providing for foreclosure and sale as prayed. No bill of exceptions was filed in this case, and by this fact the issue now before this court is further narrowed to the single question: "Can any natural person enter into a valid contract with another

person requiring the payment of interest?" Appellant contends for the negative of the question as above stated.

In consideration of this contention it is not to be forgotten that since the adoption of the Constitution in 1787 the enforcement of written contracts bearing interest has been a matter of daily occurrence in all of the courts of the land. All of our states have adopted interest and usury statutes similar to those involved in this case. The supreme court of the United States, as well as the supreme courts of all the states, have repeatedly upheld the validity of these statutes, when attacked, as a proper exercise by the states of police power; also that the business transactions of the nation proceed and are carried on upon the commonly accepted basis that these statutes are valid, and that interest-bearing contracts, otherwise unobjectionable, are enforceable obligations.

Now we are met with the proposition that the provisions of the notes and mortgages in suit, providing for the payment of interest, strictly within the limitations of the Nebraska statutes, and in form heretofore universally deemed valid and enforceable, must be declared by this court to be illegal and void solely because of alleged repugnancy of our interest statute to the provisions of the federal Constitution. Certainly, before this court departs from the path so long traveled, and proceeds to terminate the well-established order of affairs so long maintained, the most cogent and impelling reasons should be forthcoming to sustain the contention now advanced.

In the present case, because of the limitation of the record, appellant can offer but one argument upon which to support his contention, which is substantially as follows: The Constitution provides that "Congress shall have power to coin money," and "regulate the value thereof;" that interest determines or "regulates" the value of money; that to prescribe the rate of interest or provide for interest by contract or by statute is, in truth, to affect or "regulate" the value of money. Therefore, the words quoted above reserving to congress the exclusive right to "regulate the value there-

of" are an implied limitation on the powers of the states to pass any law whatsoever upon the subject of interest; that our state statutes above referred to are therefore beyond the power of the state and void; that no federal law providing for interest is applicable, and, the recovery of interest being prohibited at common law, there is no law which would support the decree of foreclosure providing for interest in the present case.

It is thought that counsel is in error in his construction of the words "regulate the value thereof." "It has been justly remarked that the power 'to coin money' would, doubtless, include that of regulating its value, had the latter power not been expressly inserted." 2 Story, Constitution of United States (5th ed.) sec. 1117.

"Value," as that term is used in the Constitution, is the true, inherent, and essential value, not depending upon accident, place, or person, but the same everywhere and to every one. *Bank of North Carolina v. Ford,* 27 N. Car. 692. In this sense regulating the "value" of the coinage is merely determining and maintaining the coinage composed of certain coins within certain limitations at a certain specific composition and weight. In this constitutional sense the term "value" is not concerned with the question of interest any more than with wheat, pork, labor, rent, land, or automobiles, all of which, in the sense the term "value" is used in appellant's brief, may be said to measure or determine from time to time the "value" of the coins or money of the nation. It therefore follows that state interest statutes providing for a legal rate of interest, prohibiting all interest in excess thereof as usury, etc., do not in any manner contravene any limitation of the federal Constitution and are valid exercise of the police power reserved to the states. *Beach v. Peabody,* 188 Ill. 75. See, also, *Ex parte Berger,* 193 Mo. 16, 112 Am. St. Rep. 472; *Munn v. Illinois* (dissenting opinion by Justice Field), 94 U. S. 113, 136; *Morley v. Lake Shore & M. S. R. Co.,* 146 U. S. 162.

In the case of *Beach v. Peabody, supra,* which involves

the same question we have here, Justice Magruder says in part: "The value of the use of money, or the rate of interest which a lender is entitled to receive for the use of his money, is an entirely different thing from the value of money as coined by the general government, and as used for the purposes of currency, or as a circulating medium. The idea that the statutes of all the different states which regulate the rates of interest therein are a violation of that provision of the Constitution of the United States which confers upon congress the power to coin money and regulate the value thereof is too fanciful to be regarded as serious."

Upon the whole case it is apparent that the notes and mortgages in suit, so far as their interest provisions are concerned, are valid, enforceable obligations, and as the pleadings support the judgment it follows that the judgment of the district court must be, and is,

AFFIRMED.

Note—See Interest, 33 C. J. sec. 26.

IN RE ESTATE OF CAMPBELL FAIR.
MARY S. FAIR, EXECUTRIX, ET AL., APPELLANTS V. ABRAHAM L. REED ET AL., APPELLEES.

FILED NOVEMBER 18, 1925. No. 23389.

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

Smith, Schall, Howell & Sheehan, for appellants.

Morsman, Maxwell & Haggart, contra.

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

PER CURIAM.

This is an appeal from an order of the district court for Douglas county affirming, in the main, an order made by

the probate court of that county in a proceeding brought by the administratrix and the executor of the estate of Campbell Fair, deceased.

Campbell Fair died many years ago leaving a substantial estate. The appellants entered into a contract with the appellees under which the estate property, consisting largely of bonds, notes and similar securities was handled by, or through, the appellees. On this proceeding in accounting a difference arose between the parties as to the position in which appellees stood with relation to the estate.

It is the theory of appellants that under this contract such a fiduciary relation existed between the estate and the appellees that interest at the legal rate of 7 per cent. should be charged against appellees on all funds in the hands of appellees for the time such funds were held in appellees' custody. The appellees, on the other hand, contend that the contract was not between the estate and appellees but between the executrix and executor on the one hand and the appellees on the other; that appellees did not stand in a fiduciary relation to the estate; that they fully performed their part of the contract, and that their services were advantageous to both appellants and the estate.

We have reached the conclusion that the contention made by appellants is not supported by the facts, and that the order made by the county court is correct. The cause, is, therefore, remanded to the district court, with directions to enter a judgment confirming and approving *in toto* the order of the county court. As thus modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

T. F. GREEN, SR., ET AL., APPELLEES, V. OLAF H. PARSON ET AL., APPELLANTS.

FILED NOVEMBER 18, 1925. No. 23368.

Evidence outlined in the opinion, and *held* to support the decree entered by the trial court.

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

J. A. Sullivan and *W. W. Slabaugh,* for appellants.

Dolezal, Spear & Mapes, contra.

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

MORRISSEY, C. J.

This is a suit brought to foreclose a real estate contract. From a decree in favor of plaintiffs, defendants Parson have appealed.

On and prior to May 22, 1919, plaintiffs T. F. Green, Sr., and R. M. Erway, were the owners of an eighty-acre tract of farm land in Douglas county. On the day mentioned, plaintiffs entered into an executory contract in writing with one Harry Adams, whereby they sold and agreed to convey to Adams the land mentioned for the sum of $12,000. At the making of this contract, Adams paid plaintiffs $500 in cash, and obligated himself to pay $1,000 March 1, 1920, $1,500 March 1, 1921, and $2,000 March 1, 1922. "The balance of $7,000 to be paid in seven annual payments on March 1 of $1,000 each. All deferred payments to bear interest from March 1, 1920, at 6 per cent. per annum payable annually." January 26, 1920, Adams sold and assigned his interest in and to the contract to defendant Olaf H. Parson, and the plaintiffs entered their written consent to the assignment upon the contract.

In effecting the sale of the property by plaintiffs to Adams, the Farmers State Bank of Valley, through T. F. Green, Jr., acted as agent for plaintiffs, and the initial pay-

ment was made to that bank. Adams subsequently employed the bank as his agent, and through that bank the sale of Adam's interest in the real estate and his rights under the contract were sold to defendant Parson. At the time of the sale to Parson, he paid to the bank, or its cashier, T. F. Green, Jr., $3,500 to be applied on the purchase price of the land, and Parson executed his promissory notes for different amounts and due at different periods, payable to plaintiffs, in the gross sum of $10,500. The bank, which was acting as agent for Mr. Adams, paid over or placed to the credit of Adams $2,500 and credited plaintiffs with the sum of $1,000. It is said that this $1,000, placed to the credit of plaintiffs, covered the payment of the sum which, under the terms of the contract, would have fallen due March 1, 1920. Defendant Parson went into possession of the premises and subsequently paid his two notes of $750 each, payable to plaintiffs, representing the amount which under the terms of the contract fell due March 1, 1921. Thereafter defendant Parson failed to make further payments, and this suit was brought in a court of equity to foreclose his interest in the land. In answer to plaintiff's petition, defendant alleged that he had purchased the rights of Adams under the contract and agreed to pay therefor only the sum of $12,000, that being the amount for which Adams had originally purchased the property from plaintiffs, and that of this amount he had already paid a total of $5,000, to wit, $3,500 paid at or about the time the assignment of the contract was made, and the payment of his two notes aggregating $1,500 on or about March 1, 1921. He also alleged that false and fraudulent representations had been made to him as to the value of the farm, and alleged his damage in that regard to be $2,400, and prayed that a decree might be entered accordingly.

Defendant Parson's contention is that the whole sum of $3,500 which he paid to the bank, or to its cashier, should have been applied and used so as to reduce his debt to $8,500, whereas this money was in fact so applied that Adams received $2,500, giving him a net profit on his deal

of $2,000, and only $1,000 was applied to the reduction of the debt due plaintiffs.

There is a direct dispute in the evidence as to the price at which defendant Parson purchased the land from Adams. Parson testified directly that they agreed upon a price of $150 an acre, or a total of $12,000, while Adams and the banker who negotiated the sale testified directly that the price agreed upon was $175 an acre, or a gross sum of $14,000. It will be seen that, even on the oral testimony, the evidence seems to preponderate against Parson. In addition to this, the promissory notes which he executed and the $3,500 in cash which he paid aggregate $14,000. To this circumstance may be added the fact that more than a year later he paid the notes aggregating $1,500, and that it was not until notes maturing March 1, 1922, were about to fall due that he raised any question about the amount which he had agreed to pay, or about the application of the money which he had paid into the bank at the time of making the contract. A consideration of the evidence would constrain us to hold, if indeed it be material to the issues here, that the price agreed upon between Mr. Adams and defendant Parson was $14,000.

In support of defendant Parson's cross-petition, there is evidence to show that the land is not, and was not, at the time of sale, worth the amount stipulated in the contract, and that in some particulars the ground is of inferior quality. On the other hand, plaintiffs have offered evidence on this issue calculated to show that, at the time plaintiffs sold the land to Adams and when Adams sold his rights in the contract to Parson, the land was reasonably worth, on the market, $150 to $175 an acre, or a gross sum of $12,000 or $14,000. However, it is hard to see how this issue can be material here. It was the theory of defendant Parson that there was a conspiracy between plaintiffs, Adams, and the bank, or its cashier, to sell this land to him, and that the sale of the contract was in fact made by plaintiffs, and not by Adams. There is, however, a total failure of proof to support this theory. The record shows without sub-

stantial contradiction that plaintiffs made a *bona fide* sale to Adams; that they were not interested in the sale which Adams subsequently made to Parson; that at all times plaintiffs stood upon the terms of their contract; and that, if any misrepresentations were made by Adams, or the bank, they were wholly without the authority and without the knowledge of plaintiffs. Indeed, there is no convincing evidence of misrepresentations having been made. Mr. Parson had lived and farmed in the immediate vicinity of the land for more than 40 years and probably had a fuller knowledge of its character and value than did the young banker who was acting as the agent for Adams. Furthermore, there is a total lack of evidence in this record to show that, even if deceit and fraud were practiced, plaintiffs are answerable for it. If Adams or his agent, the bank, misapplied the money which Parson paid upon the making of the assignment, Parson must look to them, not to plaintiffs who were not parties to the transaction.

Complaint is made of the form of the judgment, it being thought that it is intended to fix a personal responsibility upon Mrs. Parson, wife of Olaf H. Parson, but this criticism is not merited. A sale under the decree will simply extinguish any interest she has in the land by virtue of her status as the wife of Olaf H. Parson. The decree expressly reserves the question of the right to a deficiency judgment for the consideration of the court after there is a return made to the order of sale. And as Mrs. Parson is not a party to the contract and as the notes signed by her do not bind her separate estate, we see no error in the form of the judgment.

The judgment of the district court is fully sustained, and it is

AFFIRMED.

WILLIAM ERNEST WELTER V. STATE OF NEBRASKA.

FILED NOVEMBER 18, 1925. No. 24108.

1. **Criminal Law**: TRIAL: REVIEW. The order of proof and the general conduct of a trial rest largely in the sound discretion of the trial court, and, in order to work a reversal of a judgment of conviction, its rulings must be shown to be not only erroneous, but to have imposed some hardship upon, or worked some prejudice to, defendant.
2. ———: REVIEW. The rulings of the court made on the introduction of evidence have been examined, and *held* free from error.
3. **Homicide**: INSTRUCTIONS. On the trial of one charged with murder in the first degree, it is not error for the court to submit for the determination of the jury the questions whether or not defendant is guilty of murder in the first degree, or murder in the second degree, notwithstanding the jury subsequently finds him guilty of manslaughter only, when there is evidence in the record upon which they might have found him guilty of murder in either the first or second degree.
4. ———: ———. The rulings of the court on instructions to the jury have been examined, and *held* free from error.
5. ———: SENTENCE. The court, under the authority of section 10186, Comp. St. 1922, imposes a sentence on defendant of five 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 Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

Jamieson, O'Sullivan & Southard, McKenzie, Lower & Sheehan and *Andrew P. Moran,* for plaintiff in error.

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

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

MORRISSEY, C. J.

Defendant prosecutes error from a conviction had in the

district court for Douglas county of the crime of manslaughter. The information charged defendant Welter, James Griffin, and Jayce Banks, jointly, with the crime of murder in the first degree. Each defendant demanded and was accorded a separate trial. Although assignments of error are numerous, they may be considered in three general classes, namely, alleged error in the court's rulings on the admission or exclusion of evidence; insufficiency of the evidence to sustain the verdict; and errors in the instructions to the jury.

For some time prior to the commission of the crime charged, Griffin conducted a garage in the city of Omaha and, in connection with this business, dealt in used automobiles. One Leo Brunson was a friend of Griffin and, to some limited extent, a business associate. Defendant Welter and his codefendant Banks lived at Nebraska City, but were acquainted with Griffin and Brunson. Brunson purchased an automobile from Welter for $450, paid $250 of the purchase price, and owed the balance of $200 to Welter. Subsequently a dispute arose between Brunson and Welter over the balance due on the car. Brunson is said to have refused payment of this balance because of a mortgage upon the car held by a brother of Welter. Either to make this collection, or for some reason which is not material, Welter, accompanied by his friend Banks, went from Nebraska City to Omaha, and for a day or two prior to the homicide spent considerable time in and about the garage of their codefendant Griffin, and visited the Taylor battery station. Welter and Banks, on the afternoon of November 23, 1923, went to the Taylor battery station, and Banks, who was alleged to have been under the influence of liquor, engaged in a dispute with the proprietor. In the course of the dispute Banks fired several shots from a revolver, but apparently these shots were fired in a spirit of bravado, and not in an attempt to injure any person. The proprietor took the revolver from Banks, extracted the shells from its cylinder, and ordered him to leave the premises. Later Banks returned to the battery station and was given his revolver.

Sometime during the afternoon Welter telephoned to Brunson and arranged for Brunson to meet him at the Taylor battery station. In compliance with this arrangement, Brunson, accompanied by an acquaintance, Henry McArdle, drove to the appointed place. Brunson stopped his car in the street and was immediately met by Welter and Banks. Welter took a position on one side of the car and Banks upon the other. It is claimed that they engaged in a conversation about the balance alleged to be due Welter upon the car. While this conversation, or quarrel, was in progress, Griffin arrived. There is a sharp dispute in the testimony as to just what occurred upon the arrival of Griffin. According to the testimony for the state, Griffin at once stepped into the tonneau of the touring car and, pressing a revolver against Brunson, ordered him to drive on, while Welter and Banks appear to have stepped upon the running boards. Brunson, fearing that he was about to be kidnapped by the three defendants, struggled with Griffin for the possession of the revolver and alighted from the car. Welter and Banks grappled with Brunson, and while this struggle was in progress the revolver was discharged, and McArdle, who was occupying the right front seat of the automobile, was shot in the head and mortally wounded. Much of this narrative is undisputed, but, on behalf of defendant, it is claimed that Griffin played merely the part of a peacemaker; that the gun from which the fatal bullet was fired was drawn by Brunson. But it is either admitted, or proved beyond question, that, following the firing of this fatal shot, the three defendants forced Brunson into the automobile and drove away, with defendant Griffin at the wheel, McArdle dead, or dying, in the seat beside him, Brunson beaten into a state of unconsciousness, lying on the floor of the tonneau, and Welter and Banks occupying the rear seat with their feet resting upon Brunson. Subsequently the body of McArdle, whose murder is charged in the information in this case, was found partially consumed by fire in a burning haystack a few miles outside the city of Omaha. Brunson, who was a witness for the state, testi-

fied that, following the assault upon him by the defendants, he was unconscious for a long time and knew not what disposition was made of the body of his friend McArdle; that, when he recovered consciousness, he was still held by the three defendants, and that he understood that this assault upon him had been made, not only because of the balance due upon the automobile, but because he was suspected by Griffin of having knowledge as to the theft of alcohol from Griffin. It is the theory of the state that Griffin was engaged in the unlawful traffic in alcohol, and that he suspected Brunson of being implicated in the theft of his stock, and that the three defendants had conspired together to kidnap him and either murder him or torture him into disclosing the whereabouts of the stolen alcohol. Whatever the motive, the defendants continued to drive about Omaha or her suburbs until after nightfall, when Brunson, having recovered consciousness, during the absence from the car of one of the defendants, made his escape, reported the conduct of defendants to the police, and defendants were arrested during the night.

On the trial neither defendant Welter nor his codefendant Banks took the witness-stand, but their codefendant Griffin was called and testified as a witness for the defense. He denied that there was any conspiracy between himself and his codefendants; denied that the pistol from which was fired the fatal shot belonged to him, but claimed that it was the pistol of Brunson, and that he was playing only the part of a peacemaker. But there is much even in Griffin's testimony that is difficult to explain on any theory other than that of a conspiracy on the part of the three codefendants. It is not denied that, after McArdle had been mortally shot, Brunson was beaten, thrown into the car, and there detained. Griffin testified that McArdle was not dead when they drove away from the Taylor battery station, and that they had driven a short distance before discovering that he was wounded; that they then transferred McArdle from the Brunson car, which the witness was driving, to a Ford car, which they met on the road, driven by a man called

"Smitty," a friend of one of the codefendants, with directions to "Smitty" to take McArdle to a hospital. "Smitty" was not produced as a witness, nor is any excuse attempted to be given for the failure of defendants themselves to drive to the hospital. The story told is so unreasonable that no intelligent jury could be expected to believe it. The falsehood is so apparent that all of Griffin's testimony, except where corroborated, may well be rejected.

It is not the theory of the state that any of these defendants intended to do violence to McArdle. He was the unfortunate victim of what is alleged to have been a criminal conspiracy against Brunson.

In the brief of defendant many criticisms are offered of the rulings of the court on the admission and exclusion of evidence. The order of proof and the general conduct of a trial rest largely in the sound discretion of the trial court, and, in order to work a reversal of a judgment of conviction, its rulings must be shown to be not only erroneous, but to have imposed some hardship upon, or worked some prejudice to, defendant.

After going through the assignments made and reading the evidence adduced, or offered, we do not find that defendant was prejudiced by any ruling made by the trial court in relation to the introduction, or exclusion, of evidence.

We are seriously urged to hold that the court erred in submitting to the jury the charges of murder in the first degree, and murder in the second degree. This assignment must, of course, be determined by the character of the proof. If the theory of the state is adopted, and apparently the jury did adopt it, the three codefendants had entered into an unlawful conspiracy; Griffin had suddenly appeared, and, pointing a revolver at Brunson, had ordered him to drive on. If this order had been obeyed, it may reasonably be supposed that in the course of a short time he would be outside the limits of Omaha, perhaps in a sequestered spot, under the domination of these three conspirators. The extent of the injury, if any, which they might then inflict

upon him may only be conjectured. If the jury, from all the evidence before them, had reached the conclusion that the three codefendants had planned to murder Brunson, then, indeed, they might have been convicted of the murder of McArdle. And the failure of the jury to find defendant guilty of murder either in the first or second degree is not, of itself, sufficient to show that the evidence would not have supported such verdict. Since we conclude that there was evidence which might have supported murder in either the first or second degree, it was not error for the court to submit these degrees of homicide for the consideration of the jury.

The instructions of the court are also criticized. First it is claimed that the instructions defining the different degrees of murder were erroneous. We are, however, unable to discover where they were prejudicial to defendant. He has been acquitted of these two charges. But assignments of error are directed against the instructions relating to the crime of manslaughter. These instructions have been carefully considered, together with the instructions which defendant requested the court to give, but we fail to find any error in the ruling of the court either in the submission of the instructions given, or in the refusal of those tendered.

We are asked to render sentence under section 10186, Comp. St. 1922, and we accordingly fix the term of penal servitude at five 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 the date of that judgment. With the term thus fixed, the judgment is

AFFIRMED.

JAYCE BANKS, ALIAS JAYCE BANKER, V. STATE OF NEBRASKA.

FILED NOVEMBER 18, 1925. No. 24109.

1. **Homicide**: REVIEW. In this, a conviction of manslaughter, the record has been examined, and *held* free from error.
2. ———: SENTENCE. The court, under the authority of section 10186, Comp. St. 1922, imposes a sentence on defendant of five

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 Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

Jamieson, O'Sullivan & Southard, McKenzie, Lower & Sheehan, and *Andrew P. Moran,* for plaintiff in error.

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

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

MORRISSEY, C. J.

Defendant Jayce Banks, alias Banker, prosecutes error from a judgment of the district court for Douglas county wherein he was sentenced to serve a term of years in the penitentiary on a conviction of manslaughter. He is one of the parties jointly charged with William Ernest Welter and James Griffin in connection with the death of Henry McArdle (*Welter v. State, ante,* p. 28). The facts are stated in that opinion.

Each defendant demanded and was given a separate trial. In each case the defendant was convicted of manslaughter.

In the instant case the evidence is substantially the same as the evidence in the case of *Welter v. State, supra,* and with some minor exceptions the errors assigned and questions presented to us for review are the same as are found in that case. Having reached the same conclusion in this case as in that, it is unnecessary to discuss the assignments of error.

We find no error in the record requiring a reversal of the judgment entered, but we have been asked to render sentence under section 10186, Comp. St. 1922, and we accordingly fix the term of penal servitude at five 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 the date of that judgment. With the term thus fixed, the judgment is

AFFIRMED.

ADVANCE-RUMELY THRESHER COMPANY, APPELLANT, V. FRED BARTZAT, APPELLEE.

FILED NOVEMBER 18, 1925. No. 23352.

1. **Vendor and Purchaser:** FALSE REPRESENTATIONS: QUESTION FOR JURY. It is within the province of the jury to determine from the evidence whether the facts and circumstances are established which show that a buyer was justified in relying on the representations made by a seller and whether such representations were made to induce the sale, or the exchange of properties, as the case may be. *Sanders v. Nightengale*, 109 Neb. 667.
2. **Contracts:** RESCISSION. "It has been often held, and may be regarded as elementary law, that one who seeks to rescind a contract on the ground of fraud must offer to return the property or consideration received therefor by him, provided it be of any value, within a reasonable time." *Building & Loan Ass'n v. Cameron*, 48 Neb. 124.
3. **Principal and Agent:** AUTHORITY OF AGENT. "A principal is bound by the acts of his agent to the extent of the apparent authority conferred on him." *Webster v. Wray*, 17 Neb. 579.
4. ———: ———: WAIVER. "An agent, who made the contract for the sale of an engine for his principal, must be held to have had authority to subsequently waive a provision of the written contract." *Fairbanks, Morse & Co. v. Nelson*, 217 Fed. 218.
5. **Sales:** WAIVER. "A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive." *Fairbanks, Morse & Co. v. Nelson*, 217 Fed. 218.
6. **Verdict:** SUFFICIENCY OF EVIDENCE. An examination of the evidence discloses that the verdict is clearly supported thereby, and it will not therefore be disturbed.
7. **Appeal:** REVIEW. Reversible error cannot be predicated upon the giving of instructions, and the refusal to give tendered in-

structions in respect of material evidence, where the verdict of the jury is the only one which should have been returned under the testimony.

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

Good & Good and *A. W. Richardson,* for appellant.

D. J. Flaherty and *Roy F. Gilkeson, contra.*

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

DEAN, J.

Plaintiff is a manufacturer and vendor of tractors, farm implements, and machinery, and maintains a branch agency at Lincoln. Defendant is a farmer and thresherman of 20 years' experience and resides a few miles out of Lincoln. He bought a second-hand, rebuilt farm tractor from plaintiff, which is described as a "15-30 gas pull engine," for which he executed a contract and four certain promissory notes for $200 each, bearing 8 per cent. yearly interest until due and 10 per cent. thereafter. Defendant alleged failure of consideration, and also that the notes were fraudulently obtained, and therefore, as alleged, he refused payment. In an action on the contract and notes, defendant recovered a verdict, and judgment thereon. Upon being nonsuited plaintiff appealed.

Thomas Helehan has been a salesman and agent in the employ of plaintiff for many years. From his evidence it appears that he "started the tractor for him (defendant), ran it around * * * for three or four blocks," in Lincoln, defendant following along behind, and that, the tractor demonstration ending at the fourth city block, defendant announced his satisfaction, and informed the agent that the tractor suited him and thereupon signed and delivered the contract and the notes sued on, to plaintiff's agents at its Lincoln office.

Plaintiff, aside from its denial of the material evidence of defendant, relied on its printed form contract, and a typewritten insertion of an alleged waiver of warranty by defendant therein. The argument is that the transaction between the parties became and was a closed incident when the sale was made and the contract and the notes signed. It may be here noted, however, that plaintiff's reliance was more particularly based on the typewritten recital, above referred to, which was inserted in the body of the contract and which reads:

"This is a second-hand tractor and is sold as such without warranty, as it stands at Lincoln, Nebraska."

Defendant, however, testified that plaintiff's agents, on some pretext, retained both duplicates of the contract, and that his copy subsequently came to him by mail, and not until then did he discover the insertion of the two lines of typewritten words therein, of which he now complains, and he contends that all except the words, "This is a second-hand tractor," were inserted by some person after his signature was affixed thereto and wholly without his knowledge or consent. Plaintiff denied this imputation of unfair dealing, and insists that defendant's copy of the contract was then and there handed to him and that it was never again in its possession.

On the part of defendant, evidence was submitted which tends to prove that plaintiff's agents made to him certain oral representations which were material and upon which he relied, and that in reliance thereon he was induced to purchase the tractor and to execute the contract and the notes in suit. Among such representations, so made, it seems that the tractor, made by a corporation other than plaintiff, though a rebuilt machine, was nevertheless represented by the company's authorized Lincoln agents to be in good working order, and it was orally guaranteed by them to have sufficient power, first, to pull a grain separator from place to place on the public highway, and, second, to run a grain separator in the threshing season, and third, that the company would have on hand at its Lincoln agency

such repairs as were reasonably necessary to replace such breakages in the machine as might reasonably be expected to occur in this class of power machinery. And on this feature of the case there is competent evidence which tends to establish defendant's contention that the foregoing material representations, guaranties, and promises, so made by plaintiff's agents, were all unfulfilled, and that they were "breached" by the company in every material respect. We have uniformly held to the proposition that it is within the province of the jury to determine from the evidence whether the facts and circumstances are established which show that a buyer was justified in relying on the representations made by a seller and whether such representations were made to induce the sale or the exchange of properties, as the case may be. *Sanders v. Nightengale,* 109 Neb. 667. See, also, *Realty Investment Co. v. Shafer,* 91 Neb. 798.

That the tractor utterly failed to do the work for which it was made and for which it was purchased seems to have been well established and to the jury's satisfaction. Only a few instances out of many will be noted which tend to show its material defects. When defendant started away from plaintiff's branch agency to take the tractor to his farm home, under its own power, when a half mile from Lincoln, "it had some machinery break on it" and had to be returned to Lincoln for repairs, according to defendant's evidence. That the tractor did not have power to move a separator on the highway nor to run a grain separator was a material fact established by the evidence. When breakages occurred, as frequently happened, plaintiff did not have the needed repairs on hand at Lincoln. In one instance there was a delay of about a week and in another of more than two weeks before repairs for the defective broken part could be obtained, and those happenings occurred from time to time while defendant was engaged in small grain threshing for his patrons, and to such an extent that he was compelled to hire another engine. And, besides, his occupation as a thresherman was shown to have been practically destroyed for the fall threshing season, at great

loss, because of the vitally material defects in the engine. And there were other like instances, in which even much greater time was consumed by plaintiff in getting needed repairs, which need not be referred to herein. It need hardly be urged that defendant, as a thresherman, required a reasonably efficient power tractor, but the evidence, on defendant's part, tends to prove that it was worthless for any purpose, and the jury were justified by the evidence in so believing.

Defendant cites, and seems to have relied on, section 8384, Comp. St. 1922, which provides:

"That every person, firm, association and corporation, or their agent, distributor, or dealer, who is engaged in the sale, trade or exchange of automobiles or tractors within this state shall carry in stock, at some point within the state, all necessary supplies and repairs for such makes of automobiles or tractors as are sold by them within the state. That each and every sale, trade or disposition of any automobile or tractor by any such person, firm, association and corporation, or their agent, distributor or dealer, shall be void unless such stock of supplies and repairs are kept within this state, as herein provided."

Plaintiff concedes that the foregoing act is both wholesome and beneficial and is well designed to protect the public from the imposition of manufacturers of new machinery, but that it cannot properly be applied to "a *bona fide* sale of a second-hand machine, which as a new machine has once before been sold in all respects within the provisions of the law." Plaintiff, however, contends also that the act is not in harmony with the Constitution, and that it is therefore void. But we do not find it necessary to pass on the constitutionality of the act, for the reason that the act in question is not necessarily involved here. The jury found, from the evidence, that plaintiff had no cause of action against defendant, and in view of the record before us we do not hesitate to say that the verdict finds ample support in the evidence in respect to every material fact involved here.

It seems that the tractor, at the time of the trial, was at or in the vicinity of the farm where it last broke down, in a final but vain attempt to function as a furnisher of power for defendant's threshing machine. Defendant testified that he notified plaintiff's agents that he exercised no dominion over it and that the tractor, for the reasons herein stated, was theirs, but they refused to take it back.

Plaintiff argues that, "in legal effect one of his (defendant's) defenses was rescission because of the fraud practiced upon him at the time he purchased the tractor and signed the notes on which this action is founded," and that such defense "cannot be maintained unless a tender back of the machinery is alleged and proved, unless such machinery is worthless for any purpose, or the conduct of the seller renders such tender unnecessary." And both defenses, so pointed out by plaintiff, seem to have met in this action. The proof, as herein noted, shows that the "machinery is worthless for any purpose," and that "the conduct of the seller" rendered "a tender back" unnecessary.

We think the present case comes fairly within the rule announced in *Building & Loan Ass'n v. Cameron,* 48 Neb. 124, in an opinion by Post, C. J., wherein this is said: "It has been often held, and may be regarded as elementary law, that one who seeks to rescind a contract on the ground of fraud must offer to return the property or consideration received therefor by him, provided it be of any value, within a reasonable time." See, also, *Murray v. Bailey,* 110 Neb. 114.

A great deal of acrimonious evidence was introduced by the parties in respect of the contention as to the time when the added words were inserted in the contract. But in view of our conclusion, even though the language complained of had been in the contract when it was signed, which we do not find it necessary to decide, we would not deem this feature of controlling importance. *First Nat. Bank v. Dutcher,* 128 Ia. 413. In an early opinion by Maxwell, J., we announced the rule, even then long familiar: "A principal is bound by the acts of his agent to the extent of the

apparent authority conferred on him." *Webster v. Wray*, 17 Neb. 579. And in a comparatively recent case in a federal court it was held that an agent, who made a contract for the sale of a certain machine for his principal, "must be held to have had authority to subsequently waive a provision of the written contract." *Fairbanks, Morse & Co. v. Nelson*, 217 Fed. 218. At page 223, the court used this language and cited authorities in support thereof:

"Error is assigned to the ruling that it was admissible to prove the acts of plaintiff's agents, who visited the defendant's ranch. It is urged that such evidence should have been excluded, for the reason that there was no proof of the authority of the agents to bind the plaintiff. But the evidence indicated that the plaintiff did not disavow the acts of its agents, but ratified the same, and that it supplied without cost to the defendant the extensions to the wheels which one of the agents suggested as a remedy for the defective action of the engine. It further appears that one of those agents had acted for the plaintiff in making the sale of the engine to the defendant, and that he signed the contract for the plaintiff. In *Advance Thresher Co. v. Vinckel*, 84 Neb. 429, the court said: 'To say that its agents were vested with the mere naked power to sell and deliver, without any authority to waive or modify any term of the printed contract, would be, as is well said in *Pitsinowsky v. Beardsley, Hill & Co.*, 37 Ia. 9, "to establish a snare by which to entrap the unwary, and enable principals to reap the benefits flowing from the conduct of an agent in the transaction of business intrusted to his hands, without incurring any of the responsibilities connected therewith." ' "

The case before us seems fairly to come within the rule which was applied in the above cited cases. It does not appear that plaintiff here disavowed any of the acts of its agents. And here, as in the *Fairbanks* case, it appears that experts were sent from the Lincoln agency to put in certain repairs for a broken part and that this was done without any expense to defendant but solely at the expense of the plaintiff company. And, as in the *Fairbanks* case,

the agents herein acted solely for plaintiff in making the sale to defendant. The rule in the *Fairbanks* case, and in cases there cited, is clearly applicable here.

It is perhaps proper to note that defendant seems, from his broken speech, and his manner of testifying, to have an imperfect knowledge of the English language, and in many respects it has been found somewhat difficult to get his meaning, and this from the fact that he did not apparently seem to understand his questioner. We think, however, that we have fairly reflected his evidence in respect of material matter, notwithstanding his evidence in part appeared to be confused and in part contradictory.

Plaintiff contends that the court erred in the giving of certain instructions of its own motion and in refusing to give others tendered by it. We do not think so. Upon examination of the instructions given and those refused, we conclude that reversible error cannot be predicated upon this assignment, since the verdict of the jury is the only one which should have been returned under the testimony. *Babcock v. Purcupile,* 36 Neb. 417.

Prejudicial error has not been made to appear in the record. The judgment is therefore

AFFIRMED.

GOOD, J., dissents.

LEWIS W. SHEPARD, APPELLEE V. HENRY D. HAMAKER, APPELLANT.

FILED NOVEMBER 18, 1925. No. 23321.

1. **Trial:** INSTRUCTIONS. It is error to submit to the jury an issue not presented by the pleadings or evidence, and, when, prejudicial to the complaining party, it is ground for reversal of the judgment.
2. **Evidence** examined, and *held* sufficient to support the judgment as modified by the court.

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

Herman Aye, for appellant.

McKenzie, Lower & Sheehan, contra.

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

DAY, J.

Lewis W. Shepard, plaintiff, brought this action against Henry D. Hamaker, defendant, to recover damages on account of an alleged fraud perpetrated by the defendant upon the plaintiff in an exchange of real estate between the respective parties. The trial resulted in a verdict and judgment in favor of the plaintiff for $9,960. Defendant appeals.

There is a direct conflict upon every material question of fact in the evidence, but the jury having accepted the plaintiff's version of the case the facts will be stated accordingly.

Plaintiff was a farmer living in Iowa and the owner of two tracts of land located in the counties of Mills and Fremont in the state of Iowa. Each of the farms were encumbered for a considerable amount.

Defendant was a real estate agent residing in Omaha and the owner of a section of land in Cherry county, Nebraska, the record title to which stood in the name of William R. Young. The record also showed a mortgage on the land executed by Young in favor of the defendant for something over $8,000, the purpose being to enable the defendant to more readily effect a trade of the land. Defendant, pretending to act as agent of Young, entered into negotiations with the plaintiff with the view of effecting an exchange of the respective properties. The plaintiff had never examined the Cherry county land with the view of purchase or exchange, although he had driven through the tract in looking at other lands in the vicinity. As an inducement to the plaintiff to make the exchange, the defendant represented that the Cherry county land was rented for $620 a year, payable about September 1, 1921, which

would be paid to the plaintiff in case the trade was effected; that the land had been sold to William R. Young for $25 an acre; that the land was reasonably worth the sum, and as agent for Young he had an offer of $25 an acre, and that the offer was still open; that the land consisted of 200 acres of good bottom land; that 40 acres had been cultivated for a number of years; that there was growing on the land 25 acres of corn, 5 acres of cane, and 10 acres of potatoes; that the land during the year 1920 had produced a corn crop yielding an average of 40 bushels to the acre; that there were 200 acres of good hay land, which for a number of years had yielded at least one ton an acre; that there were no blowouts on any part of the section; that there was a stream of running water through the pasture; and that the improvements were as good as any in the vicinity of Wood Lake. The defendant further represented that he intended purchasing a large amount of hay in the vicinity of Wood Lake during the winter months of 1921 and 1922; that he would pay the plaintiff 50 cents a ton for purchasing hay for the defendant, and that the plaintiff would be paid as commission at least $1,500.

The plaintiff's testimony tends to show that all of the representations above enumerated were untrue; that the land was worth not to exceed $5 an acre; that the tenant paid no rent whatever; that the reasonable rent of the land would be 15 cents an acre; that the amount of hay and corn produced on the land was extremely overrated; and that the greater portion of the land was sand. The plaintiff testified that in making the exchange he relied upon the representations made by the defendant and believed them to be true.

Without reviewing the testimony further, we think that the record clearly presented a question for the jury's determination.

Defendant complains of the giving of instruction No. 4. That instruction told the jury in substance that fraud is never presumed, but must be proved; that the law presumes that every person transacts business honestly and

in good faith; that the burden of proving fraud is on the person who charges it, and that fraud may be proved by circumstantial evidence as well as positive proof.

The court then used this language: "When fraud is charged express proof is not required." The criticism of this instruction is particularly directed against the clause just above quoted. The argument is made that the quoted clause is contradictory to the proposition just before announced and in effect told the jury that when fraud is charged no proof is required.

While the language used in this clause of the instruction is not as clear as it might have been, yet, taking the instruction as a whole, the principle of law announced does not seem to us to be misleading. The main thought embodied in the instruction is that the burden of proof is upon the party who charges fraud, and that fraud may be established by direct proof or by circumstantial evidence. In the light of the record, we are of the view that the instruction was not prejudicial to defendant's rights.

It is urged by the defendant that the court erred in giving instruction No. 5. In this instruction the court stated:

"You are further instructed that the defendant is not liable in this action for failure to employ the plaintiff to buy hay, or to work for the defendant in any other capacity, unless you find that such representations were fraudulently made and that defendant did not intend to live up to the same; but you are further instructed that, if you find that the plaintiff and defendant did enter into such agreement, and that the defendant refused to carry out such agreement, then and in that event plaintiff would be entitled to recover the sum of $1,500, less any other sum or sums which the plaintiff may have received had he diligently and earnestly endeavored to seek employment elsewhere during such period."

Under the record we think this instruction was erroneous. The action was purely for damages based upon fraud in inducing the plaintiff to make the exchange of lands. The measure of plaintiff's damages was the difference between

the value of the land plaintiff received and the value it would have been if it had been as represented. The matter of the promise of the defendant to employ the plaintiff to purchase hay for the defendant was pleaded as one of the fraudulent representations to induce the exchange of lands, and was not pleaded as an independent cause of action for a breach of contract. The instruction quoted is based upon the idea of a breach of contract for failure on the part of the defendant to employ the plaintiff.

The instruction was not responsive to any issue in the case pleaded or to the evidence and should not have been given. The rule is well established that it is error to give an instruction upon an issue not raised by the pleadings or evidence, and when prejudicial to the complaining party is ground for reversal of the judgment. *Esterly & Son v. Van Slyke,* 21 Neb. 611; *Walker v. Haggerty,* 30 Neb. 120; *Swift & Co. v. Holoubek,* 60 Neb. 784; *McAdams v. City of McCook,* 71 Neb. 789; *Sabin v. Cameron,* 82 Neb. 106.

There is no way of determining whether the jury allowed any damages based upon the issue presented by the instruction. They may have done so. They could not, however, have awarded more than $1,500 and follow the instruction.

Other errors are assigned mostly relating to the action of the court on the admission of evidence. It seems unnecessary to discuss these assignments of error in detail. We have examined them, however, and find they have no merit.

Upon the whole record we are of the view that the cause should not be remanded for a retrial because of the error in giving instruction No. 5. We think that the error can be corrected by a remittitur. If the plaintiff within 30 days files a remittitur of $1,500 as of the date of judgment in the district court, the judgment will be affirmed, otherwise it will be reversed and remanded.

AFFIRMED ON CONDITION.

MARVIN CHAMBERLAIN, APPELLEE, V. FRANK VANDERHOOF: GEORGE M. CHRISTIAN, APPELLANT.

FILED NOVEMBER 18, 1925. No. 23377.

1. **Pleading**: AMENDMENT: DISCRETION OF COURT. "It is not an abuse of discretion for the district court to refuse to permit an amended answer, presenting a new defense, to be filed at the time a case is called for trial, where it appears that the facts embraced in the proposed amendment were known when the original answer was filed, and no excuse is offered for the delay in making the application for leave to amend." *Western Assurance Co. v. Kilpatrick-Koch Dry Goods Co.*, 54 Neb. 241.
2. **Evidence**: FOREIGN JUDGMENT. A judicial record of another state authenticated as provided in section 8920, Comp. St. 1922, is admissible in evidence as proof of the foreign judgment.
3. **Foreign Judgment**: AUTHENTICITY. A judgment of a sister state, when properly authenticated, imports verity, and it is not incumbent upon the plaintiff to allege or prove that the foreign court had jurisdiction of the person of the defendant.
4. **Evidence** examined, and *held* sufficient to sustain the judgment.

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

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

W. T. Thompson and *J. C. Martin, contra.*

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

DAY, J.

Action by plaintiff upon a foreign judgment against Frank Vanderhoof and George M. Christian. In the present action service of process was had on defendant Christian only. The petition contained the usual averments in actions of this character. The answer of defendant Christian was a general denial. A jury was waived and trial had to the court, resulting in judgment in favor of the plaintiff for the amount of the original judgment with accrued interest thereon. As to defendant Vanderhoof the action was dismissed. From this judgment defendant Christian appeals.

It is first urged that the court erred in refusing permission to the defendant to amend his answer. When the case was called for trial defendant asked leave of the court to amend his answer by pleading that no service of summons had been had upon him in the original action, and that the court in that action was without jurisdiction to render a judgment against him. The plaintiff objected to the filing of the proposed amendment upon the ground that the application came too late; that the plaintiff would be prejudiced by a change in the issue at a time when the case was called for trial. The court sustained the objection and the proposed amendment was disallowed.

The right to amend a pleading is largely a matter resting in the sound discretion of the court. The matter embraced in the proposed amendment was well known to the defendant at the time he filed his answer. No excuse is given for his failure to include in the original answer the defense sought to be pleaded in the proposed amendment. In *Hurlbut v. Proctor*, 88 Neb. 491, the rule is stated as follows: "The denial of leave to amend a pleading during the trial is not reversible error, if the record fails to disclose that the trial court in so ruling abused its discretion." In *Western Assurance Co. v. Kilpatrick-Koch Dry Goods Co.*, 54 Neb. 241, it was held: "It is not an abuse of discretion for the district court to refuse to permit an amended answer, presenting a new defense, to be filed at the time a case is called for trial, where it appears that the facts embraced in the proposed amendment were known when the original answer was filed, and no excuse is offered for the delay in making the application for leave to amend." We think the court did not abuse its discretion in refusing the amendment to the pleading.

It is next urged that the court erred in admitting in evidence, over the objection of the defendant, the transcript of the judgment rendered in Adams county, Colorado, being the judgment upon which the present action is founded.

Section 8920, Comp. St. 1922, provides that a judgment of another state may be proved by the attestation of the

clerk and seal of the court annexed, together with the certificate of a judge, chief justice, or presiding magistrate, that the attestation is in due form of the law.

All of the requirements were complied with in this case and the objection to the introduction of the transcript in evidence was properly overruled. It is argued, however, that the transcript of the judgment offered in evidence fails to show that the court in which it was rendered had jurisdiction of the parties to the action. The record shows that the Colorado court was a court of record having general jurisdiction. The judgment is complete and regular on its face, and is *prima facie* valid. In such case it is not necessary that the judgment recite that the court had jurisdiction of the cause or of the parties. *Gunn v. Peakes,* 36 Minn. 177; *Kunze v. Kunze,* 94 Wis. 54; *Ferry v. Miltimore Car Wheel Co.,* 71 Vt. 457; *Fisher, Brown & Co. v. Fielding,* 67 Conn. 91.

Notwithstanding the ruling of the court denying the defendant leave to amend his answer in the manner above referred to, the defendant testified, without objection, that he was never served with process in the case in Colorado, and that he never authorized any one to appear for him in that court. He admitted, however, that he was present at the trial and testified as a witness on behalf of Vanderhoof. It is not clear whether the trial court disbelieved the testimony of Christian that he was not served with process in Colorado and did not appear as a party in that case, or whether the court regarded his testimony as not responsive to any issue made by the pleadings. The finding of the trial court was a general finding in favor of the plaintiff.

In any view which may be taken of the record, we are convinced that there was no error in the trial calling for a reversal of the judgment. The judgment of the district court is

AFFIRMED.

THOMAS B. WARD, ADMINISTRATOR, APPELLANT, V. THOMAS GEARY, APPELLEE.

FILED NOVEMBER 18, 1925. No. 23302.

Gifts. Evidence examined, and *held* insufficient to support a finding that the money received by defendant from James Carroll in his lifetime was a gift, and *held* sufficient to require a finding that defendant received the money in trust for said Carroll.

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

A. H. Murdock and *J. J. Breen*, for appellant.

S. L. Winters, contra.

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

GOOD, J.

Action by Thomas B. Ward, as administrator with the will annexed of the estate of James Carroll, deceased, against Thomas Geary, to declare that certain funds, received by defendant from plaintiff's decedent in the latter's lifetime, be held in trust, and to require defendant, as trustee, to account for and pay over the trust funds. In the court below defendant prevailed, and plaintiff has appealed.

In March, 1917, James Carroll was the owner of stock in the Commercial Savings & Loan Association to the extent of $10,000. At this time Carroll was 74 years of age and was afflicted with physical ailments, so that he was very much crippled and suffered a great deal of pain. He had become irritable, peevish and petulant. His wife, Margaret, with whom he had lived for 45 years, or upward, had in her later years become quarrelsome and fault-finding. The two did not live together in that peaceful harmony which should characterize the relations between husband and wife. They became somewhat estranged, and from time to time Carroll would leave his home and go to the home of defendant, his brother-in-law, and stay for a day or two, and finally, some months before his death, he made his home with defendant.

In March, 1917, Carroll went to the savings and loan association's office and there executed an assignment of his stock in said association to his brother-in-law, the defendant, making the statement at the time that he did not want his wife to receive a cent of his money. The pass-books which he held, representing his investment in the savings and loan association, had always been left at the office of the association, and they so remained after he executed the assignment. Carroll continued to draw the semi-annual dividends accruing on this stock so long as it remained in the association. Sometimes the dividends were paid direct to him and sometimes the check representing the dividends was made payable to defendant and indorsed by defendant, and Carroll drew the money. In July, 1919, the stock was surrendered, and its value received from the association either by defendant or by Carroll, and by the latter turned over to defendant. Shortly thereafter Carroll made a will, in which, after devising a life estate in the homestead property to his wife and making one small bequest, he devised and bequeathed all the rest and residue of his estate to his brother-in-law, the defendant. In November, following, Carroll departed this life. The will was admitted to probate. Mrs. Carroll was appointed administratrix with the will annexed and subsequently died, and Ward was appointed administrator *de bonis non* in her stead. The administrator brings this action to recover the funds arising from the withdrawal of the stock from the savings and loan association, on the theory that it was turned over to defendant, in trust, to hold for Carroll.

Defendant admits that the stock was transferred and assigned to him in 1917, and it is either admitted or proved, without dispute, that Carroll continued to draw the dividends up to and including July, 1919, and that at that time the stock was surrendered and its value in money received by defendant. Defendant's contention is that the money was turned over to him as a gift.

Both parties have filed elaborate briefs, in which they discuss the question as to whether or not the transfer by

Carroll to defendant was made with intent to defraud Mrs. Carroll of her rights as a wife in her husband's property. In view of the conclusion at which we have arrived, it will be unnecessary to consider that question.

The fact that Carroll went alone to the savings and loan association in March, 1917, and executed an assignment of the stock, which he held in the association, to defendant, but thereafter continued to draw the dividends as long as the money remained in the association, tends very strongly to indicate that Carroll did not understand that he was making an absolute gift to defendant, and the fact that defendant permitted Carroll to draw the dividends during that time likewise indicates that defendant did not consider it as an absolute gift.

In defendant's answer to the original petition in this action, he states:

"That long before the death of the said deceased, James Carroll, said certificates were duly assigned to this defendant, and the records of the Commercial Savings & Loan Association will show the exact date of said assignment.

"That thereafter on July 1, 1919, said money was withdrawn by this defendant from the said Commercial Savings & Loan Association at the express request of the said James Carroll, and the money turned over to this defendant."

Again, the witness, Louise Kerwin, testified that, after the death of Carroll, she had a talk with defendant, respecting the money which he had received from Carroll in his lifetime. Among other things, she testified that defendant said: "Jim (meaning Carroll) said, 'Tom, I want you to take this money, and take care of it.'" Defendant was called as a witness in his own behalf and testified that he received the money from the savings and loan association. He did not deny the statement attributed to him by Mrs. Kerwin, and that statement stands uncontradicted. There is no claim or pretense that defendant gave anything in consideration for the money so received by him.

We think the evidence is wholly insufficient to establish that the transfer of the stock in the association was a gift

to defendant, and, while it is somewhat meager, the evidence indicates rather clearly that defendant received the money and took it into his possession to take care of it for Carroll. The evidence justifies and requires a finding that defendant received the money in trust and that it belongs to the estate of Carroll. Demand has been made upon defendant for its return to the estate, and he has refused. The evidence shows that he received on the 1st of July, 1919, the sum of $9,940, the money that belonged to James Carroll. For this amount, together with interest from the time demand was made, he is liable to plaintiff in this action. The record does not clearly indicate when demand was made; however, the commencement of the action amounts to a demand as of that date.

The judgment of the district court is reversed, with directions to enter a judgment in favor of plaintiff for $9,940, plus interest thereon at 7 per cent. per annum from the time the action was begun until the entry of judgment.

REVERSED.

Note—See Gifts, 28 C. J. sec. 82—Trusts, 39 Cyc. 85.

GEORGE E. CALNON, APPELLEE, V. FIDELITY PHENIX FIRE INSURANCE COMPANY, APPELLANT.

FILED NOVEMBER 18, 1925. No. 23371.

1. Appeal: REVERSAL. The rule that a verdict will not be disturbed where there is evidence tending to support it does not apply where the verdict is opposed to the undisputed physical facts shown to exist.
2. Insurance: RECOVERY. In an action on a fire insurance policy by the owner of an elevator, to recover for loss of grain destroyed by fire, he cannot recover for the value of grain stored therein and belonging to another, unless the insured is liable to the owner of the stored grain, or his assigns, for the value thereof.

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

Kennedy, Holland, DeLacy & McLaughlin and *J. L. Cleary*, for appellant.

Prince & Prince, B. J. Cunningham and *A. S. Johnston, contra.*

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

GOOD, J.

Plaintiff brought this action on two policies of fire insurance, each for $4,000, issued by the defendant, covering plaintiff's grain and stock food in plaintiff's elevator building at Alda, Nebraska, which was destroyed by fire on September 22, 1921.

Plaintiff alleged that at the time of the fire there was in the elevator building 13,750 bushels of grain and 3 barrels of stock food, of the total value of $9,419; that of this grain 7,250 bushels was wheat, of the value of $1.02 a bushel; 800 bushels, barley; 4,500 bushels, corn; and 1,200 bushels, oats. Defendant admitted the issuance of the policies, the ownership of the building, and that the elevator was destroyed by fire, but denied that plaintiff had on hand the amount of grain and stock food as set forth in plaintiff's petition, and alleged that there was on hand and burned not to exceed 3,000 bushels of grain. Other issues were raised which it will not be necessary to consider. Trial to a jury resulted in a verdict of $8,490 for plaintiff, being the full amount of the policies, with interest thereon. Upon the hearing on motion for a new trial, the court directed a remittitur of $931.66 as a condition to overruling the motion. The remittitur was made by plaintiff, leaving his net recovery $7,558.34. Defendant appeals.

The errors assigned are that the verdict is excessive and is not sustained by the evidence; error in permitting plaintiff to amend his petition after trial had begun; and error in the giving and refusal of instructions.

Plaintiff testified that at the time of the fire there was in the elevator 7,250 bushels of wheat, as alleged in the

petition; that, in arriving at this amount, he figured from his books the entire amount of grain that he had purchased from the time he bought the elevator, in June, 1919, down to the time of the fire, and deducted therefrom the amount that he had sold and shipped out, but he concedes that grain was sold to the farmers from time to time and that his record of these sales was burned, so that he was unable to more than guess or estimate as to the amount that was sold from the elevator to the farmers during the more than two years; nor does he appear to make any allowance for shrinkage. Witnesses for defendant, who had been in the elevator and examined its contents three or four days before the fire, testified that the amount of grain therein was less than 6,000 bushels. Were this the only testimony, it would present a question for the jury, and its verdict would be final; but there is other evidence by plaintiff from which it can be demonstrated that his evidence as to the amount of grain in the elevator is inaccurate. He and other witnesses testified as to the dimensions of the elevator and how it was divided. On this point there is no conflict.

From this evidence it appears that the elevator was divided into 11 bins. The exact dimensions (except depth) are given. The depth of 6 bins is given as 33 or 34 feet; of 3 bins as 23 or 24 feet; and of 2 bins as 25 feet. Taking the dimensions of each bin and allowing for the greatest depth, the maximum capacity of each bin can be readily ascertained. It appears that there were 6 bins with a maximum capacity of 1,812 bushels each; 2 bins with a capacity of 1,490 bushels each; 2 bins with a capacity of 1,550 bushels each, and 1 bin with a capacity of 1,733 bushels. The total capacity of all the bins aggregated 18,685 bushels.

Plaintiff testified that all of the grain that was put in the elevator was purchased and weighed over his scales, and that he had an accurate scale record of the grain; that between the 1st day of August, 1921, and the 22d day of the following September, when the fire occurred, he purchased grain of various kinds, amounting in the aggregate to 8,006 bushels. He also testified that he had an accurate record of

grain shipped out of the elevator between those dates, and produced his books and gave the quantity of grain shipped in each car, from which it appears that 15,480 bushels of grain were shipped out of the elevator during the same period, and at least one wagon-load of 58 bushels was sold and taken from the elevator by a farmer. It thus appears that 15,538 bushels had been sold and taken out of the elevator between August 1 and September 22. If the elevator was filled to its capacity on the 1st day of August, there could have been no more than 18,685 bushels of grain therein. If to that amount is added the amount purchased and put into the elevator between those dates, the total amount would be 26,691 bushels. If from this amount is deducted the quantity of grain shipped out, there would remain but 11,153 bushels that possibly could have been in the elevator at the time of the fire, demonstrating that plaintiff's testimony, that there were 13,750 bushels in the elevator at the time of the fire, is incorrect. But plaintiff also testified that there were 4,500 bushels of corn in the elvator, of which more than 4,000 bushels had been therein since prior to the 1st day of August. It is evident that on and after the 1st day of August at least three bins must have been used for corn. His testimony is also to the effect that at all times between those dates a considerable quantity of barley and oats was in the elevator, so that two of the bins must have been used for oats and barley, leaving but six bins that could have been available for wheat. If we assume that the five bins used for corn, oats and barley were the smaller bins, that would leave the six larger bins for wheat. The maximum capacity of these six bins was 10,872 bushels, which is the most that plaintiff could possibly have had on hand on the 1st day of August, 1921. From his books he shows that the number of bushels of wheat purchased, and which went into the elevator, between August 1 and September 22, was 7,035 bushels, and that during the same period there were sold and taken from the elevator 14,650 bushels. If we add the number of bushels purchased, and which went into the elevator, to the maximum number of

bushels which could have been on hand August 1, it makes a total of 17,907 bushels, and, deducting from that amount the number of bushels shipped out of the elevator, 14,650 bushels, leaves 3,257 bushels of wheat as the maximum quantity that could have been in the elevator at the time of the fire, instead of 7,250 bushels, as testified by plaintiff. These physical facts demonstrate the inaccuracy and unreliability of plaintiff's testimony as to the number of bushels of wheat and other grain in the elevator at the time of the fire.

We have not overlooked the argument, made by counsel for plaintiff, to the effect that, where grain is of a superior quality, a bushel of dry measure will hold more than a bushel of weight, and thus the capacity of the elevator and of the wheat bins might be increased to the extent of 10 per cent. But even this allowance is wholly insufficient to account for the great discrepancy between the demonstrated facts and the amount of grain, as testified by plaintiff.

It has long been the established rule in this jurisdiction that a finding of a jury in a law action, on conflicting evidence, will not be disturbed, on appeal, unless manifestly wrong. It is likewise the rule that, where the verdict of a jury is against the weight and reasonableness of the evidence, it will be set aside and a new trial granted. *Bentley v. Hoagland,* 94 Neb. 442. The rule that a verdict will not be disturbed when there is evidence tending to support it does not apply where the verdict is opposed to the undisputed physical facts shown to exist. *Dodds v. Omaha & C. B. Street R. Co.,* 104 Neb. 692; *Oliver v. Union P. R. Co.,* 105 Neb. 243.

In the instant case, the only evidence to support the verdict was that given by the plaintiff himself. The undisputed physical facts amount to a demonstration that his evidence is untrue. The verdict is not sustained by the evidence and must be set aside.

It is unnecessary to consider the question as to whether there was error in permitting the amendment to the petition after trial had begun.

The error complained of in the giving and refusal of instructions relates to a quantity of grain that was in the elevator at the time of the fire, having been placed there for storage, and on which the owner had procured insurance. The owner had settled with the insurance company and received full payment therefor. The owner testified on the trial that he had no claim against plaintiff for the loss of this grain. It was developed, over objection, by incompetent testimony that the owner had assigned his claim to the insurance company, which had paid the loss. The trial court directed that plaintiff was entitled to recover for all the grain in the elevator, regardless of whether it was there for storage purposes. It is evident that plaintiff could only recover for such loss as he, himself, had sustained by the fire, and if the owner of the stored grain had no claim therefor, as against plaintiff, then plaintiff could not recover for that grain in this action, unless the owner of such grain had duly assigned his claim to another who had a valid claim therefor against plaintiff. Of that there was no competent evidence in this trial. There was therefore error in the instruction given.

For the reasons given, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

The following opinion on motion for rehearing was filed February 12, 1926. *Former opinion modified.*

PER CURIAM.

This action is now before us on motion for rehearing. The former opinion is reported, *ante*, p. 53, reference to which is made for a statement of the issues and facts. We are satisfied with our former opinion except the rule announced in the second paragraph of the syllabus. After further consideration we conclude the rule therein announced may be misleading.

Defendant complains of certain instructions given and refused. In the instruction given and complained of, the jury were told that plaintiff could recover for loss by fire to grain owned by others and held in storage in plaintiff's

elevator. By the provisions of section 7225, Comp. St. 1922, plaintiff, as a public warehouseman, was liable to the owners of the stored grain for loss thereof by fire. In the instant case, when the stored grain was destroyed by fire, plaintiff was liable to the owner for the value thereof, and was entitled to recover therefor from defendant. His right of recovery for the loss of such stored grain is unaffected by the fact that the owner of the stored grain had been paid for his loss by an insurance company which had insured the stored grain, because the owner's right of action would, by subrogation, inure to his immediate insurer who paid the loss. Such insurer would be subrogated to the rights of the owner, and would be entitled to recover against the plaintiff. The instruction was therefor properly given; and the instruction refused, which told the jury that defendant was not liable for the stored grain, was properly refused.

Our former opinion, in so far only as it conflicts with the views herein expressed, is withdrawn, and in all other respects is adhered to.

CLYDE ALLER V. STATE OF NEBRASKA.

FILED NOVEMBER 18, 1925. No. 24575.

1. **Rape**: CORROBORATIVE EVIDENCE. Where, in a prosecution for assault with intent to commit rape, prosecutrix testifies unequivocally to facts which would constitute the offense, a sufficient corroboration is shown if opportunity and inclination, on the part of the defendant, to commit the offense are shown, and the circumstances proved by other witnesses tend to corroborate the testimony of prosecutrix.
2. **Criminal Law**: EVIDENCE OF IMMATERIAL FACT. The receiving, over objection, of evidence of an immaterial fact constitutes no ground for a reversal, unless it is shown that such evidence is prejudicial to the complaining party.
3. ———: EVIDENCE: OBJECTIONS. Where, in a prosecution for assault with intent to commit rape, the articles of clothing, worn by the prosecutrix at the time of the assault, are fully identified and offered in evidence, an objection that no sufficient foundation has been laid is insufficient to raise the question as to

whether the clothing is in the same condition that it was immediately following the assault. Such an objection, to be availing, should challenge the trial court's attention to the specific ground for objection to the introduction of the articles.

4. ———: INSTRUCTIONS. Where the instructions of the court to the jury, as a whole, correctly advise the jury as to the law upon the points in issue, a single instruction, which, by itself, might be misleading, will not be permitted to work a reversal of the judgment. The instructions should be considered as a whole.

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

Edward J. Lambe and *Charles D. Ritchie,* for plaintiff in error.

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

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

GOOD, J.

From a conviction of the crime of assault with intent to commit rape upon Marie Boyd, a 17-year-old girl, defendant prosecutes error.

The errors assigned may be grouped under three heads: (1) Insufficiency of the evidence to support the verdict; (2) errors in the reception of evidence over objection; (3) error in the court's instructions to the jury.

Defendant urges that the evidence is insufficient because of a lack of corroboration of the testimony of the prosecuting witness, Marie Boyd. The evidence of Miss Boyd, if true, shows that defendant assaulted her with intent to carnally know her, forcibly and against her will. The question is: Is there sufficient evidence of corroboration to satisfy the requirements of the law?

The law does not require that the prosecutrix be corroborated by other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated

as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. *Fager v. State,* 22 Neb. 332; *Hammond v. State,* 39 Neb. 252; *Darwin v. State,* 107 Neb. 177; *Miller v. State,* 112 Neb. 243.

In *Dunn v. State,* 58 Neb. 807, it is held that it is not essential, in a prosecution for rape, that the prosecutrix be corroborated by direct evidence of the particular fact constituting the crime, but that proof of incriminating circumstances and corroborative facts is sufficient. Again in *Dawson v. State,* 96 Neb. 777, it is held that, if the prosecutrix testifies positively and consistently to the facts constituting the crime, other evidence of opportunity and disposition, on the part of the defendant, to commit the crime will furnish sufficient corroboration. In *Whetstone v. State,* 99 Neb. 469, it is held that opportunity and the inclination to ravish may be sufficient corroboration of direct and positive evidence, given by the prosecutrix, that defendant committed the offense.

From the previous decisions of this court, it is well established that, where, in a prosecution for assault with intent to commit rape, the prosecutrix testifies unequivocally to facts which would constitute the offense, a sufficient corroboration is shown if opportunity and an inclination, on the part of the defendant, to commit the offense are shown, and the circumstances proved by other witnesses tend to corroborate the testimony of the prosecutrix.

The record discloses, without question, that defendant was alone with the prosecutrix in a car for from two to three and a half hours, in the night season, and while the prosecutrix was probably under the influence of intoxicating liquor, furnished or procured by defendant. The opportunity is thus fully shown. The evidence discloses that defendant induced the prosecutrix to accompany him from her home in a car on his invitation to take her to a radio concert. He so represented to her and to her father, but instead, after driving her about to various places, with his

brother and another young man, he drove to a place in the country where liquor was procured, which she tasted, and perhaps drank a part of, and of which her escorts also drank. Thereafter, the two young men other than defendant were let out of the car, and defendant proceeded alone with prosecutrix and was with her alone from the hour of 8 or 9 o'clock until after 11 o'clock at night. When she was returned to her father's home, she was in an unconscious, or semi-conscious, condition, and so remained for two or three days. A pair of bloomers, which she had worn, were slightly torn and were discolored. Her body was bruised; there were scratches, resembling finger-nail scratches, upon her neck, and she was bleeding from other wounds. There were bruises upon her leg and other portions of her body. Defendant gave a false statement to Miss Boyd's father as to the cause of her condition, and two days later left his home for a distant part of the state, where he was arrested. A belt to the coat, which Miss Boyd was wearing on the night of the alleged assault, was not on her coat when she was returned to her father's home. This belt was later found on the highway, at or near the point where prosecutrix testifies that the assault occurred. They were in a car, with the curtains down. No explanation is given as to how the belt was removed from her coat and got out of the car. We think the facts thus disclosed are sufficient corroboration to meet the requirements of the law.

Error is alleged in the admission of certain evidence, as to the mental condition of the prosecuting witness during the three or four days following the assault, to the effect that she was unconscious or irrational. The evidence of the defendant and other witnesses on his behalf was to the effect that Miss Boyd was unconscious for a part of the time on the evening that the alleged assault occurred, and while she was in the car with defendant. The evidence of other witnesses on behalf of the state, including the doctor, who visited Miss Boyd several times a day for a number of days succeeding the assault, was received without objec-

tion. It was to the effect that she was unconscious during the greater part of that time. The evidence of some of the state's nonexpert witnesses, who testified to a like condition, was but cumulative of evidence received without objection, and these witnesses did not go into detail as to the facts upon which they based their opinions. Even if technically erroneous, this evidence was not prejudicial. In any event, it was not very material what her mental condition was three or four days after the assault occurred.

Complaint is made because of the admission in evidence of various articles of clothing, worn by prosecutrix on the night of the assault. These articles were all identified by the foster father and mother of the prosecutrix. When offered in evidence, a general objection was made that they were immaterial and that no sufficient foundation had been laid. It is now urged that it was not shown that the articles of wearing apparel were in the same condition as when removed from Miss Boyd's person, or that they were in a different condition than when she put them on. We think the objection made was entirely too indefinite. It did not challenge the court's attention to the specific objection that is now urged. We doubt not that, had the particular point been made, the foundation might have been more specifically laid. Under the circumstances, the court was justified in overruling the objection that was made to the introduction of the exhibits.

It is argued that one of the instructions which defined assault, without coupling with it the other elements necessary to constitute assault with intent to commit rape, was erroneous. There were two counts in the information, one charging assault and battery, and the other charging assault with intent to commit rape. The court in its instructions properly defined assault, assault and battery, and assault with intent to commit rape, and specifically told the jury what elements were necessary to be proved to constitute the offense of assault with intent to commit rape. In reading the instructions as a whole, it is clear that the jury were not told that the facts, which would constitute simple

assault, were sufficient to constitute the graver offense of assault with intent to commit rape.

The rule is well established that where the instructions, as a whole, correctly advise the jury as to the law upon a point in issue, a single instruction, which, by itself, might be misleading, will not be permitted to work a reversal of the judgment. The instructions given, as a whole, were much more favorable to the defendant than he was entitled to under the law.

The record is free from any error prejudicial to the defendant, and the judgment is

AFFIRMED.

Note—See Criminal Law, 16 C. J. secs. 2199, 2493.

JAMES INGRAM ET AL., APPELLANTS, V. BANK OF COMMERCE OF LOUISVILLE, APPELLEE.

FILED NOVEMBER 18, 1925. No. 23221.

1. **Appeal: PLEADING: AMENDMENT.** Permission to amend a pleading is of no avail unless complied with; neither does it raise a presumption that the case proceeded to trial on the theory of the permissive amendment.
2. **Judgment: RES JUDICATA.** "In order that *res judicata* as a plea in bar to a subsequent action may avail, the latter must be upon the same claim or demand. If upon a different claim or demand, *res judicata* may avail as an estoppel only as to issues therein shown to have been actually determined." *Abrahams v. Studebaker Corporation*, 113 Neb. 721.

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

D. O. Dwyer, for appellants.

C. A. Rawls, contra.

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

THOMPSON, J.

We heretofore rendered an opinion in this suit. Thereafter, a motion for rehearing was filed and hearing had thereon. This suit is one prosecuted by James Ingram and Fannie J. Ingram, husband and wife, parents of minor children, and owners of 40 acres of land in Cass county on which they reside and claim as a homestead, against the Bank of Commerce of Louisville, hereinafter called the bank, and C. D. Quinton, sheriff, seeking to enjoin Quinton as sheriff from selling such 40 acres under an execution issued on judgments in favor of the bank and against the Ingrams, aggregating $5,563.95, which judgments were rendered on the 11th day of April, 1921, in Custer county and thereafter transcripted to Cass county.

The petition alleges all facts necessary to be pleaded in support of the contention of plaintiff, to wit: That such 40 acres was, prior to the rendition of such judgments, and ever since has been, the homestead of plaintiffs and family, and of a value not exceeding $2,000, and exempt to them as a homestead under the laws of this state, and not subject to execution; that an execution has been levied on the 40 acres, sale advertised and, will be had unless prevented by the court; that plaintiffs have no adequate remedy at law. The prayer is that the homestead character of the 40 acres be determined, and the cloud upon the title created by such judgments be removed, and that defendant be enjoined from selling the same, and from having or claiming to have a lien on such land by reason of the judgments, and the right and title quieted in plaintiffs as their homestead.

Defendant for answer admits the rendition of the judgments, the issuance of the execution, levy thereof on the 40 acres as the land of plaintiffs, and that it will proceed to sell it unless enjoined, and denies each and every other allegation in the petition. It then pleads, as an estoppel to the claim of homestead, a previous judgment entered in the district court for Cass county in the case of Spence

v. Spence et al., No. 7166, in which it and these plaintiffs were parties.

Plaintiffs' reply denies that the homestead question was pleaded or in any manner determined or considered in Spence v. Spence, *supra,* and contains a denial as to the other allegations of the answer. Case tried to the court, judgment entered finding generally for defendant bank and in its favor on its plea of estoppel, and that the southeast quarter of the northeast quarter of section 19, township 12, range 12 east, being the lands in question, is not the homestead of plaintiffs in this action, or either of them. From this judgment plaintiffs appeal.

The questions for our determination are: Does the evidence sustain the contention of plaintiffs that the described land is the homestead of the plaintiff, and was prior to the rendition of the judgments, and, as such, exempt to them and has ever since so remained? Was the question of such homestead in issue in the case of Spence v. Spence, *supra,* and there determined against plaintiffs?

The evidence clearly and beyond question sustains each and every allegation in plaintiffs' petition as to the ownership, possession and occupancy of the tract as the homestead of the plaintiffs, since sometime prior to the rendition of the judgments in question, and up to the time of the trial forming the basis of this appeal, and the trial court erred in not so finding and entering judgment. The evidence further shows that the value of such tract together with the improvements thereon does not exceed $2,000, and the plaintiffs are entitled to judgment as in their petition prayed. While on this point there was one witness who testified that the value of the land was $100 an acre, he did not, like the witnesses sworn on the part of plaintiffs who placed the value at $50 an acre, show himself closely acquainted with the true nature of the soil, lay of the land, its fitness for farming purposes or productiveness; and, while the trial court must have inclined to his view, we are constrained to the contrary, and so find.

This brings us to the plea of former adjudication of the homestead question, interposed as an estoppel. The record discloses that plaintiff Fannie J. Ingram, four brothers and one sister, each inherited an undivided one-sixth interest in a 240-acre tract of land in Cass county. On or about November 2, 1920, an amicable partition was effected by and between the parties by the exchange of quitclaim deeds, each thereby becoming the sole owner of 40 acres, and plaintiff Fannie J. Ingram becoming the sole owner of the 40 acres before mentioned. On or about August 2, 1921, one of the heirs brought an action to set aside the amicable partition, alleging in substance, among other things, that the exchange of deeds was made on the assumption that the title of Fannie J. Ingram to the undivided one-sixth interest in the 240 acres was unincumbered, whereas in fact it was incumbered. He made all of his former cotenants in common, their husbands and wives, and the bank, defendant herein, parties defendant. Plaintiffs herein and defendant bank joined issue by answer and cross-petition, respectively. The question of homestead was not raised by the pleadings, but defendant insists that it was brought into the case and adjudicated by reason of the following, which was not made a matter of record, but is before us as evidence introduced from the reporter's notes: "Mr. Tidd (attorney for Ingrams): 'I would like to ask if the court is going to hold that these deeds are valid.' The court: 'On this evidence I would do so.' Mr. Tidd: 'I want to amend my petition, and allege a homestead.' The court: 'You may do so.' Mr. Rawls (attorney for the bank): 'Of course, I will ask permission to amend mine, then.' The court: 'You may make an issue of that, then.'" The record does not show that an amendment was made or had. An amendment will not be presumed merely from the fact that leave to amend is asked and granted, even if such leave is spread upon the court's record, which was not done in this case. 31 Cyc 387; *Lohrfink v. Still,* 10 Md. 530; *Briggs v. Bruce,* 9 Colo. 282; *Pooler v. Southwick,* 126 Ill. App. 264. We are strengthened in our conclusion that no amendment was had, either

in fact or in theory, by a consideration of the decree. No finding of fact was made by the court on the homestead question, nor does the word "homestead" find place in the decree. Neither does the court treat the 40 acres as a separate and distinct entity, but simply states that the bank's judgments are liens on plaintiff Fannie J. Ingram's one-sixth interest in the entire 240 acres and other lands, likewise inherited, including her one-sixth interest in the 40 acres involved herein. The court does not find the value of this 40 acres, nor of any part of the tract, and neither does it affirm or deny the amicable partition. The decree as between these parties simply responds to the issue whether the married woman's act, set up as a defense by Fannie J. Ingram, prevents the judgment for $4,513.35 from being enforced against her property, she being simply a surety on the note forming the basis of such judgment. The evidence in that case relied upon by defendant bank to sustain its contention that the parties proceeded with the trial on the theory of the permissive amendment was equally applicable to the issues joined relative to the amicable partition between plaintiff in that suit and the Ingrams, defendants therein. Furthermore, the record does not disclose whether such evidence was offered and received prior to the leave to amend, or afterwards. But, if received afterwards, it is not sufficient to sustain defendant's contention that the parties proceeded on the theory that the pleadings had been amended so as to include the homestead issue.

It is clear that neither the plea in bar nor the estoppel apply to the facts in this case, and as we said in *Abrahams v. Studebaker Corporation*, 113 Neb. 721: "In order that *res judicata* as a plea in bar to a subsequent action may avail, the latter must be upon the same claim or demand. If upon a different claim or demand, *res judicata* may avail as an estoppel only as to issues therein shown to have been actually determined."

Our former opinion is withdrawn, judgment of the dis-

trict court reversed and set aside, and defendants enjoined as prayed.

REVERSED.

Good, J., dissents.

JOHN M. RYAN ET AL., APPELLANTS, V. HENRY A. STUMPENHORST ET AL., APPELLEES.

FILED NOVEMBER 18, 1925. No. 24918.

Agriculture: FARM BUREAU: REMONSTRANCE: MANDAMUS. An act of the legislature of 1923, Laws 1923, ch. 1, providing in substance for farm bureaus, construed, and *held*, that the provision for filing a remonstrance within 20 days after the filing of the petition is mandatory, and the remonstrance filed 38 days after the filing of the petition, and the election had thereunder, are each void. In such case, mandamus will lie to compel the county board to proceed as if no remonstrance had been filed or election had.

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

Bernard McNeny, for appellants.

Howard S. Foe, contra.

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

THOMPSON, J.

Plaintiffs instituted this suit in the district court for Webster county, praying a writ of mandamus commanding defendants, county commissioners of such county, to recognize plaintiffs as the officers of the Webster county farm bureau, and to set aside from the county general fund a sum of money for their use as such farm bureau in accordance with an act of the legislature of 1923, Laws 1923, ch. 1. Writ denied, and plaintiffs appeal.

The act above mentioned reads in part as follows:

"Section 1. In counties where a farm bureau may be organized, the county boards of the several counties of this state, whenever petitioned by the number of persons hereinafter designated who are *bona fide* residents of the county, and who are actively and actually engaged in farming therein, and who shall petition the county board to appropriate a sum of money out of the general fund of the county, for the purpose of promoting improvement in agricultural methods, increasing agricultural products, the more economical distribution of such products, the conservation of the soil, and for the purpose of employing and maintaining a county agricultural agent in said county, or counties under the administration of the farm bureau, to aid therein, shall set aside, annually, from the county general fund, such sum of money for use in accordance with the provisions of this act.

"Such petitions shall be filed with the county clerk not later than the first day of September, 1924, and the first day of September of each second year thereafter."

"Section 2. Whenever such petition is filed in the time, manner and form herein prescribed, it shall be the duty of the county board to accept and allow such petition and to annually allow such budget without further action on the part of the farm bureau. If there is filed with the county clerk, within twenty days after such petition is filed, a remonstrance against the allowance of the budget, as aforesaid, the county board shall submit the question to a vote of the people of the county at the election held therein in the year 1924. * * * Provided, also, that said remonstrators shall be *bona fide* residents of the county, actually and actively engaged in farming in said county and shall be one-eighth more in number than there are signers on the petition so filed."

The record shows that on July 16, 1924, a petition as required by the act in question was filed with the county board of Webster county, and prayer granted. On August 23, 1924, a remonstrance, containing the required number of qualified signers, was also filed. Acting upon such re-

monstrance, the county board submitted the question of appropriating the money to the voters of Webster county at the election held on November 4, 1924, with the result that a majority sustained the remonstrance.

The sole question for our determination is: Does the act in question allow 20 days from the date the petition was filed, for the filing of the remonstrance, or 20 days from the last date upon which the petition might have been filed, to wit, September 1, 1924. The statute makes it imperative as to the time when and within which an act, such as filing the petition and remonstrance, must take place. When a proper petition has been filed, the county board "shall set aside" the money asked. If there is filed with the county clerk, within 20 days after such petition is filed, a remonstrance against the allowance of the budget, as aforesaid, the county board "shall submit the question to a vote," thus making these restrictions as to time mandatory. The language of the statute is plain and unambiguous, and conveys a clear and definite meaning. Had the legislature intended to allow until the 20th of September, 1924, to file the remonstrance, as contended by appellees, it would certainly have so stated. It is elementary that, in construing a statute, the intention of the legislature is controlling where, as in this case, such intention is reflected by the act. If, as we have found, the provision for appropriating the money when the required petition is filed is mandatory, surely it was not the intention of the legislature to place in the act, following such mandatory provision, a directory provision annulling it.

That part of the statute limiting the time within which a remonstrance can be filed to 20 days after the filing of the petition is mandatory, and the remonstrance in question, having been filed 38 days after the petition, and the election based on such remonstrance, are void. The judgment of the district court is reversed and cause remanded, with directions to enter judgment in harmony with this opinion.

REVERSED.

LOUISE MITCHELL, ADMINISTRATRIX, ET AL., APPELLEES V. MISSOURI PACIFIC RAILROAD CORPORATION, APPELLANT.

FILED NOVEMBER 18, 1925. No. 23268.

1. Carriers: SHIPMENTS: RIGHT OF INSPECTION. The consignee has the right to examine goods before accepting delivery; and this doctrine applies to interstate as well as intrastate shipments, there being nothing in the Carmack amendment which restricts this right, and it also applies to car-load lots. And while engaged in the reasonable exercise of this right of inspection upon the premises of the carrier, the consignee may not be considered as a trespasser or bare licensee, but is an invitee in the technical sense of that term.
2. ———: ———: ———. The duty of the carrier as to making delivery and providing opportunity for reasonable inspection prior thereto may be determined by the established custom and well-known usage which will be binding upon the shipper and the consignee; thus the place and time of inspection may be determined by the custom or usage.
3. Negligence: COMPARATIVE NEGLIGENCE: DAMAGES. "If, on the trial of an action 'brought to recover damages for injuries to a person or to his property caused by the negligence of another,' plaintiff is found to be guilty of negligence directly contributing to the injury complained of, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith; and if, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which, under the circumstances, amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, the contributory negligence of plaintiff, however slight, will defeat a recovery. And even when plaintiff has established his right to recover under this rule, it is the duty of the jury to deduct from the amount of damage sustained such amount as his contributory negligence, if any, bears to the whole amount of damage sustained. Rev. St. 1913, sec. 7892." *Morrison v. Scotts Bluff County*, 104 Neb. 254. See, also, *Bauer & Johnson Co. v. National Roofing Co.*, 107 Neb. 831.

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

J. A. C. Kennedy and *Yale C. Holland,* for appellant.

Peterson & Devoe, Good & Good and *Reavis & Beghtol, contra.*

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

EBERLY, J.

This is an action by Louise Mitchell, administratrix of James H. Mitchell, deceased, and another, plaintiffs, against the Missouri Pacific Railroad Corporation in Nebraska, defendant and appellant here, for damages caused by the death of James H. Mitchell. At the time of his death Mitchell was president of the City Fuel Company, Lincoln, Nebraska, a corporation then dealing in coal, wholesale and retail.

On August 22, 1921, Missouri Pacific car No. 70231 arrived at the railroad yards of the defendant in Lincoln consigned to the City Fuel Company. On the morning of August 23, Gaffney, who was the acting car clerk of the defendant, in accordance with the prevailing custom, called the City Fuel Company by telephone to secure "disposition" of car No. 70231. Eberly, a yard superintendent of the City Fuel Company, pursuant to instructions previously given by Mitchell, answered the telephone call and was advised of the arrival of car No. 70231 and was requested to give disposition of the same, to which Eberly then replied that this could not be done until after the coal had been inspected, and he requested that the car be held by the Missouri Pacific Railroad Corporation for that purpose. In turn, Gaffney conveyed the information to Gardner, the foreman of the switching crew, that there was no disposition of car No. 70231, and that the same was directed to be "held." About an hour after the message concerning car No. 70231 had been received at the office of the City Fuel Company, Mitchell, the deceased, accompanied by Eberly, proceeded to search out the car in question for the purpose of inspection. They commenced at the east end of the Missouri Pacific yards and proceeded westerly in search of

the car in question and finally arrived at a point where the Lincoln mill is located on defendant's right of way. Here the car sought for was discovered as the leading car of a string of six or eight cars which were standing detached from a switch engine and extending from a point near what is known as the "scale house" in a westerly direction on what appears in the record as the "scale track" and the "crossover track" connected therewith. These men passed over this space of some 150 feet that intervened between the south line of defendant's right of way and the car in question and were in the unobstructed view of the employees of the defendant constituting the switching crew. In like manner the switch engine which was then faced to the east and detached from the string of cars in question, and not in motion, was in plain sight of the two men. The evidence discloses that car No. 70231 which was an open coal car loaded with coal, was, because of a curve in the track, and the presence in the string of cars of some box cars, not within the view of the members of the switching crew. On arrival at the car, Mitchell, in the manner usual to making such inspections, mounted the ladder and took a position on the east end of the car, part of the time standing on the coal, and part of the time on a beam which was some eight inches in width across the east end of the car. Eberly followed up the ladder, where he remained. The inspection was completed and Eberly descended from the ladder. Mitchell had returned to his position on the beam and was stooping preparing to follow. As he stooped to grasp the ladder, a car set in motion by the switch engine, without any warning of any kind, and without knowledge of either Eberly or Mitchell, came in contact with the east end of the string of cars, and the force of the impact transmitted through the cars intervening struck the car on which Mitchell was standing with such force as to precipitate him to the ground between the car on which he was standing and the car immediately east of it. This accident resulted in his death.

Evidence was introduced by the plaintiffs tending to

show that for many years a custom or usage, well known and tacitly, if not expressly, approved by the defendant, existed in the Lincoln yards, and that pursuant thereto consignees of cars sought them out and inspected them wherever in the yards they might be found, which obviously would include as a place where cars would be subject to inspection the scene of the death of the deceased. The defendant controverts this claim and insists that, even if the evidence as a whole establishes the fact that inspections were permitted in certain portions of the defendant's railroad yards, the scale track, the scene of the accident, was a lead track and kept open continuously and was never occupied for any length of time except when cars were being weighed, and also insists that the scale track in question as well as the crossover connected therewith were never used for inspection purposes and were not within the custom or usage referred to.

Before the issues were joined on plaintiffs' amended petition, a motion was filed by the defendant to strike certain portions of the same, which was in part sustained and in part denied. The case was finally tried upon plaintiffs' amended petition and the amended answer of the defendant denying negligence and averring contributory negligence and the assumption of risk by plaintiffs, and the reply of plaintiffs. There was a verdict for the plaintiffs, and defendant appeals.

Among the assignments of error most emphasized in defendant's brief are those which relate to the claim of the insufficiency of the evidence to warrant a verdict in favor of the plaintiffs. In this connection it is to be remembered that, the jury having returned a verdict for the plaintiffs, all matters of conflicting evidence must be resolved in their favor, and also where the evidence is susceptible of two constructions, one favorable to the plaintiffs and one against them, the first, and not the second, will prevail in the consideration of these assignments of error. The fundamental contention of the defendant is that Mr. Mitchell at the time of his death was in its yard purely on his own business,

business in which the railroad company was not interested; that if he was not a trespasser he was at least in no better position than a bare licensee. In either case he was a person to whom the railroad company then owed no duty as long as no wanton or wilful injury was inflicted upon him. In view of the facts of the record, the rule adopted in this jurisdiction applicable, appears to be otherwise. *Chicago, B. & Q. R. Co. v. Wymore,* 40 Neb. 645; *Chicago, B. & Q. R. Co. v. Wilgus,* 40 Neb. 660; *Omaha & R. V. R. Co. v. Wright,* 47 Neb. 886; *Stading v. Chicago, St. P., M. & O. R. Co.,* 78 Neb. 566; *Hair v. Chicago, B. & Q. R. Co.,* 84 Neb. 398. In *Shults v. Chicago, B. & Q. R. Co.,* 83 Neb. 272, and also in *Merkouras v. Chicago, B. & Q. R. Co.,* 101 Neb. 717, the doctrine of the case of *Chicago, B. & Q. R. Co. v. Wymore, supra,* is expressly approved, though the case itself is distinguished. Indeed, if Mitchell is to be deemed a trespasser or, at most, a bare licensee, it would seem that the facts of the instant case would call for the application of the doctrine announced in *Krummack v. Missouri P. R. Co.,* 98 Neb. 773, which is as follows:

"'A railroad company * * * is bound in all cases to exercise reasonable care to avoid injuring all persons who are known to be, *or who may be reasonably expected to be, upon its right of way.' Chicago, B. & Q. R. Co. v. Wymore,* 40 Neb. 645. And where the evidence shows that the switching-yards of a railway are close to a large public school building and playground, that young children have long been in the habit of playing on or near the cars and tracks, ordinary care demands that in switching cars due regard should be paid to these conditions, and a failure to enclose the tracks and a neglect on the part of those engaged in switching to observe whether children are on the cars or tracks when a train is being backed in, from the lack of which precautions a traspassing child is injured, may constitute actionable negligence."

For, in view of the custom and usage which the jury's verdict presupposes, the defendant's attention was necessarily challenged to the fact of the continued presence of con-

signees or their agents in the yards engaged in duties of inspection, and was therefore required by law to exercise reasonable care to avoid injuring all parties known to be, or who might reasonably be expected to be, upon its right of way in the yards and for the purpose in question. It could not therefore be said that the defendant in the instant case, under the circumstances hereinbefore recited, performed its full duty when it inflicted no wanton or wilful injury upon the deceased, even though he be considered a trespasser or a bare licensee. But it is thought that the rule of law, defining the rights of trespassers and licensees, is inapplicable under the facts in this case. The defendant at the time was a common carrier engaged in completing the shipment of coal over its lines consigned to the City Fuel Company, of which the deceased was president and managing officer. This car-load of coal had arrived at its destination, Lincoln, Nebraska. It was for delivery. By reason of the relation of carrier to the consignee certain rights were created and certain duties were imposed. These duties were necessary incidents of the shipment and for the performance of which defendant had collected or was to receive the compensation permitted and fixed by the law of the land. One of the rights growing out of this transaction was the right of the consignee to inspect the coal before accepting delivery, and this doctrine applies to interstate as well as intrastate shipments, there being nothing in the Carmack amendment which restricts the right, and also applies to car-load lots. *Burkenroad Goldsmith Co. v. Illinois C. R. Co.*, 138 La. 81; *Scovern v. Chicago, M. & St. P. R. Co.*, 189 Ill. App. 126; *Reed Oil Co. v. Smith*, 154 Ga. 183; *Hines v. Scott*, 112 Tex. 506; 10 C. J. 253, sec. 363.

Necessarily the duty imposed upon the carrier to make due and proper delivery of the shipment and the right vested in the consignee to demand and receive delivery thereof were incidents of this contract of shipment and further imposed upon the carrier the duty to deliver at the destination mentioned in the contract at a place safe and reasonable for the consignee to receive the consignment.

10 C. J. 252, sec. 361. So, also, the right of inspection vested in the consignee likewise, of necessity, imposed the correlative duty upon the carrier of providing at its own cost and responsibility a place safe and reasonable for the consignee to inspect. From these considerations it logically follows that inspection of the consignment as well as acceptance thereof by the consignee are not purely his own business in which the carrier has no interest, but rather involved duties for the performance of which the carrier was paid a compensation and which duties it is bound to perform.

With reference to the character and the rights of a person or his agent who goes upon the right of way to accept delivery and receive a consignment at a place where the same has been unloaded and placed upon the grounds (within the carrier's yards) this court has said: "Where a person or his agent goes upon the railroad right of way for the purpose of obtaining goods consigned to him, which the railroad company has unloaded and piled upon the ground, such person is an invitee and not a trespasser, and the company owes to him the duty of exercising ordinary care not to injure him." *Wilson v. Union P. R. Co.*, 107 Neb. 111.

In the nature of the case, there appears no reason why this court should differentiate between the status of the man who rightfully goes upon the right of way pursuant to an established custom and usage to inspect a consignment of goods held there by the carrier, prior to delivery, and the man who rightfully goes upon the same right of way to remove the same consignment. In neither case is the right exercised gratuitous or conferred as the result of permission, or favor, extended by the carrier. In both it is exercise of rights which are created and arise under contract, and because of the relation of carrier and consignee. Both inspection and receipt of consignment are therefore business in which the carrier has an interest, and neither is purely the business of the consignee. It would follow therefore that both the man who inspects as well as the man who accepts and receives the delivery are invitees in the technical sense of the term, and engaged in business

with the company or its agents when performing such acts, and the company owes them alike the duty of ordinary care. It follows that we must proceed to the consideration of the further assignments of error on the basis that the deceased was an invitee at the scene of his death pursuant to custom and usage established with at least the tacit consent and implied approval of the defendant, and which was observed by all parties, and as such invitee was a person "who might be reasonably expected on its right of way" at the time and place of the accident, and for the safety of whom the defendant was bound to exercise ordinary care. In other words, having in view the physical condition of defendant's yards; the lack of warnings; the existence of the custom and usage which necessarily caused the lawful presence within the yards on or about the tracks and upon and in the cars of those engaged in transacting the business of inspection as contemplated thereby; the nature, methods, and dangers connected with the business carried on in its yards, aforesaid, by the defendant, including those inherent in the instrumentalities by it made use of; all create a situation which requires the due application of the rule—"That, whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." *Heaven v. Pender,* 11 Q. B. Div. (Eng.) 503.

But it is said that deceased, under the facts disclosed by the evidence, was guilty of such contributory negligence as will bar recovery. In consideration of this proposition it is to be remembered that the rule applicable to the situation is: "Shippers and consignees of freight on railroad premises for the purpose of loading and unloading cars are properly there and are not trespassers, or bare licensees, and the railroad company is bound to use reasonable care to avoid injuring them while so engaged. If such persons while so

engaged, and without negligence on their own part, other than that inattention to their own safety which an absorption in the duties in which they are engaged naturally produces, are hurt by the negligence of the railway company, they have an action for damages. It is a duty of switch crews with knowledge, or the means of knowledge, that persons are loading or unloading cars, to warn them of an intention to switch cars over a track on which their car is placed. These persons do not assume the risk of injuries from this cause. The persons actually at work must be notified; it is not sufficient to notify their employers." 3 Elliott, Railroads (2d ed.) sec. 1265c. See, also, *Missouri, O. & G. R. Co. v. Collins,* 47 Okla. 761; 33 Cyc. 811.

In view of the custom and usage prevailing in the yards, it would seem that consignees lawfully engaged in inspections of consignments are strictly within the protection of the above rule. Under the custom and usage prevailing it would seem that a jury would be justified in finding that the defendant should have expected the presence of inspectors and should have taken reasonable care to ascertain the facts with reference thereto. For, if they knew or had reason to suspect Mitchell's presense on the car in question, it was the duty of the company to notify him that the car was about to be moved before it was moved, and the failure so to do resulting in injury was negligence of the defendant.

In the case of *Johnson v. Waverly Brick & Coal Co.,* 276 Mo. 42, it was insisted by counsel for the railroad company that the plaintiff was guilty of such contributory negligence as to prevent a recovery, as a matter of law, by standing with his back to the approaching train so that he could not see it; the train referred to being an engine with cars attached which were then in the process of switching. The rule laid down is that an employee of a coal company engaged in trimming cars on a siding and working in a dangerous place has a right to assume that the railroad company will not move the cars without warning. *Alabama G. S. R. Co. v. Foley,* 195 Ala. 391; *Degitz v. Missouri, K. & T. R. Co.,* 97 Kan. 754; *Weaver v. St. Louis & S. F. R.*

Co., 170 Mo. App. 284; *Missouri, O. & G. R. Co. v. Collins*, 47 Okla. 761.

"Where a car was placed for loading by an employee of the railroad company, the shipper loading the car could assume that the employee would not negligently injure him by striking the car with an engine operated by the employee within the scope of his employment, and the shipper, working in the car without taking any precautions against injury by the car being struck by the engine, was not guilty of contributory negligence." *Fellhauer v. Quincy, O. & K. C. R. Co.*, 177 S. W. 795 (191 Mo. App. 137).

It would seem therefore that it was incumbent upon the switching crew to use a reasonable care to determine the presence of inspectors on the coal cars that made up the string of cars in their possession for the purpose of warning them of impending movements of such cars, and that persons lawfully engaged in said car had the right to rely upon such warning being given, under the circumstances existing in the present case. At all events the facts involved in this case are proper to submit for the consideration of the jury on the issue of contributory negligence as was done by the trial court in this case.

This brings us to the consideration of the objections to the instructions given and refused by the court on the subject of contributory negligence. The rule upon this subject as applicable to the facts in this case was announced in *Morrison v. Scotts Bluff County*, 104 Neb. 254, and is as follows: "If, on the trial of an action 'brought to recover damages for injuries to a person or to his property caused by the negligence of another,' plaintiff is found to be guilty of negligence directly contributing to the injury complained of, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith; and if, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which, under the circumstances, amounts to slight negligence, or if the negligence of de-

fendant falls in any degree short of gross negligence under the circumstances, the contributory negligence of plaintiff, however slight, will defeat a recovery. And even when plaintiff has established his right to recover under this rule, it is the duty of the jury to deduct from the amount of damage sustained such amount as his contributory negligence, if any, bears to the whole amount of damage sustained. Rev. St. 1913, sec. 7892." See, also, *Bauer & Johnson Co. v. National Roofing Co.*, 107 Neb. 831. The trial court attempted to cover this subject in the giving of instructions Nos. 4, 6, 8, 11. In these instructions however the element referred to in the following language: "Or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, the contributory negligence of plaintiff, however slight, will defeat a recovery" is wholly omitted. In instruction No. 10 requested by defendant in the court below and refused this element was substantially covered. The failure of the court to embody in his instructions the element above quoted thus constitutes error. In view of the fact that the controlling issues in this case are certainly the matter of negligence and contributory negligence, the error is deemed prejudicial and necessitates the reversal of the case. A retrial of this case being necessary in the court below, and that court now having before it the decision of this tribunal in the case of *Lawson v. Union P. R. Co.*, 113 Neb. 745, further discussion of the errors assigned by the defendant would serve no good purpose. For this error in the instruction of the trial court, the judgment of the district court is reversed and the case remanded for a new trial.

REVERSED.

STATE, EX REL. CEARANCE A. DAVIS, ATTORNEY GENERAL, V. FARMERS & MERCHANTS BANK OF WALTON: FRED OSSENKOP, CLAIMANT, APPELLEE: J. E. WHITNEY, RECEIVER, APPELLANT.

FILED DECEMBER 8, 1925. No. 23498.

APPEAL from the district court for Lancaster county:

WILLIAM M. MORNING, JUDGE. *Affirmed as modified.*

Richard F. Stout and *C. M. Skiles,* for appellant.

Frampton & Polk, contra.

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

PER CURIAM.

The receiver of the Farmers & Merchants Bank of Walton, insolvent, has appealed from the judgment of the district court, allowing the preferred claim of one Ossenkop, and directing its payment from the depositors' guaranty fund.

The undisputed facts are that Ossenkop deposited $3,015 in the bank; that, without his authority, the cashier of the bank drew checks against Ossenkop's account and appropriated the money for the use of the bank. Ossenkop discovered that his money had been misappropriated, asked to have the wrong righted, and expressed a wish to have the deposit converted into a time deposit drawing interest. The cashier told him that the bank would pay interest upon the deposit, but no rate was agreed upon; nor does the record disclose when the cashier made the statement that the bank would pay interest.

The receiver insists that, since Ossenkop was advised, long prior to the bank's failure, that his money had been misappropriated, he had ratified the wrongful act by not bringing an action against the bank to recover the amount of the deposit, and is now estopped from claiming the protection of the depositors' guaranty fund.

To this view we cannot assent. Ossenkop did not consent to the wrongful act. He complained of it from time to time. His relation to the bank as a depositor was never changed. The bank was liable to him as a depositor, and upon its failure the depositors' guaranty fund was liable for the payment of the claim.

The district court allowed Ossenkop interest from the date the money was wrongfully withdrawn from his ac-

count by the bank's cashier. We think this was error. The deposit never was changed to a time certificate, or to an interest-bearing deposit. The record does not disclose the date when the cashier said the bank would pay interest on the deposit; nor was any rate agreed upon. In this state of the record, the deposit would not draw interest except from the date of the allowance of the claim by the district court.

The judgment of the district court is therefore modified, so as to allow Ossenkop's claim for $3,015, payable out of the depositors' guaranty fund, with interest thereon at 7 per cent. from the 10th day of May, 1923, the date of the allowance of the claim by the district court. As modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA, APPELLEE, V. BOARD OF EQUALIZATION OF RICHARDSON COUNTY, APPELLANT.

FILED DECEMBER 8, 1925. No. 24286.

1. **Taxation**: COUNTY BOARD OF EQUALIZATION: JURISDICTION. The jurisdiction of a county board of equalization is limited to a session of 20 days, but it may adjourn from day to day or from time to time, and its jurisdiction will continue until such time as will enable the assessor to forward a copy of the assessment to the state board of equalization on or before July 10 of each year, and the board will have jurisdiction, within the time limited, to hear the protest of any taxpayer who may properly present a protest against the assessment made against his property.
2. **Record** reviewed, and *held* free from error.

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

F. N. Prout, for appellant.

J. A. C. Kennedy and *Charles F. McLaughlin, contra.*

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

MORRISSEY, C. J.

This is an appeal by Richardson county from a judgment entered in the district court for that county reversing a finding of its board of equalization in the matter of the assessment made against the property of the Missouri Pacific Railroad Corporation.

In June, 1923, the county assessor of Richardson county appraised certain property of the railroad situated within the county, and gave notice of this assessment to the tax department of the company. Included in the assessment made were two parcels of ground, one consisting of 33.1 acres and another of .999 acres. A roundhouse, machine shops, etc., are situated upon the larger tract, and the office building of the company, at Falls City, is located upon the smaller tract. As provided by statute, the county board of equalization convened on June 12, 1923. On June 29, the board still being in session, the local superintendent of the company notified the county assessor that the company wished to protest the assessment made, and, by mutual agreement, the date for hearing of the protest was set for July 5, 1923. On the day agreed upon, the representatives of the company appeared before the board, but were informed that the period within which protests might be filed and heard had expired, as more than 20 days had passed since the date upon which the board convened, but that the board would hear the protest, reserving the question of jurisdiction for a later ruling. A hearing was then had on the company's protest, which alleged:

"(1) The assessment upon the machine and blacksmith shops, storage buildings and office building is too high.

"(2) The assessment of the 33.10-acre tract and the buildings thereon situated is illegal, except such part of said assessment as may be levied upon machine repair shops, general office buildings or store house thereon located, for the reason that said tract and buildings is not subject to local assessment and is included in the return made by the Missouri Pacific Corporation in Nebraska to the state tax

commissioner of the state of Nebraska under and pursuant to the laws of the state of Nebraska.

"(3) That the assessment on the .999-acre tract and the buildings thereon situated is illegal, except such part of said assessment as may be levied upon machine repair shops, general office buildings or store house thereon located, for the reason that said tract and buildings is not subject to local assessment and is included in the return made by the Missouri Pacific Corporation in Nebraska to the state tax commissioner of the state of Nebraska under and pursuant to the laws of the state of Nebraska."

On July 9, 1923, the board of equalization dismissed this protest "for lack of jurisdiction." The railroad company took an appeal to the district court, and that court held that the board of equalization erred in holding that it did not have jurisdiction to hear and determine the protest, and entered a decree in which assessments made upon the two parcels of land were set aside, as were, also, the assessments made upon the power house and certain other buildings. In respect to all other items of the assessment, the court confirmed the appraisement made by the county assessor.

Appellant's first assignment of error deals with the jurisdiction of the court to hear the appeal taken from the decision of the board of equalization. It is argued that on the date of hearing by the board, July 5, 1923, the 20-day period provided by statute had expired and thus the board of equalization was without jurisdiction, and, that body being without jurisdiction, the court could not acquire jurisdiction. It is true that the date set for hearing the protest was more than 20 days after the board had convened, but the statute (Comp. St. 1922, sec. 5979) provides that the county board may take adjournments from time to time awaiting the action of the state board of equalization. In *Hiller v. Unitt*, 113 Neb. 612, it is held:

"The jurisdiction of a county board of equalization is limited to a session of 20 days, but it may adjourn from day to day or from time to time, and its jurisdiction will

continue until such time as will enable the assessor to forward a copy of the assessment to the state board of equalization on or before July 10, of each year."

The record does not show that the board had held a session of 20 days, and, in the absence of such showing, the trial court did not err in holding that the board of equalization had jurisdiction to hear the protest of the taxpayer.

In addition to the question of jurisdiction already discussed, and applying to the property held to be exempt from local assessment, appellant has advanced the following proposition:

"The property being off the right of way of the railroad and being of the character embraced within the proviso of the statute, it was the duty of the officers of the company to list it for taxation with the county assessor."

This assignment is based upon appellant's construction of section 5839, Comp. St. 1922, which, among other things, provides that all machine repair shops, general office buildings, store houses, and also all real and personal property outside of the right of way and depot grounds, etc., shall be listed for taxation with the local assessor. It is argued that the right of way should be held to be a strip of ground only 200 feet in width. However, this court has held in *Chicago, B. & Q. R. Co. v. Box Butte County,* 99 Neb. 208:

"A railroad, for the purpose of assessment and taxation, is considered as an entity, and includes all property that is held and used principally in the operation of the road and carrying on the business of transportation."

And in *Chicago, B. & Q. R. Co. v. Webster County,* 101 Neb. 311:

"A pipe line connecting springs with a water system established and operated by a railroad company, owner, for general railroad purposes at a station and roundhouse, and the necessary land around the springs, should be assessed by the state board of equalization and assessment, and not by the county board of equalization, though the property described is not within the regular railroad right of way and station grounds. Rev. St. 1913, secs. 6375-6377."

Giving effect to the holdings just quoted, it logically follows that the property covered by this assessment was not subject to local assessment, and the trial court did not err in striking it from the local assessment rolls.

The judgment of the district court is

AFFIRMED.

Note—See Taxation, 37 Cyc. 1075 (Ann).

CHARLES HANNEMAN ET AL., APPELLEES V. OSCAR P. OLSON ET AL., APPELLANTS.

FILED DECEMBER 8, 1925. NO. 23335.

1. **Evidence**: PAROL EVIDENCE. "The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible." *Pym v. Campbell*, 6 Ell. & Bl. Q. B. (Eng.) *370.
2. ———: ———. "Parol evidence is admissible, in an action between the parties, to show that a written instrument, executed and delivered by the party obligor to the party obligee, absolute on its face, was conditional and was not intended to take effect until another event should take place." *Ware v. Allen*, 128 U. S. 590.
3. **Fraud**: SUFFICIENCY OF EVIDENCE. Upon examination of the evidence, we conclude that the verdict of the jury is amply supported thereby.

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

Smith, Schall, Howell & Sheehan, A. F. Mullen and *V. H. Johnson*, for appellants.

McKenzie, Lower & Sheehan, contra.

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

DEAN, J.

The plaintiffs Hanneman are brothers, residing at Mag-

nolia, Iowa, where they were formerly engaged in the farm implement, hardware, and automobile business. They commenced this action in the district court for Douglas county to recover damages for an alleged fraud said to have been perpetrated by defendants in the sale of a certain tract of eastern Colorado land to them, and in this they allege they were damaged in the sum of $63,200, for which they sought to recover judgment. Upon submission of the evidence, plaintiffs recovered a verdict, and judgment thereon, for $43,560, this sum including lawful interest on the indebtedness up to the date of the verdict. Defendants have appealed.

It may here be observed that this action involves a consideration of two land sale contracts between the parties. The first contract is dated October 21, 1919, and has to do with land designated in the record as the "Frost tract," consisting of approximately, 2,880 acres, for which the purchase price was $35 an acre, or a little over $100,000 in all. On this contract plaintiffs paid $5,800 on the date of purchase. The second sale contract, dated December 20, 1919, has to do with another tract of land, consisting of about the same number of acres and at about the same price. The first tract having been subsequently exchanged for the second tract, the above payment of $5,800 was applied thereon as a part payment. The contract in suit also obligated plaintiffs to deliver to defendants a certain stock of implements, hardware, automobiles and accessories, then at Magnolia, Iowa, or so much thereof as was necessary to pay out the unpaid remainder of the purchase price. This stock of merchandise was owned by plaintiffs and was valued at approximately $28,000 or $30,000, at wholesale prices.

Before the contract for the Frost tract was closed, plaintiffs made a thorough examination of the land and found a body of "about 1,100 acres of wheat" coming up at the time, and they noted that the farm equipment, of the then supposed former owner, consisted of "four or five tractors, a plow for each tractor, a couple of discs, a couple of drills, a tank wagon" and other implements, all of which tended to show that it was a fertile and producing farm.

When the contract for the Frost tract was entered into, plaintiffs were strangers in Colorado and had been but a few days in the vicinity of the land. And it appears that, from the time of their arrival until their departure, they were constantly in the company of defendants and their agents, and among the latter were Swanson, Stout, and Armstrong. On this point Homer Hanneman testified: "Q. You may tell who was with you during the time you were there from the time you hit Burlington, Colorado, until the time that they put you on the train. * * *A. There was always Mr. Olson, or Mr. Swanson, Mr. Stout, or Mr. Armstrong with us all the time." So that from this evidence the jury doubtless concluded that plaintiffs had little opportunity to make an independent inquiry and investigation of other Colorado lands in respect to soil composition, value, quality, productivity, and the like. And it appears from the evidence that, while plaintiffs were being driven to the railroad station, accompanied by some of the vendors and their agents, preparatory to returning to their Iowa home, a farmer named Rudolph was sighted "100 or 150 yards away," and that "Mr. Swanson got out of the car and started to walk ahead of us and talk to Mr. Rudolph a little while before we got there." When Swanson and Rudolph came to the car, the latter told plaintiffs that the Frost tract was worth "about $60 to $65 an acre." In respect to this incident, Mr. Rudolph testified that Swanson had a talk with him "separate and apart from Hanneman brothers," and that he, Swanson, told him "to price this land at $65 an acre—big deal on." And this Rudolph did.

About two months after plaintiffs bought the Frost tract, or believed they had bought it, they were called up by telephone at their Iowa home from Missouri Valley, by one of defendants' agents, and informed that, owing to the then recent death of the late owner of the land which they had bought, the title thereto was in such condition that it would take at least a year, by appropriate court proceedings, to make the title merchantable. Plaintiffs then, by appointment, went to Omaha, taking Mr. Stirtz, a brother-in-law,

along, where the party met Olson, Swanson, and Stout, by whom an exchange of the Frost land was proposed for another 2,880-acre tract of Colorado land, which, they were then informed, was owned by defendants, and which they were willing to sell at approximately the same price which was paid for the Frost land. This tract was a considerable distance from the Frost tract, and was represented by defendants to be several miles nearer town and well improved, and a better tract than the one they had purchased in many material respects.

At first plaintiffs expressed an entire unwillingness to consent to an exchange of land for other land which they had never seen, and for a time they refused to even consider the proposition unless they were given time and opportunity for examination. But in this resolve, as disclosed by competent evidence, plaintiffs were overborne by the representations made by defendants and their agents, in respect of the value of the proposed tract and the like, and, in apparently implicit reliance on the representations so made, an exchange contract, or rather a new contract, for the purchase of the proposed tract was there entered into. It may here be noted that it afterward transpired that defendants never owned the Frost tract and the transaction proved to be only a pretended sale, though one of the vendors testified that they had a verbal agreement with the owner authorizing a sale.

In respect of the false and fraudulent representations, which induced the sale of the second tract, there is competent evidence, on this vitally material feature, tending to prove that defendants, by themselves and their agents, falsely represented to plaintiffs that a very large proportion of the 2,880-acre tract under consideration, namely, the second tract, was as smooth as a floor; that the soil was fertile; that it was free from sand and gravel; that it would produce 25 bushels of wheat to the acre and upward, and other crops in like proportion, and that some of it was subirrigated land which, for growing alfalfa, was easily worth $250 an acre. Defendants further informed plaintiffs that

they bought the land for $32.50 an acre and were willing to sell it for the slight advance of $2.50 an acre, or $35, and gave as a reason for selling that they had another tract of land which they wanted to retain, but that, solely for financial reasons, they were unable to keep both and were therefore willing to sell the land in question to plaintiffs even at a sacrifice. But there is evidence tending to prove that the land was bought by defendants shortly before, for less than half of the sum which they represented to plaintiffs they had paid for it.

Plaintiffs consulted Stirtz, and he advised them to make the exchange and to forego a personal examination. He, being a man of mature years, assured them, in substance, that he, Stirtz, had become informed in respect of Olson's standing; and that he was a reliable man, who could be depended on, and would scorn to make false representations in order to effect a sale or a trade. Naturally, plaintiffs listened to their brother-in-law, in whom they placed implicit confidence, and, in view of defendants' fraudulent representations and assurances, on which they relied, they yielded and the purchase was made. But it transpired that Olson had paid Stirtz $500 for his influence in getting plaintiffs to make the purchase without going to Colorado to examine the land. This was, of course, undiscovered by plaintiffs until some time after the sale was effected. And it may here be noted that proof was offered which tended to show that one of defendants' regular agents received almost $3,000 for his assistance in closing the deal, and that another was promised a like amount, or perhaps more; but it appears that he, for some reason, realized nothing for his efforts.

Plaintiffs, as noted, in reliance on the false and fraudulent representations of defendants and their agents, and in utter ignorance of the real facts, of which they were the victims, and in ignorance of the fact that their brother-in-law had been basely seduced by defendants, proceeded to invoice their farm implements, their hardware, their automobiles and accessories, which, as above noted, approximat-

ed $37,000 or $38,000 in value, and this, in addition to the $5,800 which was paid on the Frost tract, was delivered to defendants, and also mortgages for the remainder of the purchase price of the land. Some automobile tires plaintiffs forwarded to Swanson, but the bulk of the merchandise was delivered to Olson. In addition to the foregoing, one of the Hannemans testified: "Q. Now, what was the approximate amount of the mortgages that you had given to Olson, Swanson, or other parties, on this land, in addition to the $38,000 you paid? A. $62,000 or $63,000."

The truth in respect of the transaction was not discovered by plaintiffs until they went to Colorado the following spring and tried to farm the land in suit, but they found that the soil was sandy and so streaked with gravel that it could not be farmed, and was altogether an unproductive tract and was fit for grazing purposes only. They and other witnesses, produced by them, testified that the value of the smooth land which was sold to them was about $10 an acre, and the rough land, of which there was considerable, was worth about $7.50 an acre. Other evidence was introduced which tended to prove that the land was worth about $16 an acre. But the question of value, and of the credibility of the witnesses as well, was for the jury.

In respect of defendant, D. R. Jones Land Company, the contention is that no liability attaches on the ground that Swanson, who was Jones' partner, exceeded his authority as a member of the firm. In view of the evidence, the argument does not appeal to us. In passing, it may be observed that the offices of defendant "Land & Cattle Company" and of defendant "D. R. Jones Land Company" are closely located in the same building, and certain features of the transaction were talked over in both offices between plaintiffs and defendants' agents. But this is only an incident. Jones, however, testified that the "D. R. Jones Land Company" was a partnership, consisting of himself, and his partner Swanson, and was located at Cheyenne Wells, Colorado. A large folder, or poster, is in evidence which is a direct and persuasive invitation to purchasers

to invest in land in Cheyenne county, Colorado. Jones admitted that he knew the poster was generally circulated in the neighborhood of the land in suit and at other points. And the poster, which is really impressive in its makeup, designated the "D. R. Jones Land Company" as its sponsor. From all the evidence we conclude that the jury were justified in finding that this company was liable, with the other defendants, as an active participant in the transaction here in question.

Plaintiffs began a former action in Douglas county to recover damages. Defendants endeavored to bring about a settlement of the action, which in effect amounted to a dismissal, but plaintiffs refused to consider a dismissal until their money was returned to them. Subsequently, however, they did sign an instrument which, in terms, indicated that there was no suit pending, and this, solely on defendants' assurance that it would help them in their efforts to sell the land. Defendants' contention now is that this instrument constitutes an absolute dismissal by which plaintiffs are bound. But plaintiffs testified that they signed the proposed settlement agreement, or dismissal, above referred to, with an agreement on the part of defendants that it would be used solely to show to prospective buyers, and that it should not become effective until defendants returned their money which was wrongfully obtained, and this, for the very obvious reason that no person would consider a purchase of land which was involved in present litigation. On the cross-examination, in respect of the above-mentioned proposed agreement for settlement and dismissal, Swanson testified that he told plaintiffs, or one of them, that he was going to see defendants' attorney and have him "draw up an agreement along the line we had discussed, provided it met with his approval," and that plaintiffs "were to sign what we had agreed upon." Swanson further testified in respect of the instrument of dismissal that the Hannemans were "to be the judge whether it was what you had agreed upon."

It is well settled, in this and other jurisdictions, that such an agreement is enforceable. In *Gund v. Roulier*, 108

Neb. 589, on rehearing at page 595, it was held competent for parties to agree that certain conditions precedent were to be performed before the instrument, there in question, became a binding contract. And this appears to be a rule of long and respectable standing. In *Pym v. Campbell,* 6 Ell. & Bl., Q. B. (Eng.) *370, it was held, in a case wherein it had been agreed that a certain contract should not be binding until a third party's approval was obtained: "If it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible." See *Collingwood v. Merchants Bank,* 15 Neb. 118; *Coffman v. Malone,* 98 Neb. 819, L. R. A. 1917B, 258; *Davis v. Stearns,* 85 Neb. 121.

Ware v. Allen, 128 U. S. 590, is in point. The court there said:

"Parol evidence is admissible, in an action between the parties, to show that a written instrument, executed and delivered by the party obligor to the party obligee, absolute on its face, was conditional and was not intended to take effect until another event should take place." And it was further held that the contract, there in suit, never went into effect because the condition upon which it was to become operative never occurred, and that the case therefore came under the well-recognized rule, as stated, "By which an instrument, whether delivered to a third person as an escrow, or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or to be ascertained thereafter." To substantially the same effect is *Golden v. Meier,* 129 Wis. 14.

Defendants excepted to certain instructions tendered by them, and refused by the court, and also in respect of certain instructions given by the court of its own motion. Upon examination we find that reversible error cannot be predicated upon these assignments of alleged error. The jury

were fairly instructed on every material fact involved in the controversy herein, and we find that the verdict is amply sustained by the evidence, notwithstanding it conflicts on every material point. The court did not err in overruling the motion of defendants, and each of them, for a new trial.

Reversible error has not been pointed out. The judgment is therefore

AFFIRMED.

Note—See Evidence, 10 R. C. L. 1055—22 C. J. secs. 1459, 1540, 1617.

JOHN C. STEWART, APPELLEE, V. CITY OF LINCOLN APPELLANT.

FILED DECEMBER 8, 1925. No. 23453.

Municipal Corporations: DEFECTS IN STREETS: NOTICE. When a notice of a defective condition of a street is given to a city council at an open session thereof, five days before the happening of an accident occasioned by such defective condition, a written notice filed with the city clerk as provided by section 3970, Comp. St. 1922, is not a necessary prerequisite to the right of recovery.

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

C. Petrus Peterson, Charles R. Wilkie and *R. A. Boehmer*, for appellant.

Sterling F. Mutz, contra.

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

DAY, J.

The plaintiff recovered a judgment for $300 against the city of Lincoln as pecuniary loss, on account of damages to

his automobile. The cause of action was based on the claim of negligence on the part of the defendant, in failing to keep that part of Holdrege street, where the accident occurred, in a reasonably safe condition for travel.

While several assignments of error are set forth in defendant's brief, they all center about the one question, namely, whether, under the facts presented by the record, it was a necessary prerequisite to the right of recovery that a written notice of the defective condition of the street should have been filed with the city clerk five days before the accident. It is the claim of the defendant that the statute requires that such notice be filed and in the absence of a literal compliance with these requirements no recovery can be had.

Section 3970, Comp. St. 1922, provides as follows:

"Cities of the first class shall be absolutely exempt from liability for damages or injuries suffered or sustained by reason of defective public ways, or the sidewalks thereof within such cities, unless actual notice in writing of the defect of such public way or sidewalk shall have been filed with the city clerk at least five days before the occurrence of such injury or damage. In the absence of such notice so filed the city shall not be liable, and in all cases such notice shall describe with particularity, the place and nature of the defect of which complaint is made."

It is conceded by the plaintiff that no formal written notice of the defective condition of the street was ever filed with the city clerk, but it contends that actual notice of the defective condition of the street was given to the city at an open session of the city council, and that such notice was sufficient to meet the purpose of the statute, even though its terms were not literally complied with. The record shows that for some time prior to the accident the street in question had been out of repair, full of chuck holes, and in a dangerous condition for the purpose of travel. While the street was in that condition, a delegation of citizens interested in the street appeared before the city council in open session, on June 6, 1921, and five days before the

happening of the accident, and notified the council of the dangerous condition of the street. While the main purpose of the delegation was to secure the paving of the street, they made it plain that the street was full of chuck holes and dangerous to life and property to persons attempting to use it. There is no question but that the city council as a body had knowledge of the defective condition of the street.

It has repeatedly been held by this court that it is the duty of cities to keep and maintain its streets and sidewalks in a reasonably safe condition for public use. *City of Lincoln v. Walker,* 18 Neb. 244; *Davis v. City of Omaha,* 47 Neb. 836; *City of Omaha v. Jensen,* 35 Neb. 68; *Goodrich v. University Place,* 80 Neb. 774.

In *Tewksbury v. City of Lincoln,* 84 Neb. 571, this court had occasion to consider this same statute in its application to the facts then before the court. In that case an employee of the city in flushing a sewer drain had permitted water to escape from the hydrant and go upon the sidewalk, which froze and formed a coating of ice on the sidewalk and bridge connecting the sidewalk with the street. On the following day a lady passing over the sidewalk, without knowledge of the condition, slipped, fell, and sustained injuries for which she sought damages against the city. In that case, of course, no notice in writing of the condition of the sidewalk had been filed with the city clerk. Under the facts a five days' notice would have been impossible. In that case the court held that, where the city itself created the dangerous condition which caused the accident, the written notice prescribed by section 3970 was not necessary.

A similar statute was again before the court for interpretation in *Updike v. City of Omaha,* 87 Neb. 228. In that case it was likewise held that the statute had no application where the defect which caused the injury was created by the city itself.

In the discussion of this latter case, the purpose of the statute, requiring a written notice to be filed with the city clerk, is considered. A part of the discussion is as follows:

"In another part of the brief a better reason for this legislation is suggested. 'What was the purpose of requiring this notice? Clearly, to direct the attention of the proper officers of the city to the fact that at a particular point on one of the public highways of the city there exists at the time a condition in the public highway which renders the street unsafe and dangerous for public travel, a condition likely to result in injury to some traveler on the highway. The purpose of this notice was to enable the city to prevent accidents by repairing or guarding the defects.' This is undoubtedly the real purpose of the legislation."

One of the reasons advanced why the written notice required by statute was unnecessary in the *Updike* case, just referred to, was because the city itself had created the defect, and therefore had actual knowledge of the condition of the street. Under such circumstances a written notice would not have added anything to the information the city already possessed. We think the reasoning in the two cases above referred to applies with equal force to the case at bar.

Considering the underlying purposes of the statute, our decisions have made an exception to the necessity of a literal compliance with its terms. We have considered the spirit rather than the letter.

If a written notice is not required where the city itself creates the defect, because it has knowledge of the condition, it is difficult to see on what principle a written notice should be required when the same information is brought to the attention of the city council in an open session by a delegation of citizens complaining of the condition of the street. At the close of the hearing, we dare say, the city council had as much knowledge of the defective condition of the street as a written notice of the condition filed with the city clerk would have imparted.

Considering the broad purpose of the statute, we are of the view that, when a defective condition of a street or sidewalk is brought to the knowledge of the city council in open session five days before an accident occurs, the

written notice provided for in section 3970, Comp. St. 1922, is not a necessary prerequisite to the right of recovery.

The court did not err in its ruling refusing to direct a verdict for the defendant. The judgment of the district court is

AFFIRMED.

Note—See Municipal Corporations, 20 L. R. A. (n. s.) pp. 689, 728; 13 A. L. R. pp. 44, 62; 13 R. C. L. p. 337; 3 R. C. L. Supp. p. 44; 4 R. C. L. Supp. p. 810; 28 Cyc. 1389.

PURL C. DREW, APPELLANT, V. GEORGE LE ROY MUMFORD ET AL., APPELLEES.

FILED DECEMBER 8, 1925. No. 25060.

1. **Municipal Corporations**: LIGHTING SYSTEM: LEVY. Section 4123, Comp. St. 1922, in so far as it authorizes the mayor and council of cities of the first class to levy a tax of five mills on the dollar for the respective purposes of lighting the streets and alleys and for extension or maintenance of a municipal lighting system, and for other purposes expressed in said section, *held* to be modified by section 5910, Comp. St. 1922, which reduces the amount of levy for the respective purposes specified in section 4123 to one mill on the dollar valuation.
2. ———: ———: ———. Provisions of sections 4396 and 4397, Comp. St. 1922, in so far as they authorize a levy of five mills on the dollar valuation, *held* to be modified by section 5910, Comp. St. 1922.
3. **Statutes**: AMENDMENT. Section 4123, Comp. St. 1922, being a part of an act complete in itself, is not inimical to section 14, art. III of the Constitution, which requires that "No law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed."
4. ———: REPEAL BY IMPLICATION. In such case, the earlier statute, in so far as it is inconsistent with the latter, will be deemed to have been repealed.

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

Hazlett, Jack & Laughlin and *Hainer & Flansburg,* for appellant.

Sackett & Brewster, Frank A. Dutton and *H. F. Mattoon, contra.*

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

DAY, J.

The plaintiff, a citizen and taxpayer of the city of Beatrice, on behalf of himself and all other taxpayers similarly situated, brought this action against the defendants to enjoin them from enforcing the mill-rate levy in excess of one mill on the dollar valuation for the purpose of extending and maintaining the city's electric transmission lines.

The defendants filed a demurrer to the plaintiff's amended petition upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and, the plaintiff electing to stand on his amended petition, the cause of action was dismissed. From this judgment the plaintiff appeals.

The amended petition charged in substance that the city of Beatrice is a city of the first class having a population of more than 5,000 and less than 25,000; that for many years it has owned and operated a municipal electric plant used for the purpose of lighting the streets, alleys and public places in the city and for public lighting; that in recent years the city officials have extended the use of the electric current for commercial purposes; that for the year 1925 the city officials by proper ordinances appropriated $40,000 for line extension, equipment, and labor, and $8,500 for lighting the streets and alleys of the city; that said sums were to be raised by levying a tax upon the taxable property in the city; that the total assessed valuation of the city property did not exceed $9,922,000; that to meet the appropriation thus made requires a mill-rate levy of approximately five mills of the dollar valuation. The

amended petition further alleged that there is no power or authority in law given to defendants to levy a tax in excess of one mill on the dollar valuation for the purposes specified. The plaintiff prayed that all of the mill-rate levy in excess of one mill on the dollar valuation be decreed to be excessive, *ultra vires*, and void.

The plaintiff contends that an act of the legislature passed in 1921 and carried as section 5910, Comp. St. 1922, limits the power of taxing officers to a one-mill levy on the dollar valuation for the purposes specified in the action. On the other hand, the defendants contend that section 5910, above referred to, does not apply to those provisions of the statute which authorize cities of the class of the city of Beatrice to make a five-mill levy for the purposes specified, and, if it was so intended, would be unconstitutional.

The defendants' main reliance in justification of their action is upon section 4123, Comp. St. 1922. They also rely upon sections 4396 and 4397, Comp. St. 1922.

A determination of the question thus presented involves an examination of the several provisions of the statute to which reference has been made. Section 4123 in its present form was passed by the legislature of 1921 with an emergency clause and became effective April 14, 1921. The only change in the section in 1921 was to increase the amount of bonded indebtedness, which cities of that class might assume, from $150,000 to $250,000. The provisions of section 4123, in so far as they relate to the power of cities of that class to levy a tax of five mills on the dollar, have been effective since 1901, and while some minor changes have been made from time to time the power to make a levy of five mills on the dollar for the purposes specified in the act, including the purposes now before us, have not been changed. That section, in so far as it relates to the precise question now before us, provides in substance that the mayor and council are granted power to levy a tax for the purpose of paying the cost of lighting the streets, alleys, and lanes, and for the purpose of extending and maintaining electric and other light works. After enumerating a

large number of purposes for which a tax may be levied, including those now before us, the section contains a limitation upon the power to tax in these words: "Not exceeding five mills on the dollar for any one of the respective purposes." The provisions of the section are plain, and, if those relating to a five-mill levy are still in force, there would seem to be no doubt of the power of the mayor and council to levy a tax of five mills on the dollar for the purpose of lighting the streets and alleys and other public places, and also five mills on the dollar for the purpose of extending the electric lighting system of the city.

At this point it may not be amiss to refer to some matters relating to the general revenue law of the state. From an early period of the state's history, the law provided that property for the purpose of taxation should be assessed at its fair cash value. In practice, however, this provision of the law was not followed. It is a matter of common knowledge among residents of the state of forty years standing that property was valued for the purpose of assessment at but a fraction of its cash value. This situation caused considerable discussion, and in 1903 the legislature passed an act (Laws 1903, ch. 73) which in substance provided that property subject to taxation should be valued at its actual value, but should be assessed at 20 per cent. of the actual value. One of the purposes of this act was to conform the law to a practice of assessment which had grown up. The effect of the law of 1903 made but little difference in the amount of revenue raised, based upon the mill-rate levy authorized by statute. The manner of assessment as above outlined continued in force till the act of 1921, which will be discussed later in the opinion.

During the period when property was assessed at one-fifth of its actual value, acts were passed by the legislature authorizing taxing bodies to levy taxes on the assessed valuation not exceeding certain mill rates. It was during this period that section 4123 in its original form was enacted. During this time defendant city, as well as other cities of the same class, were limited in making a tax levy

for the same purposes now before us to a five-mill levy based upon a one-fifth valuation of property.

In 1921 the legislature passed a general revenue law complete in itself covering the entire matter of revenue, assessment and valuation. That act is now carried as chapter 61 (sections 5808-6228), Comp. St. 1922. Section 5820, Comp. St. 1922, is a part of the 1921 revenue act, and provides in substance that all property in the state subject to taxation shall be valued and assessed at its actual value. The effect of this valuation for taxable purposes was to increase the taxable value of property five fold. It was apparent, therefore, that unless the mill-rate levy of five mills on the dollar, which cities were authorized to levy for purposes enumerated in section 4123, was also reduced, five times more revenue could be raised by the cities under the new law than under the old law. We think it was to obviate this situation that the legislature of 1921 also passed an act which is carried as section 5910, Comp. St. 1922. That section, in so far as applicable to the present situation, provides in substance that it shall be unlawful for any city council to fix or make any levy upon the assessed valuation of property for the purpose of taxation in excess of 20 per cent. of the maximum rates of levy authorized by statutes in force on the date that this act becomes effective, except as different rates shall have been authorized by the legislature in the year 1921 either in specified sums or by percentage levies where the act states the levy is to be based on actual value. This act was passed April 26, 1921, and became effective July 29, 1921. The legislature of 1921 also passed section 4123, Comp. St. 1922, heretofore referred to. By virtue of an emergency clause that section became effective April 14, 1921.

Construing these sections of the statute in the light of the object sought to be obtained, we are quite convinced that, in enacting section 5910, the purpose was to reduce the tax levies in the same proportion as the taxable value of property was increased by section 5820, so that the taxes under such levies should not be greater than they were under the old one-fifth valuation law.

There is an exception in section 5910 to the effect that the tax rate shall not be reduced where the legislature of 1921 shall have in specific enactment at that session fixed a rate levy, and where the act fixing the levy expressly states that the levy is based upon actual value. It seems clear that section 4123 is not within the exception noted in section 5910.

It is argued by the defendant that, if section 5910 was intended to repeal the provisions of section 4123, the former section would be unconstitutional, because in conflict with that part of section 14, art. III of the Constitution, which provides: "No law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed." As before stated, section 5910 is a part of ch. 61, Comp. St. 1922. This chapter in itself is a complete revenue measure, and repeals by special reference a number of sections of the statute bearing on the general subject of taxation. It also recites: "All acts and parts of acts in conflict herewith are hereby repealed." When an act is complete in itself and does not purport to be an amendatory act, although the provisions of the act may be in conflict with other provisions of the statute, this court has held that the act is not in conflict with the clause of the Constitution above referred to. *State v. Cornell*, 50 Neb. 526; *Bryant v. Dakota County*, 53 Neb. 755; *Zimmerman v. Trude*, 80 Neb. 503; *Allan v. Kennard*, 81 Neb. 289. In such case the earlier statute will be construed to be repealed in so far as it is inconsistent with the latter.

The defendants also rely upon sections 4396 and 4397, Comp. St. 1922. Section 4396 provides in substance, in so far as applicable to the present situation, that cities of the first class, second class, and villages shall have the power to purchase, construct and maintain lighting systems. Section 4397 provides in substance that the cost of such utilities may be defrayed by the levy of a tax not to exceed five mills on the dollar valuation in any one year. What has been previously said with respect to the provision of sec-

tion 5910 repealing such portions of section 4123, in so far as they are inconsistent with section 5910, applies with equal force to sections 4396 and 4397.

Other arguments have been advanced in support of defendants' contention which we have considered but regard as having no merit. From what has been said, it would seem to follow that the levy of a tax to meet the appropriation of $8,500 for the purpose of lighting the streets and alleys is within the one-mill levy authorized by law upon the assessed valuation of the property in the city. It also appears that to meet the appropriation of $40,000 for extending and maintaining the lighting system would require a levy in excess of one mill on the dollar valuation, and to the extent of the excess would be *ultra vires* and void.

On the face of the record, unless an answer is filed raising an issue of the value of the taxable property in the city, a decree should be entered sustaining the levy in so far as it applies to the street lighting, and reducing the levy to one mill on the dollar for extension and maintenance of the lighting system. The district court is directed to enter a decree in conformance with the views expressed in this opinion.

REVERSED AND REMANDED.

Note—See Municipal Corporations, 19 R. C. L. p. 718; 4 R. C. L. Supp. p. 1286; 28 Cyc. 1669; Statutes, 36 Cyc. 1064, 1073, 1076.

OTTO E. KOEHN, ADMINISTRATOR, APPELLANT V. CITY OF HASTINGS, APPELLEE.

FILED DECEMBER 8, 1925. No. 23482.

1. **Municipal Corporations: NEGLIGENCE: PROOF.** Whether the agents or employees of a municipal corporation are negligent in the manner in which they park a motor truck in the street must be determined by the standards fixed by law, without regard to any private rules or usage or custom, adopted by the corpora-

tion's employees, and the admission of evidence as to such rules, usages and customs is erroneous.

2. Trial: INSTRUCTIONS. In stating the issues of fact in its charge to the jury, the court should submit to the jury only such issues as are presented by the pleadings and are in controversy, and which find some support in the evidence.

3. ———: ———. Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is error to submit such issue to the jury.

4. ———: ———. Where two conflicting instructions are given on a question, one containing an incorrect, and the other a correct, statement of the law, the latter will not cure the former.

5. Negligence: LIABILITY. If one suffers injury and damage as the proximate result of the negligence of two others, and the damage would not have occurred but for the negligence of each of such parties, both are liable to the person so injured.

6. ———: ———. Ordinarily, the negligence of the driver of a public taxicab cannot be imputed to a passenger or to an invited guest riding with him.

7. Witnesses: EXAMINATION: LEADING QUESTIONS. The question of permitting leading questions to be put to a witness ordinarily rests largely in the sound discretion of the trial court; but, where the witness is shown to be friendly to the party calling him, leading questions should be avoided upon the important issues of fact to be submitted to the jury.

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

William L. Dowling, Earl J. Moyer, Barnhart & Stewart, J. W. James and *C. B. Ellis,* for appellant.

W. M. Whelan and *Bruckman & Paulson, contra.*

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

GOOD, J.

Action by Otto E. Koehn, as administrator of the estate of his deceased wife, against the city of Hastings, to recover damages for negligently causing her death.

The action is grounded on sections 1382 and 1383, Comp. St. 1922. Defendant denied negligence, and pleaded the statute of limitations and contributory negligence on the part of Mrs. Koehn. A jury trial resulted in a verdict for defendant. Plaintiff appeals.

Defendant, city of Hastings, is a municipal corporation and a city of the first class, and owns and operates an electric light plant, selling electric current to its citizens and others. Defendant owned a motor truck, which was used by its employees in keeping its lighting plant in repair, and among the tools carried on this truck was a pike pole, about 14 feet long, with a sharp steel point on one end. This pole was carried strapped upon the left side of the truck, with the steel point projecting two or three feet from the rear.

On the morning of July 24, 1920, the defendant's employees parked the truck, with the pike pole so strapped to it, on the west side of Denver street, in the city of Hastings. The rear end of the truck was to the north. Mr. and Mrs. Koehn resided in Norfolk, Nebraska. Upon the morning in question she was visiting with her parents in the city of Hastings. Two guests at the home of her parents desired to go to the railway station, and her father called a taxicab to convey them thither. Mrs. Koehn was invited to ride to the station in the taxicab. She took her position in the front seat and on the right-hand side of the driver. The driver of the taxicab, with his passengers, drove south along Denver street, and, as he approached the point where the city's truck was parked, he observed another truck parked on the east side of the street and opposite the city's motor truck. At about this point he met another automobile coming from the south, and turned to the right, so as to leave room for the other car to pass. He did not observe the pike pole protruding into the street. The sharp end of the pike pole entered the taxicab and struck Mrs. Koehn in the neck, inflicting injuries from which she died a few days later.

There was no substantial conflict in the evidence save as to the angle at which defendant's motor truck was parked

and the distance that the point of the pike pole protruded into the street. Plaintiff's evidence tended to show that the motor truck was parked at an angle of about 45 degrees, and that the sharp point of the pike pole protruded some 14 feet into the street, while defendant's testimony tended to show that its motor truck was parked nearly parallel with the curb, and that the sharp point of the pike pole protruded no more than 8 or 9 feet into the street.

The errors assigned relate to rulings on admission of evidence, over objection, and to the giving and refusing of instructions.

Over objection, defendant was permitted to introduce evidence tending to show that, pursuant to conversations had among the employees of the city, the foreman had formulated and adopted a rule that the truck in question should be parked parallel with the curb, and that an employee should be left to guard the pointed pike pole; that, pursuant to this rule, the usage and custom for more than three years had been to so park the truck and guard the pole. There is no pretense that plaintiff's deceased had any knowledge of this rule or custom.

It is a well-settled rule that usage and custom will not justify negligence. If the usage or custom is invalid or unreasonable and is productive of injury, the fact that such custom has prevailed for a long time will not justify a negligent act. Such usage or custom constitutes no defense in an action for negligence. The rule is well stated in the case of *Fonda v. St. Paul City R. Co.*, 71 Minn. 438, wherein it is said:

"But a person cannot, by the adoption of private rules, fix the standard of his duty to others. That is fixed by law, either statutory or common. Such rules may require more, or they may require less, than the law requires; and whether a certain course of conduct is negligent, or the exercise of reasonable care, must be determined by the standard fixed by law, without regard to any private rules of the party."

Other cases supporting this view are *Hamilton v. Chicago,*

B. & Q. R. Co., 145 Ia. 431; *Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 399; *Beidler v. Branshaw*, 200 Ill. 425; *McCartney v. City of Washington*, 124 Ia. 382; *Polmatier v. Newbury*, 231 Mass. 307; *Stewart v. Cushing*, 204 Mass. 154; 27 R. C. L. 194, sec. 39.

The admission of evidence as to the rules, usages and customs, adopted by defendant, regulating the parking of its motor truck, would naturally impress the jury with the idea that it was proper for them to consider it in determining the issues of fact. Its effect could not be otherwise than prejudicial to plaintiff.

It is alleged that the charge to the jury was erroneous in many respects. We shall not comment on each instruction, but shall call attention to such parts of the charge as we think were prejudicially erroneous.

In outlining the issues to the jury, the charge contained statements of fact, submitted to the jury, which were not controverted, and also a number of issues of fact where there was no competent evidence to support such issues. In outlining the issues to be submitted to the jury, the court should limit the issues to such as are controverted and are supported by evidence. Issues presented by the pleadings, but not supported by evidence, should not be submitted to the jury. To do so is calculated to confuse and befog the real issues of fact which they are to determine.

In this connection it may be observed that among the questions submitted to the jury was the question of contributory negligence of plaintiff's decedent and the rule of comparative negligence. There was no competent evidence in the record that would tend, in the remotest degree, to establish contributory negligence on the part of plaintiff's decedent. The submission of that question, or of the question of comparative negligence, would necessarily lead the jury to believe that there was evidence that would justify a finding upon these points.

Again, the instructions are in conflict with each other. In one instruction the jury were informed that plaintiff was entitled to recover if defendant's negligence was the

sole and proximate cause of the death of plaintiff's deceased, and in another instruction they were properly told that, if the defendant was negligent, and its negligence was one of the proximate causes of the death of plaintiff's decedent, it would then be no defense to show that the driver of the taxicab, in which she was driving, was also negligent.

Where conflicting instructions are given, it leaves the jury in doubt as to which should be followed. In this case there was evidence tending to show negligence, on the part of the taxicab driver, that may have contributed to the injury complained of. If one suffers damage as the proximate result of the negligence of two others, and the damage would not have occurred but for the negligence of each of such parties, both are liable to the person so injured. In the instant case it was no defense that the negligence of the taxicab driver may have contributed to cause the injury complained of, provided the injury would not have occurred but for the negligence of the defendant. *Davis v. Union P. R. Co.*, 99 Neb. 769; *Gould v. Schermer*, 101 Ia. 582; *Harvey v. City of Clarinda*, 111 Ia. 528.

That the negligence of the driver of a public conveyance, such as a taxicab, cannot be imputed to a passenger or an invited guest, riding with him and in his conveyance, is thoroughly settled in this jurisdiction. *Berlo v. Omaha & C. B. Street R. Co.*, 104 Neb. 827; *Reudelhuber v. Douglas County*, 100 Neb. 687; *Loso v. Lancaster County*, 77 Neb. 466; *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 586. Under the facts disclosed by the record, clearly it was error for the court to submit to the jury the negligence of the driver of the taxicab as a defense.

Under the issues raised by the pleadings and established by the evidence, the only issues that should have been properly submitted to the jury were whether or not defendant was guilty of negligence, which, either alone or concurring with the negligence of the taxicab driver, caused the injury complained of, and, if so, the extent of plaintiff's damage.

We deem it but proper to observe that complaint is made because of the leading character of the questions propound-

ed by counsel for defendant. Ordinarily, discretion is vested in the trial court as to permitting leading questions, but, where the witnesses are shown to be friendly to the party calling them, leading questions upon the important issues of fact to be submitted to the jury should be avoided. The continued and persistent course of leading questions, as disclosed by the record, is such as to call for condemnation. On a future trial it is hoped that they will be avoided.

For the reasons given, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Municipal Corporations, 28 Cyc. 912-Trial, 38 Cyc. 1612, 1618, 1783; Motor Vehicles, 28 Cyc. 38-; Negligence, 29 Cyc. 487, 498, 547, 548-; L. R. A. 1915B, 953; 2 R. C. L. 1207; 1 R. C. L. Supp. 743; 4 R. C. L. Supp. 159; 5 R. C. L. Supp. 148.

FRANK I. OLSEN V. STATE OF NEBRASKA.

FILED DECEMBER 8, 1925. No. 24899.

1. Criminal Law: INFORMATION: PLEA OF NOT GUILTY. By entering a plea of not guilty to a criminal information, the defendant waives all defects therein which may be excepted to by a motion to quash or a plea in abatement.

2. ———: CHANGE OF VENUE. Whether an application by the defendant in a criminal action for a change of venue should be granted rests largely in the sound discretion of the trial court. However, when it appears that there exists among the citizens of the county such a feeling of hostility and enmity toward the defendant as to render it improbable that he could secure a fair and impartial trial, it is error to deny the application.

ERROR to the district court for Valley county: EDWIN P. CLEMENTS, JUDGE. *Reversed, with directions.*

Corcoran & Sprague and *J. M. Lanigan,* for plaintiff in error.

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

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

GOOD, J.

Defendant prosecutes error to review the record of his conviction of the crime of arson. This case is before us for the second time. A former judgment of conviction was reversed by this court in *Olsen v. State*, 113 Neb. 69, reference to which is made for a statement of the facts.

Among the errors assigned are that the information did not charge defendant with a crime; and error in refusing defendant's application for a change of venue.

The information charges that defendant procured and caused one Anderson to set fire to a barn, the property of defendant, insured against loss and damage by fire by the Sun Insurance Company, of London, England, a stock company, with intent to defraud the stock company. It is urged that the information is defective, in that it fails to charge that the insurance company was a corporation, if such was the fact, or, if a copartnership, in not so alleging and naming the individuals composing it.

Whether the information was defective may well be doubted, but we find it unnecessary to determine that question. Section 10113, Comp. St. 1922, is as follows: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement by demurring to an indictment or pleading in bar or the general issue." In this case defendant did not file a motion to quash or a plea in abatement. Had he attacked the information by motion, and had it been sustained, an amended information might have been filed, setting out the facts as to the corporate or partnership capacity of the insurance company. Having failed to make a timely attack upon the information in the manner provided by law, defendant has waived his right to now question its sufficiency.

Denying defendant's motion for a change of venue presents a more serious question. From the record it appears that two newspapers are published in the city of Ord, the

county seat of Valley county, wherein the offense was charged to have been committed and the trial had; that these newspapers have a very wide circulation and are generally read by the citizens of the county. The following items were published in these newspapers and were generally read:

A sworn, written confession, made by Anderson who set fire to the barn, and in which he charged that he did so at the request of defendant and for a promised money consideration, was published in full. The details of the fire and the great danger to the property owners in Ord from such a fire were set forth. The arrest of defendant; the facts relating to the preliminary hearing and the first trial, including a summary of the evidence given at the trial, which lasted three days; the result of the verdict; the sentence and remarks of the trial judge, were all published. An article in one of the papers severely criticised the trial judge for his remarks indicating a friendly feeling for defendant and his family, and because the sentence was not sufficiently severe. It appears that great public interest was manifested at the trial, the courtroom being filled to capacity, and at times spectators were unable to gain admission. It appears that there was a strong feeling against defendant among the people of Valley county. Shortly before the second trial, articles were published in the newspapers setting forth an alleged attempt of defendant to cause the witness Anderson to leave the jurisdiction of the court, so that he could not appear at the second trial as a witness. The persons, who were supposed to have acted for defendant in inducing Anderson to leave, were taken into custody, and their statements, as to their connection with the affair, were all given full publicity. It also appears that counsel, who appeared for defendant at the first trial, refused to appear for him at the second trial. Defendant procured counsel residing in a distant city, and this attorney sought to secure the assistance of local counsel, and did employ a member of the bar of Valley county to assist in the trial of the case, but before the trial this attorney

withdrew and refused to participate in the trial. Counsel representing defendant was unable to secure any assistance from the local bar to aid him in the trial of the cause, or even to assist in impaneling a jury. It is inferable from the record that the refusal of resident counsel to appear in behalf of the defendant was because of the unpopularity which they might incur and the injury which they might sustain to their professional business and standing in the community if they should appear as counsel for defendant. Many persons, who were approached by the nonresident counsel for defendant and asked to make affidavits in support of the motion for a change of venue, readily admitted to him that there was an intense feeling against the defendant in the community, that they did not believe defendant could secure a fair and impartial trial, but were unwilling to make affidavits and refused so to do.

Suffice it to say that, from the whole record, we are convinced that there was such a feeling of hostility existing against the defendant in Valley county that we believe it was improbable that he could therein have a fair and impartial trial.

We are not unmindful of the rule, well established, that, ordinarily, the question of granting a change of venue rests in the sound discretion of the trial court; but, when the public sentiment of a community is aroused and a general feeling of hostility against the defendant is shown to exist, its effect upon a jury is to prevent a calm and dispassionate inquiry into the merits of the controversy. Under our Constitution, every one is entitled to a fair and impartial trial—a trial where the court and the jury will be governed by the evidence alone in determining the guilt or innocence of the accused. Under the facts disclosed, the verdict may reflect the clamor and the feeling of the community. The situation is not unlike that presented in *Richmond v. State*, 16 Neb. 388, where a conviction was reversed for refusal to grant a change of venue. We deem the showing for a change of venue to be such that it was error to deny the motion.

The judgment of the district court is accordingly reversed and the cause remanded, with directions to grant a change of venue to defendant.

REVERSED.

Note—See Indictments and Informations, 14 R. C. L. 208; 31 C. J. sec. 531; Criminal Law, 27 R. C. L. 828; 16 C. J. secs. 306, 307.

IN RE ESTATE OF GEORGE B. DARR.
JOHN DARR ET AL., APPELLEES, V. KATE E. DARR, ADMINISTRATRIX, ET AL., APPELLANTS.

FILED DECEMBER 8, 1925. No. 23495.

Wills: CONSTRUCTION. Where the will provided: "I bequeath all my property, both real and personal, to my beloved wife, Kate E. Darr, to have absolutely. At her death without issue one-half of all property remaining shall revert to my brothers and sisters in equal share"—*held*, that the wife took the entire estate (subject to debts) to have, hold, and convey without limitation, together with the usufruct thereof, save and except that, if she dies without issue, one-half of the bequeathed property remaining unconveyed by Kate E. Darr in her lifetime passes to the testator's brothers and sisters, share and share alike, and to the heirs of such of them as may then be deceased.

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

Smith, Schall, Howell & Sheehan and *Congdon & Finlayson*, for appellants.

S. L. Winters and *H. J. Beal, contra.*

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

THOMPSON, J.

This action comes to this court on appeal from the district court for Douglas county. The sole question for our determination is the construction to be given the last will and testament of George B. Darr, deceased, which, omitting

the formal parts, is as follows: "Being of sound mind I make this my last will and testament. I bequeath all my property, both real and personal, to my beloved wife, Kate E. Darr, to have absolutely. At her death without issue one-half of all property remaining shall revert to my brothers and sisters in equal share."

Kate E. Darr and the administrator, appellants, contend that by this will George B. Darr gave all his property to her absolutely and that by the last clause he did not intend to curtail or limit her right to such absolute ownership and enjoyment of the property, but by such clause simply expressed the wish that, upon her death without issue, one-half of the bequeathed property remaining should pass to his brothers and sisters in event she was of a like notion. John Darr, Anna Mary Scanlon, and Elizabeth Darr, by John Darr her next friend, brothers and sisters of George B. Darr, and heirs of such as are deceased, appellees, contend in their amended and supplemental petition that a proper construction of the will should be: "That the brothers and sisters of George B. Darr each took an undivided one-fourth interest in and to an undivided one-half of said estate, real and personal, subject to the life estate of the widow, Kate or Katherine E. Darr. That Kate E. Darr took only a base or determinable fee to said estate, and that if she dies, which she now must, without issue, that one-half of the fee should and does go to the brothers and sisters of George B. Darr."

Upon the issues raised the district court construed the will to give Kate E. Darr "a full, absolute, complete and unrestricted title in and to one-half of said estate, both real and personal, of which said deceased died possessed and seised, and that the said Kate E. Darr should have and take, upon the death of the said George B. Darr, under and by virtue of said will, a base or determinable fee in and to the other one-half of the lands, to be determined and terminate should the said Kate E. Darr die without issue, and conditional title and ownership in and to the other one-half of the personal property should the said Kate E. Darr die

without issue, but that should said Kate E. Darr die with issue, then the said Kate E. Darr should have and take all of said estate, both real and personal, under and by virtue of said will, by a full, absolute, complete and unrestricted title in and to all of said estate."

It must be noted at the outset that appellees present a somewhat different contention in this court from that presented in the district court, as shown by their allegations hereinbefore quoted, for on pages 62 and 63 of their brief they say: "She (Kate E. Darr) had, and has, the use and benefit of this whole estate in any event, as long as she lives, and one-half of it is hers absolutely to dispose of as she sees fit. At her death without issue, one-half of all property remaining should revert to his brothers and sisters in equal share."

In our further consideration we shall use the term brothers and sisters in referring to the appellees, and the word widow in referring to appellants. The brothers and sisters contend that, as the first clause of the will is without words of inheritance, a fee simple title and full ownership were not intended to be given the widow. In this they are answered by section 5590, Comp. St. 1922, which provides: "The term 'heirs,' or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple." Furthermore, section 1242, Comp. St. 1922, provides: "Every devise of land in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will, that the devisor intended to convey a less estate." It will be noticed that this section specifically directs as to the proper construction of wills. That the word "clearly" in such section is significant in such construction has been held by this court ever since the decision in *Little v. Giles,* 25 Neb. 313. It was this word that caused the supreme court of the United States to reverse itself in *Roberts v. Lewis,* 153 U. S. 367, wherein it is held: "Under a will, by which the testator devises and bequeaths to his wife 'all my estate, real and personal, of which I may die

seised, the same to be and remain hers, with full power, right and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow, upon the express condition, however, that if she should marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike,' the widow has power during widowhood to convey to third persons an estate in fee simple in his lands." Then, again, the word "absolutely" used in the will in the instant case means: "Without condition, exception, restriction, qualification or limitation." Black, Law Dictionary.

As to the contention of the widow that, having disposed of the entire estate to her in the first clause of the will, the second clause should not be considered, it is sufficient to say that section 5594, Comp. St. 1922, provides: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true 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."

These statutes above quoted relieve us from the strict application of common-law canons of construction of wills in this state, and direct us to glean the intent of the testator from the instrument he has left, considering it is an entirety, and giving each word, clause, or paragraph thereof a part in the disposition of his property. With these conclusions in mind, let us consider the will, observing it with a view of determining the intent of the testator, as shown by the record. He and his wife at the time it was made were without living issue or heirs of their body. They had accumulated their property, as we infer, by their joint efforts. The record is without even a charge of a lack of that love and affection usually existing between husband and wife. At the making of this will, in 1905, Mrs. Darr was about 52 years of age. George B. Darr lived until February

17, 1922, and during all the time intervening, although they were without issue, no change was made in the will. Neither is it shown what property he possessed in 1905. What would be more natural than that he should desire that his wife should have their accumulations, to have and to hold and convey as to her might seem meet and proper? Thus, the first clause in the will. Then, as to the second clause: Although, as we have seen, they were without issue, he, with a human yearning for offspring, called to mind that there might be such issue, and, being so minded, he said in this second clause, in effect, that, if such child should be born, he trusted to her to provide for it by will as to all of the property remaining, if she so desired. But, if she should die without issue, then one-half of the property bequeathed "remaining" should "revert" to his brothers and sisters.

Lack of harmony in our holdings under the statutes hereinbefore quoted is presented. This alleged inharmony disappears when the conclusion reached in each case is applied to the facts therein. We have consistently followed the rule of giving force to every part of the will for the purpose of ascertaining the intent of the testator, and have striven to carry out such intent so far as found to be consistent with the rules of law, accepting, as above indicated, statutory direction, rather than common-law canons of construction. In *Little v. Giles, supra,* we held: "A devise 'to my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seised, the same to remain hers, with full power, right, and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow, upon the express condition, however, that if she shall marry again, then it is my will that all of my estate herein bequeathed, *or whatever may remain,* shall go to my surviving children share and share alike,' etc. *Held,* that under the statutes of this state a conveyance of such real estate by Editha J. Dawson, after the death of the testator and before her remarriage, conveyed the fee to such realty, and her subsequent marriage did not affect the title to the same." It was further

held that the words, " 'Or whatever may remain,' in the will, apply to both the real and personal estate, and are restricted to such part of the estate as remained undisposed of at the time of the second marriage of Mrs. Dawson." The law announced in this case has been controlling from its rendition down to and including the decision in *Krause v. Krause*, 113 Neb. 22.

Thus, considering the law and applying it to this will, it is plain that the testator intended to, and did, devise and bequeath to his wife, Kate E. Darr, all of his property, real and personal, of every kind and nature whatsoever, and wherever situate, to have, hold, and convey as her own without limitation, together with the usufruct thereof (subject to debts), save and except that, if she dies without issue, one-half of the bequeathed property remaining unconveyed by Kate E. Darr in her lifetime passes to and becomes the property of the testator's brothers and sisters, share and share alike, and to the heirs of such of them as may then be deceased. This gives full force and effect to each and every provision of the instrument under consideration, and is clearly the expressed intent of the testator.

The judgment of the district court is reversed and the cause is remanded, with instructions to enter judgment in accordance with this opinion.

REVERSED.

FRED BUNDY V. STATE OF NEBRASKA.

FILED DECEMBER 8, 1925. No. 24699.

1. **Kidnapping:** CONSENT. Section 9561, Comp. St. 1922, construed, and *held*, that the gist of the crime of taking, carrying, decoying, or enticing away any child under the age of eighteen, with intent unlawfully to detain or conceal such child from its parent or parents or guardian, is the malicious or forcible or fraudulent removal of such child from the custody of its legal custodian, and consent of the child to such removal is immaterial, and does not constitute a defense.

2. ———: INSTRUCTIONS. The information and plea of not

guilty formulate the issue, and the instructions should conform thereto.

ERROR to the district court for Jefferson county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

E. A. Wunder and *Harry W. Fouts,* for plaintiff in error.

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

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

THOMPSON, J.

In the district court for Jefferson county an information was lodged in apt terms charging that the defendant, Fred Bundy, on the 28th of October, 1924, "did unlawfully, maliciously and fraudulently take and carry away Hazel Vandervoort, a child under the age of eighteen years, with intent, unlawfully to detain said Hazel Vandervoort from Harry Vandervoort and Mrs. Harry Vandervoort the parents of said child, having the lawful charge of said Hazel Vandervoort." On this information defendant was arraigned and pleaded not guilty, tried to a jury, found guilty, and sentenced to one year in the reformatory, to reverse which error is prosecuted, presenting as grounds therefor the following: The court erred in refusing to give instructions Nos. 1, 3, 5, and 6, respectively, offered by defendant, and in giving instructions Nos. 6, 7, 8, 9, 14, 23, and 24, each alleged error being separately stated and presented. The court erred in excluding competent testimony offered by defendant. The verdict is contrary to the evidence and not sustained thereby.

Section 9561, Comp. St. 1922, under which this action is prosecuted, is as follows:

"Whoever maliciously or forcibly or fraudulently leads, takes or carries away or decoys or entices away any child under the age of eighteen years, with intent unlawfully to detain or conceal such child from its parent or parents or guardian or other person having the lawful charge of such

child, shall be imprisoned in the penitentiary not more than twenty years nor less than one year."

Taking up the first assignment of alleged error, we find that the instructions offered by defendant, and refused, each embodied the theory that the child's will and desire were material to a determination of the issues. The gist of such crime is the malicious or forcible or fraudulent removal of such child from the custody of its legal custodian, with intent unlawfully to detain or conceal it from such custodian, hence consent of such child is immaterial and does not constitute a defense. In *Gould v. State,* 71 Neb. 651, it is said in the body of the opinion that the fact that the prosecutrix consented to leave her parents with the accused is immaterial. To the same effect, see 1. C. J. 286, sec. 9; *People v. Cook,* 61 Cal. 478; *State v. Bussey,* 58 Kan. 679.

In instructions Nos. 9 and 14, the court uses the word "conceal" in addition to the word "detain," thus giving rise to an issue not presented by the information. In such case the language of the information should be followed, as it and the plea thereto formulate the issue to be determined, and it is error to impose an extra or different burden on defendant. As it will be remembered, the information charges that defendant "did unlawfully, maliciously and fraudulently take and carry away Hazel Vandervoort." In instruction No. 24 the court charges that, if the jury find beyond a reasonable doubt that defendant took and carried away Hazel Vandervoort "intentionally and wilfully and without any legal justification or excuse and with intent to detain or keep her from her parents, you will find for the state and will find defendant guilty." The word "wilfully" does not appear in either the statute above quoted or in the information. Wilfully is not a synonym of unlawfully or maliciously or fraudulently. Bouvier in his Law Dictionary defines wilfully as "distinguished from maliciously in not implying an evil intent. * * * It implies that the act is done knowingly and of stubborn purpose, but not with malice." By giving this instruction, the court required less

proof in order to warrant a conviction than that required by the statute, and the giving thereof is reversible error.

Since we have held that the consent of the child could not avail as a defense, and that evidence thereof is immaterial to the issues joined, it is elementary that the exclusion of the proffered testimony to that effect is not error.

We have considered the other alleged errors presented; but, in view of the conclusion reached, it is unnecessary to discuss them. The judgment of the district court is reversed and the cause is remanded.

REVERSED.

Note—See Abduction, 1 C. J. sec. 9; Kidnapping, 8 R. C. L. 297; 35 C. J. sec. 8.

CHARLES CASPARY, APPELLEE, V. BOYD COUNTY, APPELLANT.

FILED DECEMBER 30, 1925. No. 23409.

Taxation: TAX SALES: INTEREST. By the passage of sections 6101, 6102, and 6103, Comp. St. 1922, none of the rights of a tax purchaser under section 6078 and section 6068 were abrogated, but expressly reserved, and when a purchaser brings himself within the terms of the last two mentioned sections, he is entitled to judgment for the amount of the money paid, together with interest thereon at the rate of 15 per cent. per annum from the date of payment to the date of judgment.

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

A. B. Wallace, for appellant.

W. T. Wills, contra.

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

MORRISSEY, C. J.

This proceeding was brought by plaintiff against the county of Boyd for the recovery of money which he had paid to the county treasurer on the purchase of a tax sale

certificate on a tract of land in that county which was not subject to assessment when the taxes which plaintiff paid were assessed. The trial court entered a judgment in favor of plaintiff for the amount of his payment, plus interest at the rate of 15 per cent. per annum from the date of payment to the date of the judgment. The county has appealed, and in its brief tersely states the issue as follows:

"The issue actually tried by the court was whether the plaintiff was entitled to 15 per cent. upon the tax payment."

The brief of appellee supplements this statement and puts the issue thus:

"The only question at issue in this case is as to whether or not the appellee is entitled to 15 per cent. under section 6078 of the 1922 statute or whether or not he is entitled to only 6 per cent. as provided in sections 6101, 6102, 6103 of the Compiled Statutes of 1922."

By section 6078, Comp. St. 1922, which is an older statute than sections 6101, 6102, and 6103, it is provided that when, by mistake or wrongful act of the county treasurer or other officer, land has been sold on which no tax was due, etc., the county shall hold the purchaser harmless by paying him the amount of the principal, interest and costs to which he would have been entitled had the land been rightfully sold. Section 6068, Comp. St. 1922, which also antedates sections 6101, 6102, 6103, provides for the payment of interest on tax sale certificates in case of redemption at the rate of 15 per cent. per annum. In computing the rate of interest to which plaintiff was entitled, the district court took the rate fixed by the latter statute.

Chapter 228, Laws 1915, constituting sections 6101, 6102, and 6103, Comp. St. 1922, provides in a general way that, whenever under the contingencies therein mentioned the purchaser at tax sale shall be entitled to recover back his purchase money because of the failure of the tax, interest shall be computed on his payment at 6 per cent. The county would have the court adopt the rate fixed by this statute. And herein lies the controversy.

The title and context of chapter 228, Laws 1915, sug-

gest that its author had in mind special assessments rather than the ordinary taxes for governmental purposes covered by the older statutes. It specifically provides:

"This act shall be construed as cumulative only, and not to deprive any county, municipality, drainage district or other political subdivision of the state of any right or remedy they may now have for the collection of taxes, or special assessments under the existing laws of this state, nor shall it be construed to deprive any tax purchaser of any right or remedy he may now have under the laws of this state. Nor shall it be construed to mean that the legislature intended by the passage of this act that the right to sell real estate for special assessment does not exist under the present law." Comp. St. 1922, sec. 6103.

We think it clearly appears that all the rights which plaintiff had under the statute in force before the passage of sections 6101, 6102, and 6103 were reserved to him. The judgment of the district court is clearly right and it is

AFFIRMED.

FIRST TRUST COMPANY OF LINCOLN, APPELLANT, V. HERMAN L. CORNELL ET AL., APPELLEES.

FILED DECEMBER 30, 1925. No. 23447.

1. **Appeal:** APPLICATION OF LEGACY TO DEBT OF LEGATEE: REVIEW. When in a suit in equity, by an executor, the petition contains every allegation necessary to present the right of the executor to retain a legacy and apply the amount thereof upon the debt of the legatee due the estate of plaintiff's testator, that issue will be determined by this court on appeal, notwithstanding the petition contains matter that is mere surplusage.

2. **Executors and Administrators:** APPLICATION OF LEGACY TO DEBT OF LEGATEE. The right of an executor to retain in his own hands so much of a legacy as does not exceed the amount due from the legatee to the executor and apply it toward the extinguishment of that debt does not depend upon the insolvency of the legatee.

3. ———: ———: RIGHTS OF ASSIGNEE. While a legatee retains in his own hands a part of the fund out of which his legacy and

other legacies should be paid, he is not entitled to receive from the executor the amount of his legacy without deducting therefrom the amount of the fund which is already in his hands as a debtor of the estate. And the assignee of such legatee takes it subject to any equity which existed against it in the hands of his assignor.

4. ———: ———: ———. The assignee of a legatee takes subject to any existing equities in favor of the executor and against the legatee, and any right of retainer that could be enforced against the legatee may be enforced against the assignee, notwithstanding the assignee took without notice of the existence of such equities.

5. ———: ———. The right of an executor to retain a legacy and apply it *pro tanto* upon the debt of the legatee exists independently of statute.

6. ———: POWER TO BIND ESTATE. A declaration or promise made by an executor is ineffectual to bind his testator's estate until it has received the sanction of the proper court.

7. ———: ESTOPPEL. *Held,* that plaintiff is not estopped to maintain this proceeding because of any of the matters pleaded in defendant's answer.

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

Burkett, Wilson, Brown & Wilson, for appellant.

R. H. Hagelin and *R. F. Stout, contra.*

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

MORRISSEY, C. J.

This is a suit in equity brought by the First Trust Company of Lincoln, Nebraska, as executor of the last will and testament of Bartlett L. Paine, deceased.

Paine departed this life March 13, 1921, leaving a last will and testament under the terms of which Herman L. Cornell, one of these defendants, received a legacy of $2,000. April 11, 1921, the will was duly admitted to probate. On

and prior to the date of the death of testator, Cornell was indebted to testator in the sum of $15,000, which indebtedness was evidenced by promissory notes. April 30, 1921, before the notes Cornell had given plaintiff's testator had matured, Cornell, for a valuable consideration, assigned the legacy to defendant Diehl, and this assignment was immediately filed with the probate court of Lancaster county. January 5, 1922, the executor recovered a judgment against Cornell upon the notes, and, upon execution issued, return was made, no property found.

The petition in this case, in addition to alleging the matters above mentioned, charged that defendant Cornell was insolvent at the time of the assignment of his legacy and was insolvent at the time plaintiff's petition was filed.

By this suit plaintiff seeks to have the legacy applied as a partial payment of the judgment debt.

Defendant Cornell has defaulted. Defendant Diehl, by answer, has set up the assignment of, and his right to, the legacy. And he pleads also that the notes executed by defendant Cornell did not mature until after his purchase of the assignment of the legacy, and that, before making the purchase, he counseled with the officer who was then in charge of plaintiff's business with relation to the legacy and that he was assured by such officer that he, Diehl, might make the purchase, and was by that officer directed to the attorney who prepared the assignment, and that defendant relied solely upon such advice in making the purchase of the legacy, and plaintiff is estopped to deny its liability therefor to this defendant.

The answer affirmatively denied the insolvency of defendant Cornell and contained a general denial of all matter not specifically admitted.

The reply was a general denial supplemented by an allegation that, at the time Cornell executed the assignment, he was insolvent and that his insolvency was then well known to his codefendant Diehl, and that Diehl took the assignment with knowledge that Cornell was indebted to plaintiff's testator in a sum largely in excess of the legacy.

By the court's decree, plaintiff's petition was dismissed and plaintiff was directed to pay over to defendant Diehl the sum of the legacy which he had purchased from his codefendant Cornell. From this decree, plaintiff has appealed.

On the material issues of fact there is no substantial dispute. In the presentation of its case in this court, plaintiff invokes the doctrine of equitable retainer, which is frequently loosely called a set-off.

Defendant asserts that in the district court, plaintiff tried and submitted its cause as a creditor's bill, and, therefore, cannot here invoke the doctrine of retainer. We do not know what theory was advanced in oral argument in the lower court. At that time counsel may have had a different theory from that urged here; but, regardless of what may then have been in the mind of counsel, we are bound by the record, and as the petition contains every averment necessary to raise the right of retainer, although some matters of mere surplusage are pleaded, we must determine the question presented. Comp. St. 1922, sec. 9150.

The pleadings put in issue the solvency, or insolvency, of the legatee, and the finding of the court was had thereon. However, this question may be dismissed, for the right of an executor to retain in his own hands so much of a legacy as does not exceed the amount due from the legatee to the executor and apply it toward the extinguishment of that debt does not depend upon the insolvency of the legatee. *Estate of Angle,* 148 Cal. 102.

We will assume that defendant Diehl, for a valuable consideration, purchased an assignment of the legacy of his codefendant Cornell, in good faith, and with the knowledge of the executor, before the notes evidencing the indebtedness of Cornell to plaintiff's testator had matured. What are the rights of the respective parties? The weight of authority is to the effect that, while a legatee retains in his own hands a part of the fund out of which his legacy and other distributive shares should be paid, he is not entitled to receive from the executor the amount of his legacy.

"Where a distributee is indebted to the estate, it is the duty of the executor to retain from his share the amount of such indebtedness." *Hoffman v. Hoffman*, 88 Md. 60. Nor is the rule otherwise where a legacy has been assigned to a good faith purchaser.

"This right of retainer depends upon the principle that the legatee or distributee is not entitled to his legacy, or distributive share, while he retains in his own hands a part of the funds out of which that and other legacies or distributive shares ought to be paid, or which is necessary to extinguish other claims on those funds. And it is against conscience that he should receive anything out of such funds without deducting therefrom the amount of the funds which is already in his hands as a debtor to the estate. And the assignee of the legatee, or distributee, in such a case, takes the legacy or distributive share subject to the equity which existed against it in the hands of the assignor." *Smith, Admr., v. Kearney*, 2 Barb. Ch. (N. Y.) 533.

"A legatee, who is indebted to the estate of his testator, is not entitled to recover his legacy, nor that which he holds by assignment in right of another legatee, so long as any part of that debt, equal to the amount of the legacies claimed, remains due and unpaid; and the assignee of such legatee can be in no better situation than the legatee himself." *Keim v. Muhlenberg*, 7 Watts (Pa.) 79.

It is suggested in argument that this legacy is taken out of the general rule and cannot be retained because it was assigned before the notes which defendant Cornell had given to testator had matured. This argument is answered in *Stanley v. United States Nat. Bank*, 110 Or. 648, wherein the supreme court of Oregon say: "An assignee of a legacy, whether with or without notice of legatee's indebtedness to the estate, takes subject to existing equities." And in 3 Woerner, American Law of Administration (3d ed.) sec. 563, it is said: "Since the assignee can have no greater right in a legacy or distributive share than the assignor possesses, it is obvious that any right of set-off which existed against the assignor is good against the assignee."

For other cases touching the general subject, see *Kinealy v. O'Reilly,* 236 Pac. (Ariz.) 716; *Harvey v. White,* 129 Atl. (R. I.) 263; *Baily's Estate,* 156 Pa. St. 634; 3 Woerner, American Law of Administration (3d ed.) sec. 564.

The assignee of the legacy challenges the right of the executor to retain the legacy and apply it *pro tanto* upon the debt of the legatee in the absence of a statute authorizing such procedure. But this right exists independently of statute. *Webb v. Fuller,* 85 Me. 443.

Defendant Diehl invokes the doctrine of estoppel. He asks the court to hold that, because he consulted an officer of plaintiff as to the purchase of the legacy and was assured by that officer that he might safely make the purchase, plaintiff is now estopped to maintain this proceeding. The effect of admissions, or declarations, by executors and administrators has been affected by the change in procedure resulting from the probate statutes of the several states. As has been said: "The functions of an executor, or administrator, constitute an essential element of the law, and are exercised with entire independence of the personal views, desires, and intentions of the parties concerned." 1 Woerner, American Law of Administration (3d ed.) sec. 10.

"The interest which an executor or administrator has in the estate of the deceased is *in auter droit* merely. He is the minister or dispenser of the goods of the dead. Since the property is not his own, it follows that he may maintain an action therefor *in auter droit* although he himself be disabled from suing *proprio jure.*" 1 Woerner, American Law of Administration (3d ed.) sec. 174.

And a declaration or promise made by an executor is ineffectual to bind his testator's estate until it has received the sanction of the proper court.

Plaintiff is not estopped to maintain this proceeding for the benefit of the estate because of any act or declaration of its officer. 2 Woerner, American Law of Administration (3d ed.) sec. 324.

The judgment of the district court is reversed and the

cause remanded for proceedings in accordance with this opinion.

REVERSED.

Note—See (2, 3, 4) 11 R. C. L. 246; 2 R. C. L. Supp. 1229-24 C. J. sec. 1317. (5) 11 R. C. L. 245; 2 R. C. L. Supp. 1227; 4 R. C. L. Supp. 706; 5 R. C. L. Supp. 604.

FRANK A. WILLIAMS V. STATE OF NEBRASKA.

FILED DECEMBER 30, 1925. No. 24775.

1. **Criminal Law**: SUFFICIENCY OF EVIDENCE. Evidence outlined in the opinion, and *held* sufficient to sustain the verdict as to the first count of the information, and insufficient to sustain the verdict as to the second count thereof.

2. ———: SENTENCE. When a defendant has been convicted of separate offenses on several separate counts of an information, the better practice requires the imposition of a separate sentence on each count whereon there has been a conviction.

ERROR to the district court for Garden county: P. J. BARRON, JUDGE. *Affirmed in part, and reversed in part.*

E. E. Richards, for plaintiff in error.

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

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

MORRISSEY, C. J.

The county attorney of Garden county filed an information in three counts charging defendant with three separate violations of the liquor law. On the trial, the court withdrew from the consideration of the jury count three of the information, because there was a total lack of evidence to sustain that count, but submitted to the jury for its consideration counts one and two. Count one charged de-

fendant with the unlawful possession of a still. Count two charged defendant with the unlawful possession of intoxicating liquor. The jury returned a verdict finding defendant guilty on each count submitted. The court imposed a single sentence.

Defendant has prosecuted error and complains of a number of alleged errors occurring at the trial. Each of these assignments has been examined, but, in view of our statute and the decisions of this court heretofore rendered dealing with the objections presented, we do not feel warranted in indulging in a separate discussion of each assignment.

The assignment of first importance alleges: "The verdict is not sustained by sufficient evidence." This assignment must be considered first with reference to count one of the information, namely, the count charging possession of a still. The still, or equipment which is alleged to constitute a still, has not been lodged in this court with the bill of exceptions, and the description given in the oral testimony of the article, or articles, said to constitute a still is somewhat general in terms, but these exhibits were before the jury and undoubtedly added force to the oral testimony given on behalf of the state. Defendant gave testimony in relation to the so-called still, and from this testimony it may be inferred that the character of the implement when its parts were assembled, was not seriously questioned. Defendant admitted having seen the exhibits in evidence upon his premises before they were taken under the search warrant. Defendant's son, who was a witness in behalf of defendant, testified that they were brought to defendant's home by one Beecher who had talked to the witness about bringing them there for the purpose of making liquor. The evidence is sufficient to warrant the jury in finding that the exhibits constituted a still; that it was found in defendant's possession, and was kept by defendant for an unlawful purpose.

As to the sufficiency of the evidence to support the second count of the information, we reach a different conclusion. The evidence as to this count is found to be insufficient to

sustain the verdict, and the conviction on this count is set aside and the charge dismissed.

Where a defendant has been convicted on separate counts of an information, the better practice seems to require the trial court to impose a separate sentence on each count whereon there has been a conviction. With the imposition of a sentence in the form suggested, the reviewing court is the better able to deal with the questions presented on appeal. As in the instant case a single judgment has been pronounced, the cause is remanded to the district court, with directions to enter a dismissal as to the second count, and to enter a new sentence on the first count, the conviction on which is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

Note—See (2) 8 R. C. L. 233.

IDLEWILD FARM COMPANY, APPELLEE, V. ELKHORN RIVER DRAINAGE DISTRICT, APPELLANT.

FILED DECEMBER 30, 1925. No. 23421.

1. **Drains: DAMAGES.** One who sells and conveys to a drainage district a right of way through land owned by him cannot recover for damages to his lands which are occasioned by negligent installation of construction and diversion works installed where and as he in express terms directed, and where he paid a substantial part of the expenses and at the time assumed responsibility for such damage as might thereafter be thereby caused to lands owned by him.
2. **Estoppel** is a means of repose, promotes fair dealing, and cannot be made an instrument of wrong or oppression. Like the statute of limitations, it is a conservator. *Daniels v. Tearney*, 102 U. S. 415.

APPEAL from the district court for Dodge county: LEONARD W. COLBY, JUDGE. *Reversed.*

Courtright, Sidner, Lee & Gunderson and *J. C. Cook*, for appellant.

Jacob Fawcett and *Abbott, Rohn & Dunlap, contra.*

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

DEAN, J.

Plaintiff sued in Dodge county to recover damages for injury to its farm lands which, it is alleged, arose from defendant's negligence in the installation of drainage construction and diversion works on the banks of the Elkhorn river on and adjacent to a part of that portion of plaintiff's lands through which the river then flowed. In its natural course the Elkhorn river is a whirling, winding stream and has many abrupt bends; and the works here in question were installed with the view, in part at least, of materially shortening the river by causing it to flow through a newly formed and substantially straight channel and thereby prevent erosion and damaging overflow. In putting this project into practical effect the river, where it flowed through a part of plaintiff's lands in the form of a succession of damaging loops, was diverted into the new-made channel, which is designated as "cut-off E" in the record. By this channel the river was caused, eventually, to flow through the lands of others, whose lands joined that of plaintiff's on the south, but they are not parties to this suit. The case was tried to the court without a jury. Plaintiff recovered judgment for $15,150 and defendant has appealed.

Some time before this action was begun R. B. Schneider was the owner of 1,400 acres of land in the Elkhorn river valley and it bordered, in part, on the river of that name near the city of Fremont. Subsequently he and his wife and three daughters formed a corporation, and it took over the ownership of the 1,400 acres. The four Schneiders were the only stockholders. They named the corporation "Idlewild Farm Company." Schneider became the president and general manager of the Idlewild. He owned no other land in the drainage district, nor was he an officer or stockholder of any corporation except the Idlewild which owned land therein.

About the year 1909, the exact date being immaterial, the Elkhorn River Drainage District was organized and Schneider became a stockholder and a member of its board of directors and was elected its first president. He retained his place in the directorate of the drainage district, and also its presidency, and he also retained his office as president and general manager of the plaintiff corporation until 1913 when he died. So that, as disclosed by the record, he became, and was, an active participant in all of the activities and in the management and control of both corporations so far as material here. It may here be observed that upon the death of Mr. Schneider all of the Idlewild stock became the property of his widow and his three daughters and thereafter the farm was carried on under their supervision.

The substance of plaintiff's contention is that the proximate cause of the alleged damage to its lands, by erosion, flooding and the like, was defendant's negligent installation of the drainage and construction works complained of.

The record is very voluminous and it is impractical to reproduce here much of the evidence. It fairly appears, however, from the evidence of many practically uncontradicted witnesses that Schneider not only favored the installation of all of the materially important construction works, of which the Idlewild now complains, but in fact it appears therefrom that the work was done at and because of Schneider's apparently urgent request and as and where he wished to have it installed. It appears, too, that plaintiff, aside from the defendant district, by Schneider, its president, alone made substantial contributions to the expense of such changes of installation as are hereinafter referred to.

Joseph Roberts, a long-time resident of Dodge county, was a member of defendant's board of trustees and its president when the case was tried, and formerly for several years during the formative period of the drainage district he was a member of the county board of supervisors and in both official capacities had much to do with practically all of the installation of the construction works which are

here in question. He was secretary of the district when its plans and specifications were adopted. The substance of Roberts' evidence is that a certain river cut-off, which is marked "abandoned" on a map in evidence, was so abandoned at Mr. Schneider's request, and "cut-off E" was, by his request and on his insistence, substituted in its place. Some of the board of directors opposed the change when the following colloquy took place. "Q. State what Mr. Schneider said to the board with reference to that change. A. Well, there was some objections made to it, to the making of this change, and Mr. Schneider said: 'As long as I am willing to assume the responsibility of making this change, and it effects no other land or any other party but the Idlewild land, why do the board object to making the change? Why should they object?'" And the evidence is that the change was accordingly made. The same witness also testified that, at Schneider's request, certain rock work was installed, and that only the Idlewild company, by its president, contributed part of the necessary labor and expense. On this point he further testified: "Q. Under whose direction and supervision was that work put in—that rock work? A. Mr. Schneider's. Mr. Schneider contributed a part of the labor to put that in. * * * Then there was deducted thirty cents a foot from his (Mahar's) contract for brush and trees that Mr. Schneider furnished. Q. You mean the Idlewild company? A. Yes. Q. That is shown by the contract? A. Yes."

And in respect of a certain dike that was used in the construction work this is shown by the evidence of witness Roberts: "Mr. Schneider stated that, if we would spend a certain amount of money to put the dike in where he requested it, he would add a certain amount, and on that proposition we consented to putting in the dike where it was put in finally. Q. That was at the last meeting? A. Yes. Q. What, if anything, did he say at the first meeting as to why he wanted it located where he did want it located? A. He wanted it as a crossing to go over the land across the old river bed." And it appears that Schneider

also said: "If you put it (the dike) where I want it, I will assume all responsibility of any danger in the future. * * * Q. What, if anything, did Mr. Schneider say at that second meeting with reference to contributing $100 toward the expense? A. Yes. Q. Did he say that? A. Yes. Q. And what did he say about the future maintenance of it, if anything? A. He said he would take care of it in the future. * * * The Court: At this time, was the cut-off made in the river? A. Yes. Q. And the water was running from the river into the cut-off largely? A. Yes, sir."

It seems that Roberts and Schneider and others officially connected with the defendant floated through the cuts in small boats for the purpose of making observations, and that "Mr. Schneider remarked that he was very much gratified the way the river had changed and gone into the different cuts, and especially in cut-off E," the latter being the new and straightened channel which, from all appearances, was intended to divert practically all of the excess flowage of the Elkhorn river away from plaintiff's 1,400 acre tract.

E. C. Diers, I. M. Williams, C. B. Nicodemus, B. W. Reynolds, and J. A. Yeager, also trustees, testified on the part of defendant, and they corroborated the evidence of Mr. Roberts, which had to do with the material facts involved in this suit, in every essential particular, and in respect of the damage to the Idlewild farm several of these witnesses, and at least one other, testified that no material damage was occasioned as claimed by plaintiff.

Plaintiff's deed of conveyance of the right of way of the land necessary for the ditch in question, as urged by it, provides that the land so conveyed "is to be used perpetually according to the present or future plans of said drainage district, its successors and assigns, for drainage purposes." And the deed also contains this: "*In consideration aforesaid the said first parties* their heirs and assigns waive all claim to the construction by said drainage district of any bridge and *hereby release all damages and claims thereto on account of and by reason of* the occupancy and use of

said land." The same language, in part, was construed by us in *Boschulte v. Elkhorn Drainage District*, 102 Neb. 451, on rehearing 454, on which plaintiff relies. We do not think the *Boschulte* case is in point, because it is not made to appear therein that the installation and construction there complained of were in any manner influenced or controlled or paid for in part by Boschulte, the complaining party, nor does it appear that he had any official relationship to the defendant drainage district. And he assumed no responsibility for subsequent damages.

In view of the record, we think the fact is established that the changes here were made upon the request and insistence of Mr. Schneider, not only as president and manager of the Idlewild, but as president and member of the board of directors of the defendant corporation as well. Certain it is that Schneider made no protest against any part of the proposed construction so far as this record discloses.

Should defendant be holden for damages arising from the installation of the works complained of in view of the proved fact of Schneider's urgency that it be installed pursuant to his insistent views, and in view of the evidence generally? We do not think so. And this in part because of Schneider's official and managerial relationship to the plaintiff, the owner of Idlewild, as its president and general manager. And it seems to us material in this inquiry to observe that the record shows Mr. Schneider to have been a strong, purposeful and dominant character, and that apparently he controlled and practically compelled, by his persuasive manner, the material action of the defendant district in respect of the installation and construction facts here complained of.

Plaintiff in its argument seems to lose sight of the activity of the Idlewild's president in procuring the installation of the drainage works, and of its substantial contribution to the necessary expenses and the assumption of the risk which might thereby be occasioned to the Idlewild lands. But, neither in reason nor in law does it seem to us

that its argument finds support.

It has been held that, in an action for the diversion of water by the building and maintenance of a dam by defendants, where it appears that plaintiff assisted in maintaining the dam and diverting the water, he cannot recover, and that such participation in such diversion need not be specially pleaded, but may be proved under an issue raised by defendant's denial that plaintiff was injured by the diversion of the water. *Churchill v. Baumann*, 95 Cal. 541. The act of the president of the Idlewild was the act of the Idlewild. *Howells State Bank v. Estate of Muller*, 113 Neb. 177. It has been held that one who is apprised of the proceedings of a drain commissioner in relocating a ditch and who dug the ditch cannot attack such proceedings. *People v. Drain Commissioner*, 40 Mich. 745. The mayor of a city, as mayor, directed the building of sidewalks and the like, and it was held that he could not be heard to deny that such streets are public streets. *Ritchie v. City of South Topeka*, 38 Kan. 368. And it has been held that, where a person authorizes the removal of dirt from a street in front of his land, he cannot be heard to complain of such removal. *Wheat v. Van Tine*, 149 Mich. 314. A party cannot take advantage of an action in which he has acquiesced for his own benefit. 2 Herman, Estoppel, sec. 995. "He is said to be willing who either expressly consents or tacitly makes no opposition. He who consents cannot receive injury." Black's Law Dictionary, p. 1212. Judge Cooley in his work on torts announced this rule:

"Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance, the erection of which he concurred in or countenanced. He is not injured by a negligence which is partly chargeable to his own fault." 1 Cooley, Torts (3d ed.) sec. 187.

In *Daniels v. Tearney*, 102 U. S. 415, 420, Mr. Justice Swayne said:

"The principle of estoppel * * * has its foundation in a wise and salutary policy. It is a means of repose. It

promotes fair dealing. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice, where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the statute of limitations, it is a conservator, and without it society could not well go on."

Our conclusion, based on the weight of evidence, and derived from the authorities, is that one who sells and conveys to a drainage district a right of way through land owned by him cannot recover for damages to his lands which are occasioned by negligent installation of construction and diversion works installed where and as the vendor directed, and for which he paid, in substantial part, and where he at the time assumed responsibility for such damage as might thereafter be caused thereby to lands owned by him. Plaintiff, in a word, actively and effectively participated in the doing of the things of which it now complains. It may be added that the record seems fairly to disclose that the material evidence of the defendant drainage district stands practically uncontradicted, while that of plaintiff in opposition thereto is almost negligible; and in some material respects it corroborates defendant's evidence.

The defendant district made an offer to prove by three or four of the members of its board of directors that they would not have voted for the construction works complained of except for Schneider's assurance of responsibility for such damages as might result from the material changes which he proposed, and which were subsequently made, and his repeated assertion that he was taking all chances and that no person should be harmed thereby. Counsel contend that the court erred in excluding this offer, but, in view of our decision, we do not find it necessary to pass on this ruling of the court.

We have examined defendant's material assignments of alleged error and we think they are well founded in fact and in law. It appears to us that the judgment is not supported by the evidence.

In view of our conclusion it follows that the judgment must be, and it hereby is, reversed and the cause is remanded.

REVERSED.

Note—See (1) notes in 12 L. R. A. (n. s.) 461; 20 L. R. A. (n. s.) 876; 48 L. R. A. (n. s.) 667; 18 R. C. L. 682; 4 R. C. L. Supp. 1200; 5 R. C. L. Supp. 998.

JOHN D. O'NEILL, APPELLANT, V. GUST M. ROVATSOS ET AL., APPELLEES.

FILED DECEMBER 30, 1925. No. 23436.

1. **Master and Servant:** MINORS: CONTRIBUTORY NEGLIGENCE: ASSUMPTION OF RISK. Where a minor under 14 years of age is employed in violation of the child labor law, namely, section 7669, Comp. St. 1922, and is injured in the course of such employment, contributory negligence cannot be attributed to the minor, nor can he be held to have assumed the risk of such employment.
2. **Torts:** JOINT AND SEVERAL LIABILITY. "An act wrongfully done by the joint agency or co-operation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally." *Schweppe v. Uhl*, 97 Neb. 328.

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

H. E. Kuppinger and *Sullivan, Wright & Thummel*, for appellant.

Kennedy, Holland, DeLacy & McLaughlin and *Baker & Ready, contra.*

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

DEAN, J.

John D. O'Neill is a minor who was under 14 when the facts occurred on which this action is based. He sued in

the district court for Douglas county by his mother Rozanna Garries, as next friend, to recover damages from defendants for personal injuries sustained in Omaha by being struck by an automobile which it is alleged was then being driven at an unlawful rate of speed, to-wit, in excess of 25 miles an hour. The automobile was owned by J. Kahn, an automobile liveryman, and when the accident happened it was being driven by Walter Lowe, a driver then in Kahn's employ. Plaintiff was riding a bicycle at the time, and his counsel's contention is that he was then engaged in the work for which he was employed. This is denied in the answer. But defendants produced no witnesses, and at the close of plaintiff's evidence the court, pursuant to motions being filed therefor, dismissed the action generally as to defendant Rovatsos, the employer, whose name, awhile before the trial, was changed to Rogers. The action was also dismissed as to Kahn, and as to defendant Walter Lowe the action was dismissed, but without prejudice as to him. Plaintiff has brought the record here for review.

From the evidence it appears that plaintiff was an Omaha school boy, and during a part of the summer vacation period he was hired by defendant Rogers who was a merchant florist engaged in the business of retailing and delivering flowers from his store to his customers in and about Omaha. Plaintiff was Rogers' delivery boy, and he used his own bicycle in delivering the packages, making from one to ten trips daily. When he was not delivering flowers he worked generally in Rogers' store. For his services Rogers paid him a wage of $6 a week.

From the evidence submitted on the part of plaintiff it appears that he sustained injuries in the collision. But, as the case is for retrial, we will not, of course, in the present state of the record, discuss the extent of the injuries. The only question before us now is in respect of the court's ruling wherein plaintiff was nonsuited upon submission of his evidence.

It appears that plaintiff left his employer's store about 5 or 5:30 in the evening, but before leaving Rogers gave him

a quantity of canary bird seed in a large tin container, and directed him to deliver it at his home. And it was while he was on his way to deliver this package at Rogers' home that the accident happened. Counsel contend that plaintiff's day's work was ended when he left the store and that Rogers is not therefore liable. But whether Rogers handed the boy a package of bird seed or a package of flowers, or any other commodity, with directions to deliver it while he was on his way to his own home, is immaterial so far as the nature of the package is concerned. The vitally important and material fact is that he did give him a package to deliver and plaintiff was injured while in his employ and while making the delivery. And liability thereby arises because the hiring was an express violation of the minor child statute. Nor is it material that plaintiff and his mother and Garries, his stepfather, had been living at Rogers' home and on the day of the accident were moving or were about to move away to another location in the city. We are not in accord with defendant's insistent argument that plaintiff's employment had ceased for the day and that he was not therefore in the employ of Rogers when he left the store. We do not need to discuss this question more than to say that the errand with which plaintiff was entrusted by his employer had not been completed when he was struck by the passing automobile.

Plaintiff's contention is that liability attaches, as against defendant Rogers, under the child labor law, namely, section 7669, Comp. St. 1922, which among other recitals contains this:

"No child under fourteen years of age shall be employed, permitted or suffered to work in, or in connection with any theater, concert hall, or place of amusement, or in any mercantile institution, store, office, hotel, laundry, manufacturing establishment, bowling alley, passenger or freight elevator, factory or work-shop, or as a messenger or driver therefor within this state."

The proposition has long been recognized that a minor child, in a peculiarly important and personal sense, is a

ward of the state. This solicitude for child welfare is shown in many legislative enactments in Nebraska. Among these are the laws for the establishment of a home for dependent children, the child labor law, and the law for the establishment of an orthopedic hospital, and in the law which fixes the age at which the child's school attendance is made compulsory and its course of study is outlined. In all of these the law must be impartially enforced. And this because it is the law. The child welfare acts, all of them, come within the regulatory prerogative of the state in the exercise of its police power and are, of course, binding alike on all of its citizens. In respect of the child labor law in this and other states, the rule is well established by the weight of authority that, under statutes of this character, the minor child cannot, if injured, be holden for contributory negligence, nor can he be held to have assumed the risk attendant upon such dangers as may go with such employment. This is, of course, because of his tender years and of his consequent inability to understand or to appreciate the perils to which he may be subjected if he engages in the inhibited employment.

In respect of the unlawful employment of a minor, under the age fixed in a restrictive act, the rule is aptly stated in *Iron & Wire Co. v. Green,* 108 Tenn. 161:

"Employment of an infant in violation of statute forbidding such employment and making it a misdemeanor constitutes *per se* such negligence as makes the employer liable for all injuries sustained by the infant in the course of his employment."

In *Lenahan v. Pittston Coal Mining Co.,* 218 Pa. St. 311, the court points out that the legislature may, under its police power, fix an age limit below which boys may not be employed to labor, and that where a boy is employed to do dangerous work contrary to the provisions of the statute the employer cannot in case of his injury in such work set up the fact that he was guilty of contributory negligence. To substantially the same effect is *Marino v. Lehmaier,* 173 N. Y. 530. In the *Marino* case it is also held that the minor

cannot be held to have assumed the risks of the employment. See, also, *Rolin v. Tobacco Co.*, 141 N. Car. 300, 7 L. R. A. n. s. 335.

In support of the argument that, in cases of this class, all defendants are joint tort-feasors and that all are jointly liable, we said this in a comparatively recent case:

"Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it." *Robertson v. Chicago, B. & Q. R. Co.*, 108 Neb. 569.

In *Schweppe v. Uhl*, 97 Neb. 328, we said:

"An act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally."

A personal injury action, which is in point here, involving the question of joint liability, was appealed to the supreme court of the United States, in which a husband and wife had sued to recover damages for personal injuries which arose, simultaneously, from culpable negligence on the part of the employees of a steam railroad and the employees of a street horse-car company in the handling of their respective conveyances. Plaintiffs prevailed in the lower court and the supreme court affirmed the judgment as against both defendants. The court there held that the driver of the horse-car was guilty of negligence in attempting to cross the track of the steam railroad under the circumstances, and that there was evidence to warrant the jury in finding that the gateman was the servant of the steam railroad company, and that it was responsible for the results of the gateman's negligence. Counsel, however, argued nonliability on the part of the horse-car company, and on the question of joint liability the court said:

"This is an attempt to separate that which upon the facts in this case ought not to be separated. The so-called two negligent acts were, in fact, united in producing the result, and they made one cause of concurring negligence on the

part of both companies. They were in point of time substantially simultaneous acts and parts of one whole transaction, and it would be improper to attempt a separation in the manner asked for by the counsel for the horse-car company." *Washington & G. R. Co. v. Hickey*, 166 U. S. 521.

In view of the record and of the weight of authority, it seems to us that the injury occurred in the course of the employment of plaintiff, and that the question of proximate cause is for the jury, and it is also for the jury to determine the question in respect of liability, whether joint or several, as the facts may warrant.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED.

NOEL THOMPSON V. STATE OF NEBRASKA.

FILED DECEMBER 30, 1925. No. 24674.

Criminal Law: ADMISSIONS. Where a person is informed against for the commission of a crime and, while under arrest, is interrogated, in respect of apparently compromising facts which tend to show guilt, by one who is properly connected with the prosecution, it is imperative that, before an alleged admission may be received in evidence, it must ordinarily be shown that the statements of the accused were voluntary, and the reception in evidence of such statements, without proper foundation, is ordinarily reversible error.

ERROR to the district court for Morrill county: P. J. BARRON, JUDGE. *Reversed.*

L. L. Raymond and *T. F. Neighbors*, for plaintiff in error.

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

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

DEAN, J.

Noel Thompson was charged in Morrill county with stealing a two-year-old steer of the alleged value of $50, and the jury returned a verdict of guilty. Thereupon he was sentenced to serve a term of from two to four years in the penitentiary. He prosecutes error to have the record reviewed.

Peter Thompson is defendant's father. He testified that on July 26, 1924, he and his son, Noel, left his ranch with 10 head of cattle to take them to the Douglas ranch, which is about 30 miles southeast of Alliance. This bunch of cattle was made up of animals that were uneven in size and color. When they got the cattle started on their way, Peter left them in charge of Noel to be by him driven to the Douglas ranch. But it appears from Peter's evidence that when they left his ranch they encountered several herds on their route, and that, in driving through them, it was difficult to keep the strange cattle from getting into his herd, and that this troublous situation was a continuing annoyance and kept them busily engaged. He further testified that, after he assisted in giving the cattle a good start, he returned to his home, leaving them in charge of his son for the remainder of the drive.

From defendant's evidence it appears that, on the day of his arrest, he was taken into a vacant room in the courthouse and interrogated by a paid detective. He testified: "They took me in there and asked me how many head of cattle we started with, and I told them 10 head. They started talking about a red steer, and I told them, yes, there was one red steer a little smaller than the rest in the bunch that my dad had bought for $5. Mr. Davis (the sheriff) got up and come out in here (the courtroom) and took off his coat, and while he was out," the defendant, continuing, said he was kept in the room by the detective for about two hours, and that he then "went out and took off some brown garment, a coat or something, and he came back in, and then he threatened—Q. Did he have a gun with him? A. Yes; he had a gun in his holster, and he put his hand

on his gun and says, 'We can make you talk.' "

The detective testified, over objection, that he talked to the boy in the room in the courthouse the day of the arrest "probably an hour," and that he "said quite a little to him. I talked to him quite a bit." He did not deny defendant's statement that he had a gun on his person. He merely said he did not remember.

The briefs and the oral arguments of the parties disclose that Peter Thompson was also informed against for the theft of the same animal that is here alleged to have been stolen by his son, Noel, but Peter was tried at another time and was acquitted by the jury. Defendant's counsel contend that the proof in the present case does not reasonably tend to connect Noel with the offense with which he is charged. An examination of the evidence shows, in the present trial, that the verdict does not seem to be clearly supported by the evidence, and that the case seems to come within the rule recently announced by us where we said in substance that, where the evidence is insufficient to sustain a verdict, the judgment is for reversal. *Larson v. State,* 110 Neb. 620.

The rule is that, where a person is informed against for the commission of a crime and, while under arrest, is interrogated, in respect of apparently compromising facts which tend to show guilt, by one who is properly connected with the prosecution, it is imperative that, before an alleged admission may be received in evidence, over objection, it must be shown that the statements of the accused were voluntary, and the reception of the evidence of such statements without proper foundation, over objection, as in the present case, is ordinarily reversible error. *King v. State,* 108 Neb. 428. It is known to everybody that it sometimes regretfully happens that an innocent person, who is accused of a criminal offense, might be harrassed into the use of compromising language which, on trial being had, may seem to bear such resemblance to a confession as to result in conviction. And the compromising language is often resorted to by the accused, perhaps in the hope of obtaining

leniency, or even to avoid present annoyance. Anyhow, defendant was not on a footing with his keen interrogator, a mature man, an experienced detective, in that back room courthouse colloquy. He was a mere boy, who had just turned 21 years of age, and his evidence shows him to be a callow youth at that, who was, confessedly, not even informed of the fact that whatever he might say to his adversary, against interest, would be used against him at the coming trial. It follows that, in view of the foregoing, the judgment must be and it hereby is reversed, and the cause remanded for further proceedings.

REVERSED.

Note—See notes in 18 L. R. A. (n. s.) 796; 50 L. R. A. (n. s.) 1084; 1 R. C. L. Supp. 202; 4 R. C. L. Supp. 41.

ANNA THEISEN ET AL., APPELLEES, V. JOHN PETERSON, APPELLANT.

FILED DECEMBER 30, 1925. No. 23485.

Mortgages: FORECLOSURE: 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 the receiver, as well as in granting the foreclosure." *Lackey v. Yekel*, 113 Neb. 382.

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

Spillman & Muffly, C. H. Kelsey and *Lloyd Dort*, for appellant.

Douglas Cones and *M. H. Leamy, contra.*

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

DAY, J.

On June 2, 1921, Anna Theisen brought an action in the

district court for Pierce county against John Peterson to foreclose a chattel mortgage for $16,000, alleged to have been given to her by Peterson to secure a note of like amount due January 1, 1922. The mortgage covered certain live stock, grain and farm machinery. The plaintiff based her right to foreclose upon the alleged ground that Peterson had disposed of a part of the mortgaged property; that the property was not being properly cared for and that there was danger of the security being lost.

The Security State Bank intervened, claiming that it was the holder of the note and mortgage; that it held them as collateral security for certain notes executed to the bank by Anna Theisen and Casper Theisen aggregating $15,900. In addition to the foreclosure the plaintiff, as well as the intervener, prayed that a receiver be appointed to take charge of the mortgaged property. Later the Security State Bank commenced an action in the district court for Pierce county against John Peterson to foreclose a real estate mortgage of $54,000 upon a half section of land in Pierce county.

Peterson filed answers in the two actions, alleging in substance that the notes and mortgages were given as a part of a transaction between himself and Casper Theisen, wherein the parties were making an exchange of their respective properties. Peterson was exchanging his equity in certain lands, live stock and farm implements, located in Harrison county, Iowa, which, for the purpose of trade, were valued at $40,235, for Theisen's equity in certain lands, live stock and farm implements, located in Pierce county, Nebraska, which, for the purpose of exchange, were valued at $108,235. To adjust this balance Peterson gave a chattel mortgage of $16,000 and a real estate mortgage of $54,000. The mortgage was given for $54,000 instead of $52,000 to adjust some difference which subsequently arose. Peterson further alleged that as inducement to making the exchange Theisen made false and fraudulent statements upon which Peterson relied in making the exchange; that, by reason of

the false and fraudulent statements made by Theisen, Peterson claimed that he was damaged in the transaction in an amount in excess of the two notes. The answer further alleged that the bank was not a *bona fide* holder of the notes; that, while Anna Theisen was named as payee in the notes, they were in fact owned by Casper Theisen, and that Anna Theisen paid no consideration for having the notes and mortgages made payable to her. Peterson prayed that the notes and mortgages be canceled, and that he have personal judgment against Theisen for the amount of his damages after deducting the amount of the canceled notes. In the answer Peterson also asked that a receiver be appointed to take charge of the property covered by the chattel mortgage.

While the cases were pending the chattel property was sold by the receiver, and upon an order of the court $8,452.08 was turned into court.

The two cases were consolidated and tried on January 26, 1923, but for some reason the decree was not entered of record till April 30, 1923. The decree found that the bank was a *bona fide* owner of the $16,000 note and mortgage and also the $54,000 note and mortgage; that while the instruments appeared upon their face to have been executed January 1, 1921, they were not in fact executed till February 25, 1921; that before the $16,000 note was transferred to the bank as collateral security a payment of $1,400 had been indorsed thereon as of the date of its execution. The court further found that the indebtedness of Anna and Casper Theisen for which the collateral notes were given amounted to $16,509.45. The court ordered that $7,000 of the amount paid into court by the receiver should be credited upon the $16,000 note and after deducting the credit of $1,400 indorsed thereon found that there was a balance due on the $16,000 note of $9,983.12. The court further found that there was due upon the $54,000 note the sum of $63,003.80 and decreed a foreclosure of the real estate mortgage. The court found against Peterson upon the issues presented by his answer and cross-petition. The

court further found that, after satisfying the amount due the bank, the balance of the proceeds of the sale should be paid to Anna Theisen to the extent of the amount found to be due her, and that the surplus, if any, should be paid to John Peterson, and entered decree accordingly. From this decree Peterson has appealed.

At the outset we are met by the objection, on the part of the Security State Bank and Anna Theisen, that we are precluded from examining the issues presented by this appeal, because Peterson had filed, following the decree, a request for a stay of the order of sale. The record shows that on February 15, 1923, Peterson filed a request for a stay of the order of sale as provided in section 8988, Comp. St. 1922. The mere filing of this request, as a matter of law, operates as a stay of the order of sale for a period of nine months, without any action of the court. Section 8991, Comp. St. 1922, which refers to a stay of an order of sale in foreclosure proceeding, in so far as applicable to the present discussion, provides as follows: "No proceedings in error or appeal shall be allowed after such stay has been taken."

The question presented by the objections of the appellees has been several times considered by this court. In *Lackey v. Yekel*, 113 Neb. 382, it was held: "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 the receiver, as well as in granting the foreclosure." In *Ecklund v. Willis*, 42 Neb. 737, it was held that the filing of a stay of sale is a waiver of the right to have reviewed any of the proceedings in the case prior to the taking of such stay. In *Gilbert v. Provident Life & Trust Co.*, 1 Neb. (Unof.) 282, it was held: "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." It would seem that, by the plain provisions of the statute, as well as our decisions construing the same, we are precluded from examining the issues presented by the answer and cross-petition of Peterson.

From what has been said, it would seem to follow that the judgment of the district court should be, and it is,

AFFIRMED.

The following opinion on motion for rehearing was filed November 19, 1926. *Former judgment of affirmance vacated, and judgment of district court reversed, with directions.*

1. Appeal: MORTGAGE FORECLOSURE: REQUEST FOR STAY. In an action to foreclose a real estate mortgage, a request for stay inadvertantly filed before the decree is entered of record will not preclude a review of the case upon the merits.
2. ———: STATUTE: CONSTRUCTION. A statute denying a right of appeal to this court will be strictly construed, and the proceedings to accomplish that result must comply literally with the terms of the statute.
3. Fraud: REPRESENTATION OF VALUE. In a contract of exchange certain values were placed upon the properties of the respective parties for the purpose of determining the difference to be paid by one to the other. *Held*, that such valuation was not binding upon either party in an action for fraud.
4. ———: EXCHANGE OF PROPERTIES: MEASURE OF DAMAGES. Where a contract of exchange has been procured by the fraud of one of the parties, and the other seeks to recoup his damages in an action to foreclose a mortgage given as a part of the transaction, the measure thereof is the difference between the actual value of the property transferred and its value if it had been as represented at the time of the contract of exchange.
5. Evidence examined, and *held* to establish fraud in procuring the contract.

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

REDICK, District Judge.

An opinion was filed in this case December 30, 1925, affirming the judgment of the court below. A motion for a rehearing was overruled, leave given to file a second motion for rehearing and argument had upon the same. An opinion was then prepared disposing of the case upon its merits, but the same has been recalled and the present

opinion adopted as the final disposition of the case. For a general statement of facts, reference is made to our first decision, *ante*, p. 150, but other facts necessary for the understanding and disposition of the questions presented will be noted. By our first opinion the merits of the case were not discussed nor disposed of, but the judgment of the lower court was affirmed because it appeared from the record that prior to the filing of the appeal in this court the appellant had filed in the district court a request for stay. It was therefore held in accordance with section 8991, Comp. St. 1922, that no appeal was allowable.

In view of the fact that the Constitution of this state provides that the "right to be heard in all civil cases in the court of last resort, by appeal, * * * shall not be denied" (article I, sec. 24), we have reconsidered this question. The facts of record regarding the filing of the request for stay are as follows: Trial having been concluded December 13, 1922, the case was taken under advisement, and on January 26, 1923, the court orally delivered its decision on the merits; but the decree was not passed and entered of record until April 30, 1923. On February 14, 1923, defendant filed a supersedeas bond which was approved by the clerk. That the bond was a supersedeas bond is without doubt; it is so recited, the amount fixed by the court at $500, and the condition to prosecute the appeal without delay and pay all costs was all that was required in view of the facts that the personal property had been sold and the real estate in the hands of a receiver. Under such circumstances a condition against waste is superfluous. On February 15, 1923, a request for stay in usual form was filed appearing to be signed by John Peterson. May 22, 1923, præcipe was filed in this court. These proceedings were respectively taken by different attorneys representing defendant, and we think it is justly to be inferred from the record that the request was inadvertently filed and should not defeat the appeal. The existence of the request for stay was not brought to the attention of this court by motion to dismiss the proceedings, nor until the filing of the brief of appellees, May 7,

1924, which discussed the case upon its merits very fully, and the fact of the stay was mentioned only in two lines under propositions of law and five lines in the conclusion of the brief. We are further of the opinion, under the circumstances of this case, that, the request for stay having been filed before entry of the decree upon the record, such irregularity would not destroy its efficacy *as a stay, Jenkins Land & Live Stock Co. v. Attwood,* 80 Neb. 806. But by the same liberal construction of a remedial statute, when proceedings are set up to defeat a right protected by the Constitution, they should be regular in all respects. Section 8988, Comp. St. 1922, requires request to be filed "within twenty days after rendition of such decree," and section 8991 provides that "no * * * appeal shall be allowed after such stay has been taken." Where an appeal was required to be taken "within six months after the rendition of the judgment," we held that "rendition of the judgment" meant the entry thereof upon the record. *Bickell v. Dutcher,* 35 Neb. 761. We think they should be given the same meaning here, and that we were in error in holding that the request for stay in this case defeated the appeal. We do not hold that the right of appeal may not be waived, nor that section 8991, *supra,* is unconstitutional, but that the waiver must be intentional, and the statute enforced literally within its terms. We will therefore consider the appeal on its merits.

On the one side, the Security State Bank and Casper Theisen are seeking to foreclose a chattel mortgage for $16,000 and a real estate mortgage for $54,000 and they will be hereinafter referred to as the plaintiffs. John Peterson, purchaser of the Theisen property, files a cross-petition seeking to recoup damage he claims to have sustained by alleged false representations of Theisen as to the quality, quantity and value of the cattle and hogs and the value of the half section of land received from Theisen.

While the record is very voluminous, it is quite unsatisfactory in regard to many material questions. To start with, it may be noted that this was an exchange by Peterson

of two Iowa farms consisting of 184 acres, with the stock and farm implements upon them, for the Theisen farm of 320 acres, with a much larger amount of stock, consisting of cattle and hogs, farming implements, grain, and so forth. The contract signed by the parties recited that Peterson's equity was valued at $40,235 and Theisen's at $108.235. In arriving at these figures each party placed a very much inflated valuation upon his land. There is no complaint as to the valuation of Peterson's chattels, nor upon Theisen's chattels except the cattle, which were valued at $300 a head and the hogs at $50 a head. Eighty acres of the Iowa farm were valued at $300 an acre, and 104 acres at $285, and Theisen's farm at $285 an acre.

It would serve no useful purpose to recite the evidence in detail, but we have examined it with great care and have no hesitancy in stating our conclusion that Peterson was greatly over-reached in the deal and imposed upon by Theisen. At the start of the negotiations, in response to a letter from Peterson's brother, who was a real estate agent in Omaha, Theisen wrote that he had been offered $285 an acre for his land a year ago but had it priced at $300 (no proof of this); that his cattle he priced at $325 a head, having sold some the year before at $460 and two years before at $670. He priced his 160 head of good Duroc-Jersey hogs at $10,000, but put in contract at $8,200. He stated that if the deal was made he could guarantee Peterson a sale of 50 head of these cattle the following June for $18,000 or $20,000, and at the February sale, 1921, 50 head of hogs would bring better than $7,000. When Peterson came to look at the Theisen farm, Theisen showed him the record of the sales made by him for the three years previous, which substantiated the statements of his letter and tended to establish the valuations claimed for the cattle and hogs in the contract. That the cattle and hogs were thoroughbreds substantially as represented seems to be established by the evidence; but their value, as thoroughbreds, was entirely dependent upon there being a market for that class of stock; and the evidence establishes that the market began

to fade away early in the winter of 1920, and by spring had practically disappeared. Peterson had no experience in dealing with thoroughbred stock, while Theisen had been in that business for a number of years. Peterson was undoubtedly deceived by the exhibits of prior sales and by the guaranty of Theisen of the amounts which could be realized in February and June following. He was also entirely uninformed as to the value of Nebraska lands and the lands in question, and relied upon the statements of Theisen in that regard. Upon Peterson's first visit to the Theisen farm late in November, 1920, he spent but an hour and made only a cursory examination. Upon his second visit he was there a little longer, an hour and a half or two hours, and counted the cattle and hogs. They then went to a neighboring town and had prepared the contract of exchange, but Peterson refused to sign the same because a note and mortgage for $9,600 which he was to put into the deal was up for collateral with an Iowa bank to secure $2,000. He now says that he refused because the deal looked pretty big to him that morning. Peterson and his brother and Theisen then took the train for Omaha, where Peterson proceeded to get drunk, was arrested, put in jail and the next morning fined. An effort is made to connect Theisen with this incident as the furnisher of the liquor, but the evidence is not convincing. However, the parties stayed in Omaha the following day and on the 10th of December went to Woodbine, Iowa, where the contract of sale was executed, Theisen immediately leaving for home. We do not consider the circumstances of the execution of the contract of great importance, because the mortgages in question were subsequently executed about the 2d of March, 1921, and Peterson took possession of the Thiesen farm about the 15th of January, 1921, thereby waiving any objection upon the ground of his condition at the time the contract was executed. They constitute, however, details in the picture and tend to characterize the final transaction as disclosed by the evidence. The Iowa lands were conveyed to Thiesen and the personal property disposed of by him and about

March 2, 1921, the Theisen lands were conveyed to Peterson and the mortgages in question executed to Anna Theisen, the wife of Casper, but this change is of no legal importance.

June 2, 1921, Anna Theisen began the action to foreclose the chattel mortgage, and later on the Security State Bank, to whom the two mortgages had been assigned as collateral to Theisen's notes in the bank, aggregating about $16,000, intervened, and still later, in January, 1922, filed suit to foreclose the real estate mortgage, and upon application of Peterson and by consent of parties the actions were consolidated and tried together. By consent a receiver was appointed of all property covered by the chattel mortgage and later on a receiver was appointed for the real estate. The chattels were sold under order of the court, netting $8,452.08, $7,000 of which was applied upon the Thiesen notes at the bank. In February, 1921, by consent, the hog sale was held as advertised and 40 sows were sold for $2,375. The situation of Peterson is that within a period of six months he had lost his $9,600 mortgage, his Iowa farms, and all of the chattels which were upon the Theisen farm. A decree of foreclosure for $63,000 has been rendered upon the Theisen farm and a judgment against him for $9,983.12 for the balance of the chattel mortgage note. It would seem that the situation thus presented is so unusual as to cast suspicion upon the methods by which it was brought about.

No complaint is made in the pleadings of false representations as to the value of the Iowa lands; evidence was received as to their real value, but we cannot consider it, as it is not in response to any pleading.

Theisen says he did not represent his land to be worth $285 an acre, but that he priced it at that figure. However, his letter, above mentioned, disputes him on this point. The highest value placed upon the land by two witnesses for plaintiff is $225, while witnesses for defendant put it at $90 to $120, $100 (2), $100 to $125 and $110. It also appears that the only sale in the immediate neighborhood

was at $144 an acre in 1919, and all witnesses agree that there was a decided drop in values beginning with the fall of 1920.

The hogs were lumped at about $50 a head, though the sales in previous years, reports of which were shown Peterson, showed an average of over $150.

The cattle were priced at $300, but as above noted, there was no market for thoroughbreds in December, 1920, and their value was greatly depreciated. No evidence was offered by either side as to the real value of the cattle and hogs as part of the equipment of a stock farm, which is the proper test. Defendant claims that they were only worth what they would sell for on the stock market, but this is clearly incorrect, as defendant was not purchasing for slaughter. Plaintiffs claim that they should not be held responsible for the failure of the market for thoroughbred cattle. The evidence is conclusive, however, that there was no market for that class of cattle in December, 1920, nor for a long time thereafter. While it is true the cattle had a value in excess of the beef price (which defendant figures at $3,354), no direct evidence was offered to show what was such value.

In this state of the evidence, the writer of the withdrawn opinion attempted to fix the value of the cattle by applying to them the same rate of depreciation which the evidence showed had been suffered by the hogs. This is characterized by counsel for appellees as hypothetical and speculative, and we have concluded that the criticism is just. Being without any evidence upon which to base a finding of the market value of the cattle and hogs, we are unable to dispose of the case on the merits and the case must be remanded for further proceedings.

We hold, however, the law of the case to be: (1) That filing the request for stay did not defeat the appeal. (2) That the case of Peterson for false representation is made out, and that he is entitled to recoup his damages in this action. (3) That evidence of the value of the Iowa land and chattels is irrelevant under the pleadings as they now

stand. (4) That the Security State Bank does not occupy the position of a *bona fide* holder for value (this is not seriously contended for in the briefs). (5) That the measure of damages is the difference between the actual value of the property transferred and what its value would have been had it been as represented.

It is therefore ordered that the judgment of the district court be reversed and cause remanded for an accounting of the amount due upon the mortgages in suit in accordance with the principles herein announced, each party being granted leave to file amended pleadings if so advised.

REVERSED.

TILMAN FLADER, APPELLANT, V. CENTRAL REALTY & INVESTMENT COMPANY ET AL., APPELLEES: OAK CREEK DRAINAGE DISTRICT ET AL., INTERVENERS, APPELLANTS.

FILED DECEMBER 30, 1925. No. 23500.

1. **Drains:** OBSTRUCTIONS: INJUNCTION. A drainage district organized under the laws of this state has a special right under the statute to have its drainage channel kept free from obstruction or interference on the part of third parties, and any damming of the channel to the detriment of the drainage district may be enjoined in a proper action.
2. **Waters:** OBSTRUCTIONS: INJUNCTION. Any unlawful obstruction or detention of the waters of a running stream gives the riparian owner who is injured thereby a right of action in damages for the injuries, and where such injury is of a continuing nature an action in equity will lie to enjoin the further continuance of the injury.
3. ———: ———: ———. Evidence examined, and *held* that the construction of the proposed dam by the defendants will result in a continuing injury to the plaintiff and interveners, and that an action in equity will lie to enjoin the threatened injury.

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

T. F. A. Williams and *Homer Kyle* for appellant Flader.

A. W. Richardson, A. M. Bunting, T. S. Allen, E. G. Maggi, A. H. Gutberlet, Luke H. Cheney, C. L. Clark and *Anderson & Foe,* for interveners.

O. B. Clark, contra.

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

DAY, J.

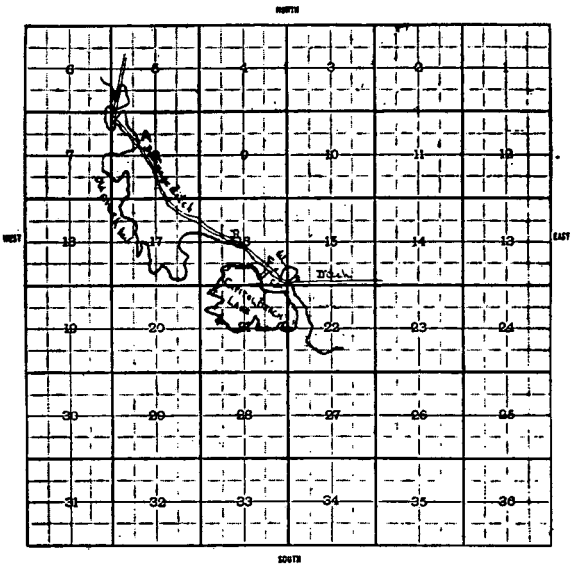
By this action the plaintiff sought an injunction against the Central Realty & Investment Company and others to prevent them from constructing a dam across the channel of Oak creek. The purpose of the dam was to enable the defendants to divert the water of Oak creek into a lake owned or controlled by them. Several interveners filed petitions of intervention in which they prayed the same relief asked by the plaintiff. At the conclusion of the testimony the trial court denied the injunction and dismissed the plaintiff's petition and also the petition of the interveners. The decree provided, however, that it should not prejudice the plaintiff or the interveners from bringing other actions at law or suits in equity if the dam, when constructed, proved to be injurious to the plaintiff or interveners. From this decree the plaintiff and interveners have appealed.

The plaintiff and all the interveners, except the Oak Creek Drainage District, which will hereafter be referred to as the drainage company, are riparian owners in the valley of Oak creek above the point where the defendants propose to construct the dam. The petition of the plaintiff and the petitions of the landowner interveners are based upon the theory that the construction of the dam will prevent the natural drainage of the lands; that in times of heavy rainfall the lands will overflow; that the seepage from the backwater will cause their lands to become wet and soggy and render them unfit for cultivation; that the backwater in the channel will become stagnant and give off offensive odors and become a menace to the health and comfort of the complainants.

The particular complaint of the drainage company is that the construction of the proposed dam will cause the water to back up in the drainage ditch, and that in consequence the ditch will become filled with silt, rubbish and logs; that to remove the same will entail upon the drainage company great and constant expense; and that the dam will destroy the purpose for which the ditch was constructed.

The testimony shows that Oak creek is a running stream having source some 30 miles above the *locus quo* involved in this action. In township 10 in Lancaster county it flows in the order named into sections 6, 5, 7, 8, 7, 8, 17, 16 and 22 and empties into Salt creek. In its natural state it flowed in a well-defined channel and formed a natural drainage for an extensive territory, especially for the lands involved in this action located in sections 7, 8, 16, and 17. The natural channel through the last-named sections was very winding and the stream so sluggish that its movement was scarcely perceptible. In this condition the complainants' lands were subject to frequent overflows, and, being very level, would not drain off. In consequence of these conditions the lands became wet and soggy and wholly unfit for cultivation except in dry years. This condition was also aggravated by a dam across Oak creek, known as the "Herdman dam," which had been maintained since about 1880. To obviate the difficulty arising from excessive water a large number of landowners in 1907 organized under the laws of the state the Oak Creek Drainage District containing about 4,000 acres. In carrying out the project the drainage company eliminated a number of curves in the stream and widened and deepened the channel. It condemned the Herdman dam and by means of a cut-off eliminated it from the channel. In making these improvements the drainage company expended about $40,000, which was raised by assessment according to the benefits upon the lands in the district, of which amount the plaintiff paid $1,500. The effect of the improvement was that the lands in the district, and especially the lands involved in the controversy, became well drained and highly productive and of

great value. For the purpose of elucidation we append hereto a plat of the improvement affecting the lands in controversy showing in a general way the course of the original channel, the cut-offs made by the drainage company, the location of the proposed dam, the lake owned by defendants, and other objects, to which reference will be made.



In 1911 the drainage company constructed an artificial channel commencing at the point A on the plat and extending in a southeasterly direction to the point B where it connected with the original channel. After following the original channel about 2,000 feet, another artificial channel was constructed connecting the points C and D, shown on the plat. The effect of the last cut was to eliminate a sharp bend in the original channel in the form of an oxbow and to sidetrack the Herdman dam located at the point E on the plat. As a consequence of these improvements the water of the creek passes through the artificial channel A to B and does not enter upon the plaintiff's land, the N.W. ¼ of section 17. The original channel passed through plain-

tiff's land as shown by the plat. The surface water in the vicinity of the old channel would drain off through this channel into the drainage ditch. At other times the old channel was dry.

The Central Realty & Investment Company owns or controls a pleasure resort a short distance from the city of Lincoln, known as "Capitol Beach." A part of the property controlled by the realty company, is an artificial lake, known as "Capitol Beach lake." Generally speaking this lake is located in the north half of section 21 and extends into a part of section 16. The outlines of the lake are shown on the plat. For a number of years prior to the construction of the drainage ditch the realty company and its predecessors in interest had at stated times, for the purpose of replenishing the lake, diverted the water from Oak creek into Capitol Beach lake. This was done by means of a canal about 100 feet in length connecting the channel of Oak creek with the lake, and designated F on the plat. After the Herdman dam was removed the level of the water of Oak creek at the point F was lowered several feet so that it was no longer feasible to divert the water through the canal. For several years the realty company pumped the water from the level in the stream into its canal and in this manner replenished the lake. In 1918 the realty company was about to construct a dam in Oak creek, a short distance below the point F, of sufficient height to raise the natural level of the water from 9½ to 10½ feet, for the purpose of diverting the water of Oak creek into the lake. To enjoin this action suit was commenced.

The testimony shows that the construction of the proposed dam will cause the water of the creek to back up several miles above the point A designated on the plat; it will also cause the water to be thrown back through the old channel from the point B to A, as well as through the artificial channel from B to A. The effect of this upon the plaintiff and a number of the landowner interveners will be to cause the water to remain in the old channel and interfere with the free use of the land through which the old

channel flows. The Central Realty & Investment Company attempts to justify the proposed action upon the ground that it has a permit from the state board of highways and drainage, issued in 1918, authorizing it to divert 50 cubic feet per second of the water of Oak creek at the point designated. The application to divert the water states: "The water is to be used for the purpose of filling and maintaining Capitol Beach lake." The permit is on a printed form and provides: "The water appropriated shall be used for developing power." Whether the permit conforms to the application need not be determined here. In any event a permit to divert the water would not authorize the building of a dam, the effect of which would be to injure the property of others. Before the defendants could build a dam which would injure the property of others, it would be necessary to compensate the injured parties for damages sustained, or obtain their consent. In *Black Bros. Flour Mills v. Umphenour*, 111 Neb. 218, it is stated that the department of public works has no jurisdiction to pass upon the height of a dam.

The defendants further urge that they have a prescriptive right to construct the dam. This contention is based upon the theory that for several years they have diverted the water from the creek into the lake; that the Herdman dam raised the level of the water in the creek so that in time of freshet the water from the creek would flow into the lake. We see no merit in this contention. The drainage company condemned the dam in the manner provided by law. The greater part of the lake is in the drainage district. The defendants or their predecessors in interest acquiesced in the construction of the ditch and the condemnation of the dam. The claim of the prescriptive right is not sustained by the record.

The defendants further contend that the construction of the dam will not injure the plaintiff's or the interveners' property; that the dam will be so adjusted that the backwater can be readily released; and that in time of threatened overflow it will be released.

There was considerable testimony of scientific character which tended to prove that there would be no damage to the riparian property owners on account of percolation. Notwithstanding this testimony, the effect of the construction of the dam will impose a burden upon the riparian owners as well as the drainage company which they are not required to bear. It leaves standing water in the old channel which otherwise would be dry and interferes with the free use of the complainants' lands. The general rule applicable to the situation presented by the record may be found in any standard text-book. In 27 R. C. L. p. 1100, sec. 36, the rule is stated as follows: "Without the consent of the other proprietors who may be affected by his operations, an upper proprietor has no right to interrupt or retard the natural flow of the water, to the injury of lower owners, nor has a lower proprietor the right to throw the water back upon the proprietors above, unless he has acquired the right to do so by grant, license or prescription." Numerous authorities can readily be found supporting this rule.

In addition to the general principle, it may be said of the drainage company that it is organized under special provisions of the law which authorizes the construction of drainage ditches, gives to such companies the power of eminent domain, and also imposes upon them the duty of keeping the ditches in repair. Comp. St. 1922, ch. 17, art. V. The act also provides a penalty for the obstruction or interference with the flow of the water-course in whole or in part owned by any drainage district. The damming up of the channel of a drainage district is a continuing injury, and in a proper action may be enjoined. From an examination of the entire record we are convinced that the defendants are without a semblance of right in attempting to build a dam across the drainage ditch. The plaintiff and interveners do not object to the defendants diverting the water from the drainage ditch, but complain only of the construction of the dam. Other questions have been dis-

cussed in defendant's brief, which we have considered, but do not regard them of importance.

Upon the record we are of the view that the plaintiff, the landowner interveners and the drainage company are entitled to an injunction preventing the defendants from constructing the proposed dam.

The judgment of the district court is reversed and the cause remanded, with directions to enter judgment in accordance with this opinion.

REVERSED.

Note—See (2) 27 R. C. L. 1100; 3 R. C. L. Supp. 1546.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. FARMERS STATE BANK OF CULBERTSON: JOHN MANSFIELD, CLAIMANT, APPELLEE: VAN E. PETERSON, RECEIVER, APPELLANT.

FILED DECEMBER 30, 1925. No. 24558.

Evidence outlined in the opinion, and *held* to support the judgment of the district court.

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

C. M. Skiles and *Butler & James*, for appellant.

C. D. Ritchie, contra.

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

DAY, J.

The Farmers State Bank of Culbertson, Nebraska, became insolvent, and in a proper proceeding by the state a receiver was appointed who took charge of the assets and business of the bank and proceeded to wind up its affairs.

John Mansfield, the claimant, filed with the receiver a

claim based on three time certificates of deposit of $2,000 each, dated April 5 and April 21, 1924, and numbered, respectively, 1572, 1573, and 1578, and also for the sum of $60.42 upon an open account subject to check. The certificates upon their face call for the payment of interest at the rate of 5 per cent. He pleads that he is an unpaid depositor and entitled to the protection of the bank guaranty law.

The receiver makes no objections to the allowance of certificate No. 1572, nor the balance due upon the open account. He concedes that these two items should be paid out of the guaranty fund. The receiver objects to the allowance of certificates Nos. 1573 and 1578 as a charge against the guaranty fund, for the reason that the certificates are renewals of prior certificates upon which the bank paid the claimant, under secret agreement, a greater rate of interest than 5 per cent. per annum, and that the payment of the excess interest was in violation of the depositors' guaranty law, and the claimant was not entitled to have the two certificates protected by the guaranty fund.

The trial court allowed the claims and ordered them to be paid out of the guaranty fund.

The receiver's objections are based upon *Iams v. Farmers State Bank,* 101 Neb. 778, where it was held: "Where money purporting to be a deposit is placed in a state bank, for which the bank issues and delivers to the purported depositor certificates of deposits in terms providing for payment of 5 per cent. annual interest, and where by an understanding between the parties the bank pays to such persons a bonus of 1 per cent. above the lawful rate of 5 per cent. interest, *held,* such transaction does not constitute a deposit within the meaning of the bank depositors' guaranty act, * * * but is a mere loan of money to the bank." We think that the proof fails to bring the case within the rule announced in the *Iams* case.

The proof in support of the receiver's claim, that interest in excess of 5 per cent. had been paid on the certificates, of which the present are renewals, rests solely upon the in-

ference to be drawn from the entries in the books of the bank, the deposit slips in the name of the claimant, and the entries in his pass-book. It appears that on the dates when the certificates were renewed the deposit slips show that there was deposited interest in the certificates based on a 5 per cent. rate, followed by an additional deposit of an amount equal to 1 per cent. upon the face of the certificates. There is nothing in the books or deposit slips to show what items were received by the bank to make up this amount. One of the witnesses testified from an examination of the books that the deposit might be for interest or it might be money or check. The receiver argues that the coincident is sufficient to show that it must have been additional interest on the certificates. The claimant, however, testifies that it was never agreed between himself and the bank that he was to receive interest on the certificates at a rate in excess of 5 per cent. and that he never received interest on any certificate in excess of that amount.

The record shows that the books of the bank contained many irregularities and in many respects were unreliable. Assuming, but not deciding, that under the circumstances shown by the record the books were properly received in evidence, we are satisfied that as against direct testimony to the contrary the entries are not sufficient to show that excess interest was paid on the certificates. The receiver had no direct evidence on this point.

On the whole we are of the opinion that the weight of the testimony supports the claimant's contention that the certificates constitute a deposit within the meaning of the guaranty law and are entitled to its protection. We think the trial court was right in allowing the claims as a charge upon the guaranty fund. The judgment of the district court is

AFFIRMED.

EDWARD WAGNER V. STATE OF NEBRASKA.

FILED DECEMBER 30, 1925. No. 24798.

1. **Criminal Law**: MOTOR VEHICLES: INFORMATION. Sections 8392 and 8396, Comp. St. 1922, regulating vehicles on highways, construed in connection with the information based thereon, and *held*, that as it does not allege that defendant operated the automobile "at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the condition of the road," nor that it was operated in a road, or the equivalents thereof, such information does not charge either a misdemeanor or a felony under such sections.

2. **Evidence** examined, and found insufficient to support the verdict.

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

John C. Mullen, for plaintiff in error.

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

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

THOMPSON, J.

This case comes here on petition in error from the district court for Richardson county, where Edward Wagner, hereinafter called defendant, was tried upon the information below quoted, and the plea of not guilty thereto. Omitting the formal parts, the information charges:

Defendant "did then and there unlawfully and feloniously drive and operate a motor vehicle, to wit, a Studebaker automobile, at a greater rate of speed than thirty-five (35) miles per hour, to wit, more than fifty (50) miles per hour within the city of Falls City within said county and state and in so recklessly and carelessly driving and operating said automobile collided with and struck one Otto Gurschke, by reason of which the said Otto Gurschke was seriously injured in that his skull was thereby fractured and he sustained other serious and painful injuries."

Defendant was found guilty, and a fine of $500 imposed.

Several alleged errors are relied upon for reversal, but we find it necessary to consider only two of them, namely: That the information fails to charge an offense under the statute; the verdict is not sustained by the evidence.

Does the information charge an offense? A motion to quash on the ground that it does not charge an offense was made by defendant and was overruled. It is admitted that the sections of the statute necessary for our consideration are sections 8392 and 8396, Comp. St. 1922, that part of the former material to this case being as follows:

"No person shall operate a motor vehicle on any highway outside of a city or village at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person, nor in any case at a rate of speed exceeding thirty-five miles per hour; and within any city or village no motor vehicle shall be operated at a rate of speed greater than is reasonable and proper, having regard of the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person."

Section 8396, *supra,* reads as follows: "The violation of any of the provisions of this article (Motor Vehicles, art. IV) shall be deemed a misdemeanor punishable by a fine of not exceeding fifty dollars for the first offense, and punishable by a fine of not less than fifty dollars nor more than one hundred dollars, or imprisonment not exceeding sixty days in the county jail for each subsequent offense, or both fine and imprisonment; provided, however, if any person operating a motor vehicle in violation of the provisions of this article shall by so doing seriously maim or disfigure any person or cause the death of any person or persons, he shall upon conviction thereof be fined not less than two hundred dollars nor more than five hundred dollars, or be imprisoned in the penitentiary for not less than one year or more than ten years."

Under section 8396, *supra,* the crime is the doing of the

thing charged in the road, meaning public highway, street, or alley. Neither of these words appear in the information, nor their equivalents. The alleged acts might have occurred on defendant's own premises, or on premises lawfully possessed by him, or on a private way, so far as reflected by it. The statute is plain, and its words defining the essential elements of the crime, or the equivalent thereof, must be contained in the information.

It will be noticed that the information alleges that defendant committed the crime "within the city of Falls City," but nowhere charges, as it must, that such speed of "more than fifty miles per hour" was "greater than is reasonable and proper, having regard of the traffic and use of the road and condition of the road," or "at a rate of speed such as to endanger the life or limb of any person." These words of the statute, or the equivalent thereof, must be contained in the information.

From the foregoing it will be seen that the information fails to charge either a misdemeanor or a felony.

As to the second assignment of error, a careful examination of the entire record discloses that the verdict of the jury is without evidence to support it.

The judgment of the district court is reversed, and the cause dismissed.

REVERSED AND DISMISSED.

Note—See (1) 28 Cyc. p. 49.

MARY WALLER REA ET AL., APPELLEES, V. FRED PIERSON ET AL., APPELLANTS.

FILED DECEMBER 30, 1925. No. 23290.

1. **Vendor and Purchaser**: EXCHANGE OF LANDS: DEFAULT: BASIS OF RECOVERY. Where one party agrees to convey certain lands to another for a tract of land and a money consideration, to be represented by promissory notes secured by real estate mortgages to be executed by the second party, the fact that the parties have recited the value of their lands in the contract as a basis for a determination of the marginal consideration to be represented by the promissory notes and mortgages of the

second party does not, of itself, amount to a contract by either party to pay in money an amount equal to the value placed upon either of the tracts of land in case he fails to transfer the land as agreed.

2. ———: ———: ———: ———. Under the facts in this case, the recovery, if any, would necessarily be based upon the actual market value of the property involved, irrespective of the recitals contained in the contract in suit.
3. **Estoppel**: ESSENTIALS. It is essential for the validity of the claim of estoppel that the defendant was influenced by and relied upon the conduct of the plaintiff, and that he changed his position in reliance thereon to his injury.
4. **Appeal**: INTERVENTION. The order of the trial court permitting the assignee, pursuant to assignment made after commencement of proceedings in the trial court of part of the cause of action in suit, to intervene and to become, in fact, a party plaintiff, after the trial had been commenced and after the evidence had been in part taken, is not prejudicial to the defendants and does not constitute reversible error.
5. ———: DISMISSAL. Where motion to dismiss the appeal of one of two joint appellants for its failure to file briefs is first made at the time of submission of the cause, and especially when no service of notice of the filing or pendency of such motion has been made upon the appellants, or either of them, it may be sustained, but without prejudice to the rights of the other appellant.

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

W. T. Thompson, Grant G. Martin, Beeler, Crosby & Baskins and *Kennedy, Holland, DeLacy & McLaughlin*, for appellants.

Hastings & Hastings, Frost & Kinsinger and *Henry Howard, contra.*

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

EBERLY, J.

This is an action at law prosecuted by Mary Waller Rea and B. M. Rea, plaintiffs and appellees, and Mary L. Short, intervener and appellee, against Fred Pierson and P. F.

May, defendants and appellants, to recover the sum of $32,000 and interest upon a contract in writing, entered into between the plaintiffs and defendants, which provided briefly as follows: (1) The defendants agree "to sell and convey to" plaintiffs "the following described property, to-wit" (description of Nebraska land and incumbrances thereon), "the said above described property to be valued at $20 per acre." (2) The plaintiffs agree "to give in payment for the above property $——— in cash and the property hereinafter described" (description of Iowa land and incumbrances thereon), "$32,000 equity, which" defendants "agree to take as part payment" thereon. Defendants agree "to carry back all differences in second mortgage" (on Nebraska land) "to be paid as follows: $10,000 due June 19, 1923, and $15,000 due in 1927, and the balance in June, 1930."

Plaintiffs transferred Iowa land to defendants as required by the contract and defendants accepted transfer and took possession thereof. Defendants, however, wholly failed to transfer Nebraska lands to plaintiffs and to perform the other terms of the contract by them to be performed. The plaintiffs thereupon commenced this action, and now, together with the intervener, are prosecuting it upon the theory that by reason of the said default they are entitled to receive from the defaulting parties the sum of $32,000 and interest, the same being "the agreed valuation" of the lands conveyed by them to the defendants as fixed and determined by the language of the contract above quoted, and also upon the additional ground that their equity in the lands thus by them conveyed "was of the reasonable value of said agreed sum of $32,000."

To the petition the defendants answered, and to the answer replies were filed. Trial was had to the court, the jury being waived. Judgment was entered for plaintiffs, including a finding generally on all issues against defendants and each of them; that all material allegations of the petition and of the petition in intervention are fully sustained by the evidence, and that there is due plaintiffs

Mary Waller Rea and B. M. Rea the sum of $9,334, and that there is due Mary L. Short, intervener, the sum of $28,000. From this judgment the defendants prosecute an appeal.

Defendant Pierson assigns the following grounds as error: (1) That there is gross error on the part of the trial court in basing the measure of damages on the sum of $32,000 named in the contract: (2) that the court erred in disregarding the plea of estoppel interposed by defendant Fred Pierson; (3) in permitting Mary L. Short to intervene; and (4) that the judgment of the trial court is contrary to the law and the evidence.

As to plaintiffs' first contention, it is thought that the rule of this court announced in the case of *Miller v. Ruzicka*, 109 Neb. 152, is controlling. The language made use of in the contract presented in the instant case, "$32,000 equity which parties of the first part agree to take as part payment," analyzed and construed in the light of the context and surrounding circumstances means nothing more nor less than the "equity" in the preceding lands, to be valued at $32,000, which "parties of the first part agree to take as part payment," etc. Thus construed, an inspection of the contract involved in *Miller v. Ruzicka, supra,* and the contract upon which the present action is based discloses that the controlling words in both contracts are substantially and essentially the same. And this fact necessitates the same construction be made and the same conclusion reached as was arrived at by this court in the case of *Miller v. Ruzicka, supra.* In that case Miller sought to recover from Ruzicka, who failed to perform his contract, the sum of $4,500 and interest, basing his right of recovery upon the fact that the words in his contract referring to the land in question, "the above-described property to be valued at $4,500," was the valuation which must be taken and accepted as the agreed valuation for all purposes of the contract and for fixing the damages in event of a breach thereof. This is substantially the contention which the plaintiffs make in the present case. In answer to this con-

tention, Flansburg, Justice, in delivering the opinion of the court says:

"The plaintiff relies upon the fact that the property was valued by the parties at $4,500, which, it is claimed, is equivalent to a promise to pay that amount of money. However, we do not so interpret the contract. The obligation of the defendants in this case was to transfer certain property and to pay certain moneys in addition. The property, it is true, was valued in the contract at $4,500, but that was an estimate agreed upon by the parties for the purpose of determining what marginal difference in value between the properties must be covered by a money consideration. The defendants did not guarantee that their property was worth $4,500; nor did they, by their contract, agree to pay $4,500 in lieu of the property, should they refuse or fail to transfer the property to the plaintiff. The parties not having made such a contract, the court cannot establish such a one for them."

And the court, also, in the syllabus of that case, announced the rule:

"Where one party agrees to convey certain land to another for a tract of land and a money consideration, the fact that the parties have recited the value of their lands in the contract, as a basis for a determination of the marginal consideration to be paid in money by the second party, does not, of itself, amount to a contract by the second party to pay in money an amount equal to the value placed upon his land in case he fails to transfer the land as agreed."

In view of the rule announced in the case above referred to, under this contract in suit, the values fixed therein to the respective properties by its terms to be conveyed are simply estimates agreed upon by the parties for the purpose of determining what marginal differences between the properties must be covered by the notes and mortgages to be given as in said contract provided. The parties in said contract do not guarantee that their respective properties were worth the amounts or valuations affixed to each, nor

do they by their contract agree to pay such amounts in the event of default. The case here presented is merely to determine the amount of damages occasioned by defendants' failure to perform. If this contract be considered a contract of sale, the recovery of the parties is governed by the rule announced by this court in *Beck v. Staats*, 80 Neb. 482, which is:

"The measure of damages for the breach by the vendor of an executory contract for the conveyance of real estate, where the breach is caused either from the refusal or the inability of the vendor acting in good faith, is the difference between the value of the land at the time of the breach and the price he contracted to receive, and in addition thereto the vendee may recover the amount advanced upon the purchase price."

The equity conveyed in this view of the law becomes "the amount advanced upon the purchase price" by the plaintiffs, and to determine this amount it would be a mere question of determining the fair market value of the equity transferred. If the contract be deemed a contract of exchange, the actual recovery remains the same, viz., the value of the equity transferred plus the value of the bargain lost. In the present case the plaintiffs apparently ask nothing by the way of damages for loss of bargain, hence their recovery would be limited to the fair market value of the equity conveyed by them under the terms of the contract.

The defendant Pierson strenuously insists that he is released from all liability upon the cause of action set forth in plaintiffs' petition herein by reason of estoppel alleged to have been created in his favor by Mrs. Rea transferring an $8,000 note and mortgage, knowing at the time of the transfer that Pierson had named as a condition to her right to transfer the mortgage that she release him from liability in connection with the Nebraska-Iowa land deal. The facts in connection with this transaction, considered briefly, are as follows: Prior to November 24, 1920, defendant Pierson was the owner of the note for $8,000 and the real estate

mortgage securing the same executed by one Louis R. Hagenmeister and wife covering real estate in Garden county, Nebraska. On the date mentioned, pursuant to an arrangement entered into between Pierson and Mrs. Rea and one C. O. Jones, this note was indorsed by Pierson, and together with the mortgage securing the same was delivered to Jones as collateral security to notes aggregating $7,768 of Mrs. Rea, due 90 days thereafter, then owned by Jones. It appears that certain securities were at this time provided for the benefit of Pierson to indemnify him against loss growing out of this transaction. At all events, the transaction was wholly concluded, and by the agreements made contemporaneous therewith the rights and liabilities of all parties thereto were fixed and were made definite and certain. Later, when Mrs. Rea's obligation matured, of which the note and mortgage were collateral security, she sought further additional concessions concerning the use of the $8,000 note and mortgage. Pierson conditionally granted this request and forwarded the necessary instruments in writing to render this action effective. The condition he sought to impose was that Mrs. Rea should wholly release him from all liability upon the contract in suit in this case, and to that end execute and return to him a release in writing which he sent her with the other papers pertaining to the matter. This condition Mrs. Rea immediately refused to accept. All papers sent by Pierson to her were immediately returned to him without any action taken thereunder or thereby, and he was promptly notified by telegraph of Mrs. Rea's decision. It must be conceded that no step taken thereafter by Mrs. Rea in this matter was pursuant to, based upon, or in any manner recognizing any of the powers tendered by Pierson to her conditionally in the second transaction. In fact, the history of this second transaction evidences no more and no less than an abortive effort of the parties in interest to make a new contract, which effort was wholly fruitless and in which their minds never met. Nothing was done or accomplished which in any manner affected or altered the relations of the

parties as they had been fixed by the first agreement herein referred to.

Under the relations of the parties that existed prior to the negotiations last referred to, in the event of an unlawful conversion of the note and mortgage by Mrs. Rea, she would be liable to Pierson, it is true, but her liability would be fixed and determined by the application of the usual rule of measure of damages which the law provides for such cases. But while the proposition tendered by Pierson had thus been openly, promptly and unconditionally rejected by Mrs. Rea, she did make further use of the $8,000 note and mortgage, and Pierson now asserts that thereby she must be deemed to have consented to his release from liability and is now for this reason estopped to enforce the contract in the instant case. From the circumstances surrounding this transaction it is clear that there could be but two possible forms of estoppel involved, (a) estoppel by contract, (b) estoppel *in pais*. As we have already seen, the first transaction between the parties is the only one which ripened into a contract, and there is no claim of estoppel growing out of this first contract. It follows therefore that the estoppel claim must be deemed an estoppel *in pais*.

"An estoppel by matter *in pais* may be defined as an express or implied admission become indisputable by reason of the circumstance that the party claiming the benefit of it has, while acting in good faith and in accordance with the real or presumed assent of the other party, been induced by it to change his position. And the parties may have been equally innocent in effecting this change of position or they may not have been equally innocent." Bigelow, Estoppel (3d ed.) ch. 13, p. 387.

But in what manner, to what extent, or in what degree has Pierson been induced to change his position since the making of the first contract? His position is unchanged. He knows now, and he has always known, that Mrs. Rea has given neither "actual" nor "presumed" consent to the condition he sought to impose. It was, in fact, expressly

rejected by her. She has never taken, accepted, or received anything of benefit by, through, under, or because of any one of the several steps that made up the second transaction, so-called, of which the attempt to force a release by Pierson forms a part. In this connection the rule appears that:

"Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." *First Nat. Bank v. First Nat. Bank,* 111 Neb. 441.

Further, this court, in the case last cited, cites approvingly the following: "Before a person can sustain the plea of estoppel against another he must have relied upon and been injured by the facts pleaded." *Dent v. Smith,* 76 Kan. 381.

In no sense can it be said that defendant could have in any manner relied upon the performance by Mrs. Rea of the conditions he sought to impose when he was immediately advised by her that the conditions would not be accepted and would not be carried out or performed.

The above principles apply to "estoppel created by the acceptance of benefits," and in 21 C. J. 1207, sec. 208, cited by appellant to this point, appears the following language:

"In order to create an estoppel by the acceptance of benefits, it is essential that the party against whom the estoppel is claimed should have acted with knowledge of his rights; also that the party claiming the estoppel was without knowledge or means of knowledge of the facts on which he bases his claim of estoppel, that he was influenced by and relied on the conduct of the person sought to be estopped, and that he changed his position in reliance thereon to his injury."

It follows therefore that the plea of estoppel in the instant case cannot be sustained and the court did not err in over-

ruling the same. *Ohio & Colorado Smelting & Refining Co. v. Barr,* 58 Colo. 116; *Griffith v. Wright,* 6 Colo. 248.

The third question presented by the defendant is the alleged error of the district court in permitting Mary L. Short to intervene after the evidence had been in part taken and after the trial had commenced. Section 8546, Comp. St. 1922, provides: "An action does not abate * * * by the transfer of any interest therein during its pendency, if the cause of action survive or continue. * * * In case of any other transfer of interest, the action may be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action." Construing this section this court has said:

"In the event of a transfer of interest by a sale and assignment after the institution of a suit, the action may ordinarily be continued in the name of the original party." *McCague Savings Bank v. Croft,* 80 Neb. 702.

It is elementary under this section 8546, Comp. St. 1922, that, where the action is brought in the name of the original party in interest and the same is assigned, the same can be continued in the name of the original party in interest, or, under the Code section, by its terms, permit the assignee to be substituted as the party. It is also the rule that in a case of this kind the adverse party has no interest in the substitution or no right to insist upon substitution. This matter is left to the election of the transferee. 20 Standard Ency. of Procedure, 971, note 52 (a); *Kringle v. Rhomberg,* 120 Ia. 472; *Renfro v. Prior,* 25 Mo. App. 402; *Lowell v. Parkinson,* 4 Utah 64. Also in a case of partial assignment the assignor may maintain an action in his own name to recover the whole thereof. 5 C. J. 999, sec. 204. In such case a partial assignment is no defense to the assignor's suit to recover the whole sum. 5 C. J. 894, sec. 60, note 15 (a); *Thiel v. John Week Lumber Co.,* 137 Wis. 272. In the light of these authorities it is plain that in the instant case the court might well have refused intervention and rendered judgment for the plaintiff wholly uninfluenced by the fact that a partial assignment

of the cause of action had been made. Therefore, under the express language of the statute in question, it was wholly optional with the court either to permit the addition of the assignee as a plaintiff in the case or to have the cause continued as originally brought. In view of these facts it is plain that the addition of the intervener as a party to plaintiff in this case in no manner changed the issues to be determined, and therefore in no manner increased the burdens which the action imposed upon the defendants. Assuming then, but not deciding, that the form made use of, viz., a form of petition of intervention, may not have been justified by the statutes covering the same, and may not have disclosed proper diligence on the part of persons tendering the same, yet, the court having granted the same, it would follow that, if error was committed, it was error without prejudice, and therefore so far as this assignment is concerned the court finds that the district court committed no reversible error therein. *Parker v. Taylor,* 3 Neb. (Unof.) 318; *Alexander v. Overton,* 52 Neb. 283.

The last question presented by this appeal is: Does the evidence support the finding of value as made by the district court? After due consideration of all the evidence on this subject in the record, which consists of the unsupported statements of the plaintiff, Mrs. Rea, opposed to the evidence of three disinterested witnesses, and giving due consideration to the fact that Mrs. Rea's evidence was given in open court and in the presence of the trial judge, we are still of the opinion that the judgment of the trial court, finding and determining that allegation in the petition, that the value of the "interest in said lands then owned by plaintiffs was of a reasonable value of said agreed sum of $32,000," is not supported by the evidence.

As to defendant and appellant P. F. May, this cause was submitted upon motion of the appellees to dismiss his appeal and to affirm the judgment of the district court, which motion is supported by brief. Of the pendency of this motion no notice was given to either appellant. It is disclosed by the record that, though defendant May was named

as a party appellant at the time of the institution of the appeal in this court, he has filed no brief. Appellees' motion to dismiss the appeal of said P. F. May because of failure to file and serve briefs, as provided by rule of this court, must be sustained, and his appeal dismissed, but without prejudice to any rights of said defendant Pierson. *Anderson v. Griswold*, 87 Neb. 578.

The motion of said appellees therefore is sustained and the appeal of said P. F. May dismissed without prejudice to the rights of defendant Pierson. The judgment of the district court is, as to defendant Fred Pierson, reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

Note—See Exchange of Property, 23 C. J. secs. 35, 82—Estoppel, 21 C. J. sec. 130; 10 R. C. L. 697; 2 R. C. L. Supp. 1045; 4 R. C. L. Supp. 673.

CHARLES MAYER, APPELLANT, V. FRANK P. DWIGGINS ET AL., APPELLEES.

FILED DECEMBER 30, 1925. NO. 23330.

1. **Landlord and Tenant: ASSIGNMENT OF LEASE: EFFECT.** A lessee, during his occupancy of the demised premises, holds both by privity of estate and of contract. Assignment of the lease by the lessee divests him of this privity of estate and transfers it to his assigneee, who thereafter holds in privity of estate with the lessor.
2. ———: ———: ———. Privity of contract, however, is not transmitted to the purchaser of the leasehold by an assignment of the lease alone; for the express covenants of the lessee contained in the lease will remain, during the continuance of the term, obligatory upon the lessee. These obligations extend to breaches of covenant which have occurred after the assignment, and the lessee is not relieved therefrom by the mere acceptance of rent by the lessor from the person to whom such assignment has been made.
3. ———: ———: RIGHTS OF LESSOR. After an assignment of a lease, in absence of further contract, the lessor retains his right to enforce all the personal covenants of the lessee con-

tained in the lease against such lessee, wholly unmodified and unaffected by the fact that the assignment has been made, and his rights against such lessee under such covenants would be wholly unaffected by the fact that the said assignee had deliberately incapacitated himself to perform his lawful obligations imposed by his privity of estate with reference to the term assigned to him.

4. ———: ———: RELEASE OF LESSEE. Where, by the express terms of the lease, it is provided that the lessees are empowered to make an assignment of said lease in a manner therein set forth, and which assignment, thus made, it is stipulated, should be effective to forever release and discharge such lessees from all obligations arising and accruing under the conditions of said lease subsequent to the date of such assignment, and where, pursuant thereto, an assignment in writing is made and duly recorded and possession taken thereunder by the assignee, and who for more than 17 months continues the payments of rents and the full performance of all the conditions and obligations imposed by the terms of the lease, which payments are received and which performances are accepted by the lessor with knowledge of the facts, and where thereafter the lessor actively engaged in assisting the said assignee in endeavoring to secure a purchaser of the term thus held by him pursuant to the aforesaid assignment, *held,* that thereby the lessor waives any rights which he might otherwise have exercised to object to the failure of the assignment to conform to the conditions provided therefor in said lease, and such assignment must be deemed valid and effective to forever release and discharge the lessee from any and all obligations imposed by the terms of the original lease.

5. ———: TERMINATION OF LEASE. In view of the conflicting claims of the parties to this action as to whether the demised premises have been surrendered or abandoned by the assignee of the lease, yet where the evidence discloses that the landlord (lessor) immediately after the abandonment or surrender of the premises by the assignee of the lease promptly took possession thereof and shortly thereafter commenced an action to quiet his title against the provisions of the lease, such proceedings are wholly inconsistent with the continuation of the tenancy and operate as an acquiescence in the abandonment or as an acceptance of the surrender, as the case may be. In either event the lease is wholly terminated, the covenants thereof are at an end, and will support an action only for liabilities that were fixed at the time of the termination of the lease, but will not sustain demands that might have thereafter accrued had the lease not been determined.

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

Field, Ricketts & Ricketts, for appellant.

F. M. Tyrrell, Peterson & Devoe, T. S. Allen, F. B. Sidles, C. S. Wilson and *A. S. Johnston, contra.*

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

EBERLY, J.

On March 4, 1922, this action was commenced in the district court for Lancaster county, Nebraska, by Charles Mayer, plaintiff, against Frank P. Dwiggins and others, defendants. The amended petition upon which the case was tried sought (1) the annulment of a 99-year lease covering lots 14 and 15, in block 40, in the city of Lincoln, Nebraska; (2) prayed that the title to said lots be quieted; (3) and that a real estate mortgage executed by defendants Sandlovich and wife as surety for the lessees be foreclosed and the premises therein described sold, and out of the proceeds the plaintiff may be paid the sum of $20,000 with interest as liquidated damages occasioned by the failure of defendants to fulfil the terms of the aforesaid lease, and that plaintiff be given a personal judgment for that amount against Dwiggins and his codefendants. To this amended petition answers and cross-petitions were filed by the various defendants, to which pleadings the plaintiff replied. The district court adjudged the lease contract "annulled," and "held for naught," and that the title to said premises be quieted in plaintiff but determined that the pleadings and evidence in the case were insufficient to support a finding in favor of the plaintiff for either liquidated or actual damages and denied further relief. From the denial of the court of further relief, the plaintiff prosecutes an appeal to this court.

The facts out of which this litigation arose are as follows: On March 24, 1920, Charles Mayer leased to Frank

P. Dwiggins, and others, for the term of 99 years, lots 14 and 15, in block 40, in the original plat of the city of Lincoln, Nebraska. As evidencing the contract of the parties, in addition to the lease, a bond in the sum of $20,000 was signed by all of the defendants, and a mortgage was executed by Sandlovich and wife only "to take the place of a surety." The terms of the lease cover 18 typewritten pages, and, in addition to the required payment of rent, provided for the payment by the lessees of taxes, insurance, water rents, and repairs, and also contained the provision that on or before April 1, 1925, they (lessees) would commence to remove the building and other improvements now situated on the premises herein leased and replace the same at their own cost "with a modern fireproof building * * * which shall be completed not later than the first day of April, 1926, at a cost of not less than $75,000." Defendants entered into the property demised under the foregoing agreements evidenced by the three instruments in writing—the lease, bond, and mortgage. On June 14, 1920, the defendants assigned in writing all their rights in the property created by this lease to the American State Bank. This assignment recited that it was the purpose of the instrument "to divest the undersigned (lessees) of any interest or right or equity in the lease and to place and hold in the American State Bank all rights and privileges granted to the undersigned by the terms of said lease." It is to be remembered that the lease itself provided for the transfer of the rights of the lessees by assignment in writing and that the effect of such assignment would be to wholly divest the lessees of all liabilities created by the lease. However, the assignment executed by the lessees, above referred to, was not acknowledged or executed by the assignee. Neither did the assignee expressly accept the same nor assume the terms and conditions thereof in writing, as was required to be done by the terms of the lease. At or about the date of the assignment, the assignee, American State Bank, entered into possession of the property thereunder and thereafter promptly paid the rent and performed all the cove-

nants imposed upon the lessees by the terms of the lease until August 1, 1921. On July 16, 1921, the American State Bank was discovered to be insolvent. A receiver was thereupon appointed for the bank, who qualified as provided by law and who continued the full payment of the rents and the full performance of the terms of this lease until December 1, 1921. On December 3, 1921, demand was made in behalf of the plaintiff for all rents due and owing from all subtenants in possession of said premises and the same was delivered to him, and also that the rents and profits thereafter accruing be paid to him. In the month of December, 1921, pursuant to authorization of the court of competent jurisdiction, the bank receiver, Mr. Warner, in behalf of the insolvent bank, elected to repudiate and abandon the lease. In pursuance of such election he orally tendered the entire premises involved to the plaintiff. However, no assignment in writing or other instrument evidenced this fact. But plaintiff took full possession, and in August, 1922, leased the premises for a term of years as owner.

After reading the conflicting provisions to be found in the lease, the mortgage, and the bond, the writer of this opinion finds himself in full accord with the statement contained in plaintiff's brief to the effect that—"The language in which the three papers are written is uncertain, confused, and does not harmonize. It is difficult to determine with certainty whether the bond and mortgage were given to secure the performance of the covenants of the lease generally, or the covenant to erect and construct the new building alone, or the performance of all covenants up to and including that providing for the erection of the new building."

In view of these conflicting provisions contained in the three instruments now before us, it is thought that the question of construction presented necessitates the application of the following canons: (a) That, the evidence in the record indicating that the lease in question was prepared under the direction of the plaintiff, the maxim "that a

deed shall be taken most strongly against the grantor" is applicable; (b) that the special mention of one thing must be understood as excluding another; (c) that a surety is entitled to stand upon the strict terms of his contract and is bound only to these and in a manner pointed out in his obligation. True, even in the light of these rules, no decision which we might reach as to the conflicting clauses of these instruments before us is entirely satisfactory or entirely free from difficulty. But the more reasonable conclusion is that, properly construed, the bond and mortgage were given to secure the covenant to erect and construct the new building only.

In view of the conclusions arrived at on the subject of the real facts upon which this controversy is based, the following propositions of law become material: At common law a lessee, during his occupation, holds both by privity of estate and of contract. His privity of estate depends upon and is coexistent with the continuance of his term. By an assignment he divests himself of this privity of estate and transfers it to his assignee; it remains annexed to the estate, into whose possession soever the lands may pass, and the assignee holds in privity of estate with the original landlord. The privity of contract, however, is not transmitted to the purchaser by an assignment of the lease; for the express covenants of a lessee will, during the term, remain obligatory upon him and his personal representatives, even for breaches which have occurred after an assignment and acceptance of rent from the assignee by the lessor; so too a lessee, by assigning his rights and interests in the premises, does not thereby discharge himself of his express obligations. And it is also true that at common law a covenant for the payment of rent ran with the land, and that the assignee of the term is chargeable by reason of privity of estate with the payment of rent, but it is not his personal obligation, and at common law an assignee may always discharge himself from liability for subsequent breaches in respect to rent as well as to other covenants by assigning over, although it be done for the express pur-

pose of getting rid of his responsibility, and although the second assignee neither takes the property nor receives the lease, and this for the reason that such assignment destroys the privity of estate which is the only ground upon which the assignee was liable, and though the tenant's liability or his covenant to pay rent may subsist during the continuance of the lease, there is no personal confidence reposed in the assignee of the lessee. 2 Taylor, Landlord and Tenant (9th ed.) pp. 13-34; *Hogg v. Reynolds*, 61 Neb. 758.

Indeed, very respectable authorities sustain the proposition that after an assignment of a lease the lessor has two remedies, either of which may be prosecuted separately or both at the same time, one against the assignee during the time he is in possession of the demised premises under the assignment, for rent accruing during his possession, and the other against the lessees upon the personal covenants, from which, of course, the lessees by the mere assignment could not divest themselves. This statement would be subject to the qualification, however, that the lessor would be entitled to but one satisfaction. Therefore the right of action in favor of lessor and against lessees is wholly independent of the right of action in favor of the lessor against the assignee, and the prosecution of a cause of action against a lessee would be unaffected by the fact that the said lessee's assignee had deliberately incapacitated himself to perform his lawful obligation.

In the order of time, the first question arising in this transaction is the effect of the assignment to the American State Bank by the defendants Frank P. Dwiggins et al., on June 14, 1920, and which was duly recorded on June 17, 1920, in the office of the register of deeds in Lancaster county, Nebraska. By the terms of section 33 of the lease it was provided and the lessees were empowered to make an assignment of the lease in question which should be effective to forever release and discharge such lessees from any obligations arising and accruing under the conditions of said lease subsequent to the date of the assignment. This

the lessees evidently attempted to do. The assignment they executed for this purpose, however, was defective in that the assignee failed to join in the execution of such assignment, and the assignment did not in explicit words bind the assignee personally to the performance of the covenants of the lease. It may be conceded that this was a failure to fully comply with said section 33 of the lease. The bank, however, entered into unmolested possession of the premises pursuant to the lease thus assigned and so long as it was solvent continued to pay rent and complied with the covenants thereof. So did its receiver up to December, 1921. It may be conceded that the rule in this state is:

"Where a lease stipulates that the lessee shall pay the rent for a definite period upon the demised premises, the mere acceptance of the rent by the lessor from the assignee of the lease will not discharge the lessee, even though the lessor had knowledge of the assignment, and that the assignee had gone into possession." *Bouscaren v. Brown*, 40 Neb. 722.

But here we have some additional facts which certainly should be considered with all the other facts pertaining to this assignment; one fact being that the lessor made no objection to the assignment of the lease which might have been deemed void, but that he accorded full recognition to the assignment as valid. The evidence is uncontradicted that about December 1, 1921, the lessor by his agent went to Warner, the receiver, anxious to have Warner continue to hold possession of the leasehold under his assignment and carry out the provisions thereof. When this was found to be impossible, at the cost of the lessor the lessor's agent went to Omaha to assist in disposing of the rights thus held by Warner under and pursuant to the terms of the assignment. Conceding that the assignment was subject to attack if a seasonable attack had been made, the fact remains that no attack was made. It plainly appears that the lessor and his agents, with full knowledge of the facts, waived any defects in the assignment, and by the force and effect of lessor's acts the same was approved, and he should

not now be permitted to take a stand inconsistent with the attitude he took when he sought to secure the benefits which would have accrued to him by the full enforcement or recognition of the assignment of said lease as a valid subsisting instrument. It would follow that under the provisions of section 33 of the lease, in view of the waiver of plaintiff, the defendants have a full and complete defense to plaintiff's action; the language relieving the lessees from further liability, as set out in said section, being that the said lessees upon such assignment by them "shall be forever released and discharged from any obligation arising and accruing under the conditions of this lease subsequent to the date of such assignment."

The next contention in this transaction was that the legal force and effect of the negotiations by the plaintiff, Mayer, and Warner, as receiver of the American State Bank, operated as a technical surrender. It is to be noted that all the defendants allege that the assignee of the lessee surrendered the lease, etc., and that the lessor accepted the same and went into possession thereunder.

The plaintiff alleges that the defendant Warner, receiver, pursuant to proper authority, "abandoned the lease" on or about December 1, 1921, and the premises covered thereby, and the plaintiff went into possession because of such abandonment. It stands in the record however that on March 4, 1922, the plaintiff commenced this action, the object of which was to secure a decree annulling the provisions of the lease in question and quieting his title against its provisions to the lots therein described, based on the abandonment.

The surrender of the leased premises by the tenant extinguishes the relation of landlord and tenant and ordinarily releases the tenant from liability for rent accruing thereafter. Though it is true, "in order that the attempted surrender shall release the tenant from further payment of rent, it must be accepted by the landlord." 36 C. J. 338, sec. 1146.

On the other hand, it is also true that "A tenant who

abandons the occupancy of the demised premises before the expiration of his lease without the consent of his landlord or other legal justification does not thereby exonerate himself from the payment of the rent for the residue of the term. * * * If, however, the landlord reenters upon the demised premises and deals with them in a way wholly inconsistent with a continuation of the tenancy, he cannot recover rents accruing after he took possession, but his right to rent which has accrued will not be affected." 36 C. J. 340, sec. 1152.

"A surrender of a lease by operation of law may be effected by any agreement between the parties that the term shall be terminated, which is unequivocally acted upon by both." *Wheeler v. Walden,* 17 Neb. 122. See, also, *Buffalo County Nat. Bank v. Hanson,* 34 Neb. 455.

With the above outlined situation existing in the pleading, it may fairly be said that the evidence and undisputed facts disclose that, though there was no formal written instrument executed tendering and conveying the leasehold possessed by the receiver to the plaintiff, yet orally a full and complete tender was made and delivery followed pursuant thereto to the lessor who at least took possession of all the property covered by the lease as owner thereof. The lessor admits these facts, but insists that he did not accept a surrender and that no formal surrender was therefore completed, but in his pleadings he alleges an abandonment, and after the transaction occurred, whether it be called an abandonment acquiesced in or a surrender accepted, the lessor instituted the present action. When this was done there could be no further questioning as to the lessor's attitude, and in fact the entire transaction must now be judged in the light of the commencement of these proceedings. If it be deemed a tender of a surrender, then the commencement of this action is conclusive evidence of the acceptance of the surrender by the lessor herein. 35 C. J. 1091, sec. 277. If it be deemed an abandonment, then in like manner the commencement of the proceedings to cancel the lease and quiet his title against the cloud created

thereby is a sufficient acquiescence to the abandonment. *Ellis v. Swan,* 38 R. I. 534. In either case the lease is wholly terminated, the covenants are at an end, and will support actions only for liabilities that were fixed at the time of the termination of the lease, and will not sustain demands that might thereafter accrue had the lease not been terminated. 35 C. J. 1095, sec. 286. In arriving at this conclusion it must be further conceded: "That a lessee by assigning all his interest in the term to an assignee empowers the assignee, if he so desires, to surrender to the lessor all or any part of the demised premises. He gives to his assignee the powers which he might himself have exercised, and as he himself might have surrendered part of the premises, he authorizes his assignee to do so." *Baynton v. Morgan,* 22 Q. B. (Eng.) 74.

In view of this conclusion, it must be said that the proposition of anticipatory breach of covenant is not in this case, nor in any manner presented by the facts before us. Therefore the case does not call for a discussion of the decisions cited in plaintiff's brief on that subject. The action of the trial court being right in denying to the plaintiff further relief after quieting his title as prayed, the judgment of the district court should be and is

AFFIRMED.

Note—See 35 C. J. secs. 93, 94, 97, 274, 277, 286; 16 R. C. L. 844; 3 R. C. L. Supp. 604.

GEORGE E. CALNON, APPELLEE, V. FIDELITY-PHENIX FIRE INSURANCE COMPANY, APPELLANT.

FILED DECEMBER 30, 1925. No. 23370.

1. Insurance: VALUED POLICY: CHARACTER OF PROPERTY. Under section 7809, Comp. St. 1922, it is provided: "Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire, tornado or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assignee, the amount of the insurance written in such policy shall be taken conclusively

to be the true value of the porperty insured and the true amount of loss and measure of damages." A grain elevator approximately 60 feet in height, 29 feet in width, and 33⅓ feet in length, constructed of wood and metal, with a substantial rock-concrete foundation, erected by a tenant upon a railroad right of way under a lease for a definite term containing stipulations for the removal of the building by the tenant at the termination thereof, is to be deemed real estate and to be within the protection of the statute.

2. ———: MORTGAGING OF PROPERTY: EFFECT. Under the statute, the violation of a condition in a fire insurance policy by the mortgaging of the property insured does not invalidate the insurance, unless the breach of contract contributes to the loss. Comp. St. 1922, sec. 7787.

3. Trial: INTEREST. Where, from the verdict and the pleadings, as in this case, it appears that, if plaintiff is entitled to recover at all he is entitled to recover interest, the court should make the computation and cover the amount of interest in the judgment.

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

Kennedy, Holland, DeLacy & McLaughlin and *J. L. Cleary*, for appellant.

B. J. Cunningham, Prince & Prince and *A. S. Johnston, contra.*

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

EBERLY, J.

This is an action prosecuted by the plaintiff, Calnon, against the defendant Fidelity-Phenix Fire Insurance Company upon two policies of fire insurance aggregating $12,000 issued by defendant, covering an elevator building and fixtures therein owned by plaintiff. The amended petition upon which the action was tried is in usual form. The amended answer of the defendant thereto, so far as material to the consideration of this case, after admitting certain facts, alleges that the Union Pacific Railroad Company was the owner of the ground upon which said elevator

building was situated, and that said elevator building was on the Union Pacific right of way, having been constructed there under provisions of a lease with said railroad company requiring the plaintiff to remove said elevator building from the premises upon the termination of the term. The defendant further contends that said elevator building, because of said facts, was personal property, and at date of its destruction was of less than $3,600 value; that it was alleged to be incumbered in the sum of $10,000 by a mortgage "without the consent of the defendant;" and that said fire which caused its destruction originated through the "act, design, procurement, and criminal fault" of the plaintiff. To this amended answer the plaintiff replied. These issues were submitted to the jury, and a verdict was returned for the plaintiff in the sum of $12,000. A motion was thereupon made by plaintiff that interest in the sum of $730.34, being interest at 7 per cent. on $12,000 for the period commencing 60 days after due proof of loss had been furnished by the plaintiff to the defendant, be included in said judgment, and also a motion that a reasonable attorney's fee be taxed in favor of the plaintiff. The court denied the motion for interest, and sustained the motion for the taxing of an attorney's fee which was fixed by order of the court in the sum of $1,200. The defendant appeals from the entry of the judgment and the allowance of the attorney's fee. The plaintiff prosecutes a cross-appeal from the denial of the claimed interest.

The verdict of the jury for the purpose of this case conclusively determined the fact that the building destroyed was not destroyed by fire which originated through the act, design, procurement, or criminal fault on the part of the plaintiff.

The fundamental question that is presented by this case is whether the subject-matter of the insurance was "real property" or "personal property." The court below tried the case on the theory that the property insured was real property. There is no dispute about the physical facts. The building was of the common, small town type of grain

elevator, approximately 60 feet in height, 29 feet in width, and 33 4/10 feet in length, constructed of wood and metal, and resting upon a substantial "rock-concrete" foundation with a steel pit constructed thereunder. It was described in the insurance policies as the "electric power, shingle roof, cribbed frame elevator building, including foundations, * * * and all permanent fixtures belonging to and constituting a part of said building; * * * known as the Omaha elevator," and situated on the Union Pacific right of way 100 feet east of the Alda depot on the south side of the main-line tracks.

Section 7809, Comp. St. 1922, provides:

"Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire, tornado or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assignee, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages."

This act is remedial in character. To ascertain and enforce the intent of the legislature is admittedly a cardinal rule in the construction of the statutes. In determining the question of legislative intent, reference may be had to the occasion and necessity of the law, and the words of the act may be interpreted in the light of the general object of the statute. In other words, in construing the provision before us, the court will give consideration to its policy, to the mischief to be remedied, and give it such an interpretation as appears best calculated to advance its objects by not effectuating the design of the legislature. *Gran v. Houston*, 45 Neb. 813; *Buckmaster v. McElroy*, 20 Neb. 557; *McIntosh v. Johnson*, 51 Neb. 33. Indeed, in the *Buckmaster* case, above cited, Judge Cobb cited approvingly the case of *Dean and Chapter of St. Peter, York, v. Middleborough*, 2 Y. & J. (Eng.) * 196, to the effect that—"It is by no means unusual in construing a remedial statute to extend the enacting words beyond their natural import and effect,

in order to include cases within the same mischief." Or, as stated in 36 Cyc. 1175: "Where necessary to effectuate the legislative intent, remedial statutes will be construed to include cases within the reason, although outside the letter." See, also, *Traudt v. Hagerman*, 27 Ind. App. 150; *Rural Independent School District v. New Independent School District*, 120 Ia. 119; *Gaster v. Estate of Gaster*, 92 Neb. 6.

The statutory language which we are seeking to construe in the instant case is the term "any real property." Is its meaning (1) the thing corporeal, or (2) the estate or interest which one may have therein? The language employed in the policies in suit in express terms describe as the subject of insurance "the thing corporeal," the elevator. The defendant, however, cites 22 R. C. L. 65, sec. 40, which is as follows:

"Where a person erects buildings on leased premises under an agreement in the lease that he may remove them, or places machinery in buildings under a similar agreement, the buildings and machinery follow the term and partake of its character as a chattel real. A term for years while denominated a chattel real is not, when speaking with legal accuracy, considered real estate, but on the contrary it is personal property, whatever might be its duration in years, whether for one or twenty, or ninety-nine years."

A consideration of the above citations leads to the conclusion that the author has in mind rather the quantity and quality of the estate which is possessed in the land to the exclusion of the land itself. And it would seem that a house permanently fixed and immovable, though leased for 99 years, would be as much, if not more, within the policy of the Nebraska act than a freehold of which the same house formed a part, but which was limited for the life of the possessor, which in the natural order of things will terminate within a decade. It thus becomes necessary to determine the purpose of the words "any real property" used in the Nebraska statute in view of its remedial character and especially in view of the manifest policy therein indicated.

Were the legislators concerned only with the consideration of matters of title or of rights and interests attaching to or adhering to real estate which at common law amounted to at least an estate of freehold, or was it their intention by the term "real property" to designate something corporeal, tangible, and which might be inspected and which was the object of the senses? It is to be remembered in this connection that the act in question was called forth by methods followed by many of the insurance companies of Nebraska in carrying on their business. These methods were not apparently actuated by good faith, and practices were followed which were characterized by deception and deceit, and which resulted in the companies participating therein in securing premiums on the basis of a valuation fixed by the company itself, continued as long as possible, but which was promptly repudiated in the event of total loss. It seemed but equitable that where property was of a substantial nature, permanent, fixed, and immovable, which might be inspected and which was not subjected to sudden change in condition when insured for a consideration based upon a certain valuation, and after due inspection by the insurer, the amount which should be paid, in the event of total loss, is the amount stated in the policy. With respect to the reason for the passage of this law, Judge Sullivan of this court in the case of *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, said:

"What reason existed at the time of the adoption of the valued policy law to induce the legislature to segregate insurers of real estate from other litigants and to subject them to burdens from which other unsuccessful suitors are exempt? The reason is not far to seek. It is a matter of common knowledge that corporations engaged in the business of insuring real estate have been long accustomed to vexatiously and oppressively resisting payment of claims arising under their policies. The reports of this court bear abundant evidence to the fact that no other class of litigants has so persistently endeavored to escape liability from

their contract obligations by interposing technical and unconscionable defenses to actions instituted against them."

From the nature of the situation the attention of the legislators was directed primarily to things real, that is, such things as are permanent, fixed, and immovable, and therefore it is in the sense of the things corporeal in which the words "any real property" are to be considered as used in the statute. It is to be noted that the word "any" is employed in this connection. This word implies unlimited choice as to the particular unit, number, or quantity. It follows that the words "any real property" are perfectly ample and cover and include "real estate" or "real property" as may be defined by common law or by statute duly passed.

Section 5809, Comp. St. 1922, reads as follows: "The term 'real property,' or 'real estate' and 'lands,' when used in this act, except as otherwise provided, shall include * * * all buildings, fixtures, improvements, * * * and privileges pertaining thereto."

Section 5586, Comp. St. 1922, reads as follows: "The term 'real estate,' as used in this chapter, shall be construed as coextensive in meaning with 'lands, tenements and hereditaments,' and as embracing all chattels real, except leases for a term not exceeding one year."

The chapter referred to in the last section is the chapter on real property, governing definitions, conveyances, occupying claimants, actions to quiet title, escheats, abstracters, Torrens system, and miscellaneous provisions. These provisions construed with the term "any real estate" as set forth in the valued policy act plainly indicate that under the law of Nebraska the elevator in controversy in this suit must be held to be real property, for it is plainly within the express words of the act itself. It is a remedial statute, and the construction given is demanded by the policy of the act, as well as by the mischief sought to be remedied. It is the only construction which can be given it which effectuates the design of the legislature. It is not even necessary in so doing that the words of this

statute be extended beyond their natural import and effect to include this case. It is plainly within the reason of the legislation involved. This conclusion is not without support of authority. In the case of *Orient Ins. Co. v. Parlin-Orendorff Co.*, 14 Tex. Civ. App. 512, the court, speaking of a warehouse similarly situated to the one here in litigation, say in part:

"But it is insisted that here the house was personal property, and is excluded by the terms of the statute. Personal, in its general sense, means simply movable, transitory; personal property, that which may be carried about with the person. It has reference to the real character of the property, and not to the title by which it is held. In this sense, a dwelling-house is not embraced within the meaning of the term personal property. To give the statutory term its general signification, the object of the statute will be accomplished; to give its technical legal sense, the evil intended to be remedied will in part still prevail, and without any good reason to support it. We are of opinion that the statute should be construed to embrace houses, without reference to the question of the fee simple title to the land."

True, appellant cites in support of his position the cases of *Sharp v. Niagara Fire Ins. Co.*, 164 Mo. App. 475, and *Millis v. Scottish Union & Nat. Ins. Co.*, 95 Mo. App. 211. It is to be observed that the cases cited are from the intermediate court of appeals of Missouri, and the decisions are not in accord with the manifest spirit of the enactment under consideration in this case.

The defendant, as further ground for reversal, insists that because of a certain unfinished transaction, having in view the ultimate execution of a chattel mortgage by the assured to the American State Bank or its receiver, to cover the property in question, the same must be deemed to have been mortgaged to secure the payment of the sum of $10,000 and that thereby the insurance was invalidated. He cites *Madsen v. Farmers & Merchants Ins. Co.*, 87 Neb. 107, as sustaining his contention. In the case cited by de-

fendant the policy in suit was issued October 15, 1907, the loss occurred December 1, 1907. It is to be noted, however, that in 1913 the legislature adopted section 3187, Rev. St. 1913, which now appears as section 7787, Comp. St. 1922. This legislative act modified the rule announced in the decision of this court in *Madsen v. Farmers & Merchants Ins. Co., supra,* and in construing this legislation in the case of *Security State Bank v. Aetna Ins. Co.,* 106 Neb. 126, this court announced the rule to be:

"Under the statutes of Nebraska, the violation of a condition in a fire insurance policy by the mortgaging of insured chattels does not invalidate the insurance, unless the breach of contract contributes to the loss. Rev. St. 1913, sec. 3187."

Assuming, but not deciding, that the effect of the transaction referred to by defendant was to create a chattel mortgage, it is not alleged in defendant's amended answer that the breach of contract on the part of the assured in any manner contributed to the loss, nor is there any evidence in the record, especially in view of the verdict of the jury, which would in any manner sustain such an allegation, had it been made. It therefore follows that this objection cannot be sustained.

The determination that the property in suit was, under the provisions of the valued policy law of Nebraska, real estate sustains plaintiff's right to have a reasonable attorney's fee taxed for his benefit. As to the amount of the attorney's fee allowed, the transcript discloses that on January 5, 1923, hearing was had on motion and evidence taken on question of attorney's fee. This evidence is not preserved in the bill of exceptions. This omission would of itself necessarily preclude a review by this court of the question of the reasonableness of the amount allowed. It appears, however, that it does not exceed 10 per cent. of the total recovery, exclusive of interest. Such an allowance, in view of the facts in this record, is not deemed excessive.

The plaintiff presents by a cross-appeal the refusal of the district court to amend its judgment entered in this case by incorporating therein the additional sum of $730.34, the same being interest due on the $12,000 recovered from January 10, 1922, until the date of the rendition of the verdict. In this connection it is to be remembered that the judgment sought to be corrected was entered November 23, 1922, the same being one of the days of the regular November term of court. On December 21, 1922, within said November term, the plaintiff filed a motion "to include interest in the judgment" amounting to $730.34. This motion was denied on January 6, 1923 (but still within the November term). To reverse this order the plaintiff prosecutes his cross-appeal. It may be said that under the facts disclosed by the record the plaintiff was, by law, entitled to the sum of $12,000, with interest from January 10, 1922, to November 23, 1922. *Peterson v. Mannix,* 2 Neb. (Unof.) 795; *Estate of Bennett v. Taylor,* 4 Neb. (Unof.) 800. Upon presentation of the motion to include interest, the court was empowered to do either one of two things: (a) Amend the verdict by adding interest and including it in the amount of the judgment rendered thereon; or (b) make the computation and cover the amount of interest in the judgment without any amendment to the verdict whatsoever. The latter seems to be indicated by this court as proper practice in such cases. *Wiruth v. Lashmett,* 85 Neb. 286; *Minot v. City of Boston,* 201 Mass. 10, 25 L. R. A. n. s. 311, 314, and note; *McAfee v. Dix,* 91 N. Y. Supp. 464; *Marsh v. Kendall,* 65 Kan. 48; *Jackson v. City of Brockton,* 182 Mass. 26; *Fletcher Bros. v. Nelson,* 6 N. Dak. 94. It follows therefore that the district court erred in overruling the application of the plaintiff for the inclusion of said sum of $730.34 in the judgment rendered in this case.

For the reasons stated the judgment entered in this cause in favor of the plaintiff for the sum of $12,000 and attorney's fees in the sum of $1,200 is affirmed subject to be corrected by the addition of $730.34 interest, and the

judgment of the district court overruling application of plaintiff for the inclusion of said sum of $730.34 as interest is reversed and the cause remanded to the district court for further proceedings in compliance with this opinion.

AFFIRMED IN PART, AND REVERSED IN PART.

Note—See Fire Insurance, 26 C. J. secs. 307, 453.

ALBERT SOULEK, APPELLANT, V. MICHAEL STIEFVATER ET AL., APPELLEES.

FILED DECEMBER 31, 1925. No. 23514.

Eminent Domain: HIGHWAYS: DAMAGES. Land in this state to which a patent has been issued under 25 U. S. St. at Large, ch. 405, sec. 21, p. 896, falls within the general rule as to damages when a public road is opened across it, and before opening the road for public travel, just compensation must be made, or provided to be made, to the owner for the damages done.

APPEAL from the district court for Knox county. WILLIAM V. ALLEN, JUDGE. *Reversed.*

M. F. Harrington and *J. F. Green*, for appellant.

W. A. Meserve, contra.

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

MORRISSEY, C. J.

This action was instituted in the district court for Knox county by plaintiff to enjoin defendants, the township officers of Raymond township, and Stewart M. Armstrong, a private citizen, from trespassing upon the real estate described in the petition, and opening a road along the section line traversing the real estate described.

The petition alleges that for more than 13 years last past plaintiff was the owner in fee simple of the property de-

scribed in his petition; that the land was inclosed with a fence and had been improved by the planting of trees and the cultivation of the soil; that defendants in attempting to open a road along the section line had cut and destroyed plaintiff's fence; that plaintiff had not been paid any damages for the opening of the road, nor had any provision been made by the board of supervisors of Knox county for the payment of damages.

The court denied plaintiff's prayer for a permanent injunction and dismissed his petition. Plaintiff has appealed.

Plaintiff states the question presented as follows:

"The principal question in this case is whether or not a section-line road can be opened without either the payment of damages or a provision being made therefor by the county board, neither of which was done in this case."

Defendants, in their brief, state the issue in the following form:

"The principal question involved was whether or not said section line was a public road. No disputed question of fact is involved."

In January, 1907, the United States government issued a patent in fee simple to one Fannie Barker, a Ponca Indian. March 20, 1909, Fannie Barker and her husband conveyed the premises by warranty deed to plaintiff, who from that date until the bringing of this suit had been in the quiet and undisputed possession thereof. The patent to Mrs. Barker was issued under the act of congress of March 2, 1889, 25 U. S. St. at Large, ch. 405, sec. 21, p. 888. *Inter alia,* the act provides:

"There shall be reserved public highways four rods wide around every section of land allotted, or opened to settlement by this act, the section lines being the center of said highways; but no deduction shall be made in the amount to be paid for each quarter-section of land by reason of such reservation. But if the said highway shall be vacated by any competent authority the title to the respective strips shall inure to the then owner of the tract of which it formed

a part by the original survey." 25 U. S. St. at Large, ch. 405, sec. 21, p. 897.

Defendants plead the foregoing portion of the statute and say that it constituted "a dedication or grant of a strip four rods wide on the section line in question for a public road;" and cite in support thereof the holding of this court in *State v. Raymond Township,* 100 Neb. 788.

In 1895 the county board of Knox county directed the county surveyor to survey land for a road along the strip now in question, and, after the survey was made and recorded in the proper plat book of the county, an order was entered declaring the same to be a public road, No. 319, but no step was taken looking to the occupancy of the strip and it has neither been worked by the township officers nor traveled by the public.

Prior to the bringing of this action, plaintiff joined with other citizens in a petition to the county board praying that the road be vacated. This petition was denied by the county board, and neither plaintiff nor any other person prosecuted an appeal from the ruling. Because of the statute quoted and the facts recited, defendants assert that the strip of ground in question became, and is, a public road. However, the ultimate determination of the case does not rest alone on the finding that the strip of ground has been, either by operation of law or the acts of the several parties, set aside as a public road. The ultimate question is: Are the officers of Raymond township free to go upon this strip of ground and open it as a road for public travel without first having paid, or made provision to pay, plaintiff for the damages he may sustain by their acts?

This is the only point presented by plaintiff in his brief, and we will assume that all other questions are waived, and that everything requisite, with the exception of payment of damage, or provision for making payment, has been done. Under the construction given in *State v. Raymond Township,* 100 Neb. 788, to the federal statute pleaded, it does

not change the rule which has long prevailed in this state, viz.:

"Private property in Nebraska cannot be taken or damaged for public use without just compensation therefor, and this rule applies to public authorities exercising the right of eminent domain in establishing and opening public highways." *Johnson v. Peterson*, 85 Neb. 83; *Weinel v. Box Butte County*, 108 Neb. 293.

The judgment of the district court is reversed and the cause remanded, with directions to enter a judgment as prayed in plaintiff's petition restraining defendants from committing the acts threatened until provision is made for the payment, according to law, for any damage plaintiff may sustain by the opening of the road.

REVERSED.

WILLIAM J. LANGFORD V. STATE OF NEBRASKA.

FILED DECEMBER 31, 1925. No. 24655.

Criminal Law: JURISDICTION. Where one charged in a complaint, filed before a magistrate, with an offense triable only in the district court waives a preliminary hearing and is held for appearance before the district court, that court has no jurisdiction to try him for the offense charged, or to pronounce sentence on a verdict of guilty returned by a jury, unless an information signed by a proper prosecuting officer has been filed in that court, or an indictment by a grand jury has been returned against him.

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

Allen G. Fisher and *Samuel O'Brien*, for plaintiff in error.

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

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

MORRISSEY, C. J.

Defendant, William J. Langford, prosecutes error from a judgment of conviction for an alleged violation of section 9588, Comp. St. 1922.

Defendant brought suit for divorce against his wife, Katie J. Langford, in the district court for Dawes county. The court entered a judgment whereby Mr. Langford was granted a divorce, but, among other things, the decree provided that Mrs. Langford have the care and custody of their minor child, until the further order of the court, and it required Mr. Langford to pay the sum of $10 a month, until the further order of the court, for the support of the child. The decree was entered November 19, 1917.

October 18, 1922, the divorced wife filed an affidavit, or complaint, in the county court of Dawes county, in which she charged that defendant had failed, without good cause, to pay the instalment due under the decree of court which fell due January 1, 1922. Upon the filing of this complaint, a warrant was issued out of the county court, and on October 23, 1922, a return was made by the sheriff showing that he then had defendant before the court. Defendant waived a preliminary hearing and was held for appearance before the district court on the first day of its next regular term. The county judge thereupon prepared the usual transcript, which in due time was delivered to the clerk of the district court.

Apparently defendant's counsel expected the county attorney to file an information upon the convening of court, for he filed in the district court a paper entitled: "Plea in Abatement of Information." In this paper a number of objections to the proceeding were set up. Among others, it was alleged that the county attorney and his deputy were attorneys for Katie J. Langford in the divorce suit; that they had a financial interest in that litigation, and in this prosecution, and that, because of such financial interest, each was disqualified to file an information in this proceeding. To this so-called plea in abatement, the county attorney filed a reply. On the issues thus made up, there

was a trial to the court, who denied defendant's plea in abatement.

Although the court had, in effect, ruled that the county attorney was not disqualified to file an information, no information was filed. A plea of not guilty was entered and the trial proceeded.

In the absence of any complaint or information filed by the county attorney, or an indictment returned by the grand jury, can the conviction be sustained?

Section 10087, Comp. St. 1922, reads:

"All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant," etc.

"Where by the Constitution or by statute an information is required, the official information of the prosecuting attorney must be filed." 31 C. J. 638, sec. 152.

The quoted section of the statute was wholly overlooked, notwithstanding its language is mandatory. The failure to comply therewith constituted a jurisdictional defect. *Cubbison v. Beemer,* 81 Neb. 824; *In re Vogland,* 48 Neb. 37; *Lower v. State,* 106 Neb. 666; *Poulsom v. State,* 113 Neb. 767.

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

REVERSED.

DEAN, J., dissenting.

This dissent is respectfully submitted because the record seems fairly to show that while the case was being tried a complaint was on file in the office of the clerk of the district court. In the so-called "Plea in Abatement of Information," it is not alleged that no complaint was on file in the district court. It is elementary that such plea must specifically point out the errors complained of, otherwise they are waived. *Baldwin v. State,* 12 Neb. 61. Defendant was arraigned and pleaded "not guilty." The jury returned a verdict of guilty. Defendant waived all defects which might be excepted to by a plea in abatement by pleading the general issue. Comp. St. 1922, sec. 10113. These cita-

tions are in point: *Korth v. State,* 46 Neb. 631; *Trimble v. State,* 61 Neb. 604; *Reinoehl v. State,* 62 Neb. 619; *Ingraham v. State,* 82 Neb. 553; *Huette v. State,* 87 Neb. 798. See, also, *State v. Carver,* 49 Me. 588; *State v. Mockus,* 120 Me. 84, 14 A. L. R. 871; 14 R. C. L. 208, 209, sec. 52. The issues raised by the plea in abatement were tried by the court and denied. Every presumption is that the proceedings of the court, being a court of record, were regular and cannot be impeached except by the best evidence obtainable. 15 R. C. L. 875, sec. 853. The state has presented a meritorious case. Clearly defendant, under the law, barring technicalities, should be concluded by the facts which are disclosed by the record.

WILLIAM HORNER ET AL., APPELLANTS, V. G. D. EELLS ET AL., APPELLEES.

FILED DECEMBER 31, 1925. No. 24914.

Eminent Domain: HIGHWAYS: DAMAGES: RELIEF IN EQUITY. Where, in proceedings to establish and open a public road, appraisers, appointed under section 2581, Comp. St. 1922, to view the ground and report upon the amount of damages sustained by claimants, fail to perform the service enjoined according to the provisions of that section, and the county clerk fails to give notice to claimants whose claims are disallowed, in whole or in part, according to the provisions of section 865, Comp. St. 1922, and claimants are thereby deprived of an opportunity to appeal from the action of the county board, a court of equity may grant claimants suitable relief.

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

Halligan, Beatty & Halligan, for appellants.

Wells C. Jones, contra.

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

MORRISSEY, C. J.

Plaintiffs brought this action in the district court for Lincoln county to enjoin defendants, who are county commissioners of that county, from opening a road through plaintiffs' land. The court granted plaintiffs only partial relief, and they have appealed.

A petition in the usual form, praying that the road involved in this suit be opened, was filed with the county clerk; proper notice was given, and the board adopted a resolution granting the prayer of the petition.

Each plaintiff filed a claim for the damages which he might suffer because of the opening of the road. The county clerk, in compliance with the statute, appointed "three suitable and disinterested electors of the county as appraisers."

Section 2581, Comp. St. 1922, provides that such appraisers shall determine the amount of damage to which the claimant is entitled and file their report in the office of the county clerk within 30 days after the day of their appointment.

The appraisers were appointed November 21, 1921, the day fixed in the notice as the last day upon which claims for damages might be filed, but the appraisers made no report to the county clerk until long after the expiration of the 30 days fixed by statute. No action was taken by the county board upon this report until May 8, 1922, when, without the knowledge of any of the plaintiffs, the county board took up for consideration the claims for damages filed by plaintiffs, and the report made by the appraisers, allowed the claims in part and disallowed the claims in part, and awarded plaintiffs damages in amounts substantially less than the amounts allowed by the appraisers.

May 29, more than 20 days after the action of the county board upon the claims, the county clerk mailed notices to the respective landowners of the action of the county board.

The court found that there was no affirmative showing that notice of the disallowance of the various claims was not mailed within 5 days after the action of the board, and

further found, as a matter of law, that the giving of such notice was not required.

On the evidence we reach a different conclusion. Plaintiffs' exhibit O, being one of the original notices mailed by the county clerk, shows upon its face that it was not written until May 29, 1922, and there is nothing in the record to indicate that any earlier notice had been sent out informing plaintiffs of the action of the county board upon their claims.

We are persuaded that the trial court's conclusion of law as to the necessity for the mailing of notices may be due to a misleading foot-note to section 865, Comp. St. 1922, which represents the case of *Richardson County v. Miles*, 14 Neb. 311, as holding that a claim for damages arising out of the location of a road is not such a claim as falls within the provisions of section 865, *supra*, which reads in part, as follows:

"Upon the disallowance of any claim, it shall be the duty of the county clerk to notify the claimant, his agent or attorney, in writing, of the fact, within five days after such disallowance. Notice mailed within said time shall be deemed sufficient."

It is true that in the body of the opinion it is intimated, by way of *dicta*, that such claims are not within the contemplation of this section of the statute, but a careful reading of the opinion shows that such is not the holding of the court. In that case a claimant had failed to comply with a provision of the statute in regard to perfecting his appeal from an order of the county board, and the necessity of such compliance was the real matter before the court. In the instant case, the officers of Lincoln county failed to comply with the provisions of section 2581, Comp. St. 1922, requiring the appraisers to make their return within 30 days from the date of their appointment; and failed to comply with the provision of section 865, Comp. St. 1922, requiring the giving of notice to claimants of the action of the county board. Because of the noncompliance with the statute by the county officers, plaintiffs were denied

their statutory rights, and are entitled to the relief prayed. *Conant's Appeal,* 102 Me. 477; *Ruhland v. Supervisors of Hazel Green,* 55 Wis. 664; *Crawford v. City of Bridgeport,* 92 Conn. 431.

The judgment of the district court is reversed and the cause remanded, with directions to enter a judgment as prayed in plaintiffs' petition, but without prejudice to any subsequent proceeding, instituted and conducted according to law, to establish and open a road over the property involved in this proceeding.

REVERSED.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, V. STATE BANK OF GERING.

NATIONAL SURETY COMPANY OF NEW YORK, CLAIMANT, APPELLANT, V. STATE BANK OF GERING ET AL., APPELLEES.

FILED DECEMBER 31, 1925. NO. 24430.

1. **Banks and Banking:** GUARANTY FUND: LIABILITY. "Where a county treasurer deposits public funds in a state bank in excess of 50 per cent. of the paid-up capital stock of said bank, the entire deposit is within the protection of the depositors' guaranty fund." *State v. Peoples State Bank,* 111 Neb. 136.
2. ———: ———: RIGHTS OF SURETY. Where a surety bond is given by a state bank to a county to secure the return to the county treasurer of money deposited by the latter in excess of 50 per cent. of the capital of said bank, and where such bank fails and a receiver is appointed to wind up its affairs, and where the surety, on demand of the county treasurer, pays to the latter the amount of liability on the bond and takes from the county treasurer an assignment of the rights and remedies of the treasurer, to the extent of the amount paid by the surety, the latter is entitled in a proper proceeding to have the amount paid allowed as a preferred claim against the bank and paid out of the guaranty fund.

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

Honnold & Clark and *J. M. Fitzgerald,* for appellant.

C. M. Skiles and *Mothersead & York, contra.*

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

DAY, J.

The State Bank of Gering, located at Gering, Nebraska, became insolvent and closed its doors September 28, 1922. Thereafter in a proper proceeding a receiver was duly appointed to take charge of the assets of the bank and to wind up its affairs. During the course of the receivership the National Surety Company of New York filed a claim with the receiver for $10,764.02 and asked that it be allowed as a preferential claim and paid out of the guaranty fund. The receiver objected to the claim being allowed as a preferred claim. At the conclusion of the testimony the trial court refused the claim as a preferred claim, but allowed it as a general claim. From this judgment the claimant has appealed.

At the time the bank failed P. M. Schmidt, the county treasurer of Scotts Bluff county, had on deposit in the bank, in his official capacity, $49,505.02.

It appeared that on June 8, 1921, the State Bank of Gering, as principal, and the National Surety Company of New York, as surety, executed a bond in favor of the county of Scotts Bluff in the sum of $10,000. Generally speaking, the provisions of the bond were to indemnify the county for money deposited in the bank by the county treasurer in excess of 50 per cent. of the paid-up capital of the bank; that the bank would pay 2 per cent. interest on the amount, based on the average daily balances, and would pay the entire sum upon the written demand of the county treasurer.

At the time of the failure of the bank, and during the term of the bond, the county treasurer had on deposit in the bank $49,505.02 of public money belonging to the county, of said sum $33,255.06 was money in excess of 50 per cent. of the capital stock of the bank and was money protected by the bond to the extent of the amount of the bond.

Schmidt, as county treasurer, filed a claim with the receiver for $49,505.02 and asked that it be allowed as a

preferred claim and paid out of the guaranty fund. On March 19, 1923, the court allowed the county treasurer $16,250 as a preferred claim, the same being 50 per cent. of the paid-up capital and surplus of the bank. It was evidently the theory of the court that the amount of deposits which the county treasurer could legally make, and which would be protected by the guaranty fund, was limited to 50 per cent. of the capital stock and surplus of the bank. As to the balance the court withheld its judgment, but later refused to allow the same as a preferred claim.

On February 5, 1924, the county treasurer made demand upon the surety for the amount for which it was liable on the bond, to wit, $10,764.02, which sum the surety then paid to the county treasurer. Thereupon the county treasurer delivered to the surety a written assignment, whereby he sold, assigned and transferred to the surety the sum of $10,764.02 on deposit in the bank and thereby subrogated the claimant to all its rights and remedies against the bank with respect to said sum. The claim of the surety company is based on the assignment, as well as upon the equitable doctrine of subrogation.

It is first urged by the receiver that the amount of the deposit in excess of 50 per cent. of the capital stock of the bank is not protected by the guaranty fund, and the court having allowed the claim of the treasurer up to that amount, no further sum could be legally allowed as a claim against the guaranty fund. Under the decisions of this court this position is no longer tenable. The same proposition was urged in *State v. Peoples State Bank,* 111 Neb. 126, and in an opinion prepared by the writer and adopted by a divided court it was held:

"Where a county treasurer, in violation of section 6193, Comp. St. 1922, deposits county funds in a state bank, in excess of 50 per cent. of the capital stock of such bank, the depositors' guaranty fund is not liable for such excess."

In that case a rehearing was granted, and in an opinion adopted by a divided court (111 Neb. 136) the former opinion was vacated and set aside, and it was held:

"Where a county treasurer deposits public funds in a state bank in excess of 50 per cent. of the paid-up capital stock of said bank, the entire deposit is within the protection of the depositors' guaranty fund."

We think this last announcement must be regarded as the settled rule in this state. Under this rule the entire sum deposited by the treasurer was under the protection of the guaranty fund. The treasurer would have been within his rights in demanding and receiving the entire sum from the guaranty fund. Instead of doing this he demanded and received from the surety company $10,764.02, which he claimed was due under the terms of the bond, and in return assigned to the claimant all his rights and remedies against the bank with respect to said sum of $10,764.02 and released the surety from further liability.

It is not clear how the sum of $10,764.02 was arrived at, but, as we view it, it is immaterial. The treasurer, as well as the county, had the right to sell their claim or any part of it to any person who was willing to buy. By the transaction the claimant became the assignee *pro tanto* of the entire claim of the treasurer and the county.

Considerable argument is made on the proposition as to whether the surety is subrogated to the rights of the obligee by paying the bond. Inasmuch as the claimant is the owner of the claim by an assignment of the interest of the treasurer and the county, to the extent of $10,764.02, the question of equitable subrogation may be immaterial. It may not be out of place, however, to say that in a recent case we held that a surety on a bond given by a state bank to secure a deposit is subrogated to the rights of the depositor of such money when he has paid the amount due on such deposit. *State v. Kilgore State Bank,* 112 Neb. 856. In that case it was also said that a paid surety is as much entitled to subrogation as an unpaid surety, unless some equity intervenes. The decisions to which reference has been made completely answer the objections of the receiver to the allowance of the claim.

In fairness to the trial court, as well as to the counsel

for the receiver, it may be said that the decisions of this court which are controlling in this case were not published at the time the claim was disallowed by the trial court.

From what has been said it would seem to follow that the claimant as assignee of the treasurer and the county was entitled to have his claim of $10,764.02 allowed as a charge upon the guaranty fund.

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

REVERSED.

Note—See 7 C. J. sec. 15 (Ann.).

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, V. FARMERS & MERCHANTS BANK OF MORRILL.
NATIONAL SURETY COMPANY OF NEW YORK, APPELLANT, V. FARMERS & MERCHANTS BANK OF MORRILL ET AL., APPELLEES.

FILED DECEMBER 31, 1925. NO. 24429.

Case Followed. The principles of law applicable in this case are announced in *State v. State Bank of Gering*, *ante*, p. 213, and will not be reiterated.

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

Honnold & Clark and *J. M. Fitzgerald*, for appellant.

C. M. Skiles and *Mothersead & York, contra.*

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

DAY, J.

In the receivership of the Farmers & Merchants Bank of Morrill, Nebraska, the National Surety Company of New York filed its claim and asked that it be allowed as a preferred claim and paid out of the depositors' guaranty fund.

The trial court refused to allow the claim as one payable out of the guaranty fund, but allowed it with some deduction as a general claim against the bank. From this judgment the claimant appeals.

The facts are not in dispute. The record shows that on June 15, 1921, the Farmers & Merchants Bank of Morrill, as principal, and the National Surety Company of New York, as surety, executed and delivered to the county of Scotts Bluff a bond in the sum of $10,000. Generally speaking, the provisions of the bond were to indemnify the county against the loss of money deposited in the bank by the county treasurer in excess of 50 per cent. of the paid-up capital of the bank; that the bank would pay interest at 2 per cent. on the amount of the deposits, based on the average daily deposits, and would repay the entire sum deposited upon written demand of the county treasurer.

During the term of the bond, and on August 16, 1922, the bank failed and a receiver was duly appointed to wind up its affairs. At the time of the failure of the bank, the treasurer of Scotts Bluff county had on deposit in the bank $14,722.26 belonging to the county, of which some $1,097.26 was in excess of 50 per cent. of the capital of the bank and was money protected by the bond. The county treasurer filed a claim with the receiver for the entire amount on deposit and asked that the claim be allowed as a preferred claim and paid out of the guaranty fund. On March 19, 1923, the court allowed the claim to the extent of $13,625 as a preferred claim and ordered it paid out of the guaranty fund. As to the balance, $1,097.26, the court deferred judgment till further date. Thereafter on February 5, 1924, the county treasurer, in writing, demanded of the surety company the amount for which it was liable on the bond, and thereupon the surety company paid to the treasurer $1,378.90 and received from the treasurer an assignment whereby he sold and assigned to the surety company the sum of $1,378.90 on deposit in the bank and subrogated the surety company to his rights and remedies against the bank with respect to said sum.

Thereupon the surety company filed its claim with the receiver for $1,378.90, based upon the assignment, and asked that it be allowed as a preferred claim and paid out of the guaranty fund. The trial court denied the claim as a preferred claim payable out of the guaranty fund, but allowed the same as a general claim to the extent of $1,097.26.

It will be noted that after the allowance of the claim, filed by the county treasurer to the extent of $13,625, there remained in the bank on deposit $1,097.26 which the county treasurer was entitled to have paid out of the guaranty fund. Instead of collecting it himself, he assigned his rights to this fund to the surety company. He could not assign a greater amount than was owing to him by the bank. The guaranty fund was not liable for more than was on deposit at the time the bank failed.

The facts above outlined are in all essential particulars the same as those in *State v. State Bank of Gering, ante*, p. 213, and the principles of law announced in that case are decisive of the questions presented in the case now before us. It is unnecessary to repeat the legal propositions involved, but reference is made to that case.

From what has been said it follows that the claimant is entitled to have its claim allowed for the sum of $1,097.26 as a preferred claim, and that it be paid out of the guaranty fund.

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

REVERSED.

REUBEN H. LAF FERRY, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 31, 1925. No. 23533.

1. **Master and Servant: NEGLIGENCE.** The mere fact that a stack of freight fell, resulting in an injury to an employee, is not of itself evidence of negligence of the employer or coemployee in a case, such as this, where it is necessary to allege and prove negligence.

2. ———: ASSUMPTION OF RISK. Where it is an employee's duty, as in this case, to store and pack freight in stacks, and restore such freight as may become disarranged in the course of the business, the risk of injuries arising from such placement and replacement is one of the risks assumed by him as such employee.
3. ———: ———. Where, as in this case, there is no evidence of negligence on the part of a common carrier engaged in interstate commerce, its officers, agents, or employees, nor of a breach of any regulatory statute enacted for the safety of its employees, the rule of assumption of risk of a coemployee's negligence, either at common law or as modified by the federal employers' liability act, does not apply.
4. **Record** examined, and *held* without evidence to support the judgment.

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

Byron Clark, Jesse L. Root, P. E. Romig, J. W. Weingarten and *C. W. Krohl,* for appellant.

Allen G. Fisher and *M. F. Harrington, contra.*

Heard before DAY, GOOD, THOMPSON and EBERLY, JJ.

THOMPSON, J.

Reuben H. Laf Ferry, appellee, hereinafter called plaintiff, brought this action in the district court for Dawes county against the Chicago, Burlington & Quincy Railroad Company, appellant, hereinafter called defendant, to recover $20,000 for certain personal injuries sustained while in defendant's employ. He alleges, in substance, that while so employed, and in the furtherance of his duties, and while he was piling freight which had been previously negligently handled by defendant's employee Bean, the same collapsed, and at the same time there came down a wagon axle which plaintiff was trying to place upon such freight, which struck his foot causing the injury complained of.

Defendant admitted the employment, and that plaintiff received some slight injury, and denied every other allegation. It then alleges that whatever injury plaintiff suffered

grew out of his own negligence, and out of risks which he assumed by reason of his employment.

The substance of plaintiff's reply is a denial of all new matter in the answer.

At the close of the evidence defendant interposed a motion for an instructed verdict, based on the insufficiency of the evidence, which was overruled. The case was submitted to the jury, and a verdict returned for plaintiff for $10,000. Motion for a new trial was overruled, and judgment entered. To reverse this, defendant appeals.

Defendant contends that, as there is no evidence to sustain a verdict in favor of the plaintiff, its motion for an instructed verdict was erroneously denied. This is met by plaintiff's insistence that, if error, it cannot now be considered, for the reason that defendant, after such motion was overruled, submitted instructions, which were given, assuming that there was evidence for the jury, and by reason thereof is estopped to now claim the contrary. The last expressions of this court on this question are found in *Sorensen v. Sorensen,* 68 Neb. 509, and *Haslam v. Barge,* 69 Neb. 644. In the former case we said: "When in a jury trial a party moves the court to instruct a verdict in his favor, which is overruled and he is compelled to submit the matter to the jury, he may assist the court in a proper submission of the matter without thereby estopping himself to afterwards contend that a verdict against him is not supported by the evidence. In such case the rule of *American Fire Ins. Co. v. Landfare,* 56 Neb. 482, does not apply." This rule was approved and extended in *Haslam v. Barge, supra,* and is controlling in this case.

It is agreed that plaintiff was engaged in interstate commerce at the time of the injury, and that the action is governed by the federal employers' liability act, and that the following are the issues for our determination: (1) Whether defendant was negligent as alleged in plaintiff's petition; (2) whether plaintiff assumed the risk which caused his injury; (3) whether plaintiff was negligent; (4) what injuries plaintiff sustained.

Taking up the issues in their order, the following facts are reflected by plaintiff's testimony, he being the only witness in his behalf as to events occurring prior to the injury: Plaintiff was employed by defendant in its freight house at Casper, Wyoming, his duty being to store and pile freight, keep the stack intact by replacing any and all such freight left disturbed by himself or other employees, and reforming any and all stacks disarranged when demanded by new freight coming in, or removal of parts of the freight stored, he having full charge of such placement and replacement; that on November 7, 1921, after he had been engaged in such employment for about nine months, shipments of freight, among others, were received at Casper for Holland Brothers and one Heistand. The Holland shipment consisted of kegs, boxes, and five or six timbers for wagon axles, each axle being about six feet long, and weighing from 75 to 100 pounds. Plaintiff piled each shipment in what is called stall "H," placing the axles on top of the stack containing the Holland shipment, which stack was about six feet high. He also stored the Heistand freight, leaving a space of about five or six feet between these shipments.

Some steel beams had been placed near the Holland shipment, which, in the course of the day's business, were removed by Bean and other employees of defendant working under his direction, in the course of which removal the axles were taken from the top of the Holland stack and placed on the floor by them. This was done without disturbing the rest of the Holland stack. In the meantime, freight in the Heistand shipment had been called for, and in removing same that stack became disarranged and scattered over the floor. Plaintiff, being engaged nearby in the line of his duty, observed these removals. An hour or so later plaintiff entered upon the restoration of these stacks, as was his duty, commencing with that of Holland. He had replaced all of the axles on top of the stack save one, which, when he threw it upon such stack, bounded back, the entire stack collapsing at the same time. As such axle bounded

back, plaintiff attempted to get out of the way, but became tangled in the disarranged Heistand freight, and the axle struck his foot, giving rise to this action. Plaintiff, in response to an inquiry by his counsel, described the occurrence as follows: "Q. In answer to a question by counsel for the Burlington you have said that at the time you were hurt the only pile that collapsed was Holland Brothers freight. In answer to my question you said there was some other stuff fell down. I wish you would tell the jury what you mean. * * * A. Why, the Holland Brothers shipment, I had it all stored after it had been disarranged, and there was other goods over here that had been disarranged too, and I hadn't got to that yet; and I was working in a small space between these bundles of freight over here, and when I put up that last axle I was up pretty high. I remember I had to exert myself to put it up there. I was forming a platform up there with these axles and kegs to conserve floor space, and when I put it up there it bounded back and I undertook to get out of the way and fell against this other freight and couldn't get out of the way. I got tangled up in this other freight that had been disarranged by Mr. Bean that I hadn't got stored as it should be. Q. Was that the stuff that had been disarranged and had fallen down? A. Yes."

The record is without evidence showing or tending to show that the steel beams which Bean removed at any time furnished support for the Holland stack, or that their removal in any way weakened or disarranged such stack, or that the removal of the axles did not leave the remainder of the stack intact as placed by plaintiff, or that there was any negligence on the part of Bean or any other employee as to any of the matters involved. In answer to the question, "The axles was the only things that was disarranged in that shipment?" plaintiff answered: "Yes, sir. Q. And you picked them up and brought them over to this pile of Holland Brothers freight which had not been disarranged? A. Yes." The mere fact that the stack fell when struck by the axle in question is not of itself evidence that the

stack remaining after Bean removed the axles was thereby weakened.

As is well said in *Samardege v. Hurley-Mason Co.*, 72 Wash. 459: "Counsel for respondent contented himself with showing the fall of the old tier and the consequent injury. No attempt was made to show the cause of the fall, that it was improperly piled, or too high; it being contended that, having shown the height of the pile and that it fell, it was a question for the jury to say whether or not the pile was too high, and further that the doctrine of *res ipsa loquitur* applies, and it was the duty of appellant to absolve itself from negligence. Neither of these contentions can be sustained. The jury could not by their verdict establish a fact until there was some evidence to support it. If, therefore, appellant desired a verdict based upon a finding that the cement was 'piled too high' or 'piled in a negligent manner,' as he had alleged in his complaint, he must furnish the jury some proof of that fact."

It must be remembered that in this case plaintiff was employed for, and it was his duty to, make and keep the place safe as to the piling of this freight and keeping it properly piled. It was his duty to pile it in the first instance, and to repile it if disarranged or displaced. In answer to the question, "Was there anybody that directed the placing of these boxes there?" plaintiff answered: "No, I stored the stuff in these runs myself. I was supposed to know; that is the reason I was placed in the freight house." That it was plaintiff's duty to pile and repile the stacks in question is undisputed.

The risk resulting from the freight becoming disarranged by removal of parts thereof, and the strength of the stack weakened thereby, was one of the risks of this employment. Such a risk was obvious and inherent in the very nature of the business, and the plaintiff is presumed to have contracted with a view to it. To him it was an ever present warning. Under this record he cannot be heard to say that he did not know of the danger he contracted in reference to and received compensation by reason of. To

urge that he did not know, and that it was his employer's duty to warn him, would permit him to deliver less for his wage than that covered by his contract, and require defendant to hire another to warn him, and then another to warn this second employee, and so on *ad infinitum,* which leads to an obvious absurdity. As is well said by the United States supreme court in *Seaboard Airline Ry. v. Horton,* 233 U. S. 492: "Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not." See, also, *O'Connell v. Clark,* 48 N. Y. Supp. 74; *Iams v. Haxel-Atlas Glass Co.,* 251 Pa. St. 439; *Brooks v. Joyce Co.,* 127 Ia. 266; *McGlynn v. Brodie,* 31 Cal. 376; 3 Labatt, Master and Servant, 3135, sec. 1176.

As this case is without evidence of negligence on the part of defendant, its officers, agents, or employees, or of a breach of any regulatory statute enacted for the safety of its employees, the cases of *New York C. & H. R. R. Co. v. Carr,* 238 U. S. 260; *Chesapeake & O. R. Co. v. De Atley,* 241 U. S. 310, and *Chicago, R. I. & P. R. Co. v. Ward,* 252 U. S. 18, cited by plaintiff, do not apply.

If negligence can be said to be reflected by this record, it is that of plaintiff in throwing the axle in question with such force upon or against this Holland stack as to cause such axle to bound back. Plaintiff testified that "when I put it up there it bounded back." Although he uses the verb "put," the very fact that the axle "bounded back" shows that he handled it with unnecessary force, thus failing to exercise that due care which a reasonably prudent man would have exercised under like conditions. It must be remembered from plaintiff's own testimony before quoted that it was not the stack as left by Bean, nor any part thereof, that struck him. Neither was he injured by such stack as it stood after he had replaced all but one of the axles.

His injury occurred when he put the last axle up and it bounded back and struck him. While he says, "I got tangled up in this other freight that had been disarranged by Mr. Bean that I hadn't got stored as it should be," he had his choice as to which he would first restack. He knew the space between the stacks, and selected his own field for action.

The conclusions reached render a discussion of plaintiff's injuries unnecessary. As the record is without evidence to support the judgment, the motion for an instructed verdict should have been sustained.

The judgment of the district court is

REVERSED.

Note—See note in 14 L. R. A. (n. s.) 266; 18 R. C. L. 676; 3 R. C. L. Supp. 841; 4 R. C. L. Supp. 1200; 5 R. C. L. Supp. 998; 39 C. J. secs. 797, 933, 1200.

MAUDE AYNES ET AL., APPELLANTS, V. WILLIAM C. BANTZ ET AL., APPELLEES.

FILED DECEMBER 31, 1925. No. 23570.

1. **Deeds**: CONSTRUCTION. A deed conveying lands to "Minerva Flack and unto her children," as in this case, does not limit the estate thus vested in Minerva Flack to one for life.
2. **Adverse Possession**: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* that by adverse possession defendant William C. Bantz became vested with a fee simple title to the land in question.

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

Pitzer & Tyler, for appellants.

Lambert & Hawxby, contra.

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

THOMPSON, J.

Plaintiffs brought this suit in the district court for Nemaha county, seeking to quiet title in themselves to 80 acres of land in such county, as children of Minerva Flack, under a warranty deed executed, delivered, and recorded in such county on June 7, 1872. At this date Minerva Flack was without issue born. Upon issues joined, trial was had to the court, resulting in a finding generally in favor of defendants and against plaintiffs, quieting title in fee and right of possession in William C. Bantz, defendant, and dismissing plaintiffs' petition. To reverse this, plaintiffs appeal.

The issues raised by the pleadings necessary for our determination are but two, namely: Did the deed vest in Minerva Flack a life estate with remainder in fee to plaintiffs? If not, are plaintiffs' rights under such deed, if any, barred by the statute of limitations, through the adverse possession of defendant?

The parts of the deed necessary for our consideration are: "That William Cummings and Lydia Cummings, his wife, of Nemaha county, in the state of Nebraska, in consideration of the sum of five hundred dollars in hand paid by Minerva Flack of Nemaha county, and state of Nebraska, do hereby sell and convey unto the said Minerva Flack and unto her children, the following described premises: * * * And we covenant with the said Minerva Flack and her children that we hold said premises by good and perfect title."

Taking up the first issue, it is true as found by the trial court, and as stated by the attorneys at the argument, it would be a useless task to attempt to harmonize the conclusions of text-writers, as well as the diverse holdings of the courts, on the question of the proper construction of such a deed. We have section 5594, Comp. St. 1922, which provides in substance that in construing conveyances of real estate it shall be the duty of the court to carry into effect the intent of the parties as reflected by the whole instrument. Section 5590 provides: "The term 'heirs,' or

other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple." We also have a statute as to descent, which provides that unborn children may inherit, but we are without a statute providing that a fee to land may vest in an unborn child under a deed so worded. The decedent statute was not made applicable to a vesting of title by deed. Deeds are contracts, in the making of which there are two parties present, each striving to get into its provisions that which is to his respective interest or advantage, and, when once signed and delivered, it speaks for itself unless challenged for fraud or mistake, neither of which is alleged in this case, or attempted to be proved.

To hold that such deed vested in Minerva Flack a life estate, as contended by plaintiffs, would be to read into the instrument provisions not placed therein by the parties. The reasoning in the decisions and the conclusions of text-writers holding to the contrary are to us not persuasive. If a life estate was intended there would certainly be something in the instrument indicative of such thought. The trial court was right in holding that the deed did not limit the estate vested in Minerva Flack to one for life.

It is not necessary to, and neither do we, determine whether "unto her children" in such deed are words of limitation or words of purchase, or if words of purchase, there being no child born at the time, whether Minerva Flack took an absolute title, or whether the deed vested in her and the unborn child the title as tenants in common, or whether such tenancy included children afterwards born.

As to the second issue, if plaintiffs or any other person acquired an interest in this land by virtue of this deed, or by or through any one claiming title thereunder or by reason thereof, the record discloses that this action was not commenced until 20 years after the youngest child of Minerva Flack became of age, and 39 years after defendant William C. Bantz purchased the land in question of Minerva Flack and those claiming title through her, by mesne conveyances, and also by assignment of a tax certificate as to one 40

acres of the tract. He made these purchases relying upon the advice of his attorney that he was getting thereby a fee simple title to the entire tract, and it is undisputed that by such conveyances he became vested with the entire estate held by Minerva Flack, and we so find. He immediately entered into the open, notorious, adverse and exclusive possession thereof under such claim of ownership, erecting valuable improvements thereon, such as dwellings, outbuildings, fences, and wind-mills, digging wells, and planting several acres of orchard. He received unto himself the usufruct of the entire tract, paying taxes thereon, purchasing adjoining lands, which became a part of such holdings. All this was done with knowledge on the part of each plaintiff and Minerva Flack. This possession has been of such character as would bar tenants in common, if it were found such existed under the deed, which latter, however, as aforesaid, is not here determined; this, notwithstanding that it takes stronger proof to establish adverse possession in favor of a tenant in common against cotenants than in a case where such tenancy does not exist. The acts of defendant were of such a nature as to necessarily and notoriously disclose on his part a claim of exclusive right and ownership to the premises, and was notice to any person claiming title as a cotenant, or otherwise, of the nature and existence of such ownership.

Furthermore, those different conveyances in no manner recognized the title, or any part thereof, as existent in any other than the parties thereto. This of itself amounts to an ouster, and we so held in *Beall v. McMenemy*, 63 Neb. 70, wherein we said that such a sale of land "by one tenant in common has been held to amount to an ouster of his cotenants," citing *Culler v. Motzer*, 13 Serg. & R. (Pa.) 356. This rule was approved by us in *Wiese v. Union P. R. Co.*, 77 Neb. 40, and *Bohrer v. Davis*, 94 Neb. 367. This adverse possession vested in William C. Bantz a fee simple title to the tract in question.

The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF WILHELM KAMRATH. CHARLES KAMRATH ET AL., APPELLEES V. MARY HODGES, CLAIMANT, APPELLANT.

FILED DECEMBER 31, 1925. No. 23428.

Evidence examined and found insufficient to sustain the findings and judgment of the district court.

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

Vail & Flory and *H. Halderson,* for appellant.

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

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

EBERLY, J.

This action was originally brought in the county court of Madison county, Nebraska, by Fritz Kamrath and his five brothers against George H. Gutru, executor of the estate of Wilhelm Kamrath, and Mary Hodges, a sister of the plaintiffs in this action. The petition in substance alleges that Wilhelm Kamrath had, on the 26th day of April, 1921, deposited in the Newman Grove State Bank, of which George H. Gutru was president and managing officer, the sum of $8,000, which sum, at the death of said deceased, became part of his estate; that Mary Hodges and George H. Gutru, for the purpose of defrauding plaintiffs, entered into a conspiracy to alter and change the terms of the contract of the deceased, and, pursuant to such fraudulent conspiracy, caused a new certificate to be issued purporting to be payable April 26, 1927, to "Wilhelm Kamrath or Mary Hodges," and prays that said sum be accounted for by the executor as part of the estate of Wilhelm Kamrath, deceased, and be distributed as such under the last will and testament which had theretofore been admitted to probate.

To this petition Mary Hodges and Gutru filed answers,

each denying generally the allegations of the petition, and also pleaded affirmatively that said sum had been given by Wilhelm Kamrath in his lifetime to Mary Hodges. To these answers replies were filed.

A trial of these issues in the county court resulted in a judgment in favor of the plaintiffs. The defendant Mary Hodges appealed to the district court, where trial was had to the court, a jury being waived, which resulted adversely to the claims of the appellant. From an order of the district court overruling her motion for a new trial, she now appeals to this court.

The first question naturally presented in the determination of this case is, upon whom, in this matter, is imposed the burden of proof. It is to be noted that, notwithstanding the allegations of the answer filed herein are a general denial coupled with additional statements affirmative in form, yet, considered as an entirety, this pleading is nothing more in its effect than a denial of the allegations in the petition. *Peaks v. Lord,* 42 Neb. 15; *Gruenther v. Bank of Monroe,* 90 Neb. 280; *Perkins v. Brock,* 80 Cal. 320; *Miller v. Brigham,* 50 Cal. 615; *Griffith v. Continental Casualty Co.,* 290 Mo. 455; *Fajardo v. American Railroad Co.,* 27 Porto Rico, 559; *Staten Island M. R. Co. v. Hinchliffe,* 170 N. Y. 473.

Petitioners in their pleadings aver that the property in controversy was owned by and constitutes a part of the estate of Wilhelm Kamrath, and charge that the respondents were guilty of fraud in connection therewith by causing a new certificate to be issued since the death of Wilhelm Kamrath payable to the order of "himself or Mary Hodges." These allegations having been denied, the general rule would be that by the form of the issues the burden of proof was imposed upon the petitioners to sustain the allegations of their petition by a preponderance of the evidence. This is especially true where fraud is formed an issue by the pleading. "Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced on him." *Davidson v. Crosby,* 49 Neb.

60. See, also, *Clark & French v. Tennant*, 5 Neb. 549; *Hampton v. Webster*, 56 Neb. 628; *Knapp v. Fisher*, 58 Neb. 651; *Watkins & Co. v. Kobiela*, 84 Neb. 422. This rule as to the burden of proof also applies to actions prosecuted by representatives of an estate to recover its assets. So, too, "the general rule that the burden of proof is on the one having the affirmative of an issue applies to actions in respect to gifts." *Krull v. Arman*, 110 Neb. 70.

In construing the petition, we must keep in mind that—"In pleading fraud it is necessary to set out the facts relied upon for relief. Mere epithets or conclusions of fraud, without any statement of the facts upon which such charge is predicated, are insufficient." *Crosby v. Ritchey*, 47 Neb. 924.

"Pleadings * * * are designed to apprise parties and the court of the material facts on which the asserted right depends, and to invoke attention to the points to which testimony should be directed. And as fraud is never presumed, it is the rule that, where it is relied upon as a ground of relief, the facts and circumstances constituting the fraud must be stated in the bill with distinctness and precision, so that an issue may be formed which will apprise both parties of proof proper to be taken." 3 Elliott, Evidence, sec. 2124.

Taking up the allegation charging the respondent Hodges, in connection with Gutru, with fraud by fraudulently causing "a new certificate of deposit to be issued purporting to be payable six years from April 26, 1921, and payable to Mary Hodges or Wilhelm Kamrath, but your petitioners aver that at the time of the issuance of said certificate the said Wilhelm Kamrath was dead," there is no evidence in the record which in any manner sustains this allegation. The only competent evidence in the record is its absolute refutation, and this conclusion is in a measure born out by the contention of the plaintiff that certificate No. 9272 for $8,000 in evidence discloses that the maturity date has been altered. It is inconceivable that a man should forge a certificate and then thereafter alter the date of the forgery. And then, too, it appears that, not only does certificate No.

9272 appear to have a maturity date 72 months after date of issue, but the same is true of two other certificates issued by the Newman Grove State Bank to Wilhelm Kamrath in which Mary Hodges could have no possible interest or connection.

Plaintiffs' evidence summarized would be as follows: Fritz Kamrath, party in interest, testified that some 40 days after Wilhelm Kamrath's death, he and Charles Kamrath, his brother, together with two appraisers appointed to appraise the estate, Olson and Weyant, examined the contents of the depository box of the deceased then at the Newman Grove State Bank. Therein was found two certificates of $8,000 each payable to the order of Wilhelm Kamrath, and one for $3,500 payable to the order of Wilhelm Kamrath or Mary Hodges, all due 12 months after date. This evidence stands practically alone. Charles Kamrath and Weyant were not sworn, and Olson testified that in making the examination he read only the amounts named in the certificates and could not state the rate of interest, to whom or when payable, except that he has a recollection that at that time there was a statement made by some one present that the $3,500 certificate of deposit was payable to Wilhelm Kamrath or Mary Hodges. Fritz Kamrath further testified that shortly after the first examination a second examination was had of the contents of this depository box, at which time it was discovered that all certificates were payable 72 months after date; that certificate No. 9272 for $8,000, being the one in controversy in this action, was then payable to Wilhelm Kamrath or Mary Hodges, and that certificate No. 9273 for $3,500 was then payable to Wilhelm Kamrath only.

It appears from the record that in the inventory returned by the appraisers it was noted that certificate No. 9272 for $8,000 was payable to the order of "Wilhelm Kamrath or Mary Hodges." This original certificate No. 9272 payable to the order of "himself (Wilhelm Kamrath) or Mary Hodges" is before the court, and as to number, date, amount, and payee, it appears regular on its face. There is no founda-

tion in the record to support an inference of substitution or duplication. Original certificate No. 9273 for $3,500 is not before us. If plaintiffs' evidence is correct this instrument must on its face bear evidence of spoliation, for if originally issued payable to "himself or Mary Hodges" the removal of the words "or Mary Hodges" from the face of this certificate would leave indisputable traces of alteration. But the record does show that certificate No. 9273 for $3,500 was introduced in evidence in county court, though not produced in district court, and so far as disclosed by the record before us, which purports to be a transcript of the testimony produced in county court, certificate No. 9273 was fair and regular on its face, and as a whole the evidence in the county court supports the inference that this certificate when introduced in evidence was found to be payable to the order of Wilhelm Kamrath only, and not to "himself or Mary Hodges." George H. Gutru testified that original certificate No. 9272 for $8,000, which is in evidence, was the original certificate as issued; that it, together with the other certificates, was issued in the exact form in which it now appears, viz., certificate No. 9272 was payable to the order of "himself (Wilhelm Kamrath) or Mary Hodges" 72 months after date. This witness is corroborated by the bank records including voided blanks for certificates of deposit Nos. 9270 and 9271.

The evidence of Will Hodges and his daughter, Paulina Hodges, is to the effect that Wilhelm Kamrath in his lifetime, and probably on the day of its issuance, manually delivered certificate No. 9272 for $8,000 to Mary Hodges as a gift at her home, and that Mary Hodges had possession of it as owner. This occurred more than four months prior to the examination of the depository box above referred to. In view of this evidence we find that, even if the "substance of the issue" as set forth in the pleading can be construed as extending to or embracing the subject of alteration of the original certificates, certificate No. 9272 for $8,000 payable to the order of "himself or Mary Hodges," bearing date of April 26, 1921, as to payee, date, number, and

amount, is the certificate originally issued by the Newman Grove State Bank, and that the petitioners (plaintiffs) have wholly failed to sustain the charge of fraud as set forth in their petition.

The next question presented by the record is: Did Wilhelm Kamrath execute the gift of certificate No. 9272 for $8,000 to his daughter, Mary Hodges? In the determination of this question it is to be remembered that the situation, relation, and circumstances of the parties, and of the subject of the gift, as well as the donor's motives, reasons and inducements for making the alleged gift are all proper to consider in the determination of the probability that the gift was, in fact, made. This intent and purpose to make a gift to his daughter, Mary Hodges, is disclosed in the provision of the will, executed September 25, 1907, whereby there was devised to the six petitioners and Mary Hodges "to be divided among them equally, share and share alike, all property both real and personal of which I may die possessed." Also it is evidenced by the facts that subsequent to the date of the execution of the will he deeded to each son a farm, announcing his purpose to provide for Mary Hodges in a manner that would equalize her situation with her brothers, and his attempt to pay off the mortgage on her land. The transaction in the Newman Grove State Bank on April 26, 1921, in the presence of Mary Hodges, which finally culminated in the issuance of certificate No. 9272, payable to "himself or Mary Hodges," not only discloses an undisputed intention by the deceased to then make this gift of $8,000, evidenced by the certificate, but it is indeed a serious question whether or not the transaction in the bank on April 26, 1921, was not, in effect, an executed gift which resulted in the vesting of the title to the $8,000, represented by the certificate, in Mary Hodges. *Smith v. Haire,* 133 Tenn. 343. At least, when, thereafter, on or about the same day of its issuance, certificate No. 9272 was by said deceased manually delivered to and accepted by Mary Hodges as a gift, all doubt as to the result of the transaction must be deemed removed, the certificate

being in terms payable to "himself or Mary Hodges." The delivery of the certificate to Mary Hodges with the intention of making a gift of the deposit thereby represented, to a party to whom the certificate was then payable, operated as a gift of the fund itself. *Foster v. Murphy*, 76 Neb. 576. As between Wilhelm Kamrath and Mary Hodges as well as the world it was not necessary for Kamrath to indorse the certificate of deposit, it being payable to "himself or Mary Hodges." Either party was authorized to negotiate and transfer the same by his own indorsement. Comp. St. 1922, sec. 4619; *Voris v. Schoonover*, 91 Kan. 530, 50 L. R. A. n. s. 1097; *Page v. Ford*, 65 Or. 450, 45 L. R. A. n. s. 247. Nor did the reservation of the interest by Wilhelm Kamrath prevent the consummation of the gift and the vesting of the title in the donee. *Dinslage v. Stratman*, 105 Neb. 274; *Bone v. Holmes*, 195 Mass. 495. So, too, it cannot be said that, because certificate No. 9272 was found after the death of Wilhelm Kamrath in the safety deposit box owned by him, it necessarily negatived the right of Mary Hodges to the principal sum evidenced thereby. The gift had been fully executed and the title vested before the death of Kamrath. The terms of the gift imported the right in him to collect the interest thereon, which fact made his possession of the certificate wholly consistent with the title of the principal as being in Mary Hodges. In other words, the evidence disclosing that the gift at one time was fully executed and title vested pursuant thereto establishes the existence of a fact the continuance of which is presumed until evidence is present inconsistent therewith. In a case similar in principle the supreme court of Massachusetts held as follows: "An owner of a bond executed a formal assignment of it, and delivered the bond and assignment to the assignee, when it was put in the owner's safety deposit box for safe-keeping, marked as the property of the assignee, who thereafter took the bond from the box and kept it in her own box for a while, when it was returned to the owner's box, where it remained until the latter's death. Held, that there was a sufficient delivery with in-

tent to pass title to constitute a valid gift of the bond *inter vivos.*" *Bone v. Holmes,* 81 N. E. 290 (195 Mass. 495). See, also, *In re Estate of Landon,* 98 Neb. 706; *Scrivens v. North Easton Savings Bank,* 166 Mass. 255; 28 C. J. 642, sec. 36; *Danley v. Rector,* 10 Ark. 211, 50 Am. Dec. 243; *Pirie v. Le Saulnier,* 161 Wis. 503; *Will of Klehr,* 147 Wis. 653; *McNally v. McAndrew,* 98 Wis. 62; *Davis v. Ney,* 125 Mass. 590, 28 Am. Rep. 272; *Meriwether v. Morrison,* 78 Ky. 572; *Ruiz v. Dow,* 113 Cal. 490; *Lord v. New York Life Ins. Co.,* 95 Tex. 216, 93 Am. St. Rep. 827.

It may be said, *arguendo,* that giving the testimony of the plaintiffs the force and effect of admitted facts, it does not necessarily negative the testimony of the defendant as to the occurrence of the gift, except to establish the fact that at the time of the delivery of certificate No. 9272 by Wilhelm Kamrath to Mary Hodges it was payable to his order and had not been indorsed by him. But indorsement of the certificate was not necessary to vest the right of property therein as of date of delivery in the donee. *Greeley State Bank v. Line,* 50 Neb. 434; *Cather v. Damerell,* 5 Neb. (Unof.) 175; *Fagan v. Troutman,* 24 Colo. App. 473; *Bertolet v. Stoner,* 164 Ill. App. 605; *Nelson v. Olson,* 108 Minn. 109.

If it be further assumed that between the first and second examinations of the contents of the depository box (both of which were made after the death of Wilhelm Kamrath) certificate No. 9272 had been altered by changing "12 months" to "72 months" and adding the words "or Mary Hodges" to the designation of the payee previously therein contained, there being no evidence connecting Mary Hodges with the alteration, the act would amount to spoliation merely and would be wholly ineffective to in any manner change, impair, or alter the rights of the real owner of the instrument. The original certificate may still be enforced so long as its original character is susceptible to proof and the rights of the parties thereto are not in any manner affected by the apparent alteration thereof. *Bingham v. Shadle,* 45 Neb. 82; 28 C. J. 642, sec. 36.

The evidence is insufficient to support the findings and judgment of the district court. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

ELMER DAGGETT V. STATE OF NEBRASKA.

FILED DECEMBER 31, 1925. No. 24691.

1. **Criminal Law: INCEST: INSTRUCTIONS: CORROBORATIVE EVIDENCE.** An instruction, framed in such language that it may be fairly inferred by the jury, to whom the same is given, that the facts and circumstances necessary to corroborate the testimony of the prosecuting witness, in a prosecution for incest, need not be proved by other witnesses is erroneous.
2. **Witnesses: IMPEACHMENT.** A witness may not be interrogated as to his previous conviction of a crime below the grade of a felony for the purpose of impeachment.
3. ———: ———. Evidence of general reputation that a female witness is, or has been, not law-abiding, unchaste, or a prostitute, is inadmissible for the purpose of impeaching the witness either upon cross-examination or by way of rebuttal; nor can these facts be shown for the purpose of impeachment by evidence as to specific acts or instances.

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

W. A. Stewart, N. M. York and *Pratt, Hamer & Beynon,* for plaintiff in error.

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

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

EBERLY, J.

In a prosecution by the state in the district court for Dawson county, Elmer Daggett, defendant, was convicted

of incest. For that felony he was sentenced to the penitentiary for a period of not less than 20 years. As plaintiff in error he presents for review the record of his conviction.

One of the errors complained of is an incorporation in instruction No. 8, given by the court, of the words:

"Yet you have no right to reject the testimony of any of the witnesses without good reason, and should not do so until you find it irreconcilable with other testimony you may find to be true."

The defendant was sworn in the district court and positively denied the charge.

The court gave no instruction with respect to the necessity of other evidence to corroborate the testimony of the prosecuting witness, and none was requested by the defendant. However, the use of the words above quoted, in connection with the paragraphs of the instruction in which the quoted words are found, was to advise the jury that they were the "sole judges" of the credibility of the witnesses, of whom the prosecuting witness was one, and of the weight of evidence. It therefore had the effect of a direction of the court to the jury that it had no right to reject the evidence of the prosecuting witness unless it was found irreconcilable with other testimony which the jury found to be true. The true rule would be that the testimony of the prosecuting witness, notwithstanding it may not be irreconcilable with other evidence found by the jury to be true, must be rejected by them if not corroborated by the testimony of other witnesses. The inevitable inference of the words quoted in the connection in which they are used is therefore that the facts and circumstances necessary to corroborate the testimony of the prosecuting witness in a prosecution for incest need not be proved by other witnesses. *Ford v. State,* 106 Neb. 439; *Schrum v. State,* 108 Neb. 186; *Boling v. State,* 91 Neb. 599; *Mott v. State,* 83 Neb. 226. In this the court erred. And so, too, that part of the instruction quoted had a tendency to minimize the benefits to which defendant was entitled in the legal presumption of innocence which attended him during the trial.

For the reasons given, the court, in giving instruction No. 8, committed reversible error.

The state, during the course of the trial, in cross-examination and also by the introduction of evidence in rebuttal, sought to impeach two female witnesses, whose evidence was given in behalf of the defendant, by proving them immoral, unchaste, and prostitutes. The reputation of the witnesses for truth and veracity was not questioned. Evidence was also introduced, however, in the manner stated and over objection (Comp. St. 1922, sec. 8824), to the effect that the reputation of these witnesses as to law-abiding, moral women, and also as to being prostitutes, was bad; that the reputation of the house in North Platte, where the prosecuting witness at one time had resided, was bad; that the witnesses had been convicted and served 15 days in the county jail of Lincoln county on a somewhat indefinite charge of vagrancy. These attempts on the part of the prosecution were wholly unwarranted by law and highly prejudicial to the defendant. "It has been frequently held by this court that a witness may not be interrogated as to his previous conviction of a crime below the grade of a felony." *Ford v. State*, 106 Neb. 439. See, also, *Young Men's Christian Ass'n v. Rawlings*, 60 Neb. 377. In this connection the record plainly indicates that the offense for which these witnesses were convicted could not have amounted to more than a misdemeanor.

The third question presented by this record is whether a female witness may be impeached by the evidence as to her general bad reputation as to being law-abiding, immoral, and a prostitute. As a general proposition it may be stated: "In this country the better doctrine that the trait of veracity only could be considered was early introduced; and this is the rule in the great majority of jurisdictions." 1 Greenleaf, Evidence (16th ed.) sec. 461*a*.

After a review of the authorities cited on the specific point before us, we adopt as our own and quote approvingly, as applied to the question presented, the following language from the case decided in the state of New York in 1837:

"It is only necessary to say that it is perfectly well settled, both in this state and in England, that the general character of the witness alone can be inquired into for the purpose of impeaching his credibility; that is, what is his general character for truth and veracity; or whether his general moral character is such that he is not entitled to credit. But you cannot prove that he has been guilty of any particular crime, or species of crimes, or immoralities, or that he has the reputation of being guilty of any particular class of crimes. You cannot therefore inquire whether the witness has the general reputation of being a thief, prostitute, murderer, forger, adulterer, gambler, swindler, or the like, although each and every of such offences, to a greater or less degree, impair the moral character of the witness, and tend to impeach his or her veracity. And if a party is not permitted to impeach the witness by proving that he has the general character of a thief or a swindler, there can be no good reason why he should be permitted to impeach the witness by showing a general reputation of being unchaste. Indeed, it would be much safer for a female witness to permit the adverse party to prove the fact that she was a common prostitute, than to attempt to impeach her credit by showing it by general reputation, as there would be some chance of refuting the charge if it was false, in the one case, when there would not be any in the other. Instead, also, of allowing the chastity of female witnesses to be drawn in question in that manner, it would be much better to resort at once to the principles of the Persian, Gentoo, and Mussulman laws, to which we were referred on the argument, which do not allow the testimony of any female except in special cases, where, from the nature of the facts to be proved, it is presumed that no male witness could have been present." *Bakeman v. Rose,* 18 Wend. (N. Y.) 146.

A consideration of the more recent cases discloses that the principles announced in the case of *Bakeman v. Rose, supra,* still obtain. These principles are that the fundamental trait desirable in a witness is a disposition to tell the

truth, and hence the trait of character that should naturally be shown in impeaching him is his bad character for veracity; that general reputation as impeaching evidence should be limited to that subject; that neither by way of cross-examination or by rebuttal may witnesses be impeached because of alleged bad reputation as to being law-abiding, immoral persons, or as affording a basis for the inference that they have been or now are prostitutes. Nor can evidence of specific instances of bad conduct, with reference to the subjects mentioned, be shown for impeaching purposes only. *Myers v. State,* 51 Neb. 517; *State v. Stimpson,* 78 Vt. 124, 1 L. R. A. n. s. 1153; *People v. Abbott,* 97 Mich. 484; *Spearman v. State,* 68 Tex. Cr. Rep. 449, 44 L. R. A. n. s. 243.

The district court therefore erred in admitting the evidence of the prosecuting witness both upon cross-examination and in rebuttal. The case is therefore reversed and remanded for further proceedings.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1926.

STANDARD OIL COMPANY, APPELLANT, V. CITY OF LINCOLN, ET AL., APPELLEES.

FILED JANUARY 23, 1926. No. 25045.

1. **Municipal Corporations:** CHARTERS. "While a home rule charter of a city, adopted pursuant to the constitutional provisions, may not contravene any provision of the Constitution or of any general statute enacted by the legislature, it is, in all other respects, binding and controlling. A city may enact and put into such charter any provisions for its government that it deems proper, so long as they do not run contrary to the Constitution or any general statute." *Schroeder v. Zehrung*, 108 Neb. 573.
2. ———: ———. "It is within the competency of the electorate of a city to adopt a charter in any form it may deem proper within the limits specified in the Constitution; it may take the form of a grant or a limitation of powers; in the former case all powers not expressly or impliedly granted to the city government are reserved to the people; in the latter all powers are granted to the city government except those expressly or impliedly withheld." *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51.

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

Leonard A. Flansburg, E. J. Hainer, and *William H. Herdman,* for appellant.

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

O. S. Spillman, Attorney General, and *T. J. McGuire, amici curiæ.*

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

DEAN, J.

This suit was brought by plaintiff in the district court for Lancaster county to enjoin the city of Lincoln, and its municipal officers, as such, "from engaging in the business of selling gasoline and lubricating oil to the inhabitants of said defendant city."

Defendant demurred generally to plaintiff's petition. The district court sustained the demurrer and plaintiff electing to plead no further, the suit was dismissed and plaintiff has appealed.

Standard Oil Company is a Nebraska corporation and is engaged, as alleged, "in the business of marketing petroleum products, including 'gasoline and oil', in all the cities and towns in the state of Nebraska, and, more particularly, in the defendant city of Lincoln."

Plaintiff alleges generally that Lincoln has more than 5,000 inhabitants and is governed by and is operating under what is known as a "Home Rule Charter" pursuant to section 2, article XI of the Constitution of Nebraska, which provides:

"Any city having a population of more than five thousand (5,000) inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this state, * * * and if a majority of such (the) qualified voters (of such city), voting thereon, shall ratify the same, it shall at the end of sixty days thereafter become the charter of said city, and supersede any existing charter and all amendments thereof."

Plaintiff alleges that, under the above constitutional provision, the city framed a city charter which was ratified and adopted by the qualified voters as the charter of the defendant city at an election held November 14, 1917. It is also pointed out that the city council, by appropriate proceedings, subsequently submitted to the people of Lincoln a proposed amendment to the city charter which was duly rati-

fied and lawfully adopted November 4, 1924. The amendment follows:

"Section 13b. The city council shall have power to engage in the business of selling gasoline and oil to the inhabitants of the city, both at retail and wholesale, and for that purpose shall have power to acquire and own such real and personal property as may be necessary and incident thereto. The city shall not charge for gasoline and oil, sold by it, more than the cost thereof to the city, plus the cost of handling the same, including contingencies."

Thereupon the Lincoln city council adopted the following ordinance:

"An ordinance creating and establishing a municipal gasoline department for the sale of gasoline and oil, and prescribing rules for the government and operation thereof."

Sections 1 and 2 of the ordinance follow:

"Section 1. That there be and hereby is created and established a municipal gasoline department for the purpose of selling gasoline and oil to the inhabitants of the city, both at retail and wholesale, and until otherwise assigned by the city council, the municipal gasoline department is hereby assigned to the department of streets and public improvements. The municipal gasoline department shall be operated pursuant to the rules hereinafter set forth and as the same may be amended, modified or extended.

"Section 2. That the following rules be and they are hereby adopted governing the operation of said municipal gasoline department, to wit:"

Here follow rules from one to eight inclusive, which for the most part have to do with expenditures, the handling of the funds, and the division of the duties under the purely administrative features of the gasoline ordinance among the different departmental members of the city council and which are to be performed by them in their several official capacities. Except as to rules 7 and 8, which follow, the rules, above referred to, need not be reproduced here:

"Rule 7. Gasoline and oil shall be purchased as directly from the original source of supply as possible, and shall be sold to the inhabitants of the city of Lincoln at the cost thereof to the city, plus the cost of handling the same, including contingencies.

"Rule 8. All gasoline and oil shall be sold for cash."

Plaintiff alleges that the charter did not empower the city to sell gasoline and oil, but that it is selling it at cost price, plus the cost of handling, including contingencies, and is using money therefore which is raised by taxation of all property in the city, including plaintiff's; that the business is carried on by city officers and employees in city-owned buildings and with city-owned facilities, and that plaintiff is thereby excluded from engaging in such business, and that such business "is not of, and does not pertain to, the government of said defendant city," and that thereby the due process of law clause of the Fourteenth Amendment of the federal Constitution is contravened; that there is no threatened shortage of gasoline and oils in the city; that "there is no agreement, trust or combination" among dealers in Lincoln, or elsewhere, in the gasoline and oil business, and that competition therein is active; that the prices charged by all dealers are not exorbitant and only return a reasonable profit; that neither gasoline nor lubricating oils are necessaries of life; that no emergency requires the city to engage in such business, but it is so engaged solely for the benefit of the buyers; that plaintiff has never been engaged nor financially interested in the production or refining of crude petroleum or other products therefrom; that plaintiff's business is worth more than $25,000, and its property and equipment used therein is worth about $210,000; and that, by reason of the city's engaging in the business complained of, plaintiff's business has "decreased in (gasoline) volume upwards of 30 *per centum*, without any decrease" in overhead costs. It is further pleaded that, by reason of the imposition of valid taxes of every sort on its property, and overhead expenses, plaintiff cannot compete with the city at its prevailing prices, and that,

unless the injunction is granted as prayed, plaintiff will be deprived of its property and business without due process of law.

Plaintiff further pleads that the money so used by the city is not for a public purpose but is solely for the benefit of the purchasers of gasoline and oil; that all city taxes, including plaintiff's will be thereby increased; that the defendant city is conducting only a three-pump gasoline service station, which is wholly inadequate to supply the necessary and normal demands of the city's inhabitants, and that it does not intend to provide any more facilities or equipment to furnish gasoline and oils to Lincoln's inhabitants, its only object being to "furnish a supply sufficient in volume to fix and control the price at which gasoline is and may be sold" by plaintiff and other gasoline dealers in Lincoln; that the city's engagement in such business is an "unlawful, unreasonable, capricious, discriminatory, and abusive exercise" of the city's power to regulate the business in question, and is in violation of the Fourteenth Amendment of the federal Constitution, and also of the Nebraska Constitution, in that the business complained of is not a business affected with a public interest; that the city's operation in the business is confiscatory of plaintiff's property and business and "does not apply equally to all other businesses in said city handling and selling to inhabitants thereof products of like general use and consumption;" that the engaging in such sales is in contravention of and does not comply with section 9, art. XV, of the state Constitution, which provides:

"Laws may be enacted providing for the investigation, submission and determination of controversies between employers and employees in any business or vocation affected with a public interest, and for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare. An industrial commission may be created for the purpose of administering such laws, and appeals shall lie to the supreme court from the final orders and judgments of such commission."

Plaintiff further contends that to engage in the business complained of by the defendant city is illegal, and that the charter amendment and the powers which purport to be granted thereby, only authorize it to engage in the business of selling gasoline and oil of like kind and class and nature and having properties and uses similar to gasoline; and that lubricating oils for motor vehicles is in kind, class and nature wholly dissimilar to gasoline. Here follow the usual allegations that plaintiff is without an adequate remedy at law, and a plea that the charter amendment shall be judged illegal, unconstitutional and void, and the city officials named herein and their successors in office, and the agents, employees, and servants of the defendant city shall all be enjoined from engaging in the business complained of.

In *Schroeder v. Zehrung,* 108 Neb. 573, we said: "While a home rule charter of a city, adopted pursuant to the constituional provisions, may not contravene any provision of the Constitution or of any general statute enacted by the legislature, it is, in all other respects, binding and controlling. A city may enact and put into such charter any provisions for its government that it deems proper, so long as they do not run contrary to the Constitution or any general statute." To the rule above stated we adhere.

Consumers Coal Co., v. City of Lincoln, 109 Neb. 51, is a case wherein it was held that the establishment of a municipal fuel yard for the sale of fuel at retail to the inhabitants of Lincoln, for the reasons therein pointed out, was not within the powers granted the city council, but, in the general discussion of the case, this is said: "It is within the competency of the electorate of a city to adopt a charter in any form it may deem proper within the limits specified in the Constitution; it may take the form of a grant or a limitation of powers; in the former case all powers not expressly or impliedly granted to the city government are reserved to the people; in the latter all powers are granted to the city government except those expressly or impliedly withheld." We adhere to the rule as expressed by us in the above citation.

It has been held that, "Public grants susceptible of two constructions must receive the one most favorable to the public." *Hamilton Gas, Light and Coke Co. v. Hamilton City,* 146 U. S. 258. "Restraints upon governmental agencies will not be readily implied." *City of Joplin v. Southwest Missouri Light Co.,* 191 U. S. 150. And this is said at page 158 in the *Joplin* case: "In *Bienville Water Supply Co. v. Mobile,* 175 U. S. 109, 186 U. S. 212, it was again decided that the granting of franchises to private persons to construct water-works in a city does not preclude the city from afterwards erecting such works and supplying its inhabitants with water."

Madera Water Works v. Madera, 228 U. S. 454, is a case taken to the supreme court of the United States from California. In that case the court held, in substance, that, if the Constitution of the state authorizes the construction of utility plants as well after, as before, such plants have been built by private parties, one who constructs such plant cannot invoke the Fourteenth Amendment of the federal Constitution to protect him against loss by the erection of a municipal plant. The court further held that there was nothing in the Constitution of that state that could be construed to mean that municipalities will not construct water-works that will compete with privately owned works built under the provisions of the Constitution giving the right, subject to municipal regulation of charges, to lay mains in the streets of municipalities where there are no public works.

In Maine a statute authorizing the sale of wood and coal without financial profit was sustained by the supreme court of the United States in a case where it was urged that such use of the public money was not for a public purpose and was in violation of the Fourteenth Amendment of the federal Constitution, *Jones v. City of Portland,* 245 U. S. 217.

In *Wolff Packing Co. v. Court of Industrial Relations,* 262 U. S. 522, in referring to the meaning of the expression, "public use," or "public purpose," it was said:

"In a sense, the public is concerned about all lawful busi-

ness because it contributes to the prosperity and well-being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest,' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn v. Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public. * * * 'Public use' in such cases would seem to be a term of wider scope than where it is used to describe that which clothes property or business 'with a public interest.' In the former, the private owner is fully compensated for his property. In the latter, the use for which the tax is laid may be any purpose in which the state may engage, and this covers almost any private business if the legislature thinks the state's engagement in it will help the general public and is willing to pay the cost of the plant and incur the expense of operation."

Plaintiff contends that the defendant city deprives plaintiff of its property without due process of law, in that the city is using public money derived from taxation to carry on the business complained of, and that the money so used is for a private purpose, and not a public purpose. We do not agree with counsel. *Green v. Frazier*, 253 U. S. 233, is a case where a group of taxpayers contended that certain acts of the legislature enacted for the establishment of a state bank, a line of warehouses and elevators, flour mills and manufacturing establishments, and for the handling of marketable wheat and the manufacture of flour, and even to establish a home-building association, were all in contravention of the Fourteenth Amendment of the federal Constitution. But the court said:

"When a state sees fit, for the promotion of the public welfare, to enter into activities which in the past have been

considered as entirely within the domain of private enterprise and to assist them by taxation, the wisdom of its legislation or the soundness of the economic policy involved cannot be considered by this court in passing upon the constitutionality of the taxation."

Plaintiff also argues that the business of selling gasoline and oil "has never been a public utility;" that such business has "never been affected with a public interest," and that it is now and always has been "in the strictest sense of the word purely private business, and universally recognized as a proper and legitimate field for private enterprise." It is also argued that "gasoline and oil are not necessities of life; they do not fall in the same category with water, food, clothing, housing, etc. They have no other, different or greater relation to the peace, order, good government and general welfare of a municipality, and to the lives, safety and health of its inhabitants, than any other commodity, not a general necessity of life, in like general use in such municipality."

In respect of plaintiff's argument upon the issues involved in the present case, it may be observed generally that gasoline has become one of the indispensable commercial commodities of our time. It is well known to everybody that there is scarcely a man, woman or child anywhere who is not directly, or indirectly, either a user of or materially affected by the use of this modern day necessity. In the past decade, in some form, the use of gasoline has steadily increased until its use has now become well-nigh universal. In some respects, it may be observed, it bids fair to revolutionize, in part at least, the railway transportation systems of our country. And it may be noted that this is now practically a reality in respect of the short haul feature of the railway business, both as to passenger and freight traffic, as such traffic is affected by the use of gasoline propelled conveyances. In our large cities and in some of our smaller towns its use has very materially decreased the revenues of the street car systems. Gasoline may be said to be a most obedient servant. By the agency of the automobile

it transports us, both far and near, from place to place; it furnishes much of the power that plows our fields, harvests our grain, and, as above noted, it is used to carry an increasing part of the short haul transportation of our railways. It now furnishes a more and more increasing part of the power that drives our stationary engines. It may be here noted that what is true of gasoline is true of the oils and the petroleum derivatives that are used in conjunction with it and which are involved in this suit. It follows that a commodity, of use so universal, may come within the purview of "public purpose," as distinguished from "private purpose," as the expression is used in the decisions of the courts which have to do with the use of utilities and necessaries by the public generally.

Plaintiff holds no contract that frees it from competition in the conduct of its business into which it entered under the usual conditions which attend the conduct of private business. Can it be said that a grant by the city to conduct a business within a municipality contemplates a grant to be free from competition in a like business in the absence of a specific grant for such exclusive privilege? The state cannot guarantee the successful outcome of any private business enterprise. See *Knoxville Water Co. v. Knoxville*, 200 U. S. 22; *Helena Water-Works Co. v. Helena*, 195 U. S. 383; *Baker v. City of Grand Rapids*, 142 Mich. 687; *Central Lumber Co. v. City of Waseca*, 152 Minn. 201, in addition to the cases hereinbefore cited.

We conclude that the defendant city of Lincoln in carrying on the gasoline and oil business, as it is involved in the present case, does no violence to the Fourteenth Amendment of the federal Constitution nor to any provision of the Nebraska Constitution. Since the power has been delegated to the defendant city, as heretofore observed, to make its own charter, the city may do that which the state may do, or which the state has authorized the city to do, so long as it does not violate the federal or state Constitution or the general laws of the state.

It may be noted that Claude E. Shamp is engaged in sub-

stantially the same business in Lincoln as is the plaintiff herein. Shamp, under an appropriate stipulation with the parties, which met the approval of the district court, became, by plaintiff's counsel, an intervening plaintiff, and he was there joined with plaintiff in this action. The judgment of dismissal of plaintiff's action was likewise rendered against him in the district court and he is also an appellant in this court.

It has not been made to appear by counsel that the act here in question is violative of the due process provision of the federal Constitution, nor of any other constitutional provision, either federal or state, nor of any general statute of the state of Nebraska.

In view of the facts before us, and for the reasons appearing herein, and under the authorities, we conclude that the judgment of the district court in its dismissal of the action is right, and, as to plaintiff and intervening plaintiff, is in all things

AFFIRMED.

ROSE, J., dissenting.

This is a suit in equity brought by the Standard Oil Company and Claude E. Shamp, pleading separately, plaintiffs, in the district court for Lancaster county, to enjoin the city of Lincoln and the members of its council from conducting at cost in competition with plaintiffs the business of selling gasoline and lubricating oils in the city of Lincoln. Defendants demurred to the petitions of plaintiffs on the ground that the facts stated therein were insufficient to constitute a cause of action. The district court sustained the demurrer. Plaintiffs elected to stand on their petitions and the suit was dismissed. Plaintiffs appealed to the supreme court where the dismissal was affirmed. *Standard Oil Co. v. City of Lincoln, ante,* p. 243. On motion of plaintiffs for a rehearing a reargument was granted. I was unavoidably absent when the cause was first submitted on appeal and took no part in the subsequent opinion and affirmance but I participated when the questions raised by the pleadings were reargued. By a majority vote a rehearing,

upon a reconsideration of the merits of the case, was denied. Being convinced that the demurrer should have been overruled I dissented from the former opinion, adherence to which resulted in the denial of an injunction.

I do not question the validity or wisdom of legislation authorizing the state or a city to enter the domain of private enterprise with money raised by taxation whenever the government properly adopts that method of procuring for the public the necessaries of life, there being no other adequate supply; of preventing conspiracies, trusts and other combinations in restraint of trade from stifling competition and arbitrarily fixing extortionate prices which injure the public; of counteracting the unlawful lowering of prices in some localities and recouping the losses, with profits made elsewhere, for the sole purpose of destroying the business of competitors; of exercising other legitimate functions of government generally for the protection of society. The unlawful destruction of competition and the exacting of unconscionable prices in the sale of the necessaries of life are inconsistent with freedom of contract. When prompted by hunger, thirst or cold to pay an illegal price-fixing monopoly extortionate prices for food, water and shelter, or other necessities of life, a purchaser in want may lose his liberty of contract. To prevent public calamities a state or city may enter what was formerly a private business, but under our republican form of government, as distinguishable from a socialism or a communism, public taxes are not available for a purely private business unless demanded by a public exigency. A city should not itself commit the wrongs it condemns to justify an entrance into a private enterprise.

The Constitution of the United States made provision for the protection of the individual from the unlawful aggressions of every department of government. To the private citizen the fields of invention, industry, art, science, literature and labor were opened with the prospect of honest rewards. The bills of rights in both state and federal Constitutions protect the individual in the ownership and con-

trol of property, including freedom of contract and the privilege of selecting a lawful avocation. The present industrial prosperity and all else that exalts and ennobles humanity under the state and federal Constitutions are due generally to individual effort and honorable reward without much extraneous aid from governmental meddling in the legitimate business of individuals.

Whether taxes are levied and collected for a private purpose depends on the facts of each particular case. The statute is not the test on the issue of constitutionality. For the protection of individual rights guaranteed by the Constitution, the court, when its power is properly invoked, is bound to inquire into the validity of a statute or ordinance. Neither the legislature nor the executive can prevent such an inquiry.

The decision in this case cites two former opinions which, in my judgment, are inapplicable to the admitted facts now under consideration. *Standard Oil Co. v. City of Lincoln, ante,* p. 243, citing *Schroeder v. Zehrung,* 108 Neb. 573, and *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51.

In the present instance plaintiffs pleaded the constitutional and legislative provisions under which the city assumed to act. It adopted a "Home Rule Charter" and under it passed an ordinance authorizing itself to engage in the business of selling gasoline and oil and to acquire the necessary real and personal property for that purpose. The ordinance limited the sale price of oil and gasoline to cost, including handling and contingencies. A municipal plant was established with public funds and the city engaged in the business of selling oil and gasoline at cost in competition with many private dealers having distributing stations in different parts of the city.

The petitions state in detail the following facts thus summarized: There has never been in Lincoln any actual or threatened shortage in the supply of gasoline and oils. The public demand for these commodities is fully supplied at all times from numerous filling stations owned and operated by private individuals and competitors at convenient places

throughout the city. The merchants are in competition with each other. There is no price-fixing by dealers, combinations or trusts. In reality competition is open, active, untrameled and complete. The prices exacted by dealers generally are not exorbitant and only pay cost and a reasonable profit. Plaintiffs have invested large sums of money in permanent equipment and have acquired good will in contemplation of a long period of business activity. They cannot carry on their business without a profit nor compete with the city in prices while the latter is selling the same commodities in the same market at cost. Private dealers conduct their enterprises with private capital and are required to pay taxes, while the city is a competitor with public money and without liability for the payment of taxes. The effect of the city's competition with its prices fixed by ordinance at cost is to confiscate the property of plaintiffs and drive them out of business. The details of the facts outlined and other allegations of the petitions negative every emergency which could be lawfully invoked to draw the city into competition with private enterprise in the business of selling gasoline and oils. The facts showing the circumstances under which the city proceeded are fully pleaded in the petitions and are admitted by the city in its demurer.

If what is alleged in the petitions and admitted by the demurrer is true, defendants themselves are committing the very iniquities which, when committed by private individuals, would justify municipal competition with private enterprise. The ruling on the demurrer must be tested by what is pleaded in the petition. By that standard money is raised by taxation of plaintiffs' property to destroy it. If the city may engage in a private business under the facts pleaded and admitted it may also, by the same methods and for the same reasons, conduct at cost with money raised by taxation, newspapers, department stores, groceries, plumbing establishments and every other private business. This is socialism and communism, twin enemies of the Republic. If the facts are as pleaded in the petitions, the

money exacted in taxes from plaintiffs by the city to conduct the business of selling gasoline at cost is used for a private purpose and amounts to the taking of property without due process of law within the meaning of the state and federal Constitutions. If the city has become a competitor with the selling price fixed at cost, as alleged and admitted, the inevitable result will be to impair or destroy property of plaintiffs and deprive them of their constitutional right to pursue in Lincoln a lawful business of their own choosing, to control their own property and to exercise freedom of contract in respect to it. The governmental interference with lawful private business, the undermining of individual initiative and honorable reward and the menace of socialism and communism may well alarm all who love their country.

In my opinion the demurrer should be overruled, our former affirmance vacated, the dismissal below reversed, and the cause remanded for further proceedings.

GOOD, J., concurs in the dissent.

Note—See 28 Cyc. 260 (Ann.), 264 (Ann.).

LEON TAYLOR V. STATE OF NEBRASKA.

FILED JANUARY 23, 1926. No. 24948.

1. **Criminal Law**: EVIDENCE OF OTHER CRIMES. In a trial on the charge of forgery and of uttering a forged instrument, evidence of similar acts at about the same time may be received to show guilty knowledge or the intent of the accused in the act charged. *Davis v. State*, 58 Neb. 465.
2. ———: ———: INSTRUCTION. Where evidence is offered tending to prove similar acts committed by the accused, the trial court should instruct the jury as to the purpose of such evidence.
3. **Forgery**: PROOF. Where, upon trial for forgery, it is shown that the accused indorsed the name of another on a bank check which was cashed by the prosecuting witness, before a conviction can be had of the crime of forgery, it devolves upon the state to prove that the indorsement was made without the authority of the person whose name was used. Such proof can be made by direct evidence or by circumstances which negative

the idea that the authority to sign another's name was given.

4. **Criminal Law**: PENALTY: HABITUAL CRIMINAL ACT. Section 10177, Comp. St. 1922, provides: "Whoever has been twice convicted of crime, sentenced and commmitted to prison, in this or any other state, or by the United States, or once in this state and once at least in any other state, or by the United States, for terms of not less than one year each, shall, upon conviction of a felony committed in this state after the taking effect of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the penitentiary for a term of not less than ten years," etc. *Held*, that the statute is not *ex post facto* as to the conviction prior to its passage, since a criminal cannot be punished under it without conviction of a felony committed after its passage.
5. ———: INFORMATION: HABITUAL CRIMINAL. Where, under a prosecution for felony, the state seeks to have the accused punished as an habitual criminal under section 10177, Comp. St. 1922, it is proper to allege in the information and prove upon the trial that the accused has been previously convicted as provided in said section.
6. **Forgery**: INSUFFICIENCY OF EVIDENCE. The facts, which are set out in the opinion, *held*, not sufficient to sustain a conviction for forgery or uttering and publishing a false and forged instrument.

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

C. E. Walsh, for plaintiff in error.

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

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

DAY, J.

Leon Taylor, herein designated defendant, was prosecuted in the district court for Douglas county, Nebraska, upon an information containing three counts. The first count, the usual form of information, charged the defendant with forging the name of "Roy Thomas" on the back of a certain check, specifically described, for the sum of $18, purport-

ing to have been drawn by F. L. Buesche in favor of Roy Thomas. The second count charged the defendant with unlawfully and feloniously uttering and publishing the above-described check, knowing that it was false, forged and counterfeited, with the intention to defraud. The third count charged the defendant with having previously served three terms in the penitentiary, the specific dates and places being set out, and alleged that the defendant was an habitual criminal under the provisions of section 10177, Comp. St. 1922. Upon the trial, the defendant was found guilty on all counts in the information, and was sentenced to serve a term of ten years in the penitentiary. Alleging that there was error upon the trial the defendant brought the record of his conviction to this court for review.

It is urged by the defendant that the facts are not sufficient to support the judgment. The testimony on behalf of the state tends to show that on August 2, 1924, the defendant purchased a pair of shoes from the Berkman Shoe Company, in Omaha, for $8.50; that in payment thereof he tendered a check for $18, dated August 2, 1924, purporting to be drawn by F. L. Buesche on the State Bank of Omaha, in which Roy Thomas was named payee; that the defendant indorsed the name of Roy Thomas on the check and received in exchange therefor the shoes and $9.50 in money. Several witnesses identified the defendant, who is a colored man, as the man who purchased the shoes. One identified him as the person who wrote the name "Roy Thomas" on the check, and another that he saw him writing. The state also produced a witness, who was an expert in handwriting, who on comparison of established handwriting of the defendant with the name of Roy Thomas indorsed on the check gave it as his opinion that the two writings were made by the same hand. The state also produced another witness who testified that on the same day the defendant passed a similar check in another store in Omaha under similar circumstances. The check in question was returned to the Berkman Shoe Company with a memorandum attached, "No such account." Some months after

the defendant was arrested, and the shoes were found in his possession, being identified by numbers on the linings.

The defendant denied that he ever had the check in his possession or that he ever indorsed it. He testified that on that date he had a crippled hand and was not able to write. In this respect he was corroborated by a doctor who attended him, who testified that, if the defendant could write at all, it would be with great difficulty. He explained the possession of the shoes by saying that, after he had selected them, he subsequently sent a lady for them and gave her the cash to pay for them.

Assuming that the proof is sufficient to present the question for the jury's determination as to whether defendant indorsed the name "Roy Thomas" on the check, the question is then presented whether the state has made out a case of forgery. It is a matter of common experience that in business transactions one man often signs the name of another to checks and notes. In such cases the presumption is that the signer has authority to sign the name. It was incumbent on the state to overcome the presumption that the defendant was authorized to sign the name "Roy Thomas" on the check. Although the testimony indicates that Buesche and Thomas were real persons, no attempt was made to show that the check was other than what it purported to be. It was not shown that the check was a false instrument, as was done in the case of *Taylor v. State,* p. 263, *post,* the same defendant. Neither was it shown that Roy Thomas never authorized the defendant to indorse the check. The fact that the defendant denied having indorsed the check did not relieve the state of the burden of showing by direct testimony or by circumstances that he was not authorized to sign it. If it had been shown that Thomas was a fictitious person, or that the check was a false instrument, then it might have been a proper inference for the jury to draw that the signature was not authorized.

The precise question we are now discussing has been presented to the courts of last resort in several states, and it is held that proof of signing the name of another and ob-

taining money thereon is not sufficient to show that a forgery has been committed.

In *State v. Swan,* 60 Kan. 461, it was held:

"Where it is shown that the defendant signed the name of another to a bank check which was cashed by the prosecuting witness, before a conviction can be had of the crime of forgery, * * * it devolves upon the state to prove that the accused signed the same without authority from the person whose name he used."

In *Romans v. State,* 51 Ohio St. 528, it was held: "In a prosecution for the forgery of a promissory note, when the defendant admits the making of the signature, the burden is not on him to prove that he had authority. In such case the burden remains on the state to prove that it was without authority, before a conviction can be had."

In *People v. Lundin,* 117 Cal. 124, it was said: "Upon the trial of a defendant accused of the forgery of a check, by signing the name of another thereto, the prosecution must prove that the defendant was not authorized to sign such name, and, until this proof is made, it is not shown to be a false instrument and the defendant is not put to his proof at all; and where a verdict of conviction is found, in the absence of such proof, it will be set aside as unwarranted by the evidence."

The last above-cited case was again before the court on a rehearing (120 Cal. 308) and, while the principle of law was adhered to, it was held that the facts were sufficient to justify the jury in believing that forgery had been committed. We are of the opinion that the proof fails to show that a forgery was committed or that defendant uttered and published a false and forged instrument.

It is next urged that the court erred in permitting evidence tending to show that defendant had committed similar offences at about the same time that the offence in question was committed. As a general rule such testimony is incompetent, but there are a number of exceptions to the rule which have been recognized by this court, and forgery is one of them. In *Davis v. State,* 58 Neb. 465, it was held:

"In a trial on the charge of uttering forged instruments, evidence of similar acts on the same day may be received to show the guilty knowledge or the intent of the accused charged in the act."

In a recent case, *Welter v. State,* 112 Neb. 22, the rule was extended to cover the charge of burglary. In *Abbott v. State,* 113 Neb. 524, on a charge of sodomy, the general rule was not extended, and it was held that the court erred in admitting evidence of similar acts. In cases where such evidence is admissible, the court should instruct the jury as to the purpose of such evidence. *Knights v. State,* 58 Neb. 225; *Davis v. State,* 58 Neb. 465. In the case before us, no instruction was asked with reference to the purpose of the evidence of similar offences, and error cannot be predicated upon the failure of the court to instruct upon that phase of the case. *Welter v. State,* 112 Neb. 22.

It is also urged that the court erred in permitting evidence tending to establish the allegations set forth in count three of the information. This count was based on section 10177, Comp. St. 1922, which in part reads as follows:

"Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or by the United States, or once in this state and once at least in any other state, or by the United States, for terms of not less than one year each, shall, upon conviction of a felony committed in this state after the taking effect of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the penitentiary for a term of not less than ten years."

It is argued by the defendant that it was greatly to his prejudice to have the matter of his previous conviction set out in the information. While it probably was not necessary to set out the fact of the former conviction in a separate count, we think it was proper to call the court's attention to the facts in the information. If the state desired to have the defendant punished under the habitual criminal statute, it was necessary to show that the defendant was the identical person named in the previous con-

victions. In this connection it is urged by the defendant that, his previous conviction having taken place before the enactment of section 10177, the provisions of the statute could not be made to apply; that to do so would make its provisions *ex post facto* and unconstitutional. We do not consider that the act can in any proper sense be regarded as *ex post facto*, and for that reason unconstitutional. The statute deals with offenses committed after its passage, permits an inquiry whether the accused has previously served terms in the penitentiary, and in fixing the penalty does not punish him for his previous offences but for his persistence in crime. Similar statutes are in force in a number of states and, so far as our inquiry goes, have uniformly been upheld. *Ex parte Gutierrez*, 45 Cal. 429; *Kelly v. People*, 115 Ill. 583; *Ingalls v. State*, 48 Wis. 647; *People v. Stanley*, 47 Cal. 113; *Commonwealth v. Graves*, 155 Mass. 163.

Upon a review of the record, we conclude that the facts are not sufficient to sustain the verdict and judgment. The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Criminal Law, 16 C. J. secs. 1163, 2157, 3151, 3161.

LEON TAYLOR V. STATE OF NEBRASKA.

FILED JANUARY 23, 1926. No. 24947.

Forgery: EVIDENCE: QUESTION FOR JURY. Where one is charged with forging the name of the payee in a check by indorsing the name of such payee thereon, and with uttering and publishing a false and forged instrument, and where the maker of the check testifies he never issued the check, or authorized any one to do so, that he did not know the payee named in the check, and that the check was a false instrument, and where the testimony tends to show that the accused indorsed the name of the payee on the check, and passed the check as a genuine instrument, such facts present a question for the jury to determine whether the offense charged has been sufficiently made out.

ERROR to the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

C. E. Walsh, for plaintiff in error.

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

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

DAY, J.

Leon Taylor, hereinafter designated defendant, was prosecuted in the district court for Douglas county, Nebraska, upon an information containing three counts. The first count charged the defendant with forging the name Thomas Brown on the back of a check purporting to have been issued by M. A. Wintroub, in which Thomas Brown was named as payee. The second count charged the defendant with having uttered and published the above-mentioned check, knowing the same to be false, and with intent to defraud. The third count charged the defendant with being an habitual criminal under the provisions of section 10177, Comp. St. 1922. Upon the trial defendant was convicted on counts one and two, and acquitted on count three, and was sentenced thereupon to serve a term of five years in the penitentiary. He has brought the record of his conviction to this court for review, and urges that the evidence is not sufficient to support the verdict and judgment.

The evidence on behalf of the state tends to show that on January 28, 1925, the defendant purchased a coat from the Reliable Clothing Company of Omaha, Nebraska, for $20; that in payment therefor he gave a check for $31.70, dated January 27, 1925, purporting to be signed by M. A. Wintroub and payable to the order of Thomas Brown; that the defendant indorsed the name Thomas Brown upon the check and received the coat and $11.70 in exchange therefor. The check was returned from the bank upon

which it was drawn with the memorandum attached thereto, "Forged". The check was introduced as evidence and identified as exhibit one. Across the top of the check was printed the words: "Mid-West Junk Co., M. A. Wintroub, 1835 North 20th street, Omaha, Nebr. Telephone We. 6240."

An employee of the store, who was a witness, identified the defendant as the person who indorsed the name Thomas Brown on the check and testified that the coat and change were delivered to him. M. A. Wintroub, a witness for the state, testified that he was the proprietor of the Mid-West Junk Company, that his place of business was located at 1835 North Twentieth street, Omaha, Nebraska; that his place of business was broken into, and among other things 22 blank checks were taken from his check book; that exhibit one was not issued by him, and that he never authorized any one to issue it; that he knew no such person as Thomas Brown; and that the check was a false and forged instrument.

The state also introduced the testimony that, about the same time that the alleged crime was committed, the defendant purchased merchandise in another store in Omaha, and in payment therefor gave a check in the identical form as the one in question, except as to the amount, and that the payment was refused by the bank on the ground that it was forged.

The defendant denied that he ever saw the check, or that he indorsed the check, or that he had ever had a similar check in his possession. The defendant also testified that, on the date on which the offense is charged to have been committed, he was sick at his home. In this he was corroborated by other witnesses. Under the facts disclosed by the record, we are of the opinion that it was for the jury to say whether a forgery had been committed.

Under the testimony the jury had the right to believe that the check was false and forged, and that the payee named therein was a fictitious person. The testimony was sufficient to negative the presumption of law that the defendant had authority to sign the name Thomas Brown on the check.

It is also urged that the court erred in overruling the defendant's motion to strike count three from the information. The propositions involved in the objection present the same questions as were before the court in *Taylor v. State, ante,* p. 257. Following the rule announced in that case, we hold that the trial court did not err in overruling the motion. Other questions were also urged which are sufficiently answered in *Taylor v. State, supra.*

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

AFFIRMED.

IN RE ESTATE OF JOHN O'CONNOR. JOHN F. KIRKMAN ET AL., APPELLANTS, V. STATE OF NEBRASKA, APPELLEE.

FILED JANUARY 23, 1926. NO. 24075.

1. **Appeal:** TRIAL DE NOVO. An appeal to this court from the district court in a suit in equity is the only one wherein it is the duty of this court to retry the issues of fact upon the evidence preserved in a bill of exceptions, and, on a trial *de novo,* reach independent findings and conclusions.
2. ———: ———: PROCEEDINGS TO DETERMINE HEIRSHIP. A proceeding begun in the county court, to determine whether petitioners are next of kin and heirs at law of a decedent, does not present a case calling for the exercise of equitable jurisdiction, and does not fall within the provisions of section 9150, Comp. St. 1922, requiring a trial of the issue of fact *de novo* in the supreme court.
3. **Trial:** REFUSAL OF INSTRUCTION. Error cannot be predicated upon the refusal to give a proper instruction, when it appears that the substance and effect of the instruction were contained in the court's charge to the jury.
4. **Appeal:** INSTRUCTIONS: HARMLESS ERROR. In a proceeding by a number of persons, claiming to be heirs of an intestate decedent, in which the state intervened, alleging that the decedent died leaving no heirs at law, an instruction which permitted the jury to find that the decedent died without heirs was not prejudicial to a claimant who was found not to be related to the decedent. If claimant was not related to decedent, it was immaterial to him whether or not decedent's property should escheat to the state.

5. **Evidence** examined and found to support the verdict.
6. **Descent and Distribution:** PROCEEDINGS TO DETERMINE HEIRSHIP: INTERVENTION BY STATE. Where, in the county court in the probate of the estate of an intestate decedent, numerous persons file petitions, alleging that they are related to decedent, and there is reason to believe that the decedent died without heirs, it is proper for the state to intervene in the proceedings, and assert its right and prevent the establishment of a spurious claim as genuine.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

McKenzie, Lower & Sheean and *W. W. Bulman,* for appellants John F. Kirkman et al.

Tibbets, Dungan & Tibbets and *Frank E. McGray,* for the Olsen Claimants.

McDonough & McDonough, for the Allman claimants.

Burkett, Wilson, Brown & Wilson and *James & Danly* for the O'Connor claimants.

O. S. Spillman, Attorney General, and *W. T. Thompson,* for the State.

J. J. Sullivan and *Epperson, Massie & Epperson, amici curiæ.*

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

GOOD, J.

This action originated in the county court of Adams county, Nebraska. John O'Connor, a resident of said county, died intestate on the 17th of August, 1913, leaving an estate valued, approximately, at $100,000. Numerous persons appeared and filed petitions, in which they averred that they were next of kin to, and heirs at law of, deceased. The state intervened, denying that any of the claimants were related to or heirs of O'Connor, and praying

that it be adjudged that O'Connor died without heirs, and that his estate escheat to the state of Nebraska.

A trial in the county court resulted in findings and judgment adverse to all the claimants. Several of the claimants appealed to the district court, where a trial was had in which the issue as to the relationship of the various parties to O'Connor was submitted to a jury. A verdict was rendered finding against each and every one of the claimants. From that judgment two sets of claimants have appealed, who will be hereinafter denominated as the Kirkman claimant and the Olsen claimants.

The first that is definitely known of O'Connor is in 1873, when he located in Fremont, Nebraska. He there worked as a cobbler for about two years. In 1875 he located in Hastings, Nebraska, and there operated a cobbler's shop for a number of years, and later opened, and for many years operated, a shoe store. He remained in Hastings from 1875 until his death in 1913. Where O'Connor was born, where he spent the years of childhood, youth and early manhood, who were his ancestors or other relatives, are all matters that are not definitely known and concerning which the evidence is in sharp conflict. Apparently, O'Connor was between 30 and 40 years of age when he located in Hastings, in 1875. During all of his residence in Fremont and in Hastings, he was known by the name of John O'Connor. During the 40 years of his life that he was fairly well known, he had with him at no time any person purporting to be a wife or child, or other relative; nor is it known that during all of those years he ever visited any one purporting to be a relative, or that any purported relative ever visited him. Neither does it appear that there was ever any correspondence during all those years between O'Connor and any other person as relative. At many times and to divers citizens of Hastings, with whom he was well acquainted and with whom he transacted business, he made the statement that, so far as he knew, he had no relatives on earth, or words of like import. When, on his deathbed, and within a day or two of his demise, he

was asked if he did not have some relative who could or should be notified, he responded: "Not a soul." Generally speaking, he seems to have been somewhat reticent concerning his early life. He was industrious, frugal, and thrifty, and succeeded in accumulating considerable property. From many things that appear in the record, he was always an honorable and upright man. During the 40 years of his known life, he is not shown to have committed a dishonorable act. In all of his business dealings he appears to have been just and kind and considerate to those with whom he dealt, and appears to have been rather fond of little children. Shortly after his death, numerous persons came forward and claimed relationship to O'Connor and the right to inherit his estate. From 18 states of the Union and from 3 foreign countries they came—about 150 in all. Two purported wills were brought forward by parties who sought to have them probated, and in which the proponents were named as beneficiaries, but both of these wills were adjudged to be forgeries. See *In re Estate of O'Connor*, 101 Neb. 617, and *In re Estate of O'Connor*, 105 Neb. 88.

From the judgment of the district court in the present proceeding, there are two appeals, one by John F. Kirkman, who avers that O'Connor's real name was James Madison Kirkman, and that claimant is his only child and heir at law; the other appeal, by Rudolph Olsen and the widow and children of John Olsen, deceased. These claimants allege that O'Connor's real name was Olaf Olsen; that Rudolph and John Olsen, now deceased, were the sons of O'Connor, the only heirs at law of O'Connor and entitled to inherit the latter's estate.

The Kirkman claimant contends that John O'Connor, alias James Madison Kirkman, was born in North Carolina and was the son of Harrison Kirkman; that about 1857, at the age of 17 or 18 years, young Kirkman left his home in North Carolina and went to Indiana and was there married to one Mary Trickey under the name of "Governor Kirkman"; that to this marriage a number of children were

born; that Kirkman deserted his wife and children and afterwards went under the name of O'Connor; that the wife of Kirkman and his children, other than claimant, are all deceased.

The Olsens contend that, in Manitoba, Canada, under the name of Olaf Olsen, O'Connor was married to Martha Johnston, a half-breed Indian woman; that O'Connor, alias Olsen, deserted his family in Canada about 1870; that Martha Johnston is dead, and that Rudolph Olsen and the widow and children of John Olsen, deceased, are the only surviving heirs at law of O'Connor, alias Olsen.

We will first consider the case as made by claimant Kirkman. He contends that he is entitled to a trial *de novo* in this court; that this court should examine the evidence and reach its findings of fact and conclusions independent of the findings of the jury or of the trial court.

The only provision of the law in this state requiring this court to retry the issues of fact involved in an action brought to this court by appeal upon the evidence preserved in a bill of exceptions, and for a trial *de novo* of such questions of fact, is contained in section 9150, Comp. St. 1922. That section, in so far as applicable, provides:

"In all appeals from the district court to the supreme court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and, upon trial *de novo* of such question or questions of fact, reach an independent conclusion," etc.

Upon a reading of the statute, it will be observed that it is only in suits in equity that a trial of issues of fact *de novo* is required in this court, and unless the present action may be properly denominated a suit in equity, then claimant is not entitled to a trial of the issues of fact *de novo*. In the instant case, the questions presented by the pleadings in the county court for determination are purely questions of fact, as to whether John O'Connor was James Madison

Kirkman and the father of claimant John F. Kirkman, and whether O'Connor was related to any of the other claimants, as by them alleged. No equitable doctrine is invoked. No question is presented that calls for the exercise of equitable jurisdiction. The case does not fall within the provisions of the statute. The claimant is not entitled to a trial of the issues of fact *de novo* in this court.

Claimant further insists that the case was tried below upon the theory that the verdict of the jury was advisory only, and that it must be so tried in this court. The record discloses that claimant Kirkman made the same claim in the district court, and that the trial court adopted the findings of fact made by the jury as its own. Evidently, this was only a precautionary measure taken by the trial court. We deem it unimportant, however, whether the verdict of the jury was advisory or not, since the trial court adopted as its own the findings of the jury. Had the case been tried to the court, without the intervention of a jury, its findings of fact would have been entitled to the same force and effect as the verdict of the jury, upon a question of fact properly submitted to it.

Claimant Kirkman complains of the exclusion of certain testimony offered by two witnesses, daughters of one Mary Hickey. It is conceded that the evidence offered is hearsay, but claimant insists that it comes within one of the recognized exceptions to the rule excluding hearsay testimony. We are of the view that it does not fall within any exception to the rule and was properly excluded, but, in any event, its exclusion was not prejudicial, because it was but cumulative of other uncontroverted testimony admitted, upon the same question.

Kirkman also alleges error in the exclusion of certain testimony offered by the witness Rowe, and in excluding certain exhibits identified by him; also in the exclusion of certain letters passing between John F. Kirkman and the witness Hambly. We have examined the evidence and the rulings thereon and each of the exhibits. In our view, none of the evidence excluded was material or relevant to

any issue of the case. It tended neither to prove nor disprove any fact in issue, and we perceive no error in the rulings complained of.

Kirkman asserts error in the court's instruction, wherein the jury were permitted to determine whether O'Connor died without heirs. We are unable to perceive that this instruction was prejudicial to the claimant, since the jury found specifically, from all of the evidence, that claimant was not related to O'Connor. If claimant was not related to O'Connor, he had no right in the property, and whether it should escheat to the state was a matter of no concern to him.

Complaint is made of the refusal to give two instructions requested by claimant. We have examined the instructions and find that one of them is covered substantially by the instructions given by the court, and that there was no error in refusing to give either of the instructions requested.

Kirkman contends with a great deal of vigor that the verdict is not supported by the evidence, and that the latter requires a finding in his favor. We have carefully examined and read all of the evidence contained in the very voluminous bill of exceptions. We shall not attempt to outline all of the evidence, or review it, in this opinion, because to do so would make an opinion that would fill the greater part of a volume of our reports, and would serve no useful purpose; but we shall summarize some of the facts disclosed.

From the record it appears that for many years prior to 1914 Kirkman had lived in either Omaha or Council Bluffs, and had gone by the name of "Kertman," and that he presumed that to be his real name. According to his testimony, he knew from the family history that his father deserted his wife and children some time about 1869. When claimant read the newspaper accounts of the various persons claiming heirship to O'Connor, he thought that O'Connor might be his father. He went to Hastings to make some investigations as to the facts, and obtained photographs

which he was informed and believed to be those of O'Connor taken many years prior to his death. With these pictures, or copies thereof, he went to his former home in Indiana, and discovered from the records, as he claims, that his father's name was Kirkman; that he was married to Mary Trickey under the name of "Governor Kirkman." He produced evidence tending to show that James Madison Kirkman was born near Greensboro, North Carolina, and resided there with his father until about 1857, when he was 17 or 18 years of age; that when he left North Carolina he went to Indiana, where he was joined in marriage to Mary Trickey; that to this marriage a number of children were born; that his mother, Mary Kirkman, and all of the issue of her marriage to Kirkman, save himself, are dead. He presented the pictures that he had obtained of various old-time residents of Indiana, Ohio, Illinois, and North Carolina, and took about 20 depositions of persons, who identified the photographs as pictures of James Madison Kirkman, alias John O'Connor. Copies of these photographs were published in a newspaper, and it developed that the pictures, instead of being those of O'Connor, proved to be the photographs of a man by the name of Cornelius Culavin, who was then living in Indiana. Mr. Culavin was produced at the trial and identified the pictures as being of himself. The fact that Culavin had identified the photographs as his own became known to Kirkman long prior to the present trial. Not daunted by this fact, Kirkman produced other witnesses, who came and viewed the corpse of O'Connor and testified that it was that of the person whom they had known 50 years before as James Madison Kirkman. Other depositions were taken in which witnesses identified photographs of the corpse of O'Connor as being the photographs of James Madison Kirkman.

There was evidence tending to show that the upper part of the right ear of O'Connor was missing, but it was not apparent to the casual observer, and, from the photographs of the corpse which were in evidence, it is scarcely observable, even when attention is called thereto. Kirkman

produced evidence that James Madison Kirkman had the rim of his right ear frozen while living in North Carolina. The rigors of a winter in North Carolina, prior to 1857, may have been severe enough to freeze Kirkman's ear to such an extent that a part of it would come off. It is probable that the testimony of witnesses, who claimed to recollect such a very trivial defect in Kirkman's personal appearance after the lapse of so many years, did not greatly impress the jury.

There was evidence that James Madison Kirkman possessed an unusually long thumb and long fingers, and that his right thumb was particularly long; also that there was a scar on his left foot; and evidence was produced tending to show that O'Connor also had a particularly long right thumb and fingers and possessed a scar on his left foot. From an examination of the photographs of O'Connor's hands which are in the record, it appears that the thumb on his right hand was slightly longer than on the hand of an ordinary individual. The evidence of the witnesses produced by Kirkman relative to these characteristics was so startling and the witnesses gave in such detail and remembered so accurately the things which happened a half-century or more ago—things that would be trivial in their nature—that it would be a tax on the credulity of any intelligent person to believe that they could so remember.

Kirkman, himself, testified that he never remembered seeing his father except once; that when he was about five years old his father came home after a long absence, and remained at home on that occasion from 24 to 36 hours; that he invited the claimant, then not quite five years old, to go with him down-town. They visited a saloon. He remembered his father and another man standing at the bar and conversing; remembered that his father's name was Kirkman, and that the barkeeper's name was Kirk, and gave their conversation, indicating a most startling and phenomenal memory on the part of Mr. Kirkman, and yet he did not know that his own name was Kirkman, and did

not find it out until 1914 or 1915. Moreover, he produced a number of persons who claimed to be his relatives, and who testified that they had known claimant Kirkman from the time he was four years old, down to the present time, and that they knew that his name was Kirkman, but did not, apparently, know that he was going under the name of "Kertman."

Kirkman also produced evidence tending to show that James Madison Kirkman, when he deserted his family in Indiana, had taken with him a silk dress, belonging to his wife, and two large pictures in oval wooden frames, 11 or 12 inches across; that one of these frames contained the picture of Mary Trickey before marriage, and the other a photograph of Mary Trickey Kirkman, with her son, John F. Kirkman, in arms. These pictures were found in Fremont, Nebraska, where, it was alleged, O'Connor had, in 1875, left them with a man by the name of Hickey, who was to keep them until called for by O'Connor. This fact, if true, would be an indication that O'Connor and James Madison Kirkman were one and the same person. In the back of one of these oval frames was a purported photograph of one Bishop Edwards, who was a brother-in-law of James Madison Kirkman. In the back of the other frame was a photograph of a bridge. Kirkman's evidence tended to show that Harrison Kirkman, father of James Madison Kirkman, was a bridge builder in North Carolina, and that the picture was a photograph of a bridge built by Harrison Kirkman over a stream, known as Reedy Fork. The evidence further tended to show that after James Madison Kirkman left his home in North Carolina, in 1857, he never returned, and none of his family ever heard from him thereafter except once in Indiana. It developed that the bridge, claimed to be represented in the photograph, was not built until in the late sixties. It is something of a mystery how the picture could have come into the possession of James Madison Kirkman in Indiana. In addition to this, the bridge picture indicates that it is over a large stream and is about 600 feet long, while evidence taken in behalf of

the state shows that Reedy Fork, at the place where the bridge is built, is an insignificant and small stream. True, it may have dwindled from a stream 600 feet wide, in 1857, to one 20 or 30 feet wide, in 1923. Moreover, other evidence was produced on the part of the state, given by old-time residents of Fremont, Nebraska, that, in their opinion, the photograph was that of a bridge over the Platte river, near Fremont, in the early days.

Suffice it to say, in summing up the evidence on behalf of Kirkman, that he has undoubtedly established that there was such a person as James Madison Kirkman, and that he has apparently established that Mary Trickey and Governor Kirkman were married, and that perhaps the claimant Kirkman, alias John Kertman, is their son, but the evidence that John O'Connor of Hastings and James Madison Kirkman, or Governor Kirkman, were one and the same individual is far from satisfactory. It may be also noted, in this connection, that other claimants testified that the photographs, claimed to be those of Mary Trickey and of Mary Trickey Kirkman, with her son, were photographs of a totally different person.

After an examination and consideration of all the evidence, we arrive at the same conclusion, as did the county court, the jury and the trial judge in the district court, that Kirkman has not established any relationship to John O'Connor.

We will next consider the contention of the Olsen claimants. Twenty-five errors are assigned in their brief, which may be grouped under the following headings: Error in the admission of certain evidence; error in the giving and refusing of instructions; and that the verdict is not sustained by sufficient evidence. Of all these assignments only two are discussed in the brief, the first being error in receiving certain evidence.

The Allman claimants, who were defeated in the district court and did not appeal to this court, offered the testimony of John T. Culavin, given at a former trial, and then offered certain evidence tending to contradict the testimony

given by Culavin. We have examined the record and find that the only evidence offered to contradict the testimony of Culavin, and to which objection was interposed by the Olsen claimants, was excluded upon their objection. At least, this is true so far as anything pointed out by the Olsen claimants is concerned. Consequently, this assignment is without merit.

We will next consider the assignment that the verdict against the Olsen claimants is not supported by sufficient evidence. We will not undertake to review in this opinion all the evidence offered on behalf of these claimants but call attention to some of its salient features. They assert that, under the name of Olaf Olsen, John O'Connor was married to Martha Johnston, a half-breed Indian woman, in Manitoba, Canada, and that to this union a number of children were born; that Martha Johnston is dead, and that John and Rudolph Olsen were the only surviving children; that John Olsen is now deceased, and that his widow and children, together with Rudolph Olsen, are the only next of kin and are entitled to inherit the O'Connor estate.

Evidence was offered tending to show that after Olaf Olsen, or Olaf Wilson, was married to Martha Johnston, Olsen got into some trouble in Manitoba; that he was mixed up in the Riel Rebellion; that he killed two English officers, and perhaps committed other crimes, and left Canada about 1871; that on one occasion, a few years later, he went back home and saw his wife and children, and asked her to go with him, but she refused because she was then living with another man; that he then departed from Canada and never again returned.

John T. Culavin, who has heretofore figured as a claimant for the estate of John O'Connor, and who presented for probate a will, purporting to have been executed by O'Connor, in which Culavin was named as devisee and legatee, testified that, at the request of O'Connor, he went to Canada, to the neighborhood where O'Connor had formerly lived, and looked up O'Connor's relatives, and told them that O'Connor was dead. It is also significant that

Culavin and his attorney at the same time procured a power of attorney from John and Rudolph Olsen, and also a contract from them whereby Culavin and his lawyer would get the entire estate of O'Connor for a consideration of $2,000, of which only $200 was paid, provided that the Olsens succeeded in establishing their claim to the estate of O'Connor. Culavin, with his attorney, seems to have been quite active in attempting to graft O'Connor on the Olsen family tree for reasons which are apparent. Numerous witnesses from Canada, who had not seen Olsen for a half-century, were brought to Hastings to view the remains of John O'Connor, and gave it as their opinion that he was Olaf Olsen. Others identified the pictures of the corpse of O'Connor as being a picture of Olaf Olsen, but the evidence on behalf of the Olsens, given by a number of witnesses, was to the effect that Olaf Olsen had light hair and a light complexion; that he was a Swede, Dane, or Norwegian; that he spoke the Norwegian or Swedish language; that he was known as a Swede, such as his name would indicate; while the fact is established beyond question that O'Connor had very dark brown hair, dark brown mustache, and hazel eyes. His physiognomy, judging from the pictures of the corpse, does not indicate Scandinavian origin. His physiognomy and general appearance, as disclosed by the evidence, show almost unmistakably that John O'Connor was of Irish descent. There were many other discrepancies in the testimony on behalf of the Olsen claimants that would tend to cast doubt and suspicion on their claim as sons of O'Connor. Suffice it to say, that the jury's verdict, that John and Rudolph were not the sons of nor related to John O'Connor, seems to be fully sustained by the evidence.

It is contended further by both sets of claimants that the state of Nebraska had no right to intervene in this proceeding, and that it was prejudicial to the interest of the respective claimants for the state to offer evidence. With this contention we cannot agree. The object of the claimants was to establish their relationship to O'Connor, and

to thereby inherit his estate. Under the law of this state, if O'Connor had no heirs to inherit, then his property would escheat and belong to the state. The state was interested, therefore, in seeing that no spurious claimant should be permitted to establish his claim. The state claimed an interest in the estate because it asserted that John O'Connor died without heirs, and it had a right to succeed to his estate, and was therefore interested in preventing any others from succeeding to the O'Connor estate, unless they were lawfully entitled so to do.

It has been held that escheat proceedings for defect of heirs cannot be prosecuted pending an administration of the estate; that the state's proper course is to intervene in the probate proceedings, setting forth its claim to the estate of the decedent. See 21 C. J. 855, sec. 15, and authorities there cited.

Other claimants than those who are parties to this action have appeared as friends of the court and filed a brief in this case, and requested that no order or judgment be entered in this cause that will bar them of their right to be heard; that they may be given an opportunity to establish their claims to heirship to the John O'Connor estate.

The judgment entered in the district court went no farther than to disallow the claims of all who are parties to this action, claiming as heirs of John O'Connor. According to the record, no judgment of escheat was entered in the county court, nor was one entered in the district court. The state did not appeal, and the question, whether judgment of escheat should be entered in this case, is not properly before us. The county court has exclusive original jurisdiction to determine heirship and to that court all claimants must go before they can be heard in this court upon that question.

The record presents no error that is prejudicial to the complaining parties, and the judgment of the district court is therefore

AFFIRMED.

Note—See Descent and Distribution, 18 C. J. 123.

STATE OF NEBRASKA, APPELLEE, V. DEWEY SWEDLAND ET AL., APPELLANTS.

FILED JANUARY 23, 1926. No. 23562.

1. **Criminal Law:** PENALTY. That part of section 9605, Comp. St. 1922, providing that one violating its provisions shall "make restitution to the party injured in two-fold the value of the property stolen or destroyed, and be fined in a sum not exceeding one hundred dollars," inflicts but a single punishment.
2. ———: SUPERSEDEAS BOND: SATISFACTION. In a case where such restitution and fine were imposed and a supersedeas bond given under section 10180, Comp. St. 1922, which suspended the issuance of an execution, such bond is not satisfied by the surrender of the body of defendant prior to the issuance of such execution and return thereof unsatisfied in whole or in part.

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

Bruckman & Paulson, for appellants.

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

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

THOMPSON, J.

Defendant Dewey Swedland was charged with stealing 30 bushels of wheat of the value of $25 in Kearney county under section 9605, Comp. St. 1922, and found guilty of stealing such wheat to the value of $22.88. He was sentenced to make restitution to the owner thereof in two-fold this value, and pay a fine of $100, in accordance with the punishment prescribed in such section. He filed the affidavit for prosecuting error to this court, requesting that supersedeas bond be fixed, which bond was fixed in the sum of $400, in accordance with section 10180, Comp St. 1922, and in open court was furnished by appellants herein. Error was prosecuted to this court, judgment of the district court affirmed, and mandate issued and filed in the office of

the clerk of such court for Kearney county. Defendant Dewey Swedland then went to the sheriff and offered to surrender himself into custody, and the two went to the office of the county attorney, who said he would let him know later in regard to it. This was done with the knowledge of the bondsmen.

The county attorney, for and on behalf of the state, then filed a motion in the case, stating its history, and praying that default of bond as to each bondsman be had, judgment entered and execution ordered issued. This motion was resisted by defendant Swedland individually, and by his bondsmen jointly, who had defendant in court and offered to surrender him. The case was heard by the court without a jury. Finding and judgment was entered against each of the bondsmen as prayed, and execution ordered. The case is brought to this court for reversal, presenting for our determination the question: Were the bondsmen released upon the surrender of Dewey Swedland?

Appellants cite, among others, sections 10031, 10032, and 10033, Comp. St. 1922. That these sections are not applicable is shown by the fact that each and all are part of the chapter covering the giving of bond for the personal appearance of defendant prior to the trial, and not after, and under conditions where the proper surrender of the accused constitutes a performance of the obligation, and meets all requirements of the law and of the record, wherein the punishment finds expression. Thus, we are left to an application of sections 9605, 10180, 10198, and 10202, Comp. St. 1922.

As to how the double restitution and fine imposed, as in this case, shall be enforced: The part of section 9605, *supra*, material here is:

"Every person so offending shall make restitution to the party injured in two-fold the value of the property stolen or destroyed, and be fined in any sum not exceeding one hundred dollars, or shall be imprisoned in the city or village jail subject to such labor on the streets or elsewhere as shall be required by the officer in charge of such jail for any time not exceeding thirty days."

Section 10198, *supra,* provides: "In all cases of misdemeanor in which courts or magistrates shall have power to fine any offender, and shall render judgment for such fine, it shall be lawful to issue executions for the same, with the costs taxed against such offender, to be levied on the goods and chattels of any such offender, and, for want of the same, upon the body of said offender, who shall thereupon be committed to the jail of the proper county until said fine and costs be paid, or secured to be paid, or the offender be otherwise discharged according to law."

This last-quoted section is followed by section 10202, *supra,* which reads: "It shall be the duty of the clerk of the district court to issue execution for every judgment rendered during the term, for fines and forfeited recognizance, and for the costs in such cases, which remain unpaid and unreplevied; and upon like condition each magistrate shall issue execution forthwith for fines and costs assessed by him."

The part of section 10180, *supra,* material here, providing for a supersedeas bond upon affidavit being filed, reads: "Said court shall fix the amount of a recognizance, which in all cases shall be reasonable, and such person or persons shall during the term of court enter into the same with good and sufficient sureties to be approved by the court, conditioned that said proceedings in error shall be prosecuted without delay and in case said judgment shall be affirmed he or they will abide, do and perform the judgment and sentence of the court."

Appellants contend that section 9605, *supra,* inflicts a double penalty for the same offense. This is answered by our holding in *Everson v. State,* 66 Neb. 154, wherein we held in construing a similar section: "The provisions of section 124 of the Criminal Code directing the assessment of a fine in double the amount embezzled, in addition to the imprisonment imposed in case of conviction, is not open to the objection that it inflicts a double penalty or punishment upon the defendant, or awards the injured party double damages." As is well said in *Coffey v. Harlan Coun-*

ty, 204 U. S. 659 (a Nebraska case): "It is within the power of the state to enact laws creating and defining crimes against its sovereignty, regulating the procedure in the trial of those who are charged with committing them, and prescribing the character of the sentence which shall be awarded against those who have been found guilty. * * * As part of the consequences of a conviction of the crime of embezzlement by a public officer, the law of Nebraska provides that a fine double the amount embezzled shall be inflicted, which shall operate as a judgment against the estate of the convict. It is not of the slightest importance whether this fine is called a penalty, a punishment, or a civil judgment. Whatever it is called, it comes to the convict as the result of his crime." As a result of such crime, he must answer to the state, not to the party whose property he has stolen.

Appellants meet the sequence of such conclusion by an offer to surrender the body of defendant Dewey Swedland, with the expressed desire on the latter's part that he be committed to, and remain in, the county jail for a period of time sufficient, at the rate of $3 a day, to liquidate the fine and costs under the provisions of section 10206, Comp. St. 1922, which provides:

"Whenever it shall be made satisfactorily to appear to the district court, or to the county judge of the proper county, after all legal means have been exhausted, that any person who is confined in jail for any fine or costs of prosecution for any criminal offense, hath no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of the said court or judge to discharge such person from further imprisonment, for such fine and costs, which discharge shall operate as a complete release of such fine and costs: Provided, nothing herein shall authorize any person to be discharged from imprisonment before the expiration of the time for which he or she may be sentenced to be imprisoned, as part of his or her punishment, nor until the convict shall have been imprisoned at least one day for every three dollars of the amount adjudged against him."

Under this record, such section is without application. Until execution is issued, and returned unsatisfied in whole or in part, the state is not in position to say, as by such section conditioned, that "all legal means have been exhausted." Then, this section applies only to one "who is confined in jail," and, as seen from section 10198, *supra,* in a case like this, the offender cannot be committed except for want of goods and chattels out of which to meet the demands of the execution.

If all that defendant desired was a review of the record by this court, the bond given was not necessary. If, however, he wanted to stay the enforcement of such judgment in the interim, such supersedeas bond, as in a civil case, became a necessity. And, as in a civil case, the bond obligates the parties thereto for its payment. If payment is not made, the state must first attempt to collect by execution. If by such the judgment is not satisfied, *then* it may take the body of such offender and commit it to jail until such fine and costs are paid or caused to be paid. The execution and its return unsatisfied in whole or in part must precede the taking of the body. The bond obligates each and every obligor thereof to answer the judgment of the court rendered thereon.

The judgment of the district court is

AFFIRMED.

Note—See Criminal Law, 16 C. J. sec. 3219; Bail, 6 C. J. sec. 314.

BOZENA GROTTE, APPELLEE, V. HARRY RACHMAN ET AL., APPELLANTS.

FILED JANUARY 23, 1926. No. 23662.

1. Statute of Frauds: SALE OF STOCK. "A cash sale of stock upon an agreement whereby the seller undertakes to repurchase at the buyer's option constitutes an entire and indivisible transaction sufficiently performed to take it out of the statute of frauds, though the agreement to repurchase be oral." *Stratbucker v. Bankers Realty Investment Co.*, 107 Neb. 194.
2. ———. "A contract not to be performed within one year, as

meant by the statute of frauds, is one which by its terms cannot be performed within one year. A contract is not within the statute merely because it may or probably will not be performed within a year." *Carter White Lead Co. v. Kinlin*, 47 Neb. 409.

3. Corporations: SALE OF STOCK: AGREEMENT TO REPURCHASE. Where, as in this case, plaintiff was induced to purchase stock in a corporation by the promise of defendants to repurchase such stock from her with interest, upon demand, at any time she needed the money, the time elapsing between the date of such purchase and demand is not controlling; it is the need for the money that exacts fulfilment of such promise.

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

Gaines, Van Orsdel & Gaines and *Eugene N. Blazer*, for appellants.

Benjamin S. Baker and *James E. Rait, contra.*

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

THOMPSON, J.

This action was commenced in the district court for Douglas county to recover $11,000 with interest at 7 per cent. per annum from June 10, 1919. Plaintiff contends that on or about such date she was the owner and holder of stock in the Burgess Nash Company, a corporation of Douglas county, of the par value of $11,000; that she and defendants were, and had been for some years, close personal friends; that she was without business knowledge, and relied solely on the representations of defendants; that they promised her that, if she would turn the Burgess Nash stock over to them and accept in lieu thereof stock in Stroud & Company of the same face value, of which company defendants were acting as agents for the sale of stock, they would, at any time that plaintiff needed the money, upon demand being made, repurchase from her the Stroud stock at its face value, with 7 per cent. interest

from June 10, 1919; that, relying upon such promise, she delivered to them the Burgess Nash stock and received stock in Stroud & Company of the same face value; that thereafter she offered, and now offers, to return the Stroud stock, and has demanded, and now demands, the $11,000 with interest, as agreed, but defendants refuse to accept the stock and pay her.

To this, defendants interpose, quoting from their brief: "(1) A general denial. (2) An oral agreement to repurchase the stock in controversy would be void under the statute of frauds. (3) The plaintiff made no request or demand of the defendants to repurchase the stock until the date of filing the petition, to wit, January 16, 1923, and hence it is too late for her now to assert any claim against defendants for the repurchase of the stock in controversy." Plaintiff denied the allegations, above quoted, in her reply.

Trial was had to a jury, which rendered a verdict in favor of plaintiff for the full amount claimed, less dividends paid, and interest thereon from date of payment to date of verdict. Judgment was entered accordingly, to reverse which defendants appeal, challenging such judgment for the following reasons: The court erred in giving instruction No. 4 on its own motion; the court erred in overruling defendants' motion for an instructed verdict.

Defendants complain of instruction No. 4 for the reason that, as the Burgess Nash stock was sold by them for $10,172.80, the jury should have been told that this sum, and not $11,000, the face value thereof, should form the basis of her recovery, if any. This conclusion is not warranted by the facts. Plaintiff did not sell this stock but turned it over to defendants at its face value for a like amount, face value, of the Stroud & Company stock, under an agreement that defendants would pay her, when needed by her, the face value of such stock with interest.

The jury having passed on the questions of fact involved favorable to plaintiff, and there being sufficient competent evidence to support their findings, we are called upon to determine but two other questions, to wit: Was the oral

agreement to repurchase the Stroud stock void under our statute of frauds? If not, did plaintiff lose her right by failing to make demand for such repurchase for three and a half years?

Taking up these questions in their order, it will be seen that such promise to purchase the Stroud stock from plaintiff entered into and became a potent factor in the making of the contract, and was an inseparable part of the consideration moving from defendants to plaintiff. Plaintiff paid full consideration at the time. As to her the contract was complete. Thus, under our holdings in *Fremont Carriage Mfg. Co. v. Thomsen,* 65 Neb. 370, and *Griffin v. Bankers Realty Investment Co.,* 105 Neb. 419, the transaction was not within the statute of frauds. In the latter case we adopted the rule announced in *Hankwitz v. Barrett,* 128 N. W. 430 (143 Wis. 639): "The sale and delivery of stock and payment of the price, under a contract whereby the seller agreed to repurchase at the buyer's option, constituted an entire transaction which was sufficiently performed to take it out of the statute of frauds, relating to contracts for the sale of goods, though the agreement to repurchase was oral." This rule was followed in *Stratbucker v. Bankers Realty Investment Co.,* 107 Neb. 194.

Then, it will be further noticed that this contract does not limit the time within which plaintiff might make this demand; therefore, it might be within one year, and thus it would come within our holding in *Carter White Lead Co. v. Kinlin,* 47 Neb. 409:

"A contract not to be performed within one year, as meant by the statute of frauds, is one which by its terms cannot be performed within one year. A contract is not within the statute merely because it may or probably will not be performed within a year."

As to the second issue, defendants urge by way of their brief, as well as in oral argument, that, as the contract fixed no definite date within which plaintiff might demand repurchase by them, she had but a reasonable time in which to do so; that as she made no demand for three and a half

years after she purchased the stock, she did not act within a reasonable time, and for that reason must fail in this action.

One buying stock in a corporation, or any other property, has a right to that which he buys and pays for; that is, he is entitled to the full consideration passing to him. Where, as in this case, one parts with her property in consideration that the other party will take back the property purchased, and pay in cash therefor to the extent of the full face value, at any time that the purchaser needs the money, she is in law, as well as in good conscience, entitled to the complete fulfilment of the contract. The length of time elapsing between the time of sale and the demand of the purchase price and interest is immaterial, except as it may be considered with other evidence in determining the good faith and intention of the parties. Such a contract is not against public policy. Good faith is demanded, and the burden is on the plaintiff to prove the existence of the condition, if such there is in the contract. This condition must not be fanciful, or created for the purpose of securing such repurchase. It must be real, and if so found, as in this case, she is entitled to the fruits of her contract. To hold otherwise would be to deny to plaintiff an inducing factor for her contracting.

At the time this contract was made plaintiff was a resident of California, and has so remained. Defendants were residents of Omaha, and have been ever since, and were financially well to do. The Burgess Nash stock was at this time what is know as "gilt edged," and was so known by each of the parties. The character of the Stroud stock was known to defendants but not to plaintiff. Her ignorance thereof was also known to defendants and they solicited her to make the purchase while she was temporarily in Omaha. She first told them that she was without money, and also without property of moment except the Burgess Nash stock, which she said she knew to be good, and which she could convert into cash whenever she needed it. To this defendants answered, in substance, that securing cash need not worry her,

for if she would turn the Burgess Nash stock over to them they would sell it and turn over to her $11,000 face value of the Stroud stock, and if at any time she needed money they would take such stock and pay the face value thereof, with 7 per cent. interest from its face date. Relying on this she turned over to them her stock and received in lieu thereof seven certificates of stock in Stroud & Company, in the following denominations: Four for 20 shares each, with a face value of $2,000 each; three for 10 shares each, face value $1,000. As these were handed to plaintiff by defendants, one of them, in the presence of the other, said that they had placed her stock in seven certificates so it would be easier for her to convert them into cash, as all she would have to do would be to enclose such certificates as would cover the amount of money needed in a letter, send same to them, on receipt of which they would send her the face value in cash. This, of itself, shows that as to when she needed money, time and conditions must determine. It appears from the evidence that she had not needed money until just prior to the commencement of this action when she purchased property in California, as she says, on the strength of this contract with defendants, and immediately tendered the stock to them and demanded payment, which was refused. This action was then instituted.

The privilege of selling her stock to defendants at any time she needed the money was a material and inseparable part of the contract. She paid for such privilege, and is, under this record, entitled to it. In this conclusion we are supported by our holding in *Fremont Carriage Mfg. Co. v. Thomsen, supra,* that where such a contract was based on the condition that, if the vendor of the stock discharged or ceased to employ the purchaser thereof, the former would pay the latter the face value of stock purchased by him, the contract having been entered into on February 1, 1894, breached September 4, 1897, and suit brought on February 6, 1899, the purchaser was entitled to recover, notwithstanding that the time he was to be employed was without limitation. The condition, "when he was discharg-

ed," was the one which was held to mature the right to demand the purchase price. In the instant case, it was when "she needed the money." In principle there is no distinction between the two cases.

Then, as said in the opinion in *Armstrong v. Orler*, 220 Mass. 112: "But the agreement found by the judge to have been made by the defendant was not an agreement to take back upon the plaintiff's being dissatisfied with the purchase, but was an absolute agreement that he 'would buy back from the plaintiff these stocks and bonds at any time he (plaintiff) desires to return the same.'"

In the course of the opinion in *Kincaid v. Overshiner*, 171 Ill. App. 37, it is said: "It is too late now for defendants to undertake to seek a new agreement; they did not limit the time when performance should be demanded by plaintiff but agreed to purchase it *at any time*. The court cannot alter the terms or conditions of the agreement as made."

Error was not committed in overruling defendants' motion for an instructed verdict, or in the application of the law to the facts. The judgment of the district court is

AFFIRMED.

Note—See (1, 2) 27 C. J. secs. 86, 96, 253.

JOHN A. MACUMBER, APPELLEE, V. WALTER E. THOMAS ET AL., APPELLANTS

FILED JANUARY 23, 1926. NO. 24880.

Evidence examined, and *held* insufficient to support the judgment and findings of the district court.

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

Sidner & Thomas, E. D. Crites and *F. A. Crites*, for appellants.

G. T. H. Babcock and *Allen G. Fisher, contra.*

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

EBERLY, J.

This is an action in equity to secure the foreclosure of two mortgages in the district court for Sioux county, Nebraska. The petition is in the usual form. The answer of Jerome and Rowland Gillett, defendants in the court below, includes a general denial of the allegations of the petition coupled with a special denial of the allegations in the petition "that no proceedings at law have been had for the recovery of either of said mortgage indebtedness as set forth in the first and second causes of action, or any part thereof, and no part has been collected and paid."

A decree of foreclosure and sale was entered on these pleadings on May 11, 1925. A bill of exceptions was certified to on June 11, 1925, in the following form by the presiding judge:

"I, * * * the judge before whom this action was tried and determined, do hereby certify that the within is a true transcript of all of the evidence produced at the trial in the above-entitled action of John A. Macumber, Plaintiff, v. Walter E. Thomas et al., Defendants, in the district court of Sioux county, in the state of Nebraska, and contains a true record of all testimony offered, admitted, heard, read and received in the trial of this case, as well as a full, true and accurate record of all objections made by the respective counsel on rulings made and entered into by the court thereon, and upon the application of the attorneys for the defendants this transcript of the record is made a bill of exceptions, and the clerk of said court is ordered to make same a part of the record herein."

It is to be noted that the form of the issues imposed the burden of proof upon the plaintiff at the trial in the court below. The transcript does not disclose that the decree was entered upon default of the defendants. It is disclosed by the bill of exceptions that the notes and mortgages forming the foundation of the suit were not introduced in

evidence at the time of the trial, nor was any evidence whatsoever offered by the plaintiff to sustain the action.

It must be remembered that the bill of exceptions, as settled by the court and filed in this case, imports absolute verity and cannot in any manner at this hearing be varied, contradicted, or modified, and parol statements of counsel which would have this effect made at the argument may not be considered for any purpose whatsoever.

It follows that, in view of the record in this case, the decree entered below is wholly unsupported by the evidence and cannot be sustained. The case is therefore reversed and remanded for further proceedings.

REVERSED.

URBAN ZEDIKER V. STATE OF NEBRASKA.

FILED JANUARY 23, 1926. No. 24890.

1. **Information**: BURGLARY AND LARCENY: SINGLE COUNT. Burglary and larceny may be charged in a single count of an information, where the criminal acts of which the defendant is accused constitute parts of the same transaction. Under such information there may be a conviction of either or both felonies, as the evidence may require.
2. **Criminal Law**: OBJECTION TO EVIDENCE. Where testimony in the nature of hearsay is sought to be introduced, an objection on the ground that the same is "incompetent" is sufficient in form and substance.
3. ———: ———. Where an objection to the introduction of evidence is once made and overruled, it is not necessary to repeat the objection to further testimony of the same nature by the same witness in order to save error, if any, in the ruling of the court whereby such testimony was received.
4. ———: CONSPIRACY: EVIDENCE: ADMISSIBILITY. Wherever the writings or words of any of the parties charged with, or implicated in, a conspiracy can be considered in the nature of an act done in furtherance of the common design, they are admissible, not only against the party himself, but against all of his coconspirators, whether present or not. Wherever the writings or words of such party amount to an admission merely of his own guilt, and cannot be deemed acts done in furtherance of the common design, they can be received in evidence only

against the party making or uttering them. *Held*, under the facts as reflected by the record in the case, statements set forth in this opinion, testified to over objection, were the recital or narration of a past transaction merely, and were not made in furtherance of the common design.

5. ———: CHANGE OF VENUE. "The Constitution guarantees to every person charged with crime a trial by an impartial jury. If there is such a prejudice in the minds of the people of the county against the defendant, or such a firm conviction of his guilt of the crime charged against him that there is substantial and well-founded reason to believe that he cannot obtain a fair trial in the county, the Constitution requires that the venue be changed. The trial court must exercise discretion in determining these facts, but has no discretion to refuse the change of venue when these facts appear." *Lucas v. State*, 75 Neb. 11.

6. ———: ———: ABUSE OF DISCRETION. In view of the facts and circumstances set forth in the record and referred to in this opinion, *held*, that a change of venue should have been granted, and that the refusal so to do constituted an abuse of discretion on the part of the trial court.

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

M. F. Harrington and *E. C. Barker*, for plaintiff in error.

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

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

EBERLY, J.

From conviction of larceny, after his separate trial, upon information filed in the district court for Box Butte county charging the defendant (plaintiff in error) and three others in one count jointly with burglary and larceny, alleged to have been committed at the same time and as one transaction by all defendants, Urban Zediker has appealed.

The first question presented by the record is the legal effect of the verdict returned by the jury that they "do find the defendant Urban Zediker guilty of larceny,"

and containing no finding on the charge of burglary. The contention is made that this verdict operates to acquit the defendant of both crimes charged in the information. With this contention we do not agree. The information is properly drawn.

"Where different criminal acts constitute parts of the same transaction, they may be charged in the same count. There are many illustrations of this rule, among which are burglary and larceny. It is permissible to charge a burglary only, as that the accused broke and entered with intent to steal property, and also a larceny, as that he then and there stole the property described; and such an indictment will sustain a conviction for either of the crimes charged. 1 Bishop, Criminal Procedure, secs. 423, 439; *Breese v. State,* 12 Ohio St. 146; *State v. Brandon,* 7 Kan. 106; *State v. Hayden,* 45 Ia. 11; *State v. Brady,* 14 Vt. 353; *Commonwealth v. Tuck,* 20 Pick. (Mass.) 356; *Josslyn v. Commonwealth,* 6 Met. (Mass.) 236." *Aiken v. State,* 41 Neb. 263. See, also, *Lawhead v. State,* 46 Neb. 607.

The principle involved in the contention here made was discussed by this court in the following language: "It is next argued that the sentence cannot stand because the verdict is fatally defective. The point is not well taken. In a single count of the information defendant was accused of burglary—feloniously breaking into a freight car with intent to steal—and of larceny—stealing articles from the freight car. The charging of both criminal acts in a single count was permissible. *Lawhead v. State,* 46 Neb. 607. The larceny tends to show the criminal intent essential to burglary. The evidence is sufficient to sustain a verdict against defendant for either burglary or larceny. Under the instructions the jury were at liberty to acquit defendant entirely or to find him guilty of either felony." *Vickers v. State,* 111 Neb. 380.

It may be said that the cases cited by counsel for the defendant present solely the question of prior conviction or acquittal as involving former jeopardy. That point is not for consideration here. The facts in the present case, as-

suming counsel's statements to be true, invoke rather the application of the rule that where two or more complaints, or counts, for the same offense, or offenses, arising or included in the same transaction, are tried together, an acquittal as to one charge by reason of variance is no bar to a conviction on another charging the offense in a different way. 16 C. J. 243, sec. 380; *Commonwealth v. Baldwin,* 213 Mass. 238.

The next question presented by the record is the admission by the trial court, over objection, of the evidence of witness Stickrod as to a conversation between Stickrod and one Gebhardt who, with the defendant herein, was jointly charged with the commission of the offense. The conversation in question occurred on the day following the burglary. The defendant being tried in this case was not present, and the evidence was introduced on his separate trial. To the question eliciting this evidence the objection, "Objected to as incompetent," etc., was made by the defendant and overruled by the court.

It may be said in passing that this objection was sufficient in form and substance. *State v. Magone,* 32 Or. 206; *Nightingale v. Scannell,* 18 Cal. 315; *Greenleaf v. Dubuque & Sioux City R. Co.,* 30 Ia. 301.

The objection being thus overruled, it was, under provisions of chapter 245, Laws 1915, section 8824, Comp. St. 1922, unnecessary to repeat this objection to further testimony of the same nature by the same witness in order to save error, if any, in the ruling of the court whereby such testimony was received.

It is to be noted that the gravamen of the offense charged in the present case is not conspiracy, but joint commission of burglary and larceny. *Butler v. State,* 113 Ind. 5.

In reply to the question to which the above objection was made and overruled, witness Stickrod spoke as follows:

"Gebhardt came to the house and he says, 'How is everything?' And I said, 'There was a big robbery up town last night.' And he says, 'Whose place was it?' And I says, 'Isaacson's.' And with that my wife left the house and

went over to one of the neighbors, I think, and he says, 'We sure pulled a clean job.' And I says, 'Was you in on it?' And he says, 'Certainly.' I said, 'How did you get it?' And he said, 'Zediker went over the transom,' I forget which one he said helped him over, 'and went through and took the bar off Mr. Isaacson's back door and let them in.' I think he said Winslow went in, and he stayed on the outside watching Cal."

In this, and in subsequent admission by the court of all testimony of the same nature by this witness, the court erred. For it must be conceded that the essential principle of the hearsay rule is that for the purpose of securing the trustworthiness of testimonial assertions, and of affording the opportunity to test the credit of the witness, all testimonial assertions must be made in court and subject to cross-examination. True, declarations of a conspirator affecting his coconspirators made during the pendency of the criminal enterprise and in furtherance of its objects form an exception to the general rule. This exception may be stated in the following language:

"The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all; and is therefore original evidence against each of them. * * * And here, also, care must be taken that the acts and declarations, thus admitted, be those only which were made and done during the pendency of the criminal enterprise, and in furtherance of its objects. If they took place at a subsequent period, and are, therefore, merely narrative of past occurrences, they are, as we have just seen, to be rejected." 1 Greenleaf, Evidence (16th ed.) sec. 184*a*.

The substance of the above rule as thus expressed appears to be adopted in this jurisdiction. Speaking with reference to a charge of conspiracy this court has said: "Declarations made in pursuance of the object (of the conspiracy) are likewise admissible, but to be so they must

not be merely narrative of past occurrences or statements of future purposes; they must tend so directly toward the accomplishment of the alleged common object as to constitute a part of the *res gestae.*" *Farley v. Peebles,* 50 Neb. 723.

Nor do we find there is any repugnancy between this doctrine and the rule announced in *O'Brien v. State,* 69 Neb. 691, relied on by the state. In this case a statement of one of the joint defendants made for the purpose of affecting the sale while he was in possession of alleged stolen hogs, and engaged in selling the same, that "he had raised them at Elkhorn," was rightfully received against all the joint defendants, whether present or not, and this on the theory that the transaction before the court was a conspiracy to steal and sell hogs for the benefit of those engaged in the illegal enterprise, and that such conspiracy was pending until the sale had been made and the property divided. The undisputable inference carried by expression made use of in the case is that the statement was made in furtherance of the criminal design. Indeed, this element was expressed in the rule announced by this court, which is as follows: "The acts and declarations of a conspirator, during the pendency of the conspiracy, and in furtherance of the common purpose, are admissible in evidence against his associates." *O'Brien v. State,* 69 Neb. 691.

The rule above cited is generally adopted throughout all jurisdictions. On this subject the supreme court of the United States has laid down the following rule: "Doubtless, in all cases of conspiracy, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. *United States v. Gooding,* 25 U. S. 460, 469. But only those acts and declarations are admissible, under this rule, which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, whether by success or by failure, the admissions of one conspirator, by way of narrative of past facts, are not admissible in evidence against the others." *Logan v. United States,* 144 U. S.

263, 308. This rule, including the limitation that the declarations, to be admissible against those not present when made, must be in actual furtherance of the conspiracy, is further sustained by the following authorities: *State v. Gilmore,* 151 Ia. 618; *State v. Crofford,* 121 Ia. 395; *State v. Weaver,* 57 Ia. 730; *Ford v. State,* 112 Ind. 373; *People v. Parker,* 67 Mich. 222; *Chapman v. Blakeman,* 31 Kan. 684; *Payne v. State,* 10 Okla. Cr. Rep. 314; *State v. Beebe,* 66 Wash. 463; *State v. English,* 14 Mont. 399; *People v. Kief,* 126 N. Y. 661; *People v. McQuade,* 110 N. Y. 284; *Langford v. State,* 130 Ala. 74; *State v. Hickman,* 75 Mo. 416; *People v. Davis,* 56 N. Y. 95; *Willis v. State,* 67 Ark. 234; *People v. Moore,* 45 Cal. 19; *Commonwealth v. Thompson,* 99 Mass. 444. It follows that the conversation set forth herein was a mere narration of a past event, and not forming a part of, or connected with, anything then being done in furtherance of the object of the conspiracy. It is incompetent as against the defendant who was not present, and its introduction constitutes reversible error.

The last subject presented by the record for consideration is the alleged error of the district court in denying the application of this defendant for a change of venue. This court has said: "The Constitution guarantees to each citizen a fair and impartial trial when charged with crime, and it is the duty of the trial court to see that this guaranty is effective. If there is such a prejudice in the minds of the people of the county against the defendant, or such a firm conviction of his guilt of the crime charged against him that there is substantial and well-founded reason to believe that he cannot obtain a fair trial in the county, the Constitution requires that the venue be changed. Where these facts appear, there is no discretion in the matter. The trial court must grant the change. The discretion of the court is in determining these facts. It is, of course, a legal and not an arbitrary discretion. The determination of the trial court upon this question will not be disturbed, unless it appears from the record that its conclusion is wrong." *Lucas v. State,* 75 Neb. 11. See *Olsen v. State, ante,* p. 112.

The facts and circumstances which make up the setting which surrounded this case at the time it was tried in the district court for Box Butte county, March 23, 1925, embrace the following: Alliance is a city with a census population in 1920 of 4,591. Hemingford has a population of 708. In the entire county 1,124 votes were cast in 1918. The rural population trades largely at Alliance. Two newspapers are published at Alliance with a circulation of over 3,000 copies weekly throughout the county. One newspaper is published at Hemingford. Burglary committed by the defendant herein on January 16, 1925, resulted in the charge of that crime against the defendant and the removal from office of the entire police force of the city of Alliance, also the offer of a reward of $1,000 for the apprehension and conviction of the guilty parties. The preliminary examination which was held on February 2, 1925, was largely attended. Witnesses at that hearing made statements sensational and damaging to the defendants, and extended accounts of these statements, and a verbatim report of a portion of the testimony appeared in the Alliance newspapers. Details of confessions of alleged accomplices previously made and the imprisonments suffered by defendant in Colorado and elsewhere are commented upon. The newspaper comment is made that punishment will soon be meted out to the guilty parties, and that their conviction will doubtless result in the breaking up of a dangerous band of lawbreakers who were supposed to have committed other crimes which "will bear investigation." Interested citizens of Alliance circulated a petition for the reinstatement of the chief of police. To this petition 420 signatures were appended. The discussion of the facts of the alleged crime which would naturally and inevitably be an accompaniment of such a proceeding disclosed that these 420 petitioners for the reinstatement of the chief of police were greatly incensed against the defendants and declare that said defendants "are guilty and should be sent over the road." The affidavits of the attorneys for the defendants are in the record and to the effect that, in preparing the showing for

a change of venue, they talked to a large number of people of Box Butte county, all of whom expressed the view that the defendants charged with the burglary were guilty, but who refused to make affidavits to support application for a change of venue on account of the strong sentiment against the accused; also, that the sentiment was universal and the prejudice against the defendants was so great in Box Butte county that it would be impossible for them to have a fair trial. A statement also appears in one of these affidavits of one of the attorneys that, in his long experience as a lawyer at the Nebraska bar, the affiant has never met such a hostile feeling against a defendant at any time as exists in this county in this case except Barrett Scott, the defaulting treasurer of Holt county, Nebraska. Approximately 75 affidavits are filed, in addition to those of defendant and defendant's counsel, fully substantiating and corroborating their statements. Opposed to these affidavits the state presents more than 400 affidavits, obtained in four days, general in language and negative in form, but strongly supporting the conclusion that there is no prejudice against the defendants in Box Butte county and that prisoners will receive a fair and impartial trial.

It does not affirmatively appear that any of the makers of the last-named affidavits were signers of the petition for the reinstatement of the deposed police officers.

One thing is undoubtedly true, and that is that, in a county with a poll list of 1,124 where 420 openly condemn the defendants, and in which approximately 500 have taken sides on the question for a change of venue, there is disclosed a condition of affairs which presents a very serious question for the consideration of this court. It is to be remembered that the 420 persons openly condemning the defendants and declaring them to be guilty of the crime charged are definite, ascertainable persons, and their names are appended to definite petitions. These facts are undenied by the state. In this view of the case, it would seem that the form of the showing herein presented is within the reason of the practice suggested in the case of *Simmerman*

v. State, 16 Neb. 615. It is not supposed that people who had taken such a decided stand and had expressed such decided opinions as are attributed to the 420 signers of the petition for reinstatement of the deposed officers would voluntarily contribute to the assistance of the defendants whom they had already prejudged and condemned. The affidavits filed by the defendants, in themselves, present a strong showing for a change of venue. And, substantiated by the uncontradicted statements in the record as to the hostile attitude of the petitioners for the reinstatement of the Alliance officers, in connection with other facts and circumstances set forth, these affidavits fairly establish, after giving due consideration to the general negative statements contained in the state's counter showing that a fair and impartial trial could not be had by the defendants in Box Butte county, and constitute ample proof, not only to sustain the motion for a change of venue, but disclose a condition of affairs in view of which the denial of the application of the defendants for a change of venue by the district court constitutes an abuse of judicial discretion, for which the case must be reversed. The case is therefore reversed and remanded for a new trial, with instructions to the district court to grant application for a change of venue.

REVERSED.

Note—Sec. (1) 14 R. C. L. p. 197; 3 R. C. L. Supp. p. 194; 5 R. C. L. Supp. p. 753; 31 C. J. sec. 321 (Ann.). (2, 3, 4) 16 C. J. secs. 1283, 1314, 1330, 2198, 2201. (5) 27 R. C. L. p. 815; 4 R. C. L. Supp. p. 1767; 16 C. J. sec. 306.

BERT WINSLOW V. STATE OF NEBRASKA.

FILED JANUARY 23, 1926. No. 24891.

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

M. F. Harrington and *E. C. Barker,* for plaintiff in error.

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

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

EBERLY, J.

This is a companion case of *Zediker v. State, ante,* p. 292, decided at the present sitting of the court, and is an appeal from a conviction of defendant Winslow in a separate trial upon an information jointly charging him with two others with the commission of the crime of burglary and larceny.

The evidence supporting the application for a change of venue is identical with the case of *Zediker v. State, supra.* An examination of the assignments of error discloses, however, that while in the main they are governed by the rule announced in the case of *Zediker v. State, supra,* there appears one exception. The question and answer relative to a division of the money obtained from the cash register at the time of the burglary, together with the statements accompanying the same, were properly received in evidence. However, in view of the erroneous admission of the other evidence objected to, in violation of the rule announced in the case of *Zediker v. State, supra,* the case must be reversed and remanded for a new trial, with directions to the district court to order a change of venue.

REVERSED.

MARVIN GEBHARDT V. STATE OF NEBRASKA.

FILED JANUARY 23, 1926. No. 24892.

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

M. F. Harrington and *E. C. Barker,* for plaintiff in error.

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

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

EBERLY, J.

This is a companion case of *Zediker v. State, ante,* p. 292, decided at the present sitting of the court, and is an appeal from the conviction of defendant Gebhardt in a separate trial upon an information jointly charging defendant Gebhardt, Zediker, and another, with the commission of the crime of burglary and larceny. The evidence supporting the application for a change of venue is identical with the case of *Zediker v. State, supra.* The assignment of errors based upon the admission of testimony of certain statements made by coconspirators is governed by the rule announced in *Zediker v. State, supra.*

It follows, therefore, that the case must be reversed and remanded for a new trial, with instructions to the district court to grant the application for a change of venue.

REVERSED.

HUGO M. NICHOLSON, APPELLEE. V. JEROME KAFKA ET AL., APPELLANTS.

FILED FEBRUARY 12, 1926. No. 23739.

Statutes: VALIDITY. Chapter 5, Laws 1922, enacted at the special session of the legislature which convened January 24, 1922, pursuant to a proclamation of the governor, dated January 16, 1922, *held* to fall within the purview of that proclamation and to be a valid enactment.

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

A. R. Oleson, for appellants.

Zacek & Nicholson, contra.

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

PER CURIAM.

This is an action to foreclose a mortgage upon certain real estate in Cuming county; a decree of foreclosure was entered and the premises sold under the usual proceedings. After the sale, defendants filed objections to its confirmation; the objections were overruled, the sale confirmed, and defendants have appealed.

The point presented raises the validity of the notice advertising the real estate for sale. It is agreed that the publisher of the newspaper in which the notice of sale was published had not complied with the provisions of chapter 185, Laws 1921.

Chapter 185, Laws 1921, provided for the filing of a certain affidavit by the publisher of a newspaper publishing legal notices, and by chapter 5, Laws 1922, passed at a special session of the legislature convened under a proclamation of the governor, dated January 16, 1922, chapter 185, Laws 1921, was expressly repealed, and certain publication of notices theretofore made were, by its terms, "declared legal and valid and of the same force and effect as if publication had been made in newspapers which had in fact complied with said provisions of chapter 185, Laws 1921."

Appellant contends chapter 5, Laws 1922, did not fall within the terms of the governor's proclamation; that the legislature could legally enact no legislation not provided for in the governor's call, and therefore chapter 5, Laws 1922, is null and void. We have examined the proclamation of the governor and find that by paragraph 6 thereof the legislature, then called to convene, was authorized to pass "an act relating to legal notices in newspapers," and we therefore hold chapter 5, Laws 1922, enacted at the special session which convened pursuant to the call of the governor, January 24, 1922, is a valid and binding act.

The judgment of the district court is

AFFIRMED.

JOHN G. COOK, ADMINISTRATOR, APPELLANT, V. CITY OF BEATRICE, APPELLEE.

FILED FEBRUARY 12, 1926. No. 23576.

1. **Appeal:** QUESTION FOR JURY. On the disputed questions of fact presented in this record, the evidence is *held* sufficient to call for the submission of the case to the jury.
2. **Compromise and Settlement:** JOINT TORT-FEASORS. A party who has a cause of action against two joint tort-feasors may settle with one and reserve his right to proceed against the other, and such settlement will not constitute a bar to his action.
3. **Municipal Corporations:** COMMERCIAL ENTERPRISES. On the record presented in this case, it is *held* that, in maintaining its electric plant and selling current therefrom, defendant was acting outside its governmental functions and corporate duties.
4. ———: ———. "It is no part of the duty of a municipal corporation to engage in a purely business or commercial enterprise. When it seeks and obtains from the legislature permission to engage in such an enterprise, its act in so doing is entirely voluntary on its part, and, while engaging in such business, it is acting in a purely private business capacity, outside of its functions and duties as a municipal corporation, and is bound by all the rules of law and procedure applicable to any other corporation or person engaged in a like enterprise." *Henry v. City of Lincoln*, 93 Neb. 331.

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

Hazlett, Jack & Laughlin and *Sabin & Vasey*, for appellant.

Sackett & Brewster and *F. A. Dutton, contra.*

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

MORRISSEY, C. J.

Plaintiff, as administrator of the estate of Robert Cook, brought this action against defendant, a municipal corporation, to recover damages sustained by the death of plaintiff's intestate, a boy approximately eight years of age. At the

close of the testimony the court instructed the jury to return a verdict in favor of defendant. The jury complied with the instruction. A judgment was entered on the verdict, and plaintiff brings this appeal.

On and prior to the day on which the boy met with the fatal accident, defendant owned and operated an electric plant in the city of Beatrice, from which it lighted the streets and alleys of the city, and also did a commercial business. The Nebraska Gas & Electric Company was likewise the owner of an electric plant, and furnished service to its patrons, within the city of Beatrice, by means of wires strung along the public streets, and supported by poles and cross-arms. On certain streets the city wires were supported by the poles of the Nebraska Gas & Electric Company by means of cross-arms attached to the poles. The city and the Nebraska Gas & Electric Company, which, for convenience, will hereafter be referred to as the company, had service lines running north on Sumner street to Bismark street, and west from this intersection on the north side of Bismark street. From what we may call the terminal pole, or intersection pole, at the corner of Sumner and Bismark streets, there descended from the top of the pole to an anchor in the ground, about 40 feet north of the pole, a metal guy-wire, or cable. The anchor was closely adjacent to the foot-path on Sumner street. West from the terminal pole there were trees with limbs projecting over and above the lines of wire, and, according to the evidence of plaintiff, several weeks before the injury complained of, employees of the company cut off a number of these overhanging limbs. The evidence does not positively show, but it may be inferred, that one of the limbs thus cut off became entangled in the wires of the city, and the company, and was permitted to remain entangled in these wires for a considerable period, and up to the time of the injury suffered. While this limb was entangled in the transmission wires, plaintiff's intestate, a pedestrian upon the public street, came in contact with the guy-wire heretofore mentioned and was instantly killed.

After the death of the boy, employees of the company removed the limb and made an examination of the transmission lines. They testified upon the trial that the limb had disturbed the proper alignment of the wires, both of the city and of the company; that two wires had been drawn together and, as a result thereof, the insulation upon them was partially burned off and the current thus reached the guy-wire. It is alleged that this dangerous condition had existed for so long a time that the city and the company knew, or ought to have known, of its existence.

As we have reached the conclusion that the cause must be remanded for further proceedings, we refrain from a more extended statement of the pleadings and from a more detailed review of the evidence, to the end that, should the case again be tried, neither party may be prejudiced by our comments.

On the disputed questions of fact, the evidence is sufficient to call for the submission of the case to the jury. See *Schmelzel v. Leecy*, 104 Neb. 672; *Traphagen v. Lincoln Traction Co.*, 110 Neb. 855.

Prior to the trial of this action, plaintiff had effected a settlement with the company, but, under the terms of the agreement, which is in writing, it is expressly provided that such settlement should not work a release of the city, or discharge it from liability to plaintiff. Since the party who has a cause of action against two joint tort-feasors may settle with one and reserve his right to proceed against the other (*Tankersley v. Lincoln Traction Co.*, 101 Neb. 578), such settlement does not constitute a bar to plaintiff's action.

Plaintiff did not file a claim with the city under the provisions of section 4160, nor give notice under section 4161, Comp. St. 1922, and the trial court, in directing a verdict for defendant, gave this as his reason for sustaining defendant's motion for a directed verdict. This point is fully discussed in *Henry v. City of Lincoln*, 93 Neb. 331, and it is held that the statute, "requiring the filing of a notice with the city clerk of a municipal corporation within

30 days from the time a right of action for an unliquidated claim accrues, as a condition precedent to an action thereon, applies to claims against such a corporation arising out of the performance of its corporate duties, but has no application to a case arising out of the conduct by it of a purely private business enterprise, voluntarily entered into, which is entirely outside of its ordinary governmental functions or corporate duties."

The evidence in this case shows that, in maintaining its electric plant and selling current therefrom, the city of Beatrice was acting outside its governmental functions and corporate duties. The rule is:

"It is no part of the duty of a municipal corporation to engage in a purely business or commercial enterprise. When it seeks and obtains from the legislature permission to engage in such an enterprise, its act in so doing is entirely voluntary on its part, and, while engaging in such business, it is acting in a purely private business capacity, outside of its functions and duties as a municipal corporation, and is bound by all the rules of law and procedure applicable to any other corporation or person engaged in a like enterprise." *Henry v. City of Lincoln*, 93 Neb. 331. See, also, *Blake-McFall Co. v. Portland*, 68 Or. 126; *Pearl v. Inhabitants of Revere*, 219 Mass. 604; *Davoust v. City of Alameda*, 149 Cal. 69, 9 Am. and Eng. Ann. Cas. 847, 851.

For the reasons heretofore mentioned, the judgment of the district court is reversed and the cause remanded.

REVERSED.

Note—See (4) note in 50 L. R. A. n. s. 174, 19 R. C. L. p. 1042; 3 R. C. L. Supp. p. 992.

T. F. GREEN, APPELLEE, V. ANTON RUZICKA ET AL., APPELLANTS.

FILED FEBRUARY 12, 1926. No. 23581.

1. **Vendor and Purchaser: RESCISSION.** A vendee of land may rescind a contract for its purchase upon failure of the vendor to furnish title in accordance with the terms of the contract, and may exercise such right within a reasonable time.

2. ———: ———. Where a vendee of land is given possession of the premises under a contract of purchase, pending efforts to perfect title thereto, and, with the knowledge and acquiescence of the vendor, leases the premises, such leasing will not, of itself, defeat the right of vendee to rescind the contract for failure of vendor to perfect and furnish good title, according to the terms of the contract, where the vendee, within a reasonable time, offers to surrender the premises and the rentals to the vendor.

APPEAL from the district court for Saunders county: LOVEL S. HASTINGS, JUDGE. *Affirmed on condition.*

J. H. Barry and *J. C. Cook,* for appellants.

Slama & Donato, contra.

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

MORRISSEY, C. J.

By a written contract, dated September 6, 1920, defendants Anton Ruzicka and wife agreed to sell, and plaintiff agreed to purchase, a tract of land in Saunders county, which comprised an island in the Platte river, of about 65 acres, and certain lands adjacent to the river, containing in all 357 acres, for a consideration of $41,500. Plaintiff was to deliver an automobile at the agreed price of $1,500 as the initial payment, pay $2,000 October 1, 1920, $8,000 March 1, 1921, and give to defendant Anton Ruzicka a mortgage on the lands for $30,000. Defendants agreed to convey the lands by warranty deed on March 1, 1921, and to furnish an abstract showing good record title to the premises. Plaintiff delivered the automobile and paid the $2,000 due October 1, 1920. No further payments were made upon the purchase price. The only record title defendants had to the island was a quitclaim deed from a former squatter owner. Possession of the premises was turned over to plaintiff by defendants early in March, 1921, and an abortive effort was made to perfect the record title to the island. Later, Ruzicka refused to perfect the record

title to the island, and insisted that plaintiff should take the premises and accept a quitclaim deed to the island. Plaintiff refused to accept such title. Defendants threatened to bring an action for specific performance, but nothing further was done until October, 1921, when plaintiff brought this action to rescind the contract, recover the payments made by him, and for the value of the improvements placed upon the premises by him while in possession under the contract.

Defendants filed an answer and cross-petition, admitting the execution of the contract, the receipt of the automobile, and the $2,000 payment, and alleged that prior to September 6, 1920, an oral agreement had been entered into between the parties to this action, by which defendants were to convey the island by a quitclaim deed and the other lands by warranty deed; that plaintiff, on the 6th of September, came to defendants' home with a written contract, which he requested them to sign, that defendant Anton Ruzicka did not have his glasses, could not read the contract, and plaintiff volunteered to read and pretended to read the contract; that he read the description of the island, whereupon defendant Anton Ruzicka objected and told plaintiff he was not selling the island, but that he was conveying it to him by a quitclaim deed as a gratuity; that plaintiff then assured defendants that said contract would not mean that he was to convey the island by warranty deed, and that the object of adding that provision to the contract was merely a memorandum to insure plaintiff that it would be conveyed by quitclaim deed; that, in reading said contract, plaintiff did not read any part thereof concerning the furnishing of an abstract, showing a good title of record to the premises, and omitted to read other portions of the contract; that shortly after the 1st of March defendants tendered a quitclaim deed to the island and a warranty deed to the other premises described in the contract, and demanded payment of the $8,000 then due; that plaintiff had taken possession of the premises; that any improvements made by plaintiff were made without the knowledge or consent

of defendants; that plaintiff rented and collected the rentals for the premises and had thereby waived his right to rescind; and, further, that the agreed price of the automobile was $1,000, and that the consideration for the entire premises was $41,000, instead of $41,500. Defendants prayed to have the contract reformed, and that it be specifically enforced. A trial to the court resulted in a decree for plaintiff rescinding the contract; that he recover from defendants the sum of $3,500, with interest, being $1,500 for the automobile and the $2,000 cash payment made to defendants. Defendants have appealed.

Defendants argue that the decree is not supported by the evidence and that a decree, reforming the contract and awarding specific performance, should have been entered.

From the record it appears that the contract was prepared by the plaintiff, in duplicate, in the presence of the defendants at their home in Holt county, and that one of the duplicates was left with them. Anton Ruzicka testified that he was unable to read writing and scarcely able to read printed matter. It appears, however, that he had had considerable business experience and was shrewd in his business dealings. His wife could readily read and write. He made no claim that the written contract did not express the understanding and agreement of the parties until after March 1, 1921, and it is inferable that he did not do so until a much later date and after he had consulted counsel with a view to enforcing the contract. There are other discrepancies in his testimony and circumstances which tend to discredit defendants' contention.

It would serve no useful purpose to review the evidence in detail. After a careful examination of the record, we deem it sufficient to say that we reach the same conclusion as did the trial court, namely, that the evidence does not establish defendants' contention that they were, by fraud, induced to sign the written contract. On the contrary, we are convinced from the evidence that the contract as written expresses the understanding and agreement of the parties, except in one particular which will be hereinafter noted,

and that the defendants were not entitled to have the contract reformed.

Defendants argue that plaintiff has waived any right to demand rescission of the contract, because he took possession of the premises, leased them to a tenant, has not surrendered or tendered back possession of the premises, and has not surrendered or tendered back the rental notes and grain rentals for the year 1921, and because he did not exercise his right to rescind promptly on discovering that good record title to the island could not be furnished.

The record shows that plaintiff took possession of the land and leased it to a tenant at a time when an effort was being made to obtain a good title of record to the island, and when plaintiff was refusing to make further payments until title to the island should be perfected. Defendants turned over to plaintiff possession of the premises, without the cash payment due March 1, 1921, without delivering a deed to the premises, and without receiving a mortgage back for the remainder of the purchase price. Under this state of facts, it seems clear that both plaintiff and defendants have acted on the assumption that the title was to be made satisfactory and that the terms of the contract were to be ultimately complied with. But later defendants refused to do anything to perfect the title, and insisted that plaintiff should accept a quitclaim deed to the island. Shortly thereafter plaintiff refused to go on with the contract unless good title to the island should be furnished. Defendants threatened to bring an action for specific performance, and plaintiff, anticipating that such action would be brought, waited for its commencement, expecting to make a defense and ask for rescission in the threatened action by defendants; but, as heretofore indicated, defendants failed to bring the action, and plaintiff finally instituted action for rescission. It also appears that plaintiff never collected any rents for the premises; that the rental notes were paid by the tenant to a bank and the proceeds thereof remain in the bank and subject to the order of defendants; that the grain rentals were hauled to and placed in an ele-

vator and are there, subject to the order of defendants. Plaintiff, at the time of the trial, specifically disclaimed a right to any of the rentals for the premises.

A vendee of land may rescind a contract for its purchase upon failure of the vendor to furnish title in accordance with the terms of the contract, and may exercise such right within a reasonable time. *Huffman v. Bankers Automobile Ins. Co.*, 112 Neb. 277, 283; *Edgar v. Skinner Packing Co.*, 112 Neb. 752; *Read v. Loftus*, 82 Kan. 485. See, also, 6 Cyc. 300, 301, and cases there cited.

The leasing of the premises by plaintiff was done with the knowledge and acquiescence of defendants. Plaintiff has not collected the rents and has not done anything, since defendants refused to furnish good title to the island, which would preclude him from rescission. Plaintiff contracted for a good title to the entire tract of land. It has not been furnished. In good conscience, he should not be required to accept an unmarketable title. He has in this proceeding tendered back to defendants all that he ever received, and is entitled to a rescission of the contract because of defendants' failure to furnish a good title in accordance with the terms of the contract.

It fairly appears from the evidence, however, that the original consideration agreed upon was $41,000, instead of $41,500, and that defendants were to accept an automobile from plaintiff for the sum of $1,000. Under this state of facts, plaintiff was entitled to recover only $3,000, with interest thereon. The judgment of the district court is therefore excessive to the extent of $592.05. If plaintiff shall, within 20 days, remit from the judgment all in excess of $3,545.38, the judgment will be affirmed; otherwise, the judgment will be reversed and the cause remanded.

AFFIRMED ON CONDITION.

Note—See note in 30 L. R. A. n. s. 878; 27 R. C. L. p. 658; 3 R. C. L. Supp. p. 1518.

GRENVILLE D. MONTGOMERY ET AL., TRUSTEES, APPELLANTS, V. HERMAN G. BOESCHE ET AL., APPELLEES.

FILED FEBRUARY 12, 1926. NO. 23634.

Insane Persons: GUARDIANSHIP: DECREE: CONCLUSIVENESS. In a proceeding to terminate a guardianship, a final decree that a married woman is mentally incompetent to transact business and subjecting her to wardship is not necessarily binding on strangers, who, in accepting from her grantee mortgage security for a loan, were without actual knowledge of her mental status, and relied on a deed from her to mortgagor at a time when an earlier decree in force in the same proceeding at the same term of court contained a finding that she was competent to make deeds, and adjudging the dissolution of the guardianship with her own consent and that of her husband, her attorney, her guardian, and her heirs at law.

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

Crofoot, Fraser, Connolly & Stryker, D. M. Vinsonhaler, E. R. Jackson and *M. A. Tinley*, for appellants.

William R. Patrick, contra.

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

ROSE, J.

This is a suit to foreclose a mortgage on approximately 80 acres of land in Sarpy county. Herman G. Boesche, a defendant, and Gladys J. Boesche, his wife, were mortgagors, the former having claimed title to the land through a deed from Julianne Pope and her husband, Charles A. Pope. The mortgage was executed June 28, 1916, to secure the note of mortgagors for $4,500, payable to W. H. Thomas, mortgagee, July 1, 1921. The latter sold the note and mortgage June 29, 1916, to Grenville D. Montgomery and the Council Bluffs Savings Bank, trustees of the estate of Grenville M. Dodge, deceased. These trustees are the plaintiffs. In addition to Herman G. Boesche and the

Popes, Eli J. LaBorde as guardian of Julianne Pope, his ward, was named in the petition for foreclosure as a defendant. The guardian, on behalf of his ward, filed the only answer in the case.

The substance of the defense is as follows: The ward was and is the owner of the land. When she attempted to deed it to Boesche she was and ever since has been mentally incompetent to transact business. Boesche, assuming to act as her attorney, fraudulently in violation of his trust, by means of false representations and undue influence, induced her to sign, acknowledge and deliver the deed without any consideration, and thus defrauded her. The deed was void and did not divest her of her title or convey the land to Boesche or transfer to him any right to incumber it. The records of the county court disclosed her guardianship and also the overruling of a motion to discharge the guardian. Upon appeal to the district court, however, a decree discharging him was entered June 19, 1916, but at the same term he was reinstated by a final judgment July 27, 1916. The mortgagee and the plaintiffs were chargeable with notice of the continuous pendency of the guardianship proceedings. The notice extended to the entry of the final order. It was before the guardianship proceedings had been finally determined that the fraudulent grantee in the ward's deed pretended to mortgage the land to Thomas. In an independent action the district court for Sarpy county subsequently canceled the deed from the ward to her grantee. The foregoing statements indicate the nature of the answer.

In a reply plaintiffs denied the facts constituting a defense, and pleaded other matter which may be summarized as follows: Plaintiffs and the mortgagee were not parties to the guardianship proceedings, nor did they have knowledge of it or of an independent action to set aside the deed to Boesche. The mortgage was given and assigned to secure an actual loan of $4,500. It was accepted in good faith for full consideration without any actual notice that Julianne Pope was an incompetent person. While executing the deed she was not insane. The mortgagee and

plaintiffs were furnished with an abstract showing title in the mortgagor, but making no reference to the guardianship proceeding. The deed to Boesche was not executed without consideration. The proceeds of the mortgage were realized and retained by Julianne Pope and she used a substantial portion of the loan to Boesche in establishing her husband in business. It would be inequitable to refuse a foreclosure. The foregoing statements are deductions from facts pleaded in the reply to the answer. Upon a trial of the issues the action to foreclose the mortgage was dismissed. Plaintiffs have appealed.

In equity, should the mortgage be foreclosed? On facts about which there is no reasonable ground for controversy, there is no defense to the suit, unless the mortgagee and the purchasers of the mortgage were chargeable with notice of the guardianship proceedings, and unless, in addition, they were bound to anticipate an exercise of the power of the district court, before expiration of the term, to set aside the decree discharging the guardian. They invested their money relying on the deed. They were presented with an abstract showing title in the mortgagor. They acted in good faith. They were not guilty of any fraud. They deceived no one. They were not parties to any suit to redress the wrongs of the ward. They did not know that she was mentally incompetent to make a deed. They did nothing to procure the decree setting aside the guardianship. It is nevertheless urged in behalf of the ward that she was defrauded, that plaintiffs were chargeable with notice of the guardianship proceedings, that they were bound in advance by the final decree reinstating the guardianship, that they were not protected by the intermediate order emancipating the ward, the court having jurisdiction to vacate it for fraud during the term at which it was rendered, and that therefore they were not innocent holders of the mortgage. Assuming, but not deciding, that, as a general principle of law, constructive notice of pending litigation extends to the final judgment without regard to intermediate orders, is the rule applicable to the facts of the present

case? From the standpoint of the defense, Thomas, the mortgagee, before relying on the deed to Boesche, was required to take notice of the guardianship proceeding in the district court and to examine the record as to the competency of the grantor. What would such a search have disclosed? The record showed that the district court had before it, when rendering the decree terminating the guardianship, the ward, her husband, her attorney, her guardian, and her heirs at law. In addition, it was the duty of the presiding judge to ascertain the facts and protect her rights. Considered an incompetent person, these were the interested representatives who could lawfully speak and act for her. The decree was rendered with the consent of all, and consequently none of them had a right to appeal from it. It contained this finding: Julianne Pope is now fully competent to transact her own business and to execute any deed or deeds she may see fit to make. The guardianship was instantly terminated by the decree. The ward was then free to make a deed at once and promptly exercised her privilege, the decree itself, to that extent, being executed. By its own terms the decree as to the emancipation of the ward went into effect when made. It was the result of the concerted action of the ward and all who could legally act for her as such at the time. The mortgagee and plaintiffs had no part in any deceit or fraud. To them the decree imported finality as a solemn adjudication from which there was no right of appeal by any interested party to the proceeding. To strangers without notice of the facts, the first decree meant justice administered, and not a warning to suspect fraud. Even if the abstract had referred to the guardianship, the record would have shown its dissolution when the rights of the mortgagee and the plaintiffs accrued. The doctrine invoked by the defense, if applied to the present situation, would have required plaintiffs, without reason, to anticipate the setting aside of the first decree for fraud before the end of the term. The rule that notice of a pending action extends to the final judgment, if good law, a point not decided, does not apply to a situation like that

described. The reasons for the principle invoked by the defense have no application to the facts.

The controlling equities are on the side of plaintiffs. Proceeds of the mortgage to the extent of $2,000 were received and retained by the ward's husband. The ward by her deed did not destroy her means of livelihood. She retained at the same time a life estate in several hundred acres of valuable land in Sarpy county; but, if she had made herself a pauper, the duty to care for her would have fallen on her husband or her heirs at law—participants in the fraud of which her guardian now complains—fraud in which the innocent holders of the mortgage had no part or knowledge.

When the undisputed facts are considered in their proper light, there is no meritorious defense to the foreclosure. The judgment of the district court is therefore reversed and the cause remanded, with directions to the district court to grant the prayer of the petition.

REVERSED.

FIRST BANK OF ULYSSES, APPELLEE, V. JAMES P. BIRKEL, APPELLANT.

FILED FEBRUARY 12, 1926. No. 23509.

1. **Bills and Notes: FRAUD: BURDEN OF PROOF.** In an action by a bank against the maker of a promissory note, when it is shown that the note in suit was obtained by fraud practiced upon the maker, the bank, in order to recover, must prove that the officer or agent of the bank who negotiated the purchase of the note did so in good faith, without notice of any defense or infirmity in the note.
2. ———: **INDORSEMENT: BURDEN OF PROOF.** Where the indorsement by the payee of a note in suit is denied, the burden is on the plaintiff to establish the fact that such indorsement was made by the payee or by some person thereunto authorized by the payee.
3. **Principal and Agent: INDORSEMENT OF NOTE: BURDEN OF PROOF.** A party asserting ownership of commercial paper through an indorsement of one other than the owner has the burden of

proving that the indorser was authorized by the owner to make the indorsement. *State Bank v. Weeks*, 45 S. Dak. 639.

4. **Appeal:** REVERSAL. It is elementary that, in a case where the evidence does not support the verdict, or the judgment of the court, such verdict or such judgment, as the case may be, must be vacated.
5. **Bills and Notes:** FRAUD: BURDEN OF PROOF. "Where fraud in the inception of a note is pleaded as a defense and supported by proof, in an action by an indorsee against the maker, the burden is on plaintiff to show he is a *bona fide* holder." *Central Nat. Bank v. Ericson*, 92 Neb. 396.

APPEAL from the district court for Butler county: WILLIAM M. MORNING, JUDGE. *Affirmed in part, and reversed in part.*

Roper & Fuller and *P. A. Tomek*, for appellant.

W. M. Cain and *C. M. Skiles, contra.*

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

DEAN, J.

First Bank of Ulysses, doing business at Ulysses, Nebraska, plaintiff herein, began this action against James P. Birkel, defendant, to recover judgment on two certain promissory notes in the principal sum of $4,000 and $5,000, respectively.

For its first cause of action plaintiff pleaded the $4,000 note. A copy follows:

"$4,000 July 23, 1919.

"Nine months after date, I promise to pay to the Missouri Valley Cattle Loan Company, or order, four thousand dollars, payable at its office in Omaha, Neb., with interest at the rate of eight per cent. per annum from date.

"J. P. Birkel."

For its second cause of action plaintiff pleaded the $5,000 note. A copy follows:

"$5,000 July 24, 1919.

"Six months after date, I promise to pay to the Missouri

Valley Cattle Loan Company, or order, five thousand dollars, payable at its office in Omaha, Neb., with interest at the rate of eight per cent. per annum from date.

"J. P. Birkel."

On the face of the above note is this inscription:

"Protested for nonpayment 1-24-20. J. A. Pestal, Notary Public."

The following indorsement, besides the required revenue stamps, appears on the reverse side of both notes: "Missouri Valley Cattle Loan Co., A. B. Kohl."

When the evidence of the parties was submitted, plaintiff moved for a directed verdict on both notes, and defendant moved for a directed verdict of dismissal as to both notes. The court sustained plaintiff's motion as to the first cause of action only, namely the $4,000 note, and directed a verdict for $4,000 with interest at 8 per cent. per annum from its date. As to the second cause of action, namely, the $5,000 note, the court sustained defendant's motion and directed a verdict of dismissal. Both parties have appealed. By agreement of the parties only one transcript and one bill of exceptions have been brought to this court.

At the outset reference must be had to a $1,000 note, which involved the parties hereto, and which is not directly involved in this action. The record shows that, on July 23, 1919, defendant Birkel executed a $1,000 promissory note, bearing 8 per cent. annual interest, in favor of the Missouri Valley Cattle Loan Company, for the purchase of certain of its corporate stock. This note was payable at sight, and it bears the same indorsements as those which appear on the two notes sued on in this action, and was obtained by plaintiff at the same time that it obtained the $4,000 note. The $1,000 note, however, was reduced to judgment January 8, 1923, in an action brought by plaintiff, which was unappealed from. Notwithstanding this $1,000 note is not directly involved here, as above noted, it becomes necessary, for reasons hereinafter appearing, to notice briefly the court proceedings which were had in respect of the note, and more particularly the pleadings and the court's

findings. This is made necessary from the fact that plaintiff, for some reason not altogether clear, seems to base its right to recover, not only on the facts presented by the present record, but also on the proceedings had in the $1,000-note action.

Plaintiff's argument, in brief, is that defendant is estopped from setting up any defense to the notes in suit, for the reason, among others, that in the judgment which was rendered on the $1,000 note the findings, in substance, are that the $1,000 note was one of a series of three notes aggregating $10,000, the other two notes being the $4,000 and $5,000 notes sued on herein, and that defendant is bound thereby. The court's material findings in the former suit follow:

The court finds, "from the evidence, that the note sued upon in this action was one of a series of three notes aggregating $10,000, the other being for $4,000, dated July 23, 1919, and one for $5,000, dated July 24, 1919, respectively, all duly executed by the defendant James P. Birkel, and payable to the Missouri Valley Cattle Loan Company, and by said company sold and indorsed to the plaintiff in due course and for value and before maturity, and that the plaintiff purchased each and all of said notes for value and in due course and without knowledge or notice of any infirmity in their procuration and in good faith, and that plaintiff was, at the time of the commencement of this action, and still is, the owner and holder in due course of each and all of said notes."

Plaintiff's petition, in the $1,000 note action, was introduced in evidence. From this it clearly appears that plaintiff confined its allegations to the $1,000 note solely and omitted all reference to the $4,000 and $5,000 notes. In this state of the record, the last-mentioned notes not having been pleaded, it is elementary that the above findings and judgment, in respect of any note save the $1,000 note, are a nullity and are of no binding force whatever. It seems to us, too, that it clearly appears, the entire record being considered, that the judgment on the $1,000 note bears no

relation to the foregoing $4,000 and $5,000 notes, and that, under the facts and the law, the $1,000 action is of no force and of no effect in the present action. May it not be reasonably presumed that, if counsel had placed any reliance on the proceedings and judgment in the $1,000-note action, he would not have begun this action?

Plaintiff pleaded the usual and necessary allegations which go to establish an "innocent purchase" of the two notes in suit. The outstanding fact is that A. B. Kohl fraudulently obtained the notes from Birkel. The case before us then is: Was the plaintiff bank by Mundy, its vice-president, an innocent purchaser of the notes? P. H. Tobey, a bookkeeper in the bank, testified that the first time Kohl came to the bank he introduced himself to Mundy and the witness as a salesman for the Missouri Valley Cattle Loan Company, and "he explained this stock to Mr. Mundy and talked about it," and told Mundy and the witness "that he was going to solicit the country for the sale of this stock." He next saw Kohl when he came to the bank and traded the $1,000 and the $4,000 notes to Mundy for liberty bonds at par, but the then present value of the bonds is not shown. The next time that Kohl came to the bank, Tobey testified, the $5,000 note was exchanged by Kohl for a certificate of deposit issued by Mundy in the same amount. Elsewhere in the record it appears from Mundy's evidence that this certificate of deposit was not cashed until January 28, 1920, and this was some six months after Kohl traded the Birkel notes for the bonds and the certificate of deposit. Tobey further testified that Mundy and Tobey had Kohl under discussion, and that he told Mundy "he didn't like the looks of the man," but that Mundy said "he believed he was all right." He further testified that he did not know whether "a commission was paid to Mr. Mundy for this business in this deal between the bank and the Missouri Valley Cattle Loan Company," but that if a commission in bonds had been paid to him it would not appear on the bank's books. There was no cross-examination of this witness.

Mundy testified that, when Kohl brought the $1,000 and

$4,000 notes to the bank, he, Mundy, called up Mr. Birkel. On this point he testified: "I asked him if they were all right; and he said they were his notes and that they would be taken care of, and that if they were to be sold that he would sooner I have them than anybody." He further testified: "Q. Did you have any other conversation with Birkel over the phone or in any other way after the 23d about the purchasing of these notes that you bought? A. No, sir; not over the phone. Q. Well, then, as a matter of fact you didn't have the $5,000 note that you bought on that day, did you? A. I asked Mr. Birkel no questions about the $5,000 note. Q. None at all? A. No, sir. Q. That was just taken for granted by you, was it? A. It was taken for granted from his first answer. Q. Then, so far as you are concerned, you don't claim at this time that you ever made any inquiry with reference to the $5,000 note? A. No, sir; I don't. Q. Now, you made that inquiry of Birkel before you bought the notes? A. Before I bought the one and four-thousand-dollar notes; yes." Defendant denied that Mundy called him up over the telephone, and testified that he, Mundy, made no inquiry of him in regard to the purchase of the notes in suit either by telephone or otherwise.

In respect of Kohl's visit to defendant's farm, a son who was present testified: "Q. What, if anything, was said there about Mr. Mundy by Mr. Kohl? A. Well, he said if this stock wasn't all right, he says, 'You know Luke Mundy down here, he is a well educated man, and if it wasn't all right he wouldn't suggest to buy.'" Mundy denied advising Kohl to go out to defendant's farm to sell the corporate stock to him. The record discloses, however, that Mundy, of his own motion and at his own expense, went to the office of the loan company at Omaha with defendant Birkel, a very few days after the consummation of the transaction complained of, to see if something could be done to relieve defendant from the financial embarrassment into which he had been thrown by the execution of the notes fraudulently obtained from him by Kohl. If

Mundy never knew before of the fraud by which defendant was victimized in this note transaction, it seems perfectly clear to us that he found it out when he went to Omaha. Nevertheless he did not, upon his return, nor at any time, make a move to prevent the $5,000 certificate of deposit from being cashed which was issued by his bank. And it is very significant that this certificate, as the record shows, was not cashed for six months after its execution.

Is further comment necessary to show bad faith on Mundy's part, or to show that he was implicated, equally with Kohl, in the fraudulent scheme to defraud defendant from the beginning? Fraud is not a mere incident in this case. The insignia of fraud cover it, as with a garment, from its very inception. It seems that the association of Kohl and Mundy was intimate. It is not denied that Kohl approached Mundy with a proposition to become a director in the loan company. In this class of cases it is elementary that the burden is on the plaintiff to show that he is a *bona fide* holder of the note sued on. Plaintiff did not prove that Kohl had authority to indorse the note, though this question was in issue. *Shawnee State Bank v. Lydick,* 109 Neb. 76; *Auld v. Walker,* 107 Neb. 676; *Riverton State Bank v. Walker,* 107 Neb. 672; *Shawnee State Bank v. Vansyckle,* 109 Neb. 86, and cases there cited.

"Where fraud in the inception of a note is pleaded as a defense and supported by proof, in an action by an indorsee against the maker, the burden is on plaintiff to show he is a *bona fide* holder." *Central Nat. Bank v. Ericson,* 92 Neb. 396.

We recognize the rule that, where in a law action both parties move for a directed verdict, the findings of the trial court take the place of a verdict by the jury. But this rule does not abrogate that other rule which provides that, in any case, where the evidence fails to support the judgment, it becomes the duty of a reviewing court to set aside such judgment. From a review of the entire record before us, we think that the judgment, so far as it is against defendant, is not supported by the weight of evidence.

The record shows that defendant is a farmer of foreign birth, with an imperfect understanding of the English language, and of business usage as well, as such usage pertains to the safeguards which ordinarily attend the execution of negotiable notes. From the record it seems to be well established, by the weight of the evidence, that Mundy, the vice-president of the plaintiff bank, knew this. So that, even if Mundy did call defendant up and make the inquiry which he says he made in respect of the first two notes he bought, this was clearly insufficient in view of the rambling answer which Mundy testified that he received from Birkel over the telephone. This was a very important transaction for one of defendant's meager understanding of business affairs.

The banking business is one of outstanding responsibility in any community. In fact, it is everywhere conceded that the responsible banker is, from the very nature of his business, a most competent business adviser in any community, be it large or small, and that implicit reliance is, ordinarily, placed on his opinion and advice in respect of investments and business affairs generally. In respect of those who deal in negotiable instruments, either as makers, buyers, or sellers, the supreme court of Iowa made this observation:

"It is ordinarily to be expected, in these (negotiable instrument) cases, that the purchaser will testify to his good faith and want of notice, and that defendant is compelled to rely upon circumstantial evidence to rebut such showing. Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser is therefore a question for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that no fair-minded person can draw any other inference therefrom. A categorical denial of notice or knowledge is something which in many, if not in most, instances cannot be opposed by direct proof; and the credibility of the witnesses or unreasonableness of their statements, the time, place and

manner of the transaction, its conformity to or its departure from the ordinary methods of business, and all the other facts and circumstances which, though of slight moment in themselves, yet, when taken together, give character and color to the purchase under inquiry, constitute a showing which the court cannot properly pass upon as a matter of law." *Arnd v. Aylesworth*, 145 Ia. 185, 29 L. R. A. n. s. 638.

In view of the record, and of the authorities, the conclusion is that the judgment, as to the $4,000 note, which is pleaded as the first cause of action herein, must be and it hereby is reversed, and is affirmed as to the second cause of action.

AFFIRMED IN PART, AND REVERSED IN PART.

Note—See (1) 29 L. R. A. n. s. 351; 44 L. R. A. n. s. 395; L. R. A. 1918F, 1148; 3 R. C. L. p. 1072; 1 R. C. L. Supp. pp. 972-975; 4 R. C. L. Supp. p. 234.

JOHN BAUER, APPELLANT, V. WILLIAM ANDERSON, APPELLEE.

FILED FEBRUARY 12, 1926. No. 24678.

Master and Servant: EMPLOYERS' LIABILITY ACT: LIABILITY. Facts disclosed by the record and set out in the opinion, *held* sufficient to support the finding that the employee at the time of receiving the injury was engaged in the regular business of the employer, within the meaning of the employers' liability act.

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

Hall, Cline & Williams, for appellant.

W. W. Towle, Francis V. Robinson and *Letton, Brown & Dibble, contra.*

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

DAY, J.

William Anderson was awarded compensation by the

labor commissioner against John Bauer under the provisions of the employers' liability act. Upon an appeal by Bauer to the district court, Anderson recovered judgment for $355.71 as compensation for temporary total disability from September 16, 1924, to and including March 1, 1925, the sum of $218.50 for medical and surgical care, $23 for hospital expenses, and $100 for attorney's fee; also $15 a week, for not to exceed six months, subject to modification upon ascertainment of the extent of permanent disability. From this judgment Bauer has appealed to this court.

The main question presented by the record is whether the employment of appellee was in the "regular trade, business, profession or vocation" of appellant. By section 3029, Comp. St. 1922, the employers' liability act is made to apply "to every employer in this state employing one or more employees in the regular trade, business, profession or vocation of such employer." Section 3038 defines the term "employee" as used in the act. Subdivision 3 of such section provides: "It shall not be construed to include any person whose employment is casual, and which is not in the usual course of the trade, business, profession or occupation of his employer."

It appears that appellant was a retired farmer living in the city of Lincoln. He had retired about three years previous and had no regular occupation or business during this time. He conceived the idea of building a residence and also remodeling another house into an apartment for renting. Preliminary to engaging in the work, he took out compensation insurance for the period of one year. He did not make a contract covering the contemplated work, but employed the necessary mechanics at specified wages, bought the materials and himself supervised the work. The record does not disclose how much time was consumed in erecting and remodeling the buildings. The apartment house job lasted about three months and cost approximately $15,000. At times seven men were employed upon the work, among those employed was appellee, who was working as hod-carrier. While so employed he slipped on a plank and re-

ceived injuries to his knee, which were the basis of his claim.

At the time of trial, appellant testified that he remodeled the house into an apartment to rent and expected an income therefrom. He was then asked, "And that is really the only business you have got at the present time as far as that goes, renting this apartment?" to which he answered, "Yes, sir." It will be noted that the above question related to a then present condition, rather than to a situation existing at the time the work of building was carried on. The appellant did not testify as to what he regarded as his business during the period of the construction of the buildings. While his view on that question would not be conclusive, it would be a circumstance which might throw some light upon the question. Whether a given case of employment is within the regular trade, business, profession or vocation of the employer is sometimes difficult to decide, and in each case must be determined upon its own peculiar facts. No hard and fast rule can be laid down which in all cases would be safe. In the case before us, the employer, in contemplation of the work, took out compensation insurance for a period of one year. He employed a number of men to do work and had as many as seven at one time. He expended upwards of $15,000 and was several months engaged in the work. He had no other business. The appellee was injured while assisting in the work. Considering all of the circumstances, it seems to us that appellee at the time he received his injury was engaged in the regular business of appellant. The trial court so found.

We have repeatedly held that the determination of an issue of fact by the trial court in compensation cases will not be disturbed unless clearly wrong. *Miller v. Morris & Co.*, 101 Neb. 169; *Anderson v. Kiene*, 103 Neb. 773; *Young v. Johnson & Blind*, 113 Neb. 149; *Tragas v. Cudahy Packing Co.*, 110 Neb. 329; *Way v. Georgia Casualty Co.*, 107 Neb. 508.

Other questions are argued in appellee's brief, contingent upon the holding that appellee was not engaged in the regu-

lar business of appellant; but, in the view we have taken of the evidence, it seems unnecessary to consider such questions. We think the present case can be distinguishd from *Kaplan v. Gaskill,* 108 Neb. 455. In our opinion the evidence supports the finding and judgment of the trial court.

An attorney's fee for appellee's attorney is allowed in the sum of $100. Our former unpublished opinion is withdrawn.

The judgment of the trial court is

AFFIRMED.

STATE, EX REL. R. C. CAMPBELL ET AL., APPELLANTS, V. GERING IRRIGATION DISTRICT ET AL., APPELLEES.

FILED FEBRUARY 12, 1926. No. 24911.

Constitutional Law: IRRIGATION ACT. The proviso in chapter 97, Laws 1923, amending section 2865, Comp. St. 1922, authorizing the board of directors of an irrigation district, under certain existing circumstances, to impose upon landowners of the district the burden of constructing and maintaining laterals and the supervision of the distribution of water, creates an unreasonable classification and an arbitrary burden on such landowners, and is void because it violates section 18, art. III of the Constitution, as adopted in 1920.

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

Morrow & Morrow, for appellants.

Olsen & Cottle and *Mothersead & York, contra.*

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

DAY, J.

By this action the relators, eight in number, who are landowners within the boundaries of the Gering Irrigation District, seek a writ of mandamus for the purpose of compelling the board of directors to make provisions for the repair and enlargement of lateral No. 2 in said district,

so as to render its capacity sufficient to furnish the relators their *pro rata* share of the water for irrigation, and also to supervise the distribution of the water through the lateral so that each water-user should receive his *pro rata* share. An alternative writ was issued and served and the return thereto filed by the respondents. When the case came on for trial, the court sustained an objection made by the respondents to the introduction of any evidence in support of the alternative writ and thereupon dismissed the action. From this judgment the relators have appealed.

This ruling of the court is now assigned as error. The main question presented by the record is whether the expense of enlarging and maintaining the lateral and the supervision of the distribution of the water among the users should be borne by the district at large or by the users of water served by the lateral. The ruling of the court was based upon the provision of chapter 97, Laws 1923, and especially upon the proviso which was added to section 2865, Comp. St. 1922.

The relators contend that the provisions of the act of 1923, as set forth in the proviso, in so far as it seems to authorize the board of directors of the district to require the expense of constructing and maintaining the laterals and supervising the distribution of the water to be borne by the water-users, is unconstitutional and void.

Without setting forth the averments of the alternative writ, we think its allegation sufficient to entitle the relators to the relief prayed, if under the law it is the duty of the district to construct and maintain the lateral and supervise the distribution of the water.

At this point a brief reference to the troubles and former litigation between the users of water to lateral No. 2 and the district may serve to throw some light on the question now being considered. It appears that since the organization of the district the board of directors have adhered to the policy of requiring the landowners served by a lateral to construct and maintain the same, as well as to supervise the distribution of water through the same. Lateral No. 2

has never been large enough to furnish all of the landowners receiving water therefrom their *pro rata* share of the water of the district. The district refused to supervise the distribution of the water, and as a consequence the landowners at the upper end of the lateral took all of the water they needed and left little or none for the relators who were landowners at the lower end of the lateral. This lateral was the longest one in the district, and by reason of the sandy condition of the soil entailed upon the landowners great expense to keep it in repair. They were required to pay much more than other water-users in the district.

It also appears that in May, 1922, under circumstances almost identical with those presented in the case before us, certain relators who were water-users from lateral No. 2 commenced an action to require the board of directors of the district to construct and maintain said lateral and to supervise the distribution of the water. In that case the board took the position that it was not its duty to perform said acts. The case was finally brought to this court, the opinion being reported in *State v. Gering Irrigation District,* 109 Neb. 642. In the above-mentioned case this court construed section 2865, Comp. St. 1922, in connection with other sections of the statute relating to the subject of irrigation, and held that it was the duty of the district to furnish water for the purpose of irrigation to all of the landowners within the district upon fair and equitable terms and conditions, and that when lateral ditches are necessary they should be provided, maintained and supervised by the district in order that a just apportionment of water should be made to such landowners. In the course of the argument it was said:

"An irrigation district is a public corporation. Its funds are derived from the taxation of all land within the district. The very purpose of its organization is to furnish water upon fair and equitable terms and conditions to each and every landowner within the district. Comp. St. 1922, secs. 2857–2953. This, in the case of some small

districts, may perhaps be done by supplying water direct to the landowners from the banks of one canal. But this can seldom be done in districts embracing many acres. In such cases there must be laterals to carry the water to the ultimate user. Such laterals are necessary portions of the irrigation works and should be provided, maintained and supervised by the district, so that a just apportionment of the water may be supplied to each landowner therein. It would be manifestly unjust and unfair to assess a landowner whose property is situated several miles from the main canal without providing him reasonable facilities to obtain the water for the furnishing of which he is taxed. To sustain the position of the respondents would be to hold that the owners of land adjacent to the main canal are entitled to receive water without further initial outlay, while at the same time other landowners, who are also taxed according to valuation, shall be compelled to build and maintain expensive works and furnish supervision for such works in order to obtain that which is supplied without such expense to others who have no greater right. This would be clearly inequitable, unfair and unjust, and such construction of the statute ought not to be adopted. Of course, landowners may provide their own laterals if they desire, but where there is more than one water-user taking water from the same lateral, and any dispute arises between the users, the district board should regulate the supply, as in the case of other users of water."

Following this decision the legislature of 1923 amended section 2865, Comp. St. 1922, by enacting chapter 97, Laws 1923. The amendment reenacted the essential features of the original section, but added new elements, which are set out in a proviso, as follows:

"Provided, however, that in districts in which the users of water have heretofore maintained the laterals through which they have used water for the irrigation of their lands, it shall be lawful to require all of the landowners obtaining water through any lateral to perform their *pro rata* share

of the work and their *pro rata* share of the expense of maintaining and keeping such lateral in repair."

The proviso further recites that, in the event the users of water are unable to agree upon proper measuring devices to be placed in such laterals for the work or repairs that may be necessary to put said laterals in proper condition to deliver to each landowner the amount he is entitled to receive, upon notice and a hearing, the board of directors shall proceed to put in suitable measuring devices and make the necessary repairs on such lateral to deliver water to all landowners receiving water therefrom, and shall apportion the expense thereof ratably to all of the land receiving water from such laterals, and the same shall be assessed against such land as a special tax and collected as other irrigation district taxes.

It is apparent that the amendment, as set forth in the proviso above mentioned, nullifies the effect of our former decision. By the amendment the board of directors are authorized to charge the expense of the construction and maintenance of the laterals to the users of water served by such laterals, while our decision requires that such expense should be borne by the district at large.

The relators seem to concede that, if the amendment is valid, the users of water served by lateral No. 2 must bear the expense of the construction and maintenance of the lateral. It is the contention of the relators that the amendment, as set out in the proviso, is unconstitutional and void, because it is local and special in its application.

Section 18, art. III of the Constitution, as it appears in Comp. St. 1922, provides: "The legislature shall not pass local or special laws * * * where a general law can be made applicable." It will be noted that the objectionable features of the amendment are contained in a proviso commencing with the words: "Provided, however, that in districts in which the users of water have heretofore maintained the laterals," etc. By the use of the word "heretofore" in the provisio, it seems clear that it was the intention of the legislature to limit the application of the

statute to conditions previously existing. The amendment is so framed that it cannot in the future become of general application. The classification is arbitrary and limits its application as clearly as though it had by name designated the district to which it was to apply. A general law could have been framed applicable to the future if the legislature had desired to do so.

It is true that a number of legislative acts, which were applicable only to a present situation, have been held not to be inimical to the provisions of the Constitution now being considered, but in such cases the acts were so framed that it was possible for others to come within the classification.

In *State v. Scott*, 70 Neb. 685, it was held: "An act of the legislature which regulates a county office, and which by its terms limits its operation to counties having a population of 50,000, 'according to the census of 1900,' is local and special in its application, since it can never apply to any other counties than the two which were in the class at the time of the passage of the act."

In *State v. Kelso*, 92 Neb. 628, it was said in the course of the argument: "The rule appears to be settled by an almost unbroken line of decisions that a classification which limits the application of the law to present conditions, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development, is special, and a violation of the clause of the Constitution above quoted."

It is true that the two cases above referred to infringed upon a different subdivision of section 18, art. III of the Constitution, than the one in the case now before us, but we see no difference in the principle involved.

It seems clear that such portion of the amendment of 1923 which authorizes the board of directors to charge the expense of constructing and maintaining laterals and supervising the distribution of water must, in view of the limited application of the law, be held to be special legislation inhibited by section 18, art. III of the Constitution.

We think the court erred in refusing to permit the relators to offer proof in support of the alternative writ and dismissing the cause of action. The judgment of the district court is reversed and remanded for further proceedings.

REVERSED.

IN RE ESTATE OF CHARLES H. RUDGE.
LINCOLN TRUST COMPANY, EXECUTOR, APPELLEE AND CROSS-APPELLEE: TRUSTEES OF WYUKA CEMETERY, APPELLANT AND CROSS-APPELLEE: WARDENS AND VESTRYMEN OF THE CHURCH OF THE HOLY TRINITY, APPELLEE AND CROSS-APPELLANT, V. COUNTY OF LANCASTER, APPELLEE AND CROSS-APPELLEE.

FILED FEBRUARY 12, 1926. NO. 23580.

1. Taxation: INHERITANCE TAX. The inheritance tax, provided by section 6153, Comp. St. 1922, is not a property tax, but a tax upon the right of succession. It is in the nature of an excise tax upon a right created by statute.
2. ———: ———: EXEMPTIONS. Statutes exempting certain legacies from an inheritance tax should be strictly construed. To be exempt from an inheritance tax, a legacy must come within the strict letter of the statutory exemption.
3. ———: ———: LEGACY TO RELIGIOUS SOCIETY. A legacy to a religious society is subject to the inheritance tax provided by section 6153, Comp. St. 1922.
4. ———: ———: LEGACY TO STATE. A sovereign state may permit an inheritance tax to be levied against a legacy to itself or to any of its subdivisions or governmental agencies.
5. ———: ———: LEGACY TO GOVERNMENTAL AGENCY. Section 6153, Comp. St. 1922, construed, and *held* that a legacy to a governmental agency created by the state is subject to the inheritance tax, as in said section provided.

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

Hall, Cline & Williams, for appellant.

Charles E. Matson, Max G. Towle, E. S. Ripley and *Holmes & Chambers, contra.*

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

GOOD, J.

This action comes to this court on appeal as a case stated under rule 14 (94 Neb. XIII) and presents for determination two questions: (1) Is a legacy by a citizen and resident of Nebraska to the trustees of Wyuka Cemetery, a body politic and corporate under and by virtue of the provisions of sections 405 to 413, inclusive, Comp. St. 1922, subject to an inheritance tax under the laws in force in this state in 1921? (2) Is a legacy by a citizen and resident of Nebraska to the wardens and vestry of the Church of the Holy Trinity, a religious corporation, whose property and bequests to it are used for religious purposes, and not used, either directly or indirectly, for gain or profit, subject to an inheritance tax under the laws in force in this state in 1921? The county court held that both legacies were subject to the tax, and on appeal to the district court a like holding was there made. Both legatees have appealed.

The answer to both questions presented for determination hinges upon the correct interpretation of the provisions of section 6153, Comp. St. 1922. That section, in so far as necessary to a determination of the questions presented, is as follows: "All property, real, personal and mixed which shall pass by will * * * from any person who may die seised or possessed of the same while a resident of this state, * * * to any person or persons or to any body politic or corporate in trust or otherwise, * * * shall be and is subject to a tax."

The wardens and vestry of the Church of the Holy Trinity contend that the legacy to them is not subject to an inheritance tax, because, under the Constitution and statutes of this state, the property of religious societies used exclusively for religious purposes is not subject to general

taxation, where such property is not owned or used for financial gain or profit to the owner or user. If the inheritance tax, provided for by section 6153, *supra,* were a property tax attempted to be levied upon property of a religious society used for religious purposes, and not for gain or profit, then the ruling of the lower court would be wrong; but this court has heretofore held in *State v. Vinsonhaler,* 74 Neb. 675, that an inheritance tax is not a property tax, but one upon the right of succession. It is, in fact, an excise tax upon a right created by statute. But for the statutes of the state, a religious society could not take under the will of a testate decedent. The state has given the privilege to the owner of property to devise or bequeath it and has given to religious societies the right of receiving legacies under the will of a testate decedent. It clearly has the power to impose an excise tax upon such right.

It is a familiar rule that statutes exempting property from taxation should be strictly construed, and one contending that his property is exempt from such tax must show clearly that he is within the exceptions provided by statute. *Young Men's Christian Ass'n v. Douglas County,* 60 Neb. 642; *Watson v. Cowles,* 61 Neb. 216; *House of the Good Shepherd v. Board of Equalization,* 113 Neb. 489. The same rule should be applied to a statute exempting certain legacies from an inheritance tax. To be exempt from an inheritance tax, a legacy must come within the strict letter of the statute. A careful examination of the statute under consideration does not disclose that a legacy to a religious or charitable society is exempt from an inheritance tax. On the other hand, the language of the statute is most sweeping in its terms, and declares that a legacy "to any person or persons or to any body politic or corporate in trust or otherwise" shall be subject to a tax.

Speaking with reference to the rule of strict construction of exemptions from taxation, an eminent jurist has said: "It is also a very just rule that, when an exemption is found to exist, it shall not be enlarged by construction.

On the contrary it ought to receive a strict construction; for the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant. On this ground it is held that an exemption of property from taxation will not preclude business or privilege taxes being imposed on the favored class, and that bequests to colleges, etc., may be taxed under the general statute taxing bequests, though after being received they would be exempt under the general statute exempting the property of such institutions." 1 Cooley, Taxation (3d ed.) 357-360, and cases there cited. The rule is announced in 37 Cyc. 1572 that a legacy to a charitable, educational or religious institution is not exempt from taxation merely because the property of the institution is exempt from general taxation.

From a consideration of the statute and authorities above cited, it seems clear that the legacy to the wardens and vestry of the Church of the Holy Trinity is subject to the inheritance tax.

The trustees of Wyuka Cemetery concede that the tax imposed under section 6153, Comp. St. 1922, is a tax upon the right of succession to property, and not upon the estate. They argue, however, that the property of the trustees of Wyuka Cemetery is state property, managed by a body corporate created by the state legislature, and that statutes, in general terms, do not affect the state or its subdivisions if they, in any way, restrict or diminish the state's rights, and that statutes will not be construed as imposing a tax upon the property of the state or its agencies, unless clearly expressed or necessarily implied.

In 1869 the legislature of the state, by legislative act, provided for a state cemetery, to be managed and controlled by a board of three trustees, and created such trustees a body corporate. The body corporate, so created, is one of the appellants. It may be conceded that, ordinarily, statutes, in general terms, do not affect the state

or its subdivisions, if such statutes in any way restrict or diminish the rights of the state or its subdivisions, and that statutes will not be construed as imposing a tax upon the property of the state or its agencies, unless clearly expressed or necessarily implied. However, as heretofore pointed out, the statute in this instance does not impose a tax upon property, but imposes an excise tax upon a privilege, viz., the right of succession to property under a will.

It is a rule universally recognized that a sovereign state may permit its property to be taxed in the same manner and to the same extent as privately owned property may be taxed. It may also permit an inheritance tax to be levied against a legacy to itself or any of its subdivisions or governmental agencies. The real question here is: Does the statute in question clearly express or necessarily imply that a legacy to the state or one of its governmental subdivisions shall be subject to the inheritance tax?

Similar statutes of other states providing for an inheritance tax have been construed upon this point, and there is a lack of harmony in the reported decisions. The courts of last resort of Tennessee and Colorado have taken the view, under statutes very similar to our own, that a legacy to a governmental agency or subdivision of the state is not subject to an inheritance tax. See *Henson v. Monday,* 143 Tenn. 418; *In re Inheritance Tax Macky Estate,* 46 Colo. 79, 23 L. R. A. n. s. 1207. One of the reasons for the decision by the Colorado court is that the taxation of such property would render necessary new taxes to meet the demand of the tax imposed; that the public would be taxing itself in order to raise money to pay to itself; that, although the state has the power to do so, the process would be a useless one and no one would be benefited except the officer employed whose compensation would go to increase the tax levy. Such reasons would not be pertinent to the case. Wyuka Cemetery is not at present, and so far as we are advised never has been, supported by any tax authorized by the state. A gift was originally made by the state to

the body corporate, created by the legislature. Since that time, so far as we are advised, no taxes have been levied for its support, nor has any authority been given for the levy of a tax for its support or maintenance. However, we do not desire to base a decision upon that distinction.

The courts of last resort of New York and Kentucky and the United States supreme court have taken a different view than that of the courts of Colorado and Tennnessee. In *Leavell's Admr. v. Arnold,* 131 Ky. 426, the supreme court of Kentucky held:

"The act imposing inheritance taxes makes no exception in favor of either legatees who may be indebted to the estate, or charitable or religious institutions.

"The tax imposed by the act imposing an inheritance tax is not levied on the fund, but on its transmission, and must be paid before the fund can become the property of the beneficiary, so that the argument that it is against public policy to levy the tax on funds devised to a public school is not applicable."

In *In re Cullum's Estate,* 25 N. Y. Supp. 699, affirmed in 145 N. Y. 593, it was held that a bequest to the United States is liable to a state succession tax. And in *United States v. Perkins,* 163 U. S. 625, the rule was laid down that, while property of the United States is not taxable by a state, yet the inheritance tax law of New York is broad enough to include legacies to the United States, and is not invalid as an attempt to tax the property of the state, since the tax was on the legacy before it reached the hands of the government.

In considering the interpretation which should be placed upon our own statute, we are inclined to follow the rules adopted by the United States supreme court and the supreme courts of New York and Kentucky. The language of our statute, designating those whose legacies are subject to the tax, is broad and comprehensive and is sufficient to include the state and any of its governmental subdivisions or agencies. The language, "to any person or persons or to any body politic or corporate," would necessarily include

the state and all of its governmental agencies created by it. Had the legislature desired to relieve legacies to the state, or to its governmental agencies, from the inheritance tax, we think that it would have so stated in the exemption clause of the statute. It possessed, but failed to exercise, that power. We are of the opinion that under the statute the legacy to the trustees of Wyuka Cemetery is subject to the inheritance tax.

The judgment of the district court is

AFFIRMED.

Note—See 23 L. R. A. n. s. 1208; 48 L. R. A. n. s. 373; 17 A. L. R. 1050 et seq.; 26 R. C. L. p. 227; 3 R. C. L. Supp. p. 1463; 4 R. C. L. Supp. p. 1652.

STATE, EX REL. ORA S. SPILLMAN, ATTORNEY GENERAL, APPELLEE, V. BRICTSON MANUFACTURING COMPANY, APPELLANT.

FILED FEBRUARY 12, 1926. No. 24140.

1. **Statutes:** CONSTRUCTION. Courts will, when necessary to effectuate the obvious intention of the legislature, construe conjunctive words as disjunctive.
2. ———: ———. Section 9295, Comp. St. 1922, construed, and held that the first clause of said section, in the following language: "If a corporation is ousted *and* dissolved by the proceedings herein authorized," should be construed as though it read: "If a corporation is ousted *or* dissolved by the proceedings herein authorized."
3. **Corporations.** The provisions of section 9295, Comp. St. 1922, relative to the appointment of trustees, are applicable to both domestic and foreign corporations.
4. ———: OUSTER: APPOINTMENT OF TRUSTEES. The district court, on entering judgment of ouster against a foreign corporation for violation of the laws or fixed policy of this state, is empowered by sections 9295 *et seq.*, Comp. St. 1922, to appoint three trustees for the creditors and stockholders of such ousted corporation, to have the power and duties prescribed by said sections.
5. ———: ———: ———: DISPOSITION OF SURPLUS. In proceedings to administer the property within this state of an

ousted foreign corporation and wind up its affairs within the state, the court is not authorized to order the return or refund to the individual stockholders of the surplus, if any, after paying costs and liabilities within the state against the corporation; but such surplus, if any, should be ordered returned to the proper officers or representatives of such ousted corporation.

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

Opinion on motion for rehearing of case reported in 113 Neb. 781. *Affirmed as modified.*

Weaver & Giller and *M. E. Culhane,* for appellant.

O. S. Spillman, Attorney General, and *T. J. McGuire, contra.*

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

GOOD, J.

This cause is now before us on motion for rehearing. The opinion heretofore adopted is reported in 113 Neb. 781, reference to which is made for a statement of the issues and facts involved.

We are satisfied with our former opinion in so far as it holds that a foreign corporation may be ousted from the state for violating the laws or fixed policy of the state, and that the evidence is sufficient to support a judgment of ouster for such reasons.

After further argument and consideration of the facts and questions of law involved, we are impelled to take a somewhat different view as to the jurisdiction of the district court to appoint trustees to take charge of the property and assets of the corporation that are properly within this state, and, after paying the costs and debts of the corporation due to citizens of the state, distribute the residue, if any, to those who may be lawfully entitled thereto.

In our opinion we held that sections 9295-9298, Comp.

St. 1922, apply only to those cases in which the court has properly decreed the dissolution of a corporation. The dissolution of a corporation signifies the termination of its corporate existence in law or in fact. It ends the capacity of the body corporate to act as such, and necessitates a liquidation and extinguishment of all legal relations subsisting in regard to the corporate enterprise. Taylor, Corporations, sec. 428. In writing the former opinion in this case, the court had in mind the general rule that courts of one state or country are generally without power to dissolve a corporation created by another sovereignty. See 14A C. J. 1334, sec. 4046. If the statute, when properly construed, requires that a corporation must be ousted *and* dissolved by court proceedings before trustees can be appointed to take charge of and wind up its affairs within the state, it would be only in very exceptional cases that the statute could be applied to foreign corporations. It is not to be presumed that the legislature of this state intended to grant greater rights to foreign than to domestic corporations and to favor them with rights and privileges greater than those conferred upon domestic corporations. It cannot be presumed that the legislature intended that corporations, created under the laws of the state, might be dissolved and prevented from transacting business in the state, and that the assets of such corporation within the state might be taken charge of and administered for the benefit of the creditors, and the surplus, if any, distributed to those lawfully entitled thereto, and at the same time permit a foreign corporation, which had been ousted from the state because of a violation of its laws or fixed policy, to withdraw its property from the state and leave creditors of such corporation within the state without remedy for, or means of, enforcing their claims and demands except by going into a foreign jurisdiction. By a judgment of ouster, a foreign corporation is deprived of its right to transact its ordinary business in the state. Many foreign corporations have acquired and hold real estate within this state which is used in carrying on their business. The respondent in

this case, as disclosed by the record, owns real estate of considerable value which it acquired for the purpose of carrying on its business within the state. By the judgment of ouster in this case, it is left without authority or right to exercise control or management of its property within the state. It would seem necessary that some instrumentality should be provided to take control of, manage and dispose of the property within the state, and distribute the surplus, if any, to those thereto lawfully entitled.

It is a familiar rule of statutory construction that courts will, when necessary to effectuate the obvious intention of the legislature, construe conjunctive words as disjunctive, and *vice versa*. 36 Cyc. 1123, and cases there cited. We feel impelled to the view that the legislature intended the statute in question to apply to both foreign and domestic corporations, and that section 9295, Comp. St. 1922, should be interpreted as though it read: "If a corporation is ousted *or* dissolved by the proceedings herein authorized, the court shall appoint three disinterested persons as trustees of the creditors and stockholders." If this be the proper interpretation of the statute, then authority is given to the court, on entering judgment of ouster, to appoint three trustees, to have the powers and duties prescribed by succeeding sections of the statute.

The decree of the district court seems to imply that stockholders may present claims for money paid for stock and have the purchase price of their stock refunded to them. In so far as this is attempted to be done, we think it is beyond the jurisdiction of the court. Doubtless, there may be stockholders who have just claims against the corporation, and there may be stockholders who, by fraudulent means, were induced to subscribe for stock of the corporation, and who may be entitled to a rescission of the contract of purchase. If such there be, we have no doubt that, when their claims are adjudicated and it is determined that they have a right to rescind their contract of purchase because of fraud, or for other valid reasons, such claims may be allowed and paid by the trustees. Under

the statute, the trustees are authorized to take charge of all of the property of the ousted corporation that is properly within this state; to collect the debts owing to the corporation; to pay the liabilities thereof that may be due to citizens or residents of this state. After the costs and all just demands against the corporation have been liquidated, the surplus, if any remaining, would properly belong to the corporation and should be, upon order of the court, turned over to its officers or proper representatives.

We are advised by the record that a number of actions were pending against the corporation which had not been reduced to judgment at the time this action was tried in the district court. It would perhaps be improper for us to suggest at this time what notice should be given to creditors and how long a time should be permitted to elapse before the final winding up of the business of the corporation within this state. We have no doubt, however, that sufficient time should be allowed to creditors of the corporation within this state, or to persons having unliquidated claims for damages, to present their claims and have them determined, so that they may be protected, to the extent at least of the property of the corporation within the jurisdiction of the court.

Our former opinion, in so far as it conflicts with the views herein expressed, is withdrawn, but in all other respects it is adhered to. The judgment of the district court is modified so as to require the trustees to collect the debts due the corporation, pay the liabilities of the corporation, and, when properly ordered, pay over the surplus, if any, to those thereto entitled, as provided by section 9298, Comp. St. 1922.

As modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

Note—See Corporations, 14A C. J. pp. 1801 n. 90, 1150 n. 98, 1244 n. 56, 1247 n. 63, 1339 n. 69, 1349 n. 82.

ROBERT J. WEBB, TRUSTEE, APPELLANT, V. JOHN W. PATTERSON ET AL., APPELLEES: E. W. EXLEY, TRUSTEE, APPELLANT: DAN MORRIS, INTERVENER, APPELLEE: ANNIE L. EPPS, INTERVENER, APPELLANT.

FILED FEBRUARY 12, 1926. No. 23713.

1. Mortgages: FORECLOSURE: PARTIES. In an ordinary mortgage foreclosure suit, one holding an interest in the proceeds of the sale by reason of rights possessed by him in the mortgage is a necessary party to such suit under article V, ch. 20 (sections 9207-9223) Comp. St. 1922.
2. ———: ———: INTERVENTION. Where, in such suit, an interested person is not made a party, ordinarily he may intervene as a matter of right under section 8552, Comp. St. 1922, at any time before sale.
3. Parties: INTERVENTION. Section 8552, Comp. St. 1922, providing how and who may intervene, should be "liberally construed, with a view to promote its object and assist the parties in obtaining justice." Comp. St. 1922, sec. 9518.
4. ———: ———: OVERRULING MOTION: EFFECT. Overruling a motion to strike a petition of intervention lodged without leave given is equivalent to the granting of leave, and relates back to the date of filing of such petition.

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

Gurley, Fitch & West, John N. Dryden, Byron G. Burbank, Mulfinger & Webb and *Baker & Ready,* for appellants.

N. P. McDonald, John A. Miller and *E. L. Randall, contra.*

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

THOMPSON, J.

This suit was brought August 20, 1920, in the district court for Buffalo county by F. C. Haver, trustee of certain property in Kearney under deed of trust, who was, after decree entered, supplanted by Robert J. Webb as such trustee, against John W. Patterson and Mary Patterson, husband and wife, and E. W. Exley, as trustee in bank-

ruptcy of the North American Hotel Company. Trial was had to the court September 25, 1920; finding and judgment of foreclosure and sale in favor of plaintiff and against defendants Patterson and Exley. After judgment was entered, and before sale, to wit, June 28, 1921, Dan Morris filed in the case a petition of intervention, claiming to be a prior lienholder against such property, as hereinafter set forth. This intervention was challenged by Webb by motion to strike such petition from the files, which was overruled. Morris later filed an amended petition in intervention, to which plaintiff Webb, and Exley, filed answers, denying the allegations in such amended petition, and Exley carrying therein the objection to the overruling of the motion to strike. After issues were duly joined, and the taking of evidence closed, and before the decree complained of in this appeal was entered, plaintiff, without leave of court, filed an amended answer to the amended petition of Morris, carrying therein objections to the intervention of Morris. Mrs. Epps, a bondholder who had been permitted to intervene, also filed an amended answer to such amended petition. Morris then filed a motion to strike such amended answers from the files, which was sustained.

Judgment for Morris was entered as prayed, from which plaintiff, defendant Exley, and Mrs. Epps appeal, relying for reversal upon the following alleged errors, to wit: (1) The court erred in overruling the motion of plaintiff to strike the petition in intervention of Dan Morris from the files. (2) The court erred in sustaining the motion of intervener Morris to strike from the files the amended answer to the amended petition of intervention. (3) The court erred in refusing to allow plaintiff to file his amended answer to the amended petition of intervention of Morris. (4) The findings and judgment of the court are not sustained by the evidence and are contrary to law.

The record discloses that prior to February, 1918, the North American Hotel Company, an Iowa corporation, owned a number of lots in Kearney, upon which it had commenced the construction of a hotel. On February 19,

1918, such company executed a trust deed to the property to Frederick C. Haver as trustee, being the one here sought to be foreclosed, to secure bonds to be issued by the corporation in the sum of $150,000, to cover cost of such construction, which deed of trust provided, among other things, that the North American Hotel Company should erect a seven-story building, specifically describing it, within six months from the date of such deed, and, if it should neglect to do so, the trustee might complete the erection thereof. It gave the trustee power to make any and all necessary contracts for such construction, and provided that any sums advanced by him for the completion of the structure, with interest at 7 per cent., should be a first lien upon the premises, and a charge upon such premises prior and paramount to the bonds secured under the trust deed. It further provided that in all actions or transactions in any way affecting the premises or any part thereof, or the title thereto, the trustee should be the representative of the bondholders, and in no case should it be necessary to notify any bondholder for the purpose of binding him.

It was provided on the face of each of the bonds, after identifying such trust deed, that "To all the provisions of which trust deed this bond and each coupon hereto attached are subject, with the same effect as if the said trust deed were herein fully set forth."

The work of construction was begun shortly after the date of the trust deed, and continued intermittently for some years. Later, it was abandoned altogether by the hotel company, parts of the constructed portion being left without roof over it, and all without windows, thus exposing the plumbing which had been installed, as well as the building generally, to the elements, resulting in deterioration. Certain public spirited citizens of Kearney, among them defendant Patterson and intervener Morris, became concerned about this state of affairs, and proceeded to investigate the situation. After some negotiation, and on May 26, 1920, the hotel company, in consideration of $1 in cash and the transfer to it of 201 shares of its capital stock, sold and

conveyed the property to defendant Patterson, subject to the indebtedness evidenced by the trust deed. However, it was expressly stated in the deed that Patterson did not assume or agree to pay any of the indebtedness against the property. At this time there was considerable personal property on the premises conveyed, to wit, materials and equipment for use in the construction of the hotel. Title to such personalty passed to Patterson by virtue of a contract entered into by and between the parties simultaneously with the execution of the before-mentioned conveyance, which provided, in part, that it was to be a complete conveyance of such personalty, which must be used by Patterson in the completion of the building, as far as applicable, and, if not so used, then it was to be returned to the hotel company; if sold by him, the proceeds were to be applied to the construction of such building.

In May, 1920, Morris entered into an oral agreement with Haver, as trustee, with approval of Patterson, the owner, by the terms of which Morris agreed to furnish labor and materials for the completion of the structure, for which he was to receive certificates of indebtedness which would be prior to the rights of the bondholders, and in accord with the provisions of the trust deed above mentioned. It was also understood that an action to foreclose the trust deed should be commenced, in which a receiver would be applied for, with power to complete the hotel and issue receiver's certificates for the expense thereof as expenditures were made, to be paid out of the proceeds of the sale of such trust property prior to the payment of any of the bonds. Immediately thereafter, Morris contracted for materials, and proceeded with the completion of the building. He also completed the payments upon a large amount of materials and millwork which had previously been acquired by the hotel company and transferred to Patterson.

In August, 1920, Haver concluded not to ask for the appointment of a receiver in the foreclosure proceedings, which was unknown to Morris, but to immediately com-

mence suit, obtain a decree as soon as possible, and then sell the property under it. Haver had previously requested Morris to proceed with the construction slowly and at moderate expense, and complete such portions of the building as would minimize deterioration, until after the foreclosure and sale. Upon the appointment of Webb in Haver's place, the former expressed dissatisfaction with the agreement with Morris. Pursuant to his contract with Haver, Morris expended $18,997.19 in furtherance of the completion of the structure, and on June 28, 1921, he filed a mechanic's lien against the property for this amount.

It will be seen that the trustee named in the deed of trust had complete authority, and it became his duty to complete the structure, and safeguard the same when necessary in the furtherance of the enterprise. The cost of this completion became superior and prior in security under the trust deed and the bonds to the $150,000 nominated therein. This authority is not only granted in the deed, but also in each bond covered thereby. Thus the trustee could personally, as such, complete the structure, or could do so by contracting with others; if by contracting with others, they to the amount of their respective contracts became and were subrogated to his rights under the trust deed *pro tanto*. The necessity for such completion on the part of the trustee had arisen at the time he contracted with the appellee Morris, and existed at all times thereafter. As Haver's successor desired, as the evidence discloses, not to permit Morris to proceed further, the debt of $18,997.19 owing the latter became due, and his right to foreclose ripened, and he became entitled to a foreclosure thereof as prayed. This brings us to the question: Did the court err in refusing to strike Morris' petition of intervention, filed after the decree in favor of plaintiff was entered, and before a sale? In such case, the court seeks to adjust the rights of interested parties and do those things which equity and good conscience require. In this case, the cause of action held by Morris antedated in its inception the commencement of this suit. His interests were at all times

known to plaintiff. It must have been also well known that to permit his claim to remain unconsidered would serve to reduce the amount that the property would bring when placed on the market, whether at private or public sale. The court could have on its own motion ordered Morris brought in, in order that the rights and interests of all might be subserved and protected. *Horn v. Volcano Water Co.*, 13 Cal. 62. Morris was lulled into inaction by the promise that plaintiff would apply for a receiver who would serve all, which was not done. Then, he had a right to rely on his contract, that out of the sale of the property he would first be paid, and that the decree would so provide. He did not know that the contrary was intended until Haver had been displaced by Webb, and Haver's attorneys by other attorneys, who, shortly before the petition was filed by Morris, informed him that his arrangements with Haver, if any such he had, were not satisfactory, and indicated that payment of such claim for $18,997.19 would be resisted.

In filing such petition in intervention, the orderly procedure would have been to have asked leave before filing, and, with such request, submit for consideration such petition duly verified, or by way of affidavit present the facts. However, as the right of Morris to intervene in this case is without question, it would have been an abuse of discretion to have refused the request if timely made, which we find it was, both under section 8552, Comp. St. 1922, as well as within the inherent equity powers of the court. We are warranted in this construction of such statute by section 9518, Comp. St. 1922, which provides: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. Its provisions and all proceedings under it shall be liberally construed, with a view to promote its object and assist the parties in obtaining justice."

We also said in *Jenkins Land & Live Stock Co. v. Kimsey*, 99 Neb. 308: "Our Code provides that the action (foreclosure of mortgage) shall be commenced in the district court; that the petition must allege that no proceedings

at law have been had, or commenced, to recover the mortgage debt; that the court shall find the amount due on the mortgage, and order the mortgaged premises sold for the satisfaction of that amount, with interest and costs. No judgment can be rendered by the court until after a confirmation of the sale, when the court may render a judgment for a deficiency, if any exists. The action is still pending and no final judgment can be rendered until the sale is confirmed, when, if there be a deficiency, a personal judgment may be rendered therefor upon which an execution may be issued."

The decree in this case found the amount due plaintiff, and provided, among other things, that sale was not to be had for 20 days; that proceeds thus realized should be first applied to the satisfaction of the sum found to be due plaintiff; that any balance should remain subject to the further order of the court; that if the proceeds were found insufficient to satisfy the decree, then plaintiff should have the right to apply for a deficiency judgment. Such decree remained open as to all matters inherent in the facts set forth in the petition as to those not parties related thereto in interest, as intervener Morris herein.

Thus, as so many questions were left open and undetermined, both as to law and fact, and being guided by the facts reflected by the record, and the object sought to be covered by section 8552, *supra,* together with the spirit of liberality in which it should be construed, we are impelled to hold that the filing of Morris' petition in intervention was within statutory time, and within his right.

However, if we should have accepted appellant's contention that leave should have been first obtained before filing such petition, the overruling of the motion to strike the petition is equivalent to granting leave to file it. *Ringen Stove Co. v. Bowers,* 109 Ia. 175.

The question is also raised as to the remaining personal property turned over to Patterson by virtue of the contract with the hotel company. This contract authorized him to dispose of such thereof as was not needed, or not suitable for

the completion of the building, and to use the proceeds in the further construction; his judgment being controlling. After the filing of the mechanic's lien by Morris, an agreement was entered into between him and Patterson, providing, among other things, that the same should be and was sold to Morris in consideration that he give credit for the agreed value thereof, to wit, $7,500, on the $18,997.19 claim held by him against the trust, which was done. This transaction was ratified by the trial court, and decree in his favor reduced by that amount. The decree safeguarded the rights of all, and was clearly within the scope and intent of the contract.

The other assignments of alleged error have been carefully considered, and are found to be without merit. The considerations of the trial court are in all things

AFFIRMED.

ELIZABETH SOHL, APPELLEE, V. JOHN SOHL, APPELLANT.

FILED FEBRUARY 12, 1926. No. 23611.

1. **Appeal**: INSTRUCTIONS. The practice of setting out pleadings at length in the charge to the jury, instead of a concise statement of the issues tried, disapproved. And where, in so doing, issues are submitted upon which there is no supporting evidence found in the record, it may constitute reversible error.
2. **Damages**: TORTS. In an action for damages for tort, compensatory damages can alone be recovered, and only such as are the probable, direct, and approximate consequences of the wrong complained of, and such as may be fairly supposed to have been in contemplation of the defendant at the time the cause of action arose.
3. **Appeal**: INSTRUCTIONS: LOSS OF SUPPORT. Where loss of support is alleged by a wife as an element of damages, in an action brought by her for alienation of her husband's affections, the failure of the district court in its instructions to the jury to limit the recovery on this ground, if there was such loss, to an award of such damages as would fairly compensate the wife for the loss of her husband's support, except to the extent that he has contributed or may, by law, be compelled to contribute to her support and to the support of her minor children, *held*, reversible error.

APPEAL from the district court for Saunders county: LOVEL S. HASTINGS, JUDGE. *Reversed.*

Hainer & Flansburg and *Slama & Donato*, for appellant.

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

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

EBERLY, J.

This is an action brought by the plaintiff below against the defendant, her father-in-law, for alienating the affections of her husband, Ezra. Trial was had to a jury, which resulted in a verdict and judgment for the plaintiff in the sum of $12,500, from which judgment, and denial of defendant's motion for a new trial, defendant has appealed.

Without attempting an exhaustive analysis of the testimony contained in the record, it may be said that the plaintiff married Ezra Sohl, son of the defendant, at Fremont, Nebraska, March 4, 1908. Three male children now living are the fruit of this marriage, whose ages, respectively, at the time of the commencement of this action, were 12, 10, and 8 years. After the marriage plaintiff and her husband lived on a rented farm near Ithaca, Nebraska. In 1912 they removed to the farm then and now owned by the defendant, situated near Cedar Bluffs, Nebraska, where they continued to live until the separation of the plaintiff from her husband in April, 1922. At the time of the marriage and for some years subsequent there was no controversy whatever between plaintiff and defendant. During that time the defendant contributed, by what was tantamount to gifts, the sum of $3,500 to plaintiff's husband for the benefit of the family. After leaving the farm in 1912, subsequently occupied by plaintiff and her husband, the defendant spent a year and ten months in Canada, and then removed his home to California, where he resided until September, 1921. In 1914 and 1918 the defendant visited the home of plaintiff in

Nebraska. No complaints of the plaintiff are based upon any events which transpired on either of these occasions. It may be said in passing, however, that testimony in the record discloses that at the time of the visit in 1918 the plaintiff complainingly stated to defendant that she and her husband were not getting along well. The defendant at that time replied, suggesting that she should not talk so much and plaintiff and her husband would get along better. There is no testimony in the record which in any manner denies the evidence of the defendant that in June or July, 1921, the defendant in California received a letter from his son, Ezra, stating that the son would not continue to farm the place he then occupied. The receipt of this letter, it appears, resulted in the defendant's coming to Nebraska. On his arrival at his farm in Nebraska in September, 1921, which had been continuously occupied by plaintiff and her husband, the record discloses that defendant found the improvements thereon in badly "run-down condition;" that the farm had been allowed to grow up in weeds; that the buildings, in particular, were badly in need of repairs; that corn was standing in the field unharvested; and that his son refused to make any preparation for, or take any part in, putting in a new crop, and, in fact, did very little personally for caring for the matured crop then in the field.

It may also be fairly said that the defendant found that his son had "nothing but debts," notwithstanding the gifts which his father had previously made him. True, the plaintiff in her testimony speaks of certain personal property possessed by her husband, but it is to be remembered that she expressly denies knowledge as to the condition of its title being incumbered or not.

For the first three or four weeks after the arrival of the defendant at the home of the plaintiff and her husband, beyond the charge that his conduct was "cool" toward the plaintiff, no allegations are made against him. He proceeded to repair the improvements on the place, and with the assistance of men, provided by his son, harvested the

matured crop in the field. They also destroyed the weeds which had been permitted to grow upon the premises. While the dates are not definitely fixed, it also appears that, in addition to the work which the defendant performed in the fields, he assisted the plaintiff from time to time in her household duties by helping in the washing of dishes, as well as occasionally assisting in doing the family washing. What transpired after the first three or four weeks of defendant's visit is a matter of disputed evidence. An analysis of the claims of the plaintiff, as reflected in the evidence, discloses that her statements in substance are that the defendant then insisted on a divorce and separation of plaintiff and her husband; that at least on one occasion the defendant stated, in the presence of plaintiff and her husband, that the plaintiff was of a "jealous disposition, always scolding about this and that;" that the defendant, many times, advised and continued to insist on a divorce and separation of plaintiff and her husband; that plaintiff's father was also brought in for a conference, and these statements were reiterated to him; that finally the defendant insisted that his son's wife leave the premises she and her husband occupied, stating that, if they would separate, the son could stay, but the wife must go. In the month of March, 1922, a statutory notice to vacate the premises, occupied by the son and his family, was served upon the son by the father. The plaintiff thereupon left her husband's home and proceeded to Fremont, Nebraska, where she sought and found employment.

It may be said in passing that no attack was alleged to have been made on plaintiff's moral character by the defendant, unless the statement, which defendant denies, to the effect that plaintiff had lied under oath. While the briefs contain statements as to divorce proceedings and a judgment of divorce, there is no evidence whatever in the record which in any manner substantiates the statement as to a decree of divorce having been entered.

The theory of the plaintiff, reflected in her evidence, is

that the affections of her husband were influenced and alienated by, through, and because of the attitude of the defendant and his continued insistence that there must be a divorce and separation between plaintiff and her husband. There is an admission by plaintiff that from time to time, and for many years, spats and altercations had frequently taken place between plaintiff and her husband, but she insists that they were unimportant in character and only temporary in their duration, and only such as ordinarily occur between man and wife, and not of a serious character. There is, however, evidence in the record by disinterested witnesses that the plaintiff stated and admitted to them, prior to the separation and prior to the coming of the defendant to the state of Nebraska, that she was unhappy in her marital relations. And it appears on one occasion that plaintiff secured six or more drygoods boxes in which to pack and remove her household property from the home of her husband, all of which occurred prior to the arrival of the defendant in 1921. But as to the exact reason which induced this conduct, there is a dispute in the evidence. It also appears in the evidence that there was paid to the plaintiff by, or in behalf of, her husband, and after she left her husband's home, the sum of $50 monthly, and for at least one month the payments amounted to $75. However, the evidence is very indefinite as to the number of monthly payments made. At the trial, the court, at the close of the evidence, gave a comprehensive instruction reciting practically verbatim all of the allegations contained in the petition, the answer, and the reply, upon which the case was tried. This instruction covers four typewritten pages. Instruction No. 4 is to the effect "that the burden is upon the plaintiff to prove, by a preponderance of the evidence, each and every material allegation of her petition," and nowhere in the instruction is the jury advised as to what the material allegations contained in the pleadings are. This practice has been uniformly and consistently condemned by this court.

In addition to this, many of the allegations in the petition thus recited and submitted as a basis of recovery are wholly unsupported by the evidence in the record, and in some cases wholly disproved by the evidence. In addition to this, it is set forth in instruction No. 1, as one of the grounds for recovery claimed by plaintiff, "that when plaintiff left her home she was practically without means to support herself and said minor children; * * * that during all of the times aforesaid the husband of said plaintiff was under the undue influence of said defendant, and that the acts of cruelty committed by plaintiff's husband, as herein set forth, were at the suggestion and insistence of said defendant, and while said husband was under the influence and control of said defendant; that by reason of all the same (including failure of her husband to support herself and children) plaintiff has been deprived of the affection, society, comfort and companionship of her said husband; that they have become estranged, and plaintiff has suffered great humiliation, mental anguish, and physical pain, and been deprived of the support of her said husband; * * * by reason of the same plaintiff has suffered damages in the sum of $25,000." Plaintiff's own evidence with reference to support, in substance, is that her husband is a strong, able-bodied man competent to earn wages and furnish adequate support. It appears that the husband was within the jurisdiction of the district court at the time of the trial in the court below. The undisputed evidence of the defendant elicited on cross-examination is that the plaintiff's husband is a big, husky individual, a good, strong man, and a good worker, and also able to take care of the three boys and properly support and care for them. So there is no question but that the evidence in the record reflects the fact that the son was amply able to support his wife, the plaintiff, and there is no reason why this duty cannot be compelled. In fact, while there is no evidence in the record disclosing a divorce granted, or an alimony judgment entered, it does appear that the plaintiff received from her husband, after

the separation, $50 monthly for a number of months, the exact number being indefinite, and $75 was paid for at least one month toward the support of herself and children.

Conceding that, under the facts and circumstances in this case, the plaintiff is entitled to support and maintenance suitable to her station in life, not only for herself but for her children as well, and conceding that this right to support was a continuing right, it must also be conceded that the husband is primarily liable for the support, and her right of support appears unquestionably enforceable against her husband, notwithstanding the separation which had taken place. This being true, how can it be said in any view of the evidence that the action of the defendant, assuming everything testified to by plaintiff to be unquestioned (which is not the case), in any way interfered with, affected, or diminished her enforceable rights of support against her husband? If this fact be admitted, the loss of support, which was not loss in fact or in law, cannot be considered as an element in plaintiff's recovery.

It must be remembered, with reference to the term "support," thus used, that its meaning has been clearly defined by this court in proceedings relating to alimony, in which it was said:

"Support may be defined to be such sum as is ordered by the court to be paid to the wife by the husband for her support during the time she lives separate from him, or to be paid her by her late husband for her maintenance after divorce from the marriage tie." *Greene v. Greene,* 49 Neb. 546.

In *Hope v. Twarling,* 111 Neb. 793, the action of the district court, which, by a preliminary order, sustained a motion to strike from the answer of the defendant the allegation that a decree of divorce granted the plaintiff $4,000 permanent alimony, was approved. The court stated as a reason: "The duty of a husband to pay for the support of a wife whose conjugal rights were destroyed by him without cause, as 'alimony,' is defined in *Greene v. Greene,*

49 Neb. 546, is not the same as the liability of a third person to respond in damages for alienating his affections."

It may be said in passing that, while the plaintiff's petition in district court in *Hope v. Twarling, supra,* set forth as grounds for recovery that the plaintiff has been deprived of the comfort, society, *support,* love, and protection of Arthur C. Twarling, as shown in the transcript, the district judge in his instructions to the jury limited the recovery to the loss of "comfort, society, love and protection" of her husband, thus expressly eliminating from the jury's consideration the element of "support." It is conceived that this is a proper practice and a correct expression of the general rule that should be ordinarily applied in alienation cases. In this case last referred to, the court also cites approvingly 30 C. J. 1123, sec. 977:

"The basis or gravamen of the husband's right of action (for alienation of affections) is not the loss of his wife's services, but rather the loss of her conjugal society or consortium. Like the husband's, the wife's right of action for alienation of the affections of her spouse rests upon the loss of his consortium."

The language of the opinion in *Hope v. Twarling, supra,* implies that this court adopted the modern definition of the term "consortium" which limits it to a right growing out of the marriage relations which the husband and wife have, respectively, to the society, companionship, and affections of each other in their life together. By this modern definition it is clearly intended to distinguish the right of consortium from that to service in the case of the wife, and to support in the case of the husband. Assuming, though not deciding, that this does not eliminate the possibility of a recovery for loss of support in a proper case as an incident to an action for alienation of affections, it would seem essential to such recovery that it must affirmatively appear that, by reason of the wrongful acts of the defendant, the enforcement of this primary right of support and maintenance, vested in the wife, for herself and

children, has been impaired or rendered impossible. And in such case, in the light of the assumption heretofore made, if a recovery for loss of support be permitted, it would be limited to the extent which, by the acts of the defendant, the wife's enforceable right of support against her husband had been impaired or rendered impossible of enforcement. On this basis, if the plaintiff is entitled to any support whatsoever from the defendant in this case, it would be a limited and conditional right for the violation of which she would be entitled to an award of such damages by the jury as would fairly compensate her for the exact injury occasioned by the acts of the defendant, viz.: An award of such damages as would fairly compensate her for the loss of her husband's support, if there was such loss, except to the extent that her husband had contributed or may, by law, be compelled to contribute to her support. *Scott v. O'Brien,* 129 Ky. 1; *Stocker v. Stocker,* 112 Neb. 565.

It is to be observed that the language of instruction No. 1, as given to the jury in the instant case, authorized the jury to return a verdict irrespective and without reference to the amounts which had been contributed by plaintiff's husband to her support, or which the plaintiff's husband may be compelled to contribute. This, manifestly, was erroneous. It must be remembered that the doctrine of damages in Nebraska is based upon the idea of compensation only. Punitive damages are not permitted. Neither may there be a recovery for a tort in excess of the amount of the actual damage suffered. *Karbach v. Fogel,* 63 Neb. 601.

Under the instructions of the court, it would follow, in the light of the record, that, no matter how much the plaintiff had received from her husband for the maintenance of herself and children, the item of "support," as defined in the language of the cases of this court pertaining to the subject of alimony, could again be recovered from the defendant in this case. This position is wholly inconsistent with the theory of this court as controlling the rights of

litigants in tort actions limiting the total recovery to actual compensation for damages suffered. In view of the size of the recovery in this case, the conclusion necessarily follows that this error contributed to the result.

It follows, therefore, that in submitting the issues in this case to the jury the district court committed error which necessitates a retrial of this action. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Damages, 17 C. J. pp. 729 n. 11, 733 n. 12, 751 n. 30, 868 n. 51, 969 n. 73.

WILLARD E. STEWART ET AL., APPELLANTS, V. CITY OF LINCOLN, APPELLEE.

FILED FEBRUARY 18, 1926. No. 23572.

1. Appeal: VERDICT. The verdict of a jury cannot be sustained merely because a similar verdict has been returned by a jury on a former trial of the same issues.
2. ———: ———. "Where the verdict of a jury is clearly against the weight and reasonableness of the evidence, it will be set aside and a new trial granted." *Bentley v. Hoagland*, 94 Neb. 442.

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

Wilmer B. Comstock, for appellants.

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

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

MORRISSEY, C. J.

The city of Lincoln, exercising the power of eminent domain, appropriated a tract of land, of approximately 159 acres, owned by plaintiff.

Appraisers were appointed under the statute, but plaintiff, being dissatisfied with their award, appealed from the award made by the board of appraisers to the district court, where the cause was tried to a jury, and from a judgment entered in that court plaintiff prosecuted an appeal to this court. The judgment of the district court was reversed and the cause remanded for further proceedings. *Stewart v. City of Lincoln,* 108 Neb. 825. On a retrial, plaintiff recovered a verdict and judgment, but, being dissatisfied with the amount awarded, has prosecuted this appeal. The sole question for determination in the trial court was the value of the land at the time of its appropriation by defendant, January 19, 1919.

Plaintiff makes seven assignments of error, but the one which seems entitled to first consideration is the assignment which alleges that the recovery is grossly inadequate compensation for the property taken.

The property is located less than a mile from two of the railway depots, the United States post office, the city hall, and the state university. The chief engineer of the Chicago, Burlington & Quincy Railroad Company, and the former superintendent of that railroad company at Lincoln, testified that, at the time the land was taken over by the city, it was so situated as to be available for railroad trackage, industrial plants, etc. The correctness of this testimony is not questioned.

The ground is low, unsightly, and, if used for industrial purposes, it would require considerable filling, but the engineer just mentioned testified that the value of property for the purposes heretofore mentioned is to be determined by its location rather than by the elevation of its surface.

For many years the valley of which this land forms a part was subject to overflows, and this condition seriously affected the market value of the land, but the testimony shows that, prior to the institution of these proceedings, drainage districts had been organized and drainage canals dug and the danger from overflow reduced to a minimum.

On the trial, there was some attempt to show that a part

of the land was suitable for residential purposes, and it was asserted by plaintiff that the land was of the same general character as a certain addition to the city of Lincoln to which this land lay adjacent. Apparently to controvert this assertion, defendant offered in evidence an ordinance of the city establishing the grade in the addition to which reference had been made, and by this evidence showed that the grade was there established at an elevation three feet, or more, above the surface of the ground in controversy. Evidence was then introduced by defendant to show the probable cost of filling plaintiff's land so as to bring it up to the grade in the platted addition. This was done over the objection of plaintiff. It requires no discussion to show that the value of plaintiff's land could not thus be established, and, in view of the verdict returned, we are constrained to believe that the true issue became obscured.

It would extend this opinion to an unnecessary length to take up separately the testimony of each witness as to value. Nine witnesses were called by plaintiff, each of whom qualified as an expert on values by showing his many years' experience in banking, real estate, etc., and his personal knowledge of the land, and their valuations varied from a minimum of $57,650 to a maximum of $78,600, with an average of over $68,000.

An average of the valuations fixed by a like number of witnesses testifying for defendant was slightly in excess of $18,000. The right of some of these witnesses to be regarded as experts on the value to be placed upon property of this character is open to question. The witness making the lowest valuation, on cross-examination, admitted that in making his estimate he did not take into account the sale of a tract of ground separated only by a street from plaintiff's ground, and stated that such sales did not influence his judgment. As we understand his testimony, he was inclined to measure the price of plaintiff's land according to its worth for agricultural purposes, when, by the testimony of men of sound judgment and unquestioned veracity, it is shown to be chiefly valuable for industrial purposes. An-

other witness explained the reason for his conclusion in the following language: "The city is the available buyer for this tract. To develop it for industrial purposes or residential purposes, or for any other purpose, the cost would be too great for a man to buy it, notwithstanding all the advantages of its proximity to the city and the trackage, and it was on this basis that the city was the only party that could buy it without hurting them." It will be seen from this excerpt from the testimony that the mere extent of the tract governed this witness in his judgment as to the value. When a close study is made of the testimony given by other witnesses, it is found, in some instances, that, although possessing knowledge as to the value of properties in other parts of the city, their knowledge of values as affecting plaintiff's land is of a loose and general character.

In behalf of defendant, it is argued that three tribunals, namely, the original board of appraisers, and two juries, have made findings as to the value of plaintiff's property, and, therefore, this court should not disturb the judgment appealed from.

The finding made by the original board was so low, it may be said to show on its face that it was grossly inadequate. The judgment entered by the first jury was set aside because it was found to be based upon evidence which ought not to have been admitted. Are we now bound by a verdict which has already been adjudged to be erroneous? No. Such a holding would ultimately lead to a rule which would sustain an erroneous verdict because there had formerly been, in the same case, an erroneous verdict.

This court may be reluctant to disturb the findings of a jury, nevertheless, it has never refused so to do, where to sustain the verdict palpable injustice would result. At an early period this court said:

"To justify an interference with the finding of a court or jury, the preponderance of evidence must be clear, obvious and decided; but when the preponderance is so great, it is

the duty of the reviewing court to correct the mistake." *Fried v. Remington*, 5 Neb. 525.

And in a case, similar in its nature to the one before us, it is said:

"On an appeal from an award of damages for the construction of a viaduct it appears from the proof that the damages were grossly inadequate. The verdict and judgment, therefore, are set aside and the cause remanded for further proceedings." *Stanwood v. City of Omaha*, 38 Neb. 552.

And in *Bentley v. Hoagland*, 94 Neb. 442, it is held:

"Where the verdict of a jury is clearly against the weight and reasonableness of the evidence, it will be set aside and a new trial granted."

See, also, *Spirk v. Chicago, B. & Q. R. Co.*, 57 Neb. 565.

It is not deemed necessary to discuss the other assignments made. The rulings on the admission of evidence, and the permission to the jury to view the land involved, notwithstanding the changes that had been made after the land had been taken over by the city, were, in part, invited by plaintiff's counsel, and these errors, if such they be, are not likely to occur upon a retrial.

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

REVERSED.

CITIZENS STATE BANK OF BENKELMAN, APPELLEE AND CROSS-APPELLEE, V. CLARENCE S. KRUTSINGER ET AL., APPELLANTS AND CROSS-APPELLEES: FRED R. WALKER ET AL., APPELLEES AND CROSS-APPELLANTS.

FILED FEBRUARY 18, 1926. No. 23702.

1. **Mortgages: FORECLOSURE: PROOF OF INDEBTEDNESS.** In a suit to foreclose a mortgage, the written instrument itself and the note thereby secured may be considered evidence of the amount of the mortgagor's indebtedness, where that issue is raised by the pleadings.
2. ———: **INDEBTEDNESS: BURDEN OF PROOF OF CREDIT.** In a suit to foreclose a mortgage, the burden is on mortgagor to prove

that he was entitled to a credit not given when the amount of his indebtedness was computed by mortgagees before the mortgage was executed, where that issue is raised by the pleadings.

3. **Bills and Notes:** INDORSERS. Where there is nothing on the back of a promissory note but the names of the payees, written with a pencil, it imports on its face their liability as indorsers, when sold and delivered to the purchaser.
4. ———: ———: PROOF. On an issue as to the liability of payees in a promissory note as indorsers, their indorsement in blank on the back of the note in the hands of a purchaser to whom it has been delivered is evidence of such liability.
5. ———: COLLATERAL: BURDEN OF PROOF. Where payees in a promissory note indorse their names in blank on the back of it and deliver it to a purchaser, the burden is on them to prove that the indorsement was made with a pencil for the sole purpose of making the note available as collateral security, if that issue is raised by the pleadings in an action to foreclose a mortgage securing the note.

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

Butler & James and *R. D. Druliner,* for appellants.

Stewart, Perry & Stewart and *Robert Van Pelt,* for cross-appellants.

Harry S. Dungan, Hines & Hines, Scott & Scott and *Pemberton & O'Keefe, contra.*

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

ROSE, J.

This is a suit to foreclose a mortgage given to secure a note for $31,900, dated October 30, 1920, due one year hence, payable to Charles R. Walker and Fred R. Walker and by them assigned to the Citizens State Bank of Benkelman, plaintiff — a bank of which the former was president and the latter cashier. The mortgagors were Clarence S. Krutsinger and Grace Krutsinger, two of the defendants. Their defense, partial only, was that the note and the mortgage for $31,900 exceeded their indebtedness to the ex-

tent of $894.90. Upon a trial of the cause, the district court decreed a foreclosure for the full amount of the mortgage. Mortgagors have appealed.

Was the indebtedness incorrectly stated in the written instruments? The mortgage was given to combine and secure a number of pre-existing debts incurred during a period of several years. It is contended that the item in question, $894.90, was erroneously considered a debt when the computation of the entire amount due was made October 30, 1920. In support of this proposition it is argued that plaintiff, the bank, three days before, debited the checking account of Clarence S. Krutsinger $894.90 to pay a note of his and afterward included the amount thereof in the estimate of the total indebtedness without any corresponding credit in any form for the payment thus made. Clarence S. Krutsinger so testified and the bank books show the debit mentioned. This partial defense, however, is not conclusively established, a point argued by mortgagors. It does not disprove a total based on unpaid notes and on other debts owing to the bank or to one or both of the Walkers who were at the time its managing officers. The total indebtedness was computed in a room in the rear of the bank by one of its officers and a third person, both of whom testified as witnesses. It is inferable from their testimony that unpaid debts only were considered, and that the total amount due on all the items was a little in excess of $31,900. One or the other of the mortgagors was present at times when the computations were being made and while the descriptions of the mortgaged land, aggregating several thousand acres, were being verified. They made no objection to the amount of the note and the mortgage before they were sued. Those instruments were themselves evidence of the amount of the indebtdness. The question is one of fact. It is difficult to solve owing to unsatisfactory proofs on both sides of the issue. The note and the mortgage were duly executed, delivered and subsequently transferred as correct in amount, and the debt, whatever it is, remains unpaid. The burden was on mortgagors to prove

the omitted credit pleaded by them. The transactions were of considerable magnitude, calling for the attention of the debtors. Years elapsed without any effort to rectify the mistake, if made. The principal debtor was a farmer, an extensive landowner, and a man of affairs. His memory failed him in regard to some of the facts about which he testified. He does not seem to have adduced sufficient proof of his defense to impeach the amount of the indebtedness evidenced by the instruments deliberately executed by him. That part of the judgment from which mortgagors appealed is therefore affirmed.

The record presents another controversy. The Walkers were also defendants. They were sued to enforce a liability as indorsers of the note for $31,900, already described. They were payees, and on the back of the note there was nothing but their names written with a pencil. They denied liability as indorsers, explaining that their names appeared on the back of the note for the sole purpose of making it available to the Broadway Bank of Denver as collateral security for obligations subsequently paid. On the controverted issue, raised, as it was, by a reply to the facts constituting a defense, the trial court held them liable to plaintiff as indorsers, and from the judgment against them they have appealed.

Are the Walkers liable to plaintiff as indorsers? The note was correctly dated October 30, 1920. The date of the pencil indorsement was not definitely known, but the recollection of the Walkers was that it was made in January or February, 1921. A duly acknowledged assignment of the mortgage itself by the Walkers to plaintiff, containing the words "without recourse," was executed and delivered December 1, 1921. The record contains a copy of another duly acknowledged instrument dated October 20, 1922, showing that the Walkers sold a controlling interest in the Citizens State Bank of Benkelman, February 21, 1921, and admitting to the purchasers their liability as "indorsers or guarantors" of the note for $31,900, an asset of the bank. In their defense the Walkers take the position that their

pencil indorsement was limited to the sole purpose of making the note available as collateral security; that their liability ended with the payment of the collateral obligations; that the indorsement was explainable by parol; that there was never any delivery which carried with it the indorsement on the note; that there was no consideration for the indorsement; that the subsequent guaranty of payment to third persons was not provable in this action; that the admission of the guaranty was erroneous, and that consequently the judgment was contrary to law and without support in the evidence. In this connection reference is made to oral testimony by the Walkers in support of the defense outlined and to the formal assignment of the mortgage "without recourse." Reference is also made to a letter written by an officer of the Broadway Bank of Denver to Fred R. Walker, inclosing the note for $31,900 and containing the statement that the writer knew the note belonged to the Walkers personally.

The burden was on the Walkers to prove what they pleaded as a defense. Their propositions of fact and law fail, if a preponderance of the evidence shows that the note on its face and back was what it purported to be — a commercial paper with the names of the payees on the back and nothing more. The note itself, thus indorsed, was evidence of the liability of the indorsers. They gave it currency as such while it was in their own hands. This occurred when they were at liberty, with a knowledge of banking, to limit their liability by express words or by other means, if that was their intention. To secure obligations of plaintiff, the bank, they pledged the note to the Broadway Bank of Denver with the indorsement unrestricted. Before it was returned they listed it as an asset of plaintiff, the bank, without anything tangible to indicate a limitation of their liability as indorsers. When they transferred the note from themselves as individuals to the bank controlled by themselves as officers, they accepted for the bank an excessive loan forbidden by a statute imposing penalties. Their individual and banking transactions were

so related and intermingled as to weaken the incentive to avoid personal liability as indorsers of their own or the bank's paper. The indorsement, if what it purported to be, was in no wise affected by the words "without recourse," printed, as they were in the body of the subsequent assignment of the mortgage. The statement by the Denver banker in his letter that he knew the note belonged to the Walkers was a gratuitous communication which did not affect the rights of plaintiff, the note having been previously listed by the Walkers as an asset of their bank. Upon payment of the collateral obligations, the Denver bank held the pledged note for plaintiff, and there was at least a constructive delivery of the indorsement, treating it as a commercial one. The Walkers sold their bank and the sale included the note as an asset. In surrendering the note upon the release of the pledge, the Denver banker mailed it in an envelope addressed to Fred R. Walker, who had been replaced as cashier, but the letter was delivered to plaintiff. This incident did not change the character of the indorsement or prejudice the legal rights of the owner of the paper. The more logical view of the evidence, as a whole, results in the conclusion that the Walkers are liable as indorsers.

AFFIRMED.

NICK BECKIUS, APPELLEE, V. WILLIAM HAHN ET AL., APPELLANTS.

FILED FEBRUARY 18, 1926. No. 23705.

1. Contracts: REFORMATION. In equity, the reformation of an instrument has the effect of making it express the real intent of the parties. The rights of the parties are measured by the instrument as originally intended, and the effect of the reformation, as a whole, should be to give all the parties all the rights to which they are equitably entitled under the instrument which they intended to execute.
2. ———: ———. Upon the reformation of an instrument, the general rule is that it relates back to, and takes effect from, the time of its original execution, especially as between the parties thereto and as to creditors at large and purchasers with notice.

3. ———: ———: RIGHTS OF CREDITORS. The equity of reformation is superior to, and operative against, the demands of general creditors, and is not affected by the subsequent rendition of judgment in favor of a general creditor.
4. ———: REFORMATION BY PARTIES. The parties to a contract which, by mistake of the scrivener, does not express the mutual intent of the parties may reform it voluntarily as effectively as if reformation was decreed in an action in equity.

APPEAL from the district court for Butler county: GEORGE F. CORCORAN, JUDGE. *Reversed and dismissed.*

A. V. Thomas and *Coufal & Shaw*, for appellants.

George W. Wertz, contra.

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

GOOD, J.

Plaintiff Beckius sued out a creditor's bill to set aside two conveyances of real estate which he averred had been made in fraud of creditors, and to subject the real estate in said deeds described to the payment of his judgment against defendant Cassie Hahn. A trial resulted in a decree canceling the deeds, and defendants have appealed.

The pertinent facts that give rise to this controversy and concerning which there is no dispute in the evidence are as follows: Defendants Eberly and wife, being each about 70 years of age, having four children, and possessing 960 acres of land, decided to make some provision for their children. They decided to, and on October 15, 1919, did, convey by deed to each of the four children 240 acres of land, but reserving to the grantors for their lifetime possession and use of the land. Defendant Cassie Hahn was one of the four children. She had been married to William Hahn for many years, and the Hahns had four children, who were at the time minors, the oldest being 16 years of age. Eberly knew that William Hahn, the husband of Cassie, was given to speculating and was, as he termed it,

a "plunger." In making the conveyance to his daughter Cassie, he desired to do so in such manner that she should have possession and use of the land during her lifetime, without power to sell or incumber it, and that at her death it should go to her four children, and be so arranged that her husband, William Hahn, would have no control over the real estate. With this end in view, he sought the county clerk of Butler county, who was an honest, able and intelligent official, but was not a lawyer or skilled in the law. Eberly informed the county clerk of what he desired to do with respect to conveying the land to his daughter Cassie, and the county clerk undertook to draw a deed which would effectuate the purpose of the Eberlys. The scrivener of the deed used an ordinary form of warranty deed, but prepared and inserted therein the following provisions, which he believed, and informed Eberly, would effectuate his purpose: "Possession of said premises is hereby reserved by said grantors during the lifetime of said grantors, and this deed to become absolute and possession given upon the death of said grantors. This conveyance is made on the condition that the grantee shall not convey or incumber the above described premises during her lifetime. In the event grantee herein seeks to convey or incumber the same, this deed shall become absolutely void." The deed containing these provisions was delivered to Cassie Hahn and recorded on the 15th day of October, 1919.

In December, 1920, William Hahn, husband of Cassie Hahn, requested plaintiff Beckius to become surety on his promissory notes, aggregating $17,000. Plaintiff at first was apparently reluctant to sign. Hahn told plaintiff that his wife had 240 acres of land, and that, to secure him against possible loss, he would procure a promissory note, signed by his wife and his father, which plaintiff might hold to indemnify him against loss by reason of his becoming surety upon the obligations of Hahn. Plaintiff consented and signed the notes. About two weeks later, a promissory note signed by Cassie Hahn, and purporting to be signed

also by George Hahn, was delivered to plaintiff, pursuant to the arrangement theretofore made.

Later, Eberly was informed that the deed was probably insufficient to carry into effect the intent and purpose of the parties thereto, because it did not provide that the real estate would, on the death of the daughter, Cassie, become the property of her four children. In March, 1921, Eberly requested his daughter and her husband to reconvey the premises to him so that he could execute a new deed which would effectuate the real intent and purposes of the parties. Thereupon, a quitclaim deed was executed by Cassie Hahn and husband, reconveying the land to the Eberlys, and they, in turn, executed a new deed to Cassie Hahn, which contained, immediately following the description of the land, this provision: "For and during the term of her natural life; conditioned, however, that said Cassie Hahn, the grantee, shall not convey or incumber the same, nor permit, suffer, or cause the same to become charged or incumbered, and any attempt or sufferance on the part of said Cassie Hahn to convey, charge or incumber the same shall work defeasance of the contingent life interest herein granted, and upon the death of the said Cassie Hahn, the grantee above, or the defeasance of the estate herein to be granted, then unto Eloine Hahn, Ellis Hahn, Ruth Hahn and Robert Hahn, their heirs and assigns absolutely forever; reserving, however, unto said Levannes J. Eberly and unto Sarah Eberly, the grantors herein, the possession, use, income and enjoyment of the said premises and each and all of same for and during the natural life or lives of each of said Levannes J. Eberly and Sarah Eberly, the grantors herein." It is the last two mentioned deeds which plaintiff in this action seeks to set aside for fraud.

The evidence discloses that, at the time the two deeds in controversy were executed, Eberly had no knowledge that his daughter Cassie Hahn had incurred any liability to plaintiff, and no knowledge that she had incurred any indebtedness, save some obligation to a bank, the amount of which is not disclosed, and which is not in controversy

in this action. There is no evidence that the children of Cassie Hahn had any knowledge or information that she was incurring or had incurred any indebtedness or liability to the plaintiff; nor did plaintiff have any conversation with Cassie Hahn or any statement or representation from her as to her ownership of the land, or her interest therein, prior to the time he signed the notes as surety for William Hahn. In fact, at the time he signed these notes he did not even have the assurance of Cassie Hahn that she would execute the note which had been promised by her husband. In signing the notes as surety for William Hahn, he relied solely upon the statements and representations of Hahn that his wife owned the land and that she would execute a note to him as indemnity.

From the facts disclosed, it is clear that the deeds in controversy were given for the purpose of reforming the deed of October 15, 1919, so as to conform to the mutual intentions of the parties, and that the latter deeds were executed without any actual intent to defraud the plaintiff or any one else. The trial court based its decree upon the fact that the title apparently conveyed by the deed of October 15, 1919, was in Cassie Hahn, and that plaintiff, having knowledge of such conveyance and relying upon the supposed fact that she was the owner of the premises, signed the notes as surety for William Hahn, and that the subsequent conveyance reforming the original instrument was, in law, a fraud upon plaintiff, for which he was entitled to have the conveyances set aside.

The question as to whether or not plaintiff is entitled to any relief depends upon the right of Eberly to have the original deed to his daughter, Cassie, reformed so as to reflect the intention of the parties. In equity the reformation of an instrument has the effect of making it express the real intent of the parties. The rights of the parties are measured by the instrument, as originally intended, and the effect of the reformation, as a whole, should be to give all the parties all the rights to which they are equitably

entitled under the instrument which they intended to execute.

Except as to *bona fide* purchasers without notice and those standing in similar relations, upon the reformation of an instrument, the general rule is that it relates back to, and takes effect from, the time of its original execution, especially as between the parties thereto and as to creditors at large and purchasers with notice. 34 Cyc. 999, 1000.

In 23 R. C. L. 343, sec. 36, it is said: "The equity of reformation is superior to and operative against creditors, whether they are judgment or attachment creditors or general creditors. The equity attaches to the property contemporaneously with the execution of the deed or mortgage, and is prior in time to and is not defeated by the rendition of a judgment and the levy of an execution; furthermore, a creditor stands in no better position than his judgment debtor, and the rendition of a judgment and a levy of execution vest in the judgment debtor no greater title than he had before."

Applying these principles to the case in hand, it seems clear that Eberly was entitled to have the deed to his daughter reformed. It was his property and his bounty he was bestowing upon his daughter and grandchildren. The intention of Eberly, and acquiesced in by the daughter, was not effectuated by his first deed. On discovering that the deed conveyed a greater estate to the daughter than intended by both parties thereto, and that it conveyed nothing to his grandchildren, as both parties intended it should do, he could have gone into a court of equity and compelled a reformation. Certainly the parties may do voluntarily that which a court of equity would have compelled them to do. The parties, then, having voluntarily reformed the deed, the effect is as though the original deed had expressed the intention of the parties. Plaintiff was not a *bona fide* purchaser, nor does he stand in the same relation as one. At the time the deed was voluntarily reformed, he had not reduced any claim to judgment and had acquired no lien upon the real estate. He was simply an ordinary creditor,

and, as such, his rights must be measured, unless Eberly has been guilty of some conduct that would estop him from insisting on the reformation of the deed. His daughter was not engaged in trade or business, and he had no reason to anticipate that she would incur obligations on the strength of her apparent ownership of the real estate. We find nothing in the record to justify a holding that he was guilty of any conduct that would have precluded him from resorting to equity to compel reformation had his daughter refused consent to a voluntary reformation.

The case of *Stone v. Hale*, 17 Ala. 557, 52 Am. Dec. 185, presents a situation very similar to that in controversy. It was there held that a deed from a father to daughter might be reformed, notwithstanding the claims of creditors of the husband, and that the interests of the parties under the reformed deed are paramount to those of judgment creditors.

It must not be overlooked that Cassie Hahn had not created, or attempted to create, any lien upon the real estate, or her interest therein, prior to the voluntary reformation, nor had she made any representation to the plaintiff as to her ownership or interest in the premises. Plaintiff was required to take notice of what the public record disclosed at the time he became surety for William Hahn. The record at that time informed him that Cassie Hahn could not sell, or incumber, or create a lien upon the real estate. We reach the conclusion that the conveyances in question were not fraudulent, and that plaintiff was not entitled to have them canceled. The judgment of the district court is, therefore, reversed and the cause dismissed.

REVERSED AND DISMISSED.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, V. FARMERS & MERCHANTS BANK OF MORRILL.
WESTERN ACCEPTANCE COMPANY, CLAIMANT, APPELLANT, V. CHARLES A. MORRILL, RECEIVER, APPELLEE.

FILED FEBRUARY 18, 1926. No. 23859.

1. **Banks and Banking**: RECEIVERS. The receiver of an insolvent bank takes and holds the bank assets, as to liens, rights and liabilities, as they exist at the time of his appointment.
2. ———: ———: AUTHORITY. Such receiver is an officer of the court, whose authority is limited by law and the records in the case in which he is operating, of which limitations those dealing with him must take notice.
3. ———: DEPOSITS. A deposit in a bank made in the ordinary course of its business is presumed to be general, and not special.
4. ———: GENERAL DEPOSITS. When money is so deposited, it ceases to be the money of the depositor, and becomes the money of the bank, and the depositor becomes a creditor of the bank to the extent of such deposit, which credit the bank can apply to a matured debt owing to it by such depositor.
5. ———: ———. Record examined, and *held* to support the finding that the Morrill Motor Company was a trade-name used by John R. Dewitt, and that John R. Dewitt and Morrill Motor Company are but one and the same person, and that the deposit in question was that of John R. Dewitt.

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

Morrow & Morrow, for appellant.

C. M. Skiles and *Mothersead & York, contra.*

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

THOMPSON, J.

This is an action wherein the appellant intervenes in the suit as a claimant of a deposit in an insolvent bank in the hands of a receiver, seeking to have its claim allowed and ordered paid out of the bank guarantee fund. The petition is in the usual form in such cases, and alleges that the

deposit is one made by the Morrill Motor Company, hereinafter termed the motor company, as a distinct entity, and assigned to it. The receiver answers, admitting the deposit as one in the ordinary course of banking business for the amount stated, but that the motor company was a trade name only, adopted by one, John R. Dewitt; that is, that John R. Dewitt and the motor company were but one and the same person so far as the matters here involved are concerned; and that, while the deposit was made in the name of the motor company, it was in fact that of John R. Dewitt, and subject to offset to the extent of his note to the bank of $900, which was past due, with accrued interest thereon, which offset, he, as such receiver, had made; and prayed that such offset be approved. The case was tried to the court, and the court found, in substance, that the Morrill Motor Company was but a trade name used by John R. Dewitt, and entered judgment that the amount of such note with accrued interest, aggregating $927.50 at the time such bank closed its doors and ceased business, be set off against the deposit of the Morrill Motor Company, which deposit amounted to $2,843.94; and that the Western Acceptance Company's claim, amounting to $1,916.44, be allowed as a general claim against the trust and be paid out of the bank guarantee fund. Claimant appeals, and, as grounds for reversal, asserts that the judgment is without evidence to support it, and contrary to the law applicable.

As reflected by the record, the plaintiff, Farmers & Merchants Bank of Morrill, hereinafter called the bank, is a corporation of Morrill, organized for the purpose indicated by its name. The defendant and appellant, Western Acceptance Company, hereinafter referred to as the acceptance company, is a corporation of Denver, Colorado. The Morrill Motor Company, at the times herein referred to, was a trade-name used by John R. Dewitt, who, under such name, was engaged in the retail of automobiles and their accessories. Dewitt, under the name of such motor company, purchased some automobiles, which were shipped to him accompanied by a bill of lading requiring him to pay

for same before their delivery to him at Morrill. He, finding himself without sufficient funds, borrowed of the acceptance company $2,340.04, which was by him received and in the usual and customary way deposited in such bank to the credit of such motor company, his then total deposit being, and so remained, $2,843.94. He at that time owed the bank on a note, then past due, $900 and accrued interest thereon, which note had been signed by him as John R. Dewitt, and so carried on the books of the bank. The next day after such deposit was made, the bank failed, was taken over by the state, and a receiver appointed, who entered upon his duties, and thereafter listed and reported to the proper court the assets and liabilities of the bank as they appeared on the books of the bank at the time he took possession. And afterwards, at request of Dewitt, the receiver prepared and delivered to such acceptance company the following certificate:

"December 5, 1925.

"Western Acceptance Company,
Denver, Colorado.

"Gentlemen: This is to certify that the Morrill Motor Company of this city have assigned to the Western Acceptance Company of Denver, Colorado, $2,340.04, from the claim for deposit in this bank. This assignment is a first lien on said claim and will be paid direct to the Western Acceptance Company in due course of time.

"(Signed) Chas. A. Morrill, Receiver."

Shortly after the receipt of this certificate, the acceptance company released a chattel mortgage it held on the shipment of automobiles. After the receiver became informed that the motor company was not an independent entity, but was in fact John R. Dewitt, simply a trade-name by him used, he computed the amount of interest due on the $900 note and offset the same on such deposit, and notified Dewitt and the acceptance company thereof. Upon receipt of such notice, the acceptance company intervened in the bankruptcy action, as hereinbefore stated.

It must be remembered that the receiver takes and holds

the bank assets, as to liens, rights and liabilities, as they exist at the time the business is turned over to him, to be administered for the uses and benefits of the creditors and stockholders of the institution. *State v. South Fork State Bank,* 112 Neb. 623; *State v. American Exchange Bank,* 112 Neb. 834; *State v. Farmers State Bank,* 112 Neb. 788.

The receiver is at all times an officer of the court, subject to its orders and directions, an agent, the scope of whose authority is limited by law. *State v. Bank of Hemingford,* 58 Neb. 818; 23 Cyc. 1065. Thus, every one dealing with such receiver knows of the limitations, or lack of limitations, to his power to transact the business of the institution. He cannot without approval of the court relinquish any of the rights of the trust.

This suit for the first time presents to the court for its approval the offset made by the receiver of the amount represented by the note against the deposit here in question. This being true, the acceptance company stands in the same position, under the issues raised by the pleadings in this case, as would the motor company or Dewitt. The receiver was uninformed until after December 5, 1925, as to the things inuring in the original transaction giving rise to the deposit of the $2,340.04, as between the bank, acceptance company, Dewitt, or the motor company, as well as to the fact that Dewitt and the motor company were one and the same person. Thus, the evidence shows that the deposit was general, and the presumption is that such a deposit is general, and not special. *Nichols v. State,* 46 Neb. 715. Then, on the deposit of the money, as between the parties thereto, it ceased to be the money of the depositor and became the money of the bank, to which the depositor became a creditor of the bank to the extent thereof. *Seward County v. Cattle,* 14 Neb. 144. In such case, the bank has the right to appropriate the funds of the depositor to a debt due it from him, as was done in this case. *Globe Savings Bank v. National Bank of Commerce,* 64 Neb. 413; Magee, Banks and Banking (3d ed.) sec. 311. See, also, *Arnold*

v. San Ramon Valley Bank, 184 Cal. 632, and note in 13 A. L. R. 325.

Applying the law to the issues raised, and the facts reflected by the record, the judgment of the trial court should be, and is, AFFIRMED.

Note—See Banks and Banking, 7 C. J. pp. 628 n. 94, 653 n. 84, 668 n. 20, 669 n. 39, 735 n. 68, 69—Receivers, 34 Cyc. 193 n. 88, 236 n. 72, 243 n. 99, 247 n. 28, 269 n. 37, 279 n. 85.

MCCAFFREY BROTHERS COMPANY, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED FEBRUARY 18, 1926. No. 23542.

1. Carriers: RATES. A freight rate once lawfully established continues to be the legal rate until legally canceled. Subsequent tariffs naming new rates, without canceling previous rates, cannot carry the new rate into lawful effect.
2. ———: TARIFF. Parts of a supplement to a freight tariff may be canceled and the remainder of the supplement continue in effect.
3. ———: ———: CONSTRUCTION. A tariff, or a supplement thereto, must be construed in its entirety, considering both the limitations on its title page and the rules contained therein. Supplements are a part of the tariff the same as though originally incorporated therein.
4. ———: ———: SUPPLEMENT. A special supplement to a tariff issued by a railroad company in form, pursuant to special permission of the interstate commerce commission, and purporting to increase freight rates, is valid and effective if it fairly sets forth, when construed as an entirety, (1) the amendments made, (2) the cancelation of all original rates relating to the same service to which the amendments pertain, and (3) information as to where all changes from the original tariff that are effective on the date thereof may be found.
5. ———: ———: ———. *Held,* under the evidence in this case, special supplement No. 7 to tariff issued by the Chicago, Burlington & Quincy Railroad Company, taking effect March 10, 1921, cancels all prior rates on the commodities therein enumerated, and the rates herein prescribed were legally in effect during the time the services set forth in plaintiff's petition were performed.

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

Smith, Schall, Howell, Howard & Sheehan, for appellant.

Byron Clark, Jesse L. Root, J. W. Weingarten, C. W. Krohl and *Kenneth F. Burgess, contra.*

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

EBERLY, J.

This is an action at law brought by plaintiff, McCaffrey Brothers Company, a corporation, against the defendant railroad company, to recover alleged excessive freight charges exacted by defendant for transportation over its line of certain car-loads of sand between named Nebraska points. Issues were joined in the trial in district court which resulted in a judgment for defendant. From this determination the plaintiff appeals.

The ultimate facts are not in dispute. The services performed and the amount of compensation exacted are agreed upon between the parties. The gist of the controversy presented in this case is found in, and to be determined from, the provisions of a certain supplement to tariffs issued by the defendant, taking effect March 10, 1921, which will hereafter be referred to as supplement No. 7. It is conceded that by tariff effective February 29, 1920 (C. B. & Q. G. F. O. Tariff, 11677-C), a rate of 2½ cents per hundred pounds between the points in controversy was the established and legal rate.

On July 20, 1920, the interstate commerce commission, in a proceeding known as Ex parte 74, entered an order authorizing the defendant to increase its existing interstate rates 35 per cent. Pursuant to said order defendant published and filed its tariff with the interstate commerce commission increasing the interstate rate at that per cent., said increase becoming effective August 26, 1920.

The defendant thereupon made application to the Ne-

braska state railway commission to increase its intrastate rate in an amount equal to that authorized by the interstate commerce commission. This was refused, and the Nebraska state railway commission authorized and directed that for transportation of sand between points named in plaintiff's petition the defendant should continue to charge the sum of 2½ cents per hundred pounds, and further ordered that the minimum charge per car-load should be increased from $10 to $12.50. Pursuant to the last order referred to, the defendant established said rates by tariffs duly published and filed with the Nebraska state railway commission, to take effect September 27, 1920, in what is known as supplement No. 4 to C. B. & Q. G. F. O. Tariff, No. 11677-C. Thereafter a complaint was filed with the interstate commerce commission alleging that the order of the Nebraska state railway commission granted undue advantage, preference, and discrimination in the transportation of interstate and intrastate traffic. The interstate commerce commission rendered its opinion and order adjudging that the aforesaid rates in the state of Nebraska were unduly prejudicial and discriminatory in favor of intrastate traffic, and further ordered the defendant and other roads to put in force and maintain charges for services on Nebraska intrastate traffic corresponding to the increase authorized in Ex parte 74. Thereafter the defendant filed its petition in the United States district court against the Nebraska state railway commission and others praying for an injunction enjoining the Nebraska state railway commission from interfering with putting into effect the increase authorized by the interstate commerce commission on February 21, 1921. The federal court, after hearing, entered its interlocutory injunction granting the prayer of plaintiff's petition. The defendant thereafter, pursuant to the action taken by the interstate commerce commission, printed and published a special supplement purporting to be applicable solely to Nebraska intrastate traffic, becoming effective March 10, 1921.

Plaintiff contends that the language of supplement No. 7

is insufficient to cancel the rates set forth in supplement No. 4, which fixed the compensation for the services set forth in petition at 2½ cents per hundred pounds, and the last-named rates, being once lawfully in effect, were therefore in effect at the time the services in controversy were rendered, and the compensation in suit, which was 3½ cents per hundred pounds, was exacted without authority and was excessive in the sum of 1 cent. per hundred pounds.

The law applicable to this case does not seem to be a matter of dispute. It is rather a question of construction presented for determination. We deem, however, (a) that a tariff or supplement must be construed in its entirety, considering both the limitations on its title page and the rules contained therein (*United Shoe Machinery Corporation v. Director General*, 55 I. C. C. 253); (b) that parts of a supplement to a tariff may be canceled and the remainder of the supplement continue in effect (rule 8-A, supplement No. 3 to tariff circular 18-A); (c) that, in determining the rate to be charged by a carrier, all parts of the tariff filed should be considered, and, if a plain meaning can be gathered therefrom, effect should be given to it (*Portland Cattle Loan Co. v. Oregon Short Line R. Co.* 251 Fed. 33).

The question presented to us becomes a mere construction of the provisions of supplement No. 7, in the light of the authorities hereinbefore referred to, the facts being practically admitted.

The first question naturally presented by the petition of the appellant here is: Are the rates prescribed by supplement No. 4 properly canceled by provisions of supplement No. 7? On the first page of supplement No. 7 appear the words: "Increase in freight rates. Freight rates named in tariffs and supplements thereto, listed on page 6, are hereby increased to the rates shown in column B of rate tables, on pages 3 to 5, inclusive. See application of rates, page 2, taking effect March 10, 1921."

On the second page of supplement No. 7 appears the following: "Effective March 10, 1921. Class and commodity

rate, * * * in effect, on July 29, 1920, on Nebraska intrastate traffic (see cancelation below) in tariffs enumerated herein as amended, to each of which tariffs this is a special supplement, are increased to the rates shown in column B in table of rates of pages 3, 4, and 5 hereof, except as otherwise provided below.* * *

"Cancelation. Rates on Nebraska intrastate traffic in supplements to tariffs supplemented hereby, as listed on page 6, published to take effect after July 29, 1920, are hereby canceled. *The increases herein provided apply to the rates which were in effect on July 29, 1920.*"

It is to be noted that "rates on Nebraska intrastate traffic," not supplements, are canceled by the terms of the above provisions. We take it that rates contained in a supplement may be canceled without the cancelation of the supplement which contains the rates. I. C. C. Tariff, Circular 18-A, supplement No. 3, rule 8, par. 9. It would seem that the rates to which the cancelation is sought to be applied are amply described in words in the above provision, viz.: "Published to take effect after July 29, 1920." The words would obviously include the rates set forth in supplement No. 4, which supplement was published as taking effect after "September 27, 1920."

It may be said in passing that no difficulty appears to be created by the reference to the supplements containing rates canceled as being those set forth on page 6 of supplement No. 7, for on this page, among others, supplement No. 4 is enumerated. It would therefore follow that the rates set forth in supplement No. 4 pertaining to sand were properly canceled by the provisions of supplement No. 7. Bearing in mind that the cancelation announced in supplement No. 7 is of rates, and not of supplements, no difficulty is created by the enumeration on page 6 of supplements Nos. 2, 4, 6, and 7, as "supplements containing all changes from the original tariff that are effective on the date hereof." An inspection of supplement No. 4 discloses that, in addition to the rates contained which were canceled, it carried a provision which was not affected by the language

of supplement No. 7, and which, therefore, remained in full force and effect. Because of this provision it was properly noted as being one which, together with other supplements, contained all changes from the original tariff that were effective on the date of supplement No. 7, March 10, 1921.

The determination that supplement No. 7 fully conformed to the rules of the interstate commerce commission, and of the statute governing the same, practically disposes of this controversy, though it may be said that the provisions in supplement No. 7 clearly provide for an increase of the rate in controversy in this action from 2½ cents to 3½ cents per hundred pounds, and also disclose that these changes were in effect at the date of the respective shipments set forth in plaintiff's petition. It would therefore follow that the amount of compensation exacted by defendant was in strict accordance with the provisions of the tariff then in force, and that the judgment of the district court was right in so determining.

The judgment of the district court is

AFFIRMED.

W. A. KNIGHT, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED FEBRUARY 18, 1926. No. 23543.

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

Smith, Schall, Howell, Howard & Sheehan, for appellant.

Byron Clark, Jesse L. Root, J. W. Weingarten, C. W. Krohl and *Kenneth F. Burgess, contra.*

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

EBERLY, J.

This is a companion case of *McCaffrey Bros. Co. v. Chicago, B. & Q. R. Co., ante,* p. 382, and is an appeal from a

judgment based upon the identical facts as appear in the last named case. The cases were tried as one in the district court and separate judgments were entered after the receipt of all the evidence. They were combined and submitted on the same basis in this court. The rules of law applicable to the controversy in this action are the same as are set forth in the case of *McCaffrey Bros. Co. v. Chicago, B. & Q. R. Co., supra.*

It follows therefore that the judgment of the district court must be, and is,

AFFIRMED.

W. A. KNIGHT, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED FEBRUARY 18, 1926. No. 23544.

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

Smith, Schall, Howell, Howard & Sheehan, for appellant.

Byron Clark, Jesse L. Root, J. W. Weingarten, C. W. Krohl and *Kenneth F. Burgess, contra.*

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

EBERLY, J.

This is a companion case of *McCaffrey Bros. Co. v. Chicago, B. & Q. R. Co., ante,* p. 382, and is an appeal from a judgment based upon the identical facts as appear in the last named case. The cases were tried as one in the district court and separate judgments were enterd after the receipt of all the evidence. They were combined and submitted on the same basis in this court. The rules of law applicable to the controversy in this action are the same as are set forth in the case of *McCaffrey Bros. Co. v. Chicago, B. & Q. R. Co., supra.*

It follows therefore that the judgment of the district court must be, and is,

AFFIRMED.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, V. NEWCASTLE STATE BANK.
WESTON BANK, CLAIMANT, APPELLANT, V. S. H. MORTON, RECEIVER, APPELLEE.

FILED MARCH 3, 1926. No. 23809.

1. **Banks and Banking.** Buying and selling commercial paper and discounting and rediscounting notes are not of themselves illegal banking transactions.

2. ———: LOANS AND DEPOSITS. The soliciting and receiving of funds by a solvent bank do not necessarily show the making of loans as distinguished from deposits within the meaning of the bank guaranty law.

3. ———: DEPOSITS. Commercial paper received and credited by a bank as a deposit may be the equivalent of money for commercial banking purposes within the meaning of the bank guaranty law.

4. ———: ———: EXCESSIVE INTEREST. A performed and closed transaction between a state bank and a depositor for the payment of excessive interest on deposits may be abandoned in good faith without tainting future deposits.

5. ———: RECEIVERS: POWERS. "Ordinarily a receiver takes charge of banking affairs where the bank left them, and cannot generally, in absence of fraud, mistake, or violation of law, open closed transactions which would conclude the bank, if solvent." *State v. South Fork State Bank*, 112 Neb. 623.

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

Slama & Donato, for appellant.

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

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

ROSE, J.

This is a controversy between the receiver of the Newcastle State Bank of Newcastle, Dixon county, Nebraska, an insolvent state banking corporation, and the Weston Bank of Weston, Saunders county, Nebraska, claimant.

In a proceeding by the state of Nebraska to wind up the affairs of the Newcastle State Bank, the Weston Bank presented to the receiver a claim for $48,583.74, based on a balance of deposits April 4, 1922, in the form of a checking account protected, as alleged, by the bank guaranty fund. The allowance of the claim was resisted by the receiver on the grounds that neither money nor its equivalent was deposited by claimant in the Newcastle State Bank, and that the claim represents loans bearing interest in excess of 5 per cent. per annum, and not desposits within the meaning of the bank guaranty law. Comp. St. 1922, sec. 8008. Upon a trial of the issues, the district court found that the Newcastle State Bank, as borrower, was indebted to claimant, as a general creditor, in the sum of $48,583.74, with interest at the rate of 5 per cent. per annum from April 4, 1922, and rendered judgment therefor, but denied participation in the bank guaranty fund. Claimant has appealed.

Was the claimant entitled to the protection of the bank guaranty fund? The Newcastle State Bank failed as a commercial banking institution in April, 1922. The indebtedness of $48,583.74, owing to claimant by the insolvent bank when its doors were closed, was shown by the latter's records and is not in dispute. There was no error in the judgment for that sum in favor of claimant, as a general creditor. The controversy is over the right of recourse to the guaranty fund for the payment of the debt. It is argued by the receiver that the claim represents loans instead of deposits. While the Newcastle State Bank, in good standing, was transacting a commercial banking business in 1917 or earlier, with its depositors protected by the bank guaranty fund, it began to send commercial notes of its patrons, guaranteed by it, to claimant for discount or

rediscount. It received therefrom the proceeds. The discounted notes were returned to it when due for exchange for other commercial paper or for payment or collection or renewal. In this manner it received from time to time during a period of several years more than it returned to claimant. To a checking account of claimant the differences were credited as deposits bearing interest at the rate of 5 per cent. per annum on daily balances. The transactions were correctly shown by the bank books and the total due claimant, as already stated, was $48,583.74.

The evidence shows that at times the Newcastle State Bank was in need of money and solicited it from claimants. From this and other circumstances it is argued that the transactions were loans disguised on the books of the insolvent bank as deposits. The point does not seem to be well taken. Without deposits one of the chief inducements to commercial banking would be wanting. Buying and selling commercial paper and discounting and rediscounting notes are not of themselves illegal banking transactions. *State v. Farmers State Bank of Allen,* 113 Neb. 82. The soliciting and receiving of funds, even when a solvent bank needs money to meet its obligations, do not necessarily prove the making of loans. *State v. Wayne County Bank,* 112 Neb. 792. The evidence does not prove illegitimate banking or bad faith in the transactions assailed by the receiver. The funds and notes upon which the claim in controversy is based, for the purposes of commercial banking, were the equivalent of money. Claimant parted with them as such and they were so received. On this phase of the controversy, therefore, claimant's credits were within the terms of the bank guaranty law. Comp. St. 1922, sec. 8008; *State v. American State Bank,* 112 Neb. 182; *State v. South Fork State Bank,* 112 Neb. 623; *State v. Gross State Bank,* 113 Neb. 119; *State v. Kilgore State Bank,* 113 Neb. 772.

The receiver argues, however, that the transactions between the banks included performed agreements for interest in excess of 5 per cent. per annum, the maximum rate fixed by the bank guaranty law, and that therefore claimant

is not entitled to participate in the bank guaranty fund. This view of the transactions is based on a certificate of deposit for $3,000, bearing interest at the rate of 6 per cent. per annum and a gift of $50 by an officer of the Newcastle State Bank to an officer of the Weston Bank. These transactions were closed before the credits comprising the present claim arose. If the bank had remained solvent it would have been conclusively bound by the disposition thus made of these two items. An arrangement for excessive interest may be abandoned in good faith without tainting future deposits. *State v. Wayne County Bank,* 112 Neb. 792; *State v. American Exchange Bank,* 112 Neb. 834. No interest in excess of 5 per cent. per annum on any deposit entering into the disputed claim was paid or contemplated. The receiver took charge of the banking affairs generally where the bank left them. The rule applicable was recently stated as follows:

"Ordinarily a receiver takes charge of banking affairs where the bank left them, and cannot generally, in absence of fraud, mistake, or violation of law, open closed transactions which would conclude the bank, if solvent." *State v. South Fork State Bank,* 112 Neb. 623; *State v. American Exchange Bank,* 112 Neb. 834; *State v. Farmers State Bank of Winside,* 112 Neb. 788.

The Newcastle State Bank had the benefit of claimant's money and without it might have failed sooner, involving the bank guaranty fund in still greater losses. The better view of the evidence leads to the conclusion that claimant was a depositor within the meaning of the bank guaranty law. That part of the judgment denying to claimant the protection of the bank guaranty fund is reversed and the cause remanded for the purpose of correcting the error.

REVERSED IN PART.

Note—See Banks and Banking, 7 C. J. pp. 485 n. 82, 589 n. 44, 712 n. 23, 720 n. 96, 736 n. 75, 737 n. 89.

GUSTAVE E. KRONBERG V. STATE OF NEBRASKA.

FILED MARCH 3, 1926. No. 24925.

1. **Criminal Law**: EMBEZZLEMENT BY EXECUTOR: JURISDICTION. Statutory power of a county court in a civil proceeding to punish an executor for contempt, if he disobeys orders relating to property belonging to decedent's estate, does not deprive criminal courts of jurisdiction under the criminal code to try and punish an executor for the embezzlement of money in his hands as such executor.
2. **Embezzlement**: EXECUTORS. An executor of the estate of a deceased person is amenable to the embezzlement statute applicable to "any individual or company or association," if money in his possession as such executor is embezzled by him.
3. **Jury**: CHALLENGE TO ARRAY. In a criminal prosecution, the failure of officers to comply with the law in drawing names for the petit jury may be assailed by a challenge to the array.
4. ———: UNIT FOR DRAWING. Under the statutes of Nebraska, the unit for drawing by lot names for a petit jury is the county, and not the precinct.
5. ———: CHALLENGE TO ARRAY: ERROR. In a criminal prosecution, the overruling of a challenge to the array of the 24 petit jurors is erroneous, where the undisputed evidence shows that their names were drawn by precinct, separately, in violation of the statute requiring the clerk and the sheriff to draw by lot 24 names from the box containing 60 names of qualified persons from the county at large, if that question is properly presented to the trial court.

ERROR to the district court for Washington county: CHARLES LESLIE, JUDGE. *Reversed.*

M. O. Cunningham and *Henry Mencke*, for plaintiff in error.

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

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

ROSE, J.

In a prosecution by the state in the district court for

Washington county, Gustave E. Kronberg, defendant, was convicted of embezzling $1,210 in his hands as executor of the estate of Ole P. Larson, deceased. For that felony he was sentenced to serve a term of one year and six months in the penitentiary. As plaintiff in error defendant presents for review the record of his conviction.

The conviction is assailed on the ground that the district court was without jurisdiction because defendant was not amenable to the statute under which he was prosecuted. He was accused and tried under that part of the criminal code or general statute relating to embezzlement, legislation providing for the punishment of any executor who, while acting in that capacity, embezzles money in his possession "belonging to any individual or company or association." Laws 1923, ch. 95; Comp. St. 1922, sec. 9629. It is argued that this statute does not apply to defendant as executor, for the reason that he is answerable to, and punishable by, the county court, a tribunal having exclusive original jurisdiction in the administration and settlement of estates. In this connection reference is made to laws empowering the county court to punish for contempt an executor who fails to comply with judicial orders in regard to funds or property belonging to decedent's estate. Comp. St. 1922, secs. 1321, 1323, 1457. These latter statutes confer on the county court authority in civil proceedings to make its orders effective in the exercise of its original jurisdiction to administer and settle estates, but do not take from the criminal courts power to try and punish an executor for embezzling money in violation of the Criminal Code.

Defendant also complains of his conviction on the ground that the embezzlement of money belonging to the estate of Ole P. Larson, deceased, as charged in the information, is not money "belonging to any individual or company or association," within the meaning of the embezzlement statute. Laws 1923, ch. 95; Comp. St. 1922, sec. 9629. This position, according to previous decisions, is untenable. An executor of the estate of a deceased person is amenable to the embezzlement statute applicable to "any individual

or company or association," if money in his possession as such executor is embezzled by him. *Hendee v. State,* 80 Neb. 80; *Edmondson v. State,* 89 Neb. 797.

In one of the assignments of error defendant complains further that he was unlawfully convicted because the names of the jurors who found him guilty were not drawn in the manner prescribed by a mandatory statute. This question was properly raised by a challenge to the array. *Clark v. Saline County,* 9 Neb. 516; 16 R. C. L. 240, sec. 57; 35 C. J. 374, sec. 418; *Clinton v. Englebrecht,* 13 Wall. (U. S.) 434. The trial court overruled the challenge. Was defendant thus deprived of a substantial right granted by a mandatory act of the legislature? It was the duty of the county board, at least 15 days before the first day of the session of the district court, to meet and select 60 persons having the qualifications of jurors, "as nearly as may be, a proportionate number from each precinct in the county," and within five days thereafter furnish the clerk of the district court a list of their names. Comp. St. 1922, sec. 9073. The clerk was required to write the name of each person selected on what the legislature called "a separate ticket" and to place "the whole number of tickets" in a box. Comp. St. 1922, sec. 9074. At least 10 days before the first day of the session of the district court it was the duty of the clerk and the sheriff to "meet together and draw by lot" from the box 24 names. The persons whose names are drawn are declared by statute to be the petit jurors. Comp. St. 1922, sec. 9075.

While the county board, in selecting 60 persons having the qualifications of jurors, were bound by the statutory clause, "as nearly as may be, a proportionate number from each precinct in the county," the clerk and the sheriff in drawing 24 names for the petit jury were required to draw them by lot promiscuously from the whole "number of tickets" in the box. The statute makes it clear that the unit from which the 24 names are to be drawn is the county, and not the precinct. In the present instance, when the 24 names were drawn, there was a rubber band around the

tickets for each precinct. With the entire 60 tickets face down by separate precincts, one or more tickets were drawn from each bunch, the whole number drawn being 24. Under this method the officers made the precinct the unit for drawing names instead of the county. Instead of drawing by lot 24 names promiscuously from the box containing 60 names, they drew 24 names by precincts. The course pursued was not the statutory method. The means for manipulating names or for otherwise committing fraud were increased by the failure to comply with the law. Compliance with the statute might have resulted in a different jury. Other jurors might have taken a different view of the evidence. In any event defendant was deprived of a substantial right. Though there is nothing to indicate that either the clerk or the sheriff was prompted by any unworthy motive, they were mistaken in their views of law. It is not every irregularity in drawing names that will prejudice the rights of defendant in a criminal prosecution, but in a material respect a radical departure from a mandatory statute should not be sanctioned. Methods of procedure for the selection of petit juries have not been left to the courts and the courts are bound by valid regulations adopted by the legislature. In early decisions the statutory provisions under consideration were held to be mandatory. *Clark v. Saline County*, 9 Neb. 516; *Barton v. State*, 12 Neb. 260. Without disregarding the law in a respect material to the rights of defendant, the conviction cannot be upheld. The challenge to the array, therefore, should have been sustained. It follows that the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Embezzlement, 20 C. J. p. 448 n. 65—Juries, 35 C. J. pp. 147 n. 85, 238 n. 17, 374 n. 41, 375 n. 57.

LILLA M. GRAHAM, APPELLANT, V. PANTEL REALTY COMPANY ET AL., APPELLEES.

FILED MARCH 3, 1926. No. 24964.

Waters: DIVERSION: DAMAGES. Where water is impounded upon land by natural conditions whereby a lake is formed, the owner of such land has no lawful right to remove an impediment to its flowage and thereby cause such water to flow upon the land of another to his damage. For such injury injunction is a proper remedy and an injured party may recover such damages in the same action as he may have sustained by such wrongful act.

APPEAL from the district court for Morrill county: P. J. BARRON, JUDGE. *Reversed.*

Morrow & Morrow, for appellant.

Mothersead & York, contra.

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

DEAN, J.

This suit was brought in Morrill county to perpetually enjoin the Pantel Realty Company et al., defendants, from unlawfully causing, and from continuing to cause, surface water to flow from defendants' lands upon hay lands owned by plaintiff, and for damages alleged to have been sustained thereby. The land involved in this suit is located in a valley. Plaintiff's land is used as a cattle ranch and is at the lower end of the valley, while defendants' lands, so far as involved here, are, in part at least, at the upper end. Plaintiff's contention is that the surface waters complained of were, and are, being conducted to and upon her lands from certain lakes, ponds, lagoons, pools, and other depressions in the soil, by a system of ditches unlawfully installed upon their own land by defendants, to the great and irreparable damage of plaintiff.

All defendants named in the petition, with the exception of an owner named Show, upon whom no service of sum-

mons was had, answered and denied liability and prayed that plaintiff's petition be dismissed. Upon submission of the evidence, the court found for defendants and against plaintiff. This suit was thereupon dismissed with prejudice. Plaintiff appealed.

This suit and another, entitled *Gentle v. Pantel Realty Company,* were begun at the same time and were tried together in the district court, the defendants being identical in both cases, and the issues are substantially the same. In the present case plaintiff prays for $2,400 damages, and Gentle prays for $5,000 damages. Upon appeal to this court the suits were consolidated for argument. The Gentle case is governed by the decision in this case.

Defendants' ranch consists of about 10,000 acres. There is a lake, called "Rush lake," on the upper end of defendants' ranch which covers about a section of land. About three miles below Rush lake there is a very much smaller lake, or lagoon, and this is also on defendants' ranch. Somewhat below defendants' ranch, and about two miles below the last-mentioned body of water, there is another lake, called "Rapp lake," which covers about 200 acres of land.

The valley in which the land involved herein is situate is narrow and is about six miles in length and runs from the northwest to the southeast. Between the two large lakes, namely, Rush lake and Rapp lake, there are several standing lagoons, or smaller lakes, and a few ponds, pools, and other soil depressions. The elevation of defendants' ranch is, of course, higher than the Graham ranch or the Gentle ranch. Plaintiff's argument is that, by the construction of the ditches complained of, defendants so submerged plaintiff's lands with surface water that more than 150 acres of hay land on plaintiff's tract and between 200 and 300 acres of hay land on the Gentle tract were destroyed as hay-producing tracts or for any agricultural or cattle-raising purpose.

Defendants' argument is that "between these two lagoons (Rush lake and Rapp lake) is almost a continuous chain of

lakes, ponds and sloughs." They contend that there is a natural water-course running through the valley. But this latter proposition is not supported by the weight of the evidence as we view it.

R. E. Knight is a witness called by plaintiff. He was formerly engaged in civil engineering in the valley neighborhood. As quoted by defendants, and set out in their brief, Knight testified:

"The valley is a continuous valley from Rush lake to the lake which I call Rapp lake on the Gentle place. We found a difference in elevation between the Rush lake and Rapp lake of a little better than six feet. Now, the natural drainage of the valley at different points between the ponds is cut off by small ridges and small sand ridges."

It is important to note Knight's evidence in respect of the "difference in elevation" and how "the natural drainage * * * is cut off." Knight also testified that, about midway between Rush lake and Rapp lake, "a cut of six or seven feet is necessary * * * to let the water through," and that such a cut was so made for this purpose. It also appears that there was a natural barrier of earth, at one point below one of the lakes, beyond which the water could not pass until a trench or ditch was installed, which, Knight testified, was dug, and it "averaged from three to five feet all along its course." This evidence tends to establish the fact that the flow of water, which was before accumulated in natural reservoirs or lakes, "ponds and sloughs," from natural rainfall and snow, on defendants' lands, was accelerated by the artificial means above pointed out whereby defendants were enabled to convey the water away from their own lands and discharge it upon plaintiff's lands.

From Knight's evidence it appears that he was familiar with all the lakes in the vicinity, and he testified that none of them had a natural outlet; that, when the levels for the dredge outfit were run to find out whether "the water in Rush lake could be lowered," at the same time they "took the various levels of the ponds down the valley," and at the same time they also ascertained "the depth of the cuts that

would have to be made to drain the lakes from Rush lake down into the other lakes;" that "the cut of five feet that they made with the machine at that time, we figured would lower it (the lake) about two feet; that they made a double cut of five feet;" that on the way down they encountered deeper cuts "in that intermediate lake, * * * but there was a sandbar there that would have to be cut that the machine couldn't cut." A ditch was subsequently dug through this sandbar at a depth of four or five feet to carry the water away. It seems, too, that the rim of the upper lake was lowered to permit the water to escape into the valley. Referring to a plat in the record made by him, Knight testified that from Rush lake the "cut was designated to be a five-foot cut, a double cut with the dredging outfit." He further testified that between the lakes, lagoons, pools, ponds, sloughs, basins and other surface depressions in the valley there is no continuous flow of water unless artificial channels are installed. Witness Rice, called by defendants, testified that the slope of the land, for five miles or more, was practically all hay valleys. His evidence corroborated that of Knight in respect of the installation of the ditches. He also corroborated Knight's evidence in that it was "correct as to the depth and so forth."

L. W. and Charles Skala, called on the part of defendants, corroborated certain material evidence of plaintiff. They testified that they lived in the vicinity of the valley for many years, and that before the ditches were put in they never saw any water flowing out of the lakes.

There is evidence, too, tending to prove that liability was recognized by defendants from the fact that, when one of the lower landowners made complaint of the submergence which is here complained of, to an authorized agent, he was informed that, if he would erect dams, he would be paid for his reasonable services. We do not, however, attach controlling importance to this evidence. From all the evidence, it is clear, however, that damages in some amount were inflicted upon plaintiff.

Some witnesses called by defendants as above pointed out,

substantiated certain of the material evidence of plaintiff's witnesses. In this respect it may be noted that at least two of these testified that, until the rim of one of the lakes was cut, and the drainage system of ditches was installed by defendants, they never saw any water flowing from the lakes, and they further testified that there never was a natural water-course running down the valley which would carry water to and upon plaintiff's lands. To quote further from the evidence would require more space than should be allotted to this opinion. We deem it sufficient to say that, upon examination, and trial *de novo,* we find that plaintiff's evidence was sufficient to support a judgment in her favor.

It is held generally, in this and other jurisdictions, that in this class of cases a fixed rule cannot be adopted which will distinguish surface waters from permanent bodies of water or at what period of development surface waters lose their fugitive character. Each case, from necessity, must be determined by the surrounding facts. Certain it is that an upper proprietor cannot lawfully cut away the rim of the banks, which incloses a body of standing water on his land, and by the installation of a system of ditches, thereby discharge such water over and upon the lower lands of his neighbor to his injury. This constitutes a nuisance for which the trespasser may be enjoined. And, besides, he may be held in the same suit, to make good for such damages as he may have so unlawfully occasioned.

"An owner of land on which there is a slough or reservoir of surface water cannot lawfully discharge it through an artificial channel upon the land of another to his injury." *Boll v. Ostroot,* 25 S. Dak. 513.

"An owner of land upon which there is a natural accumulation of water into a swamp or lake, has no right to improve his land by draining such waters from one portion of his land through a natural barrier to another portion, whence it would escape over the lower lands of an adjoining proprietor; and the fact that the latter had the right to protect himself against such waters by diking or ditching would not cause the act to fall under the rule of *damnum*

absque injuria." *Noyes v. Cosselman,* 29 Wash. 365. See, also, *Davis v. Fry,* 14 Okla. 340, 69 L. R. A. 460.

"The owner of land on which surface water accumulates has no right to conduct the water by an artificial channel to a point on his own land in close proximity to the line, where it will inevitably permeate the surrounding soil and percolate through the same into his neighbor's land, to the permanent injury of the latter." *Schuster v. Albrecht,* 98 Wis. 241.

"A landowner has the right, in the interest of good husbandry, and in the good-faith improvement and tillage of his farm, to fill up sag-holes, pools, and basins on his land, to prevent water accumulating or remaining in them, even if by so doing the water arising from rain-falls or melting snows should, in natural processes, find its way onto the land of an adjoining owner, and incidentally increase the flow thereon; but he cannot, by artificial drains or ditches, collect the waters of such receptacles and cast them in a body upon such proprietor to his injury." *Gregory v. Bush,* 64 Mich. 37.

"A runway or draw, naturally serving to drain off the surface waters of a tributary watershed occasioned by the winter's snow or the spring rains, serving this purpose only temporarily, though periodically, otherwise used and being capable of use for agricultural purposes, is not a water-course." *Froemke v. Parker,* 41 N. Dak. 408.

In an opinion by Maxwell, J., we said: "A party has no right to collect surface water in a ditch or drain and permit it to flow onto the land of another without the latter's consent, and if he do so he will be liable for the damages sustained." *Fremont, E. & M. V. R. Co. v. Marley,* 25 Neb. 138.

"Where water, be it surface water, the result of rain or snow, or the water of springs, flows in a well-defined course, be it ditch or swale or draw in its primitive condition, and seeks its discharge in a neighboring stream, its flow cannot be arrested or interfered with by a landowner to the injury

of the neighboring proprietors." *Roe v. Howard County,* 75 Neb. 448.

"A rural landowner has no right to put up such artificial barriers as will flood his neighbor's land with water that would otherwise escape over his own, for the mere purpose of reclaiming the bed of a pond that has always been on his premises, and of getting rid of the inflow." *Boyd v. Conklin,* 54 Mich. 583.

It is perfectly apparent that defendant's gain, from its drainage system, is so vastly less than the gross injury which it has inflicted upon plaintiff as to be almost negligible.

It appears from the evidence of those who, by long experience, are informed on the subject, that the water, so discharged on plaintiff's lands, will in the course of a few years, by evaporation and seepage, and other natural causes, entirely disappear from the flooded and submerged tracts, and the grass lands may therefore be, in large part, and perhaps entirely, restored to their former natural state of productiveness; provided, of course, that surface water is no longer discharged thereon.

That plaintiff sustained actionable damages, under the facts and the law, seems clearly to appear. The injunction prayed for should therefore have been granted. It follows that the judgment must be reversed. In respect of the extent of the damages, however, the evidence is not clear; so that, in view of the present state of the record, the question of damages remains open, and the parties may, if so advised, submit evidence relating thereto.

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

REVERSED.

WILLIS G. GENTLE, APPELLANT, V. PANTEL REALTY COMPANY ET AL., APPELLEES.

FILED MARCH 3, 1926. No. 24963.

APPEAL from the district court for Morrill county. P. J. BARRON, JUDGE. *Reversed.*

Morrow & Morrow, for appellant.

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

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

DEAN, J.

This is a companion suit to *Graham v. Pantel Realty Co., ante,* p. 397. The same issues are presented here that were presented in the *Graham* case. It follows that the decision in that case controls in the present case. The question of damages here, as in the *Graham* case, remains open and the parties may, if so advised, submit evidence thereon. The judgment of the district court is therefore reversed and the cause is remanded for further proceedings consistent with the opinion herein and in *Graham v. Pantel Realty Co.*

REVERSED.

DONALD RINGER V. STATE OF NEBRASKA.

FILED MARCH 3, 1926. No. 24865.

1. **Criminal Law: PRELIMINARY EXAMINATION: WAIVER.** When one charged with committing a crime, on being brought before an examining magistrate, voluntarily pleads guilty to the crime charged, he thereby waives his right to a preliminary examination.
2. **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." *Phegley v. State,* 113 Neb. 138.
3. ———: **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.'" *Phegley v. State*, 113 Neb. 138.

4. Criminal Law: CONTINUANCE. "The granting or refusing of a continuance of a criminal cause rests in the sound discretion of the court, and a ruling in that regard will not be disturbed on review, in the absence of a showing of an abuse of discretion." *Dinsmore v. State*, 61 Neb. 418.
5. ———: CHANGE OF VENUE. "A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed." *Simmons v. State*, 111 Neb. 644.
6. Jury: SUMMONING ADDITIONAL JURORS. Under the provisions of section 9078, Comp. St. 1922, in force at the time of the trial, it was competent for the trial court to direct the sheriff to summon good and lawful men, having the qualifications of jurors, to fill the regular panel, which had become depleted by excusing two members for good cause.
7. ———: QUALIFICATION. When a juror on his *voir dire* examination states that he has formed an opinion of the guilt or innocence of the accused, founded upon reading newspaper statements, and not upon conversation with witnesses, and at the same time states that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, and the court is satisfied that the juror is impartial and will render such verdict, he may, in the discretion of the court, be permitted to serve.
8. Criminal Law: CONFESSIONS. A statement freely and voluntarily made by defendant, not induced by threats, or promises, wherein he admits the commission of the crime for which he is being tried, is competent to be received in evidence.
9. ———: ———. Where the trial court, on a proper foundation being laid, admits proof of a confession made by the accused, which is subsequently challenged by the defendant as involuntary, upon the issue thus presented, the court should direct the jury to disregard the confession if, upon a consideration of all of the evidence, they find it was not voluntarily made.
10. Evidence examined, and *held* sufficient to support the verdict and judgment.

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

J. E. Willits, for plaintiff in error.

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

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

DAY, J.

Donald Ringer, hereinafter referred to as defendant, was convicted of murder in the first degree for killing one Carl W. Moore on October 16, 1924, and, in response to the verdict fixing the penalty, was sentenced to suffer death. Alleging that there was prejudicial error upon the trial, the defendant has brought the record of his conviction to this court for review. It is first urged that the court erred in overruling the defendant's plea in abatement. It appears that, when the defendant was about to be arraigned, his counsel in open court stated that he desired to present a plea in abatement, but would waive a jury trial on such plea.

Very much abbreviated, the plea in abatement alleged, in substance, (1) that the defendant never had a preliminary examination as provided by law; that no witnesses were examined by the magistrate and the binding of the defendant over to the district court was void and of no effect; (2) that the information does not allege facts sufficient to charge any degree of murder or manslaughter; (3) that there is no law in effect in the state of Nebraska defining murder or manslaughter; and (4) that the defendant was brought into the state of Nebraska from the state of Mississippi and other states, unlawfully and by force of arms, and by reason thereof the court has no jurisdiction over the person of the defendant.

In respect to the first point raised by the plea in abatement, to the effect that no preliminary examination was had, we think the record fails to sustain the defendant's contention. When the defendant was brought before the magistrate and arraigned, he entered a plea of guilty to the complaint, and, without the examination of witnesses,

was bound over to the district court. It is argued by the defendant's counsel that the magistrate had no power to bind the defendant over to the district court except upon the sworn testimony of witnesses. This position is untenable. The right of a preliminary examination is one which may be waived by the accused. *Clawson v. State,* 96 Neb. 499; *Reinoehl v. State,* 62 Neb. 619. The precise question now before the court was considered in *Latimer v. State,* 55 Neb. 609, where it was held:

"If the accused, on being arrested and brought before an examining magistrate, voluntarily pleads that he is guilty of the crime charged against him, he thereby waives his right to a preliminary examination."

It is urged, however, that, in entering the plea of guilty to the complaint, the defendant acted without advice of counsel or friends and under the dominating influence of the officers who had him in charge. It is true that the defendant did not have counsel, and that his friends had not been notified that he had been returned to the state of Nebraska. The record shows, however, that when he was brought before the examining magistrate he was told that he was entitled to have counsel to represent him, that he was entitled to have a continuance if he desired, and that it was not necessary for him to plead. After being so advised, the defendant stated that he was ready to plead, and upon being arraigned to the complaint he pleaded guilty. The showing made by the defendant in support of his claim that he was dominated by the officers in entering the plea is far from convincing.

The preliminary hearing was on January 7, 1925, the day defendant was returned to Adams county. On the following day a motion was made to expunge the record and grant defendant a further preliminary hearing. This was denied by the magistrate. Under the showing, there was no error in refusing to open up the case for further testimony. It may well be doubted whether the magistrate had any power to withdraw his order made on the previous day.

The second proposition in the plea of abatement is that

the facts alleged in the information are not sufficient to charge any degree of murder or manslaughter. The form of the information in the present case was, no doubt, drawn in response to a suggestion of this court in *Nichols v. State*, 109 Neb. 335, in which it was stated that the long and complicated form of an information for murder, generally in use, is not necessary to meet the requirements of the statute, and a short form set out in the opinion was suggested. The question now raised was before the court in *Phegley v. State*, 113 Neb. 138, in which it was held: "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." Measured by these standards, the information charged the offense of murder in the first degree.

The third contention raised by the plea in abatement to the effect that no crime of murder or manslaughter existed in the state at the time the alleged crime was committed, is entirely without merit. This point was also raised in the *Phegley* case, *supra*, wherein it was held:

"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.' "

The fourth proposition urged in support of the plea in abatement is that the defendant was unlawfully and by force of arms removed from the state of Mississippi and other states and brought to the state of Nebraska. The evidence in support of this phase of the plea was the affidavit of the defendant. The affidavit, however, does not show that he was taken out of the states mentioned without his consent or against his will, nor does it set out any facts from which such an inference may fairly be drawn. The presumption is that the officers acted lawfully and within their authority. In this connection it may be

stated that at a later period during the trial a writing was introduced in evidence, signed by the defendant, in which he waived extradition from the state of Mississippi to the state of Nebraska. Considering the record made in support of the plea in abatement and the proposition of law presented, we are quite satisfied there was no error in overruling the plea in abatement.

It is next urged that the court erred in overruling the defendant's demurrer to the information. The questions raised by the demurrer have been considered in the points in the plea in abatement and further discussion seems unnecessary. Upon the authority of the *Phegley* case, *supra*, the demurrer was properly overruled.

It is next contended that the court erred in overruling the defendant's motion for a continuance. The motion recited that a continuance was desired in order to enable defendant to secure the testimony of certain witnesses who would testify that, while the defendant was in the the different places named, he made no effort to conceal himself. With respect to these witnesses no showing of diligence was made. The motion also recited that the defendant desired the testimony of George Bender, who would testify that the defendant was not with Carl W. Moore on the date of the homicide. Bender was charged in the information as co-defendant. Counsel for defense admitted that he did not know his whereabouts. Bender was a fugitive from justice. There was no showing of any probability that his evidence could be obtained. In *Dinsmore v. State*, 61 Neb. 418, it was held: "The granting or refusing of a continuance of a criminal cause rests in the sound discretion of the court, and a ruling in that regard will not be disturbed on review, in the absence of a showing of an abuse of discretion." There was no error in overruling the motion for continuance.

Defendant also complains of the overruling of his motion for a change of venue. The only showing made in support of the motion was the verification of the motion by the defendant. There was no error in the ruling on the motion.

"A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed." *Simmons v. State,* 111 Neb. 644.

Defendant also urges that the court erred in overruling his motion to quash the jury panel. The point sought to be made is that, of the 24 names of jurors selected from a list of 60 names submitted by the board of supervisors, 22 only were on the regular panel. The record shows that in the manner provided by law 24 names of jurors were regularly selected and summoned for jury service. On reporting to the court, two of the men selected were excused for good cause and their places filled by the sheriff, by order of the court. This order of the court was authorized by section 9078, Comp. St. 1922, which was then in force.

The defendant also contends that the court erred in overruling his challenge for cause made against four jurors during the course of their examination. It would unduly prolong this opinion to set out in detail the examination of the several jurors. Generally speaking, they all stated that they had read newspaper articles concerning the case, had talked about the case, and formed opinions, which they still held. Upon examination by counsel for the state and the court, they stated that, notwithstanding such opinion, they could lay their views aside and pay no attention to what they had heard or read, in their consideration of the case, and would do so if they were retained as jurors, and would be guided solely by the evidence and the instructions of the court. Section 10134, Comp. St. 1922, in so far as applicable to the present situation, provides, in substance: When a juror on his *voir dire* examination states that he has formed an opinion of the guilt or innocence of the accused, founded upon reading newspaper statements, and not upon conversation with witnesses, and at the same time states that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, and the court is satisfied that the juror is impartial and will render such verdict, he may, in the discretion of the court, be per-

mitted to serve. In *Whitcomb v. State,* 102 Neb. 236, the *voir dire* examination of the jurors disclosed a situation strikingly similar to that in the case before us. In that case, in the course of the opinion, it was said:

"These jurors answered that they had formed opinions as to the guilt or innocence of the defendant, and some of them answered that their opinions were such as it would take evidence to remove. These opinions had been formed from what they had heard or read in the newspapers, but not from conversation with any person who had witnessed or claimed to have witnessed the crime, or from a record of the testimony of such persons. None said he had a fixed, conclusive opinion upon the facts, or prejudice of any kind. They all answered that they could lay aside the opinions which they had formed and try the case fairly and impartially upon the evidence and the law as presented."

See *Pumphrey v. State,* 84 Neb. 636, and *Christiancy v. State,* 106 Neb. 822. We think these jurors were qualified to hear the case.

We now come to consider the assignment of error relating to the sufficiency of the evidence to support the verdict and judgment, and also the assignment that incompetent testimony was permitted to be introduced, to the great prejudice of the defendant. It appears that the defendant, a young man of about 18 years of age, and a companion, George Bender, of about 23 years of age, came to Hastings, in Adams county, Nebraska, about August 5, 1924, and remained there until October 16, 1924. During their stay at Hastings they made their home with the defendant's mother and worked at different places. They purchased a second-hand Chevrolet car for $25 which they used. Defendant had formerly lived in Adams county, but for several years prior to his return in August had made his home with a married sister at Belleville, Illinois. The testimony on behalf of the state tends to show that on the afternoon of October 15, 1924, the defendant and Bender went to the Brandes Company garage in the city of Hastings, and seemed interested in a Dodge touring car which was left

at the garage for sale. The car was a 1924 model and comparatively new. Carl W. Moore was a salesman at this garage and waited upon the two men. After talking a while and examining the car, Moore took the two men out for a drive and returned with them about 30 minutes later. The defendant was identified as being one of the parties. On the following morning, October 16, 1924, the defendant again came to the garage about 8 o'clock in the morning and left with Moore in the Dodge car. The defendant was identified by two salesmen employed at the garage and by another employee as the person who left in the car with Moore on the morning of October 16. The proprietor of the garage, Mr. Brandes, testified that he saw Moore at the filling station shortly after 8 o'clock on October 16, 1924, that he talked with him, and identified defendant as being in the car at that time. A salesman at the oil filling station testified that he had sold Moore five gallons of gas on the morning of October 16; that there was some one with him whom the witness did not know. Another witness testified that he saw a Dodge touring car about 2½ miles south of Juniata, in the same direction from Hastings where Moore's body was found. Two men were in the car, one of whom he recognized as a salesman at Brandes' garage, although he did not know his name. Another witness, living about 7 miles west of Hastings, saw a Dodge touring car pass, going south; two men were in the car. Three-quarters of an hour later he saw a Dodge car going north on the same road with one man in the car. This place was about 4½ miles north of where the body of Moore was found. On the same day, between 1 and 2 o'clock in the afternoon, the car in question was parked on the streets of Wilber, the driver, upon alighting, going towards the station. The car remained where it had been parked and was later identified as the Dodge touring car in question. On November 1, 1924, the dead body of Carl W. Moore was found in a plum thicket a short distance from an unfrequented highway, and about 9 miles distant from Hastings, in Adams county. The autopsy revealed a fracture of the skull over the frontal

eminence. The doctor who performed the autopsy gave it as his opinion that the injury would cause death, and that it was produced by a blunt instrument. On searching the locality where the body was found, a hammer was discovered, the head and handle being separated.

On December 1, 1924, about 2½ miles from Lyman, Mississippi, the defendant was apprehended. W. W. Branagan, chief of police of Hastings, Nebraska, was present at the time defendant was taken into custody. He testified that defendant was told that he did not have to return to Nebraska without requisition papers if he did not want to; that he had a legal right to demand requisition and to have a lawyer; that the defendant stated that he did not want a lawyer and was willing to return, and that he would sign a waiver of requisition, and thereupon did sign such a waiver, which was identified and offered in evidence. The defendant was then taken to Gulfport, Mississippi, and from there to Eastland, Texas, where he was confined in jail from December 3, 1924, to January 4 or 5, 1925. The reason for this delay being that the officers were searching for Bender. On the trip north, the first stop was at St. Joseph, Missouri. While in jail at St. Joseph defendant made a confession, which was afterwards reduced to writing and signed by him. Before the statement was offered, Branagan testified that he was present at the time the confession was made and the statement signed; that they were freely and voluntarily made, and without threats or inducements. We think a sufficient foundation was laid for the introduction of the statement. At this time the defendant had not testified. In substance, the confession stated that George Bender was the first to suggest getting a new car. He suggested that they go to the garage and act as if they wanted to buy a new car, take the salesman out and get the car. These plans were made about a week before October 16. They both went down to the garage October 15 and had the salesman take them out riding. The next day they both went to the garage, but Bender remained outside and did not get in the car. Defendant and Moore left

the garage in a Dodge touring car about 9 o'clock in the morning and drove out in the country about 9 miles. Defendant was driving the car. He and Bender had picked out the place two days before, thinking it would be an ideal spot to hide the body. Defendant stopped the car and hit Moore with his fist and then hit him with a small mechanic's hammer. Moore became unconscious and fell out of the car. Defendant concealed Moore's body in some bushes and drove the car back to Hastings, and then to Wilber, where he left it, went to the station and bought a ticket to Lincoln. When they left the garage they stopped to get some oil. As an inducement to take him, he told Moore that George wanted to buy the car, that he lived out there and that defendant was his neighbor. He also stated that Bender had taken the hammer from the house and given it to defendant.

John Harr, sheriff of Clay county, testified that he met Branagan and defendant on the train at Carleton, Nebraska; that he had previously known Donald Ringer and sat down and had a conversation with him; that no threats or inducements were held out to the defendant and the statements made by him were free and voluntary; that the defendant was handcuffed. Mr. Crow, county attorney, was present, and stated to Ringer that anything he said might be used as evidence against him. The witness testified in substance that the defendant stated that on the morning of October 16, 1924, he and Bender went to the garage; that later he looked around and could not find Bender, and thought he had gone out; that defendant went with Carl Moore by himself; that he was driving the car; that he hit Moore with his fist first, and then took the hammer out of his pocket and hit him once on the head with it, and that the head of the hammer came off the handle; that he put Moore in the bushes; that they had picked out the spot two days before; that he backed his car, turned around and came back to Hastings; that he went up the alley to see if Bender's car was there, and, not finding it, he drove the car to Wilber, where he left it; that he bought a ticket from Wilber to Lincoln, and caught one train after another and did not

stop any place. Defendant also stated that he expected to plead guilty.

George Harm, sheriff of Adams county, after laying a sufficient foundation, testified concerning the conversation had with the defendant on January 7, 1925, in the courthouse, as follows: "Q. Now, will you please tell what statements or admissions he made at that time and place in connection with the murder of Carl Moore? A. Well, I was searching him, and said to him, 'Did you know Carl Moore?' He said, 'No, sir.' I said, 'Did you kill him?' He said, 'Yes, sir.' I said, 'Tell me how it happened, Donald.' He said, 'Do you want me to tell you just like I told those other fellows?' I said, 'Tell just how it happened.' 'Well,' he says, 'George Bender planned it, and we wanted an automobile to go to Texas. We had talked about stealing one, and we decided we would get a salesman out; and he said that I was to go in and get in the car with the salesman at the Brandes garage, and when we backed out he, George Bender, was to get in the car. We went to the garage and I left Bender outside. I got in the car with the salesman,' and he said he didn't know who the man was, 'and we backed out of the garage and Bender wasn't there.' He said, 'We drove down there to that place,' and he says, 'I did not know what to do, so,' he said, 'as we drove down the hill I reached down and pulled the clutch, and as I pulled it back I reached over and hit him with my left hand.' And he said that, 'Carl fell out over the car this way (indicating),' and he said, 'I got out around the car, and took the hammer and hit him, and he fell out of the car, and I picked his body up and carried it over and put it in this brush.' I said, 'Did you do this alone, Donald?' And he says, 'Yes; I did.' And he says, 'I am willing to take what is coming to me, I realize I made a mistake.' I says, 'How did you come back to town?' He says, 'I came the same road that I went out, and drove up in the alley by Fourth street, and I saw that George's car was not there.' And he says, 'I drove down Fourth street past the courthouse out on the D. L. D.' I says, 'How did you come to Wilber?' He says,

'I don't know the name of the town, but they were grading the road, and I detoured and left the car at Wilber, and bought a ticket to Lincoln and went to St. Joe.' " The witness then stated, "I think that is as near verbatim as I can tell you as he told it to me."

Guy Cole, deputy sheriff, was present at the conversation between the sheriff and the defendant, above referred to, and corroborated the main facts as detailed by the sheriff.

The county judge of Adams county, who was the magistrate before whom the complaint was filed, identified the record made by him, which disclosed that, when defendant was arraigned on the complaint charging defendant with murder, he pleaded guilty; that before he pleaded to the arraignment he was told that he was entitled to a continuance if he wanted one; that he did not have to plead if he did not want to; and that he was entitled to have counsel if he so desired.

In addition to this, three witnesses were called in rebuttal, Harvey Moore, and his wife, and a jail companion of the defendant, each of whom testified that, in conversation had with the defendant while in jail at Hastings awaiting trial, he freely admitted having killed Carl W. Moore.

Defendant was a witness on his own behalf. He denied that he had ever been to the Brandes garage, or that he ever took a ride with any automobile salesman from that garage on October 15 or October 16, 1924, or at any other time; denied that he ever struck Carl W. Moore, or any other person, or that he killed him. In fact, he denied every detail which in any manner tended to connect him with the crime. He further testified that on the morning of October 16, about 8:15 o'clock, he and George Bender took their grips and left them at the Burlington station, and both returned to his mother's house; that they left again about 9 o'clock. In this respect defendant was corroborated by his mother and sister. Defendant also testified that he left Hastings on a Burlington train for Lincoln on October 16 between 10 and 11 o'clock. Defendant's mother testified that she was at the station and saw defendant leave

on the train. Defendant further testified that Branagan and he left Eastland, Texas, about 11:30 o'clock, on the morning of January 4, 1925, and arrived at St. Joseph about noon on the following day; that they rode in a smoking car; that *en route* Branagan asked him if he knew Carl Moore, and he answered, "No." Branagan then asked him if he ever drove a Dodge car, and he replied, "No." And he further stated, "I am not on the witness-stand, and don't care to answer your questions here." Nothing more was said on the subject on the way up. With respect to the confession made at St. Joseph, defendant testified that, on the morning of January 6, he was taken up-stairs by two policemen, who were armed with guns, to the office of Chief Detective Duncan, and left there with Branagan and Duncan. He stated that Duncan and Branagan gave him a raking over. When asked what they said, he answered, "Well, they just asked if I knew Carl Moore, and I told them, 'No.' And they asked me if I killed him; and they asked 101 other questions, but I never answered no more of them. I had my mind on those two fellows that brought me up there. I never said another word to them all the time I was there." After that the two policemen took him back to the cell. He further testified that in the afternoon the two policemen came again, and, when told that he had said nothing to Chief Duncan and Branagan, they both pulled the hammers of their guns back and said, "You do just as we tell you to or that will be the end of you when you come back." Thereupon he was again taken for an interview with Duncan and Branagan. He testified that he went up there, and they started to ask him some questions, and he would not answer them, and they brought in some paper and told him to sign his name on that. He stated Chief Duncan said, "Here is a piece of paper, sign your name on there." I said, "Give me that paper and let me read it first." He said, "I won't let you read it, I told you to sign your name on there, and you do it." Defendant thereupon signed his name in three or four places. Defendant claimed that he did not know what it contained. The paper re-

ferred to was the signed confession to which reference has been made. With respect to each of the other confessions referred to, defendant denied having made them.

It is earnestly insisted that it was error to permit the written confession, as well as the other confessions, to be received in evidence. The rule is well established that a confession freely and voluntarily made by the accused, not induced by threats or promises, is competent evidence on the trial. *Fouse v. State,* 83 Neb. 258. Under the evidence, whether the confessions were freely and voluntarily made was a question for the jury to determine.

Upon the phase of the case relating to the confession and the plea of guilty made by the defendant at the preliminary hearing the court instructed the jury that, if they were satisfied by the evidence, beyond a reasonable doubt, that such confessions, or any of them, or the plea of guilty, were freely and voluntarily made on the part of defendant, and were not induced by any promise, inducement, threat, persuasion, or demand on the part of any one, then they should consider any such confession as evidence in the case and give the same such credence or weight as they deemed it entitled to. On the other hand, they should wholly disregard and not consider any confession, admission, or plea of guilty, offered in evidence in this case, if they were not satisfied by the evidence, beyond a reasonable doubt, that the defendant was at the time of making the same mentally capable of doing so, and that it was done voluntarily and freely by the defendant, and not induced by any hope or fear on his part, or by the promise, inducement, persuasion, demand, or threat of any one. This instruction was, perhaps, more favorable to the accused than he was entitled to; in this, that the jury were told not to consider the confession unless they believed from the evidence, beyond a reasonable doubt, that the confessions were freely and voluntarily made. This instruction carefully guarded the rights of the defendant and left the jury to determine the disputed question of whether the confessions were freely and voluntarily made. This practice is approved in *Heddendorf v. State,* 85 Neb. 747.

The correctness of instruction No. 14 given by the court, defining "reasonable doubt," is assailed by the defendant. This instruction is substantially the same as the one given in *McIntosh v. State,* 105 Neb. 328, which was approved by this court. Objections are also made to several other instructions given by the court. It seems unnecessary to consider each of the objections separately. Suffice it to say that we have examined them and find that there was no prejudicial error in giving them.

Defendant also urges that the court erred in permitting the jury to separate during the trial, before the case was submitted, without admonishing them as provided by law. Section 10150, Comp. St. 1922, among other things, provides: "If the jury are permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by any other person on the subject of the trial," etc. It is argued that on several occasions when an adjournment was taken the admonition was not given. The record, however, does not sustain this contention. It is true that in some instances the bill of exceptions fails to disclose such admonition, but a reference to the transcript shows that the admonition was given.

It is also urged that the court erred in permitting the witnesses Harvey and Mabel Moore to testify on rebuttal, because they were present during the trial in violation of an order of the court excluding witnesses. These witnesses were called in rebuttal, and at the time the order was made there was nothing to indicate that the order in any way referred to them. Under such circumstances it was within the discretion of the court to permit them to testify. *Fouse v. State,* 83 Neb. 258.

It is further contended by the defendant that the court erred in failing to grant a new trial because of the alleged misconduct of juror Kerr. In support of the motion for a new trial, a witness was called who testified that, a few days before the trial, he heard juror Kerr state, in reference to the defendant, that "he should have six feet over him,"

and if he was left on the jury he would see that he got it. The record shows that on the day the motion for a new trial was heard this juror received an injury and was not able to be present. However, his *voir dire* examination is in the record and discloses that he had never formed or expressed any opinion about the case and otherwise qualified as a juror. Under the circumstances we are of the opinion that the court did not err in overruling the motion for a new trial.

Other errors are assigned which we have examined but regard them as without merit. Defendant has had a fair trial. His legal rights have been carefully guarded. If the testimony on behalf of the state is to be believed, the crime was premeditated and deliberate murder. No reason has been advanced why we should disturb the judgment.

Under the law it is the province of the jury in cases of this character to determine whether the penalty shall be life imprisonment or death. No prejudicial error appearing in the record, the judgment of the district court is affirmed, and Friday, the ninth day of July, 1926, between the hours of 6 a. m. and 6 p. m. of said date, is fixed for carrying into effect the sentence of the district court.

AFFIRMED.

BENNINGTON STATE BANK, APPELLANT, V. JOHN F. PETERSEN, IMPLEADED WITH WILLIAM MARKMANN, APPELLEE.

FILED MARCH 3, 1926. No. 23747.

1. **Trial.** In a jury trial, the party who, by the pleadings, is required to first produce evidence is entitled to open and conclude the argument to the jury.
2. **Evidence.** In an action on a promissory note, the defense that the note is given for the accommodation of the plaintiff and without consideration may be established by parol evidence.

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

Abbott, Rohn & Dunlap and *Albert S. Ritchie,* for appellant.

John H. Grossman and *Baker & Ready, contra.*

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

GOOD, J.

This is an action by the payee against the makers of three promissory notes to recover the amount due thereon. Judgment by default was entered against defendant Petersen. The other defendant, Markmann, filed an answer in which he admitted the signing and delivery of the notes, but alleged as a defense that he signed them as an accommodation to the plaintiff and without consideration, and upon the understanding and agreement that his name was appended to the notes so that plaintiff could exhibit the notes with his signature to the state bank examiner, and that Markmann was not to be called upon to pay the notes and was to incur no liability by signing them. Plaintiff's reply was a general denial. A jury trial of the issues resulted in a verdict and a judgment thereon for defendant. Plaintiff appeals.

Plaintiff complains of the action of the trial court in permitting defendant to open and close the argument to the jury. Section 8790, Comp. St. 1922, *inter alia,* provides that the party who would suffer defeat, if no evidence were given, must first give his evidence, and that the party required to first produce his evidence shall open and conclude the argument to the jury. Defendant having, by his pleading, admitted the signing and delivery of the notes would, if no evidence had been adduced, suffer defeat. He was therefore first called upon to introduce evidence and was entitled to open and conclude the argument to the jury.

Plaintiff contends that, under the rule that the terms of a written contract cannot be contradicted, altered, or varied by evidence of a prior or contemporaneous oral agreement, defendant is precluded from establishing the defense ten-

dered in his answer by parol evidence. We think the rule is not applicable to the issues and evidence. The real defense is that the notes were signed by Markmann as an accommodation to plaintiff and without consideration. As between the original parties to a promissory note, want of consideration, and that the note was given for the accommodation of the payee, may be established by parol evidence. From the evidence on behalf of the plaintiff, it appears that the notes in question were the second renewals of other notes of like amount, and that the first notes on which defendant Markmann's name appears were signed by the defendant Markmann some time after they had been executed by defendant Petersen, and that they were signed at the request of the cashier of plaintiff bank, and without any consideration and solely as a favor to the bank. It also appears from defendant's testimony that none of the renewals was signed at the request of Petersen, but all were signed at the request of the cashier of the bank, upon the express promise that they were to be used to exhibit to the bank examiner; that the defendant was not to be liable thereon, and that he was to incur no liability by signing the notes. It thus appears that, as between plaintiff and defendant Markmann, the latter was only an accommodation maker who signed the notes without consideration. Such defense may be established by parol evidence.

Plaintiff complains of the remarks of the trial judge in the presence of the jury as to the weight of certain evidence admitted. During the progress of the trial the court, in the presence of the jury, remarked that he would receive certain evidence for what it was worth. The judge did not indicate that he thought the evidence was worth much or little. While it might have been better to have omitted such a remark, we think that it was not prejudicial to plaintiff's cause.

There are other rulings on the admission and exclusion of evidence which are complained of, and complaint is made of the giving and refusal of certain instructions. We have examined all of these assignments and find no error therein.

Since no error prejudicial to plaintiff has been found, the judgment of the district court is

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. FIRST BANK OF NICKERSON, APPELLEE: C. L. WALDRON, INTERVENER, CLAIMANT, APPELLANT.

FILED MARCH 3, 1926. No. 24599.

1. Contracts: ILLEGAL CONTRACTS. The law guards with zealous watchfulness each avenue leading to its courts, and refuses to enforce contracts, the tendency of which is to tempt interference therewith.
2. ———: ———. Our statutes having fixed the amount to be paid matter of fact witnesses residing within the jurisdiction of the court and subject to its process, for their attendance at trial therein, a special contract to pay such witnesses more than the regular witness fee is illegal, contrary to public policy, and void.
3. ———: ———. The contract's "validity is determined by its general tendency at the time it is made, and if this is opposed to the interests of the public it will be invalid, even though the intent of the parties was good and no injury to the public would result in the particular case. The test is the evil tendency of the contract, and not its actual injury to the public in a particular instance." 13 C. J. 424, sec. 360.

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

Magney & Magney, Saxton, Waldron & Hammes and *John P. Breen,* for appellant.

Cain & Johnson and *C. M. Skiles, contra.*

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

THOMPSON, J.

In this case the First Bank of Nickerson, while a going concern, received a deposit in the sum of $1,700, issuing two respective certificates therefor, dated March 21, 1923, one for $700 and the other for $1,000, payable six months

after date, interest at 4 per cent. each, payable to Lloyd Magney and C. E. Negus. The bank in the meantime became insolvent, and was so adjudged by the district court for Dodge county, and a receiver was appointed to wind up its affairs. C. L. Waldron, claiming to be the owner of these certificates by indorsement of Magney and Negus, presented the same to the receiver for payment. Payment being refused, he asked and was permitted to intervene in the suit by way of an amended petition, to which an answer was interposed, and a reply to such answer was filed. On the issues so joined, the case was tried to the court, and judgment rendered allowing such claim as against the general assets of the bank, but denying its payment out of the guarantee fund. A motion for new trial was filed, overruled, and claimant appeals. Appellant challenges the judgment of the trial court for the following reasons: First, that the judgment is not supported by the evidence; and, second, that the judgment is contrary to law.

The administration of our courts is one which involves the interests of every citizen, and, being of such general purpose, we shall quote from the pleadings and evidence at a greater length than usual.

That part of the amended petition which is material to our consideration here is paragraph 2 thereof, which reads as follows:

"2. That said certificates of deposit were made payable to Lloyd Magney and C. E. Negus for the following reasons: That said Lloyd Magney and this petitioner, in their professional capacities as attorneys at law, represented a client, whose name is not desired to be given, for the reason that such information is privileged in character, and said client was engaged in a business transaction which made it necessary for him to place the sum of $1,700 in escrow in some safe place of deposit so that said sum might be at all times available and at the same time not subject to withdrawal either by such client, his attorneys, or the other party to the transaction; that, in order to effect such arrangement, the plan was evolved of placing the money on

deposit in the First Bank of Nickerson, Nickerson, Nebraska, and taking such bank's certificates of deposit made payable to Lloyd Magney, as the representative of one side, and C. E. Negus, who was acquainted with the Fremont, Nebraska, party, as the representative of the other side, and possession of said certificates to remain with this petitioner, so that said certificates would have to be indorsed by both sides before the same could be cashed; that whether the money should go to the one or the other depended upon the result of a suit then pending in the supreme court of Nebraska, but your petitioner alleges that the only duty or contract of said bank was to pay the said certificates whenever the same should be presented properly indorsed, with interest at 4 per cent., if said money remained on deposit a minimum period of six months from date; that said C. E. Negus acted merely as a representative or agent of the Fremont party in his individual capacity, and not as an officer of said bank, in being so named as payee, and was obligated only to indorse said certificates when said suit should be finally decided in the supreme court of Nebraska, and at no time did the said C. E. Negus have any interest whatsoever in said certificates or the fund represented thereby, nor was he in any way instrumental in or responsible for the deposit of said funds in said First Bank of Nickerson, Nickerson, Nebraska, the arrangements between petitioner's client and the Fremont party having been fully consummated without consultation with said C. E. Negus until the cash was actually deposited in said bank; and your petitioner further alleges that said First Bank of Nickerson made no arrangement, agreement or contract whatsoever except to pay the sum of $1,700 which it received in full in cash, upon the return of said certificates of deposit properly indorsed."

To this petition the receiver filed an answer, which reads as follows:

"Comes now Emil Folda, receiver of said defendant bank, and, for answer to the amended petition of intervention of C. L. Waldron, respectfully shows to the court that the

certificates of deposit set forth in said amended petition and representing a sum of money left in said bank under the circumstances set forth in said amended petition did not constitute a deposit within the depositors' guaranty law of the state of Nebraska, and is not a preferred claim payable out of the depositors' guarantee fund, for the reason that said bank was acting as a stakeholder in an illegal transaction, and same was not a transaction in the usual course of banking business, but was contrary to public morals. Wherefore, this receiver prays that said claim may be disallowed and that he may go hence without day and recover his costs."

To which answer, Waldron filed a reply, which is as follows:

"Comes now C. L. Waldron, intervener herein, and while alleging that the answer of the receiver filed herein as to the claim of C. L. Waldron does not state facts sufficient to constitute a defense as against intervener's claim, and while not waiving his rights by reason thereof, and still reserving the same, for reply to said answer of the receiver herein, (1) denies each and every allegation, matter and things in said answer contained, not herein admitted or heretofore alleged in said claimant's amended petition of intervention, and to that end particularly denies that any illegal transaction was involved or that any transaction was involved contrary to public morals."

The court will take judicial notice that the city of Omaha is in Douglas county; that the city of Fremont is about 40 miles north and west and in Dodge county; and that the village of Nickerson is north of Fremont, and in the same county.

In substance, the evidence shows that Dr. John T. Mathews had been arrested, charged in the district court for Douglas county with a felony, to wit, murder in the commission of an abortion on a young woman. Waldron and Magney were his attorneys at the trial. Trial was had and a verdict of guilty returned. A motion for new trial was filed and pending. In the course of the trial these

attorneys had become informed that the young woman, on her way to Omaha, had stopped in Fremont, with the women, Mrs. Watkins and Mrs. Christofferson, or one of them. These attorneys proceeded to Fremont and met these women. They disclosed to the attorneys what they knew about the young woman's having stopped there, and had, prior to her going to Omaha, attempted to commit an abortion upon herself. The attorneys told the women that they wanted them to go to Omaha and testify in the case, if a new trial was granted, as witnesses on the part of the defendant Mathews. The women stated they did not want to go, as it would be too expensive. Then the attorneys told them that, if they would appear at the trial, they would pay them all the expenses thus incurred. The women stated that they had no assurance of that. Then the attorneys told them that they had $1,700 that they would put in a bank and deposit it in such a way as the same could not be paid out without their knowledge and consent. Then the question came up as to what bank to put the money in. One of the women said she was acquainted with Mr. Negus, vice-president of the First Bank of Nickerson. The attorneys, or whichever one was present at the time, returned to Omaha, and informed Negus at Nickerson to meet them in Fremont with two blank certificates of deposit. In furtherance of this arrangement with Negus and the women, Waldron took $1,700 in currency, and he and Magney went to Fremont, and met Negus with the certificates of deposit, informed him that they desired to deposit the $1,700 in two separate amounts, $1,000 to be covered by one certificate, and $700 by another, that Mrs. Watkins and Mrs. Christofferson were interested in the deposit, and that therefore the certificates should be made payable to Magney, who could represent the attorneys, and to Negus who could represent the women, and that the money should not be paid out until requested by the two women. The certificates were signed by Negus as vice-president of the bank, and ran to him as C. E. Negus, and to Lloyd Magney. At this time, and before returning to

Omaha, the attorneys procured the affidavits of the women, covering what they knew, or a part thereof, as to the young woman in question. These affidavits were taken by the attorneys and filed with the court in the case. The case came on for hearing on the motion for new trial, and the same was overruled, and was brought on error to this court; the case being the one reported in *Mathews v. State*, 111 Neb. 593. The judgment of the trial court was affirmed, and, thereafter, just how Negus and Magney happened to indorse the certificates, or when and where they did it, is not known. But the evidence of Waldron at the trial was that they each had indorsed them, and after such indorsement he had presented them for payment; payment was refused, and they were protested for nonpayment. This leaves the sole question to be determined by this evidence: Was the arrangement as made illegal, contrary to public policy, and of such a nature as to prevent recovery on the part of these attorneys?

It will be seen from paragraph 2 of the amended petition above quoted that the money involved, at and before the time of the deposit at least, was the money of the accused, and the then found guilty, doctor; that the business transaction mentioned in said paragraph was that involved herein; that Negus was at all times acting for and on behalf of the bank, and also for the women as to the deposit. Negus, as vice-president of the bank, went to Fremont, wrote the certificates, signed them, received and deposited the money as such representative of the bank. And, as stated in the petition, as well as shown by the evidence, Negus was the agent and representative of the women, and an important instrumentality in the involved scheme. The law gave to defendant Mathews the right to force the attendance of these witnesses by way of a subpœna, and fixed the amount of their compensation. This, the parties are conclusively presumed to have known. The women refused to attend, or indicated their desire not to, as they could not afford to for the fees provided by statute; thus, the agreement to pay their entire expense, the amount of which was

left to them to determine. That the amount for that purpose was to be liberal is evidenced by the placing before them at all times and under their control the $1,700. This agreement was not one wherein the witnesses possessed any particular skill or ability, or who were to so inform themselves. Neither were they, nor had they been, put to any effort in acquiring the knowledge being sought. These claimants told the women what they wanted the evidence for, and the women told them what they knew. The temptation to induce lack of disclosure of all they knew, or to color or add to what they knew, was too alluring to be held in furtherance of justice. Its tendency is to work a denial of due process of law. It is not necessary for us to find that the intent of the contract was to procure perjury, but that the contract had the tendency and opened a strong temptation to the procurement of perjury. The tendency of such arrangements is to pervert justice, to bring courts into disrepute, and to cause a lack of confidence therein. The maintenance of such confidence is fundamentally necessary to the promotion of our institutions, and to foster or permit such transactions is to undermine them.

Such agreements would lead to the suspicion of each and every witness presented, thus demanding that each be interrogated as to what secret arrangements he had with attorneys or clients as to his compensation. To even ask which, under our present practice, would be to insult the witness and lay such attorney open to court censure, if not more severe punishment, so clean has been our court procedure and conception of duty. The suggestion of such a practice is objectionable and fraught with many dangers. Witnesses, like jurors and court officers, owe a duty to the state to aid in the due administration of affairs of government, for such compensation as the law provides. The least tendency to the contrary should not be tolerated, however innocent the claimed intent. Even now a layman's evidence, with but knowledge gained by experience, carries more weight often than that of an expert who has qualified himself by years of study, as well as by experience, simply

for the reason that it is believed that the former is unbought, and the fear that such might not be true of the latter. If experts could but realize this, they too would more truly sense the duty they owe, as such witnesses, to their profession, as well as to the state, and at least let the court fix their compensation so they could so answer if interrogated.

It is well said in 13 C. J. 424, sec. 360: "If an agreement binds the parties or either of them to do, or if the consideration is to do, something opposed to the public policy of the state or nation, it is illegal and absolutely void, however solemnly made. * * * Where a contract belongs to this class, it will be declared void, although in the particular instance no injury to the public may have resulted. In other words, its validity is determined by its general tendency at the time it is made, and if this is opposed to the interests of the public it will be invalid, even though the intent of the parties was good and no injury to the public would result in the particular case. The test is the evil tendency of the contract, and not its actual injury to the public in a particular instance."

As is well said in *Ramschasel's Estate,* 24 Pa. Sup. Ct. 262: "The law having fixed the amount to be paid witnesses for their attendance upon a court, a special contract to pay more than the regular witness fee, in ordinary cases, is void for want of consideration, and as being against public policy." See, also, opinion in the case just quoted from, page 265.

"A contract to pay a fact witness for his loss of time occasioned by reason of his having to testify is against public policy and void." *Wright v. Somers,* 125 Ill. App. 256.

"Where a witness who is not interested in the result of the controversy resides within the state and is amenable to process therein, an agreement to compensate him in an amount in excess of the legal fees for attending as a witness and testifying only as to facts within his knowledge is contrary to public policy and void." *Clifford v. Hughes,* 124 N. Y. Supp. 478. See, also, *Neece v. Joseph,* 95 Ark.

552, 30 L. R. A. n.s. 278, and note, p. 280; *Thatcher v. Darr*, 27 Wyo. 452, 16 A. L. R. 1442, 1458; 6 R. C. L. 757, sec. 165.

It must further be remembered that the only witness called in this case was the claimant himself; that in response to a question asked by his associate Magney, the substance of which was whether or not the women were to get more if the case was finally won for the doctor than if it was lost, he answered, "Yes." No direct question was asked him in reference to such answer. However, his answers to other questions are seemingly intended to modify it, but the explanatory answers were not at all convincing, and neither was the illustration he used as to his paying a doctor $100 to testify in a compensation case.

"It is an established general principle that contracts having for their subject-matter any interference with the due enforcement of the laws are against public policy, and are therefore void. The law guards with jealousy every avenue to its courts of justice, and strikes down everything in the shape of a contract which may afford a temptation to interfere with its due administration." 6 R. C. L. 757, sec. 165.

The subject-matter and the purpose of the agreement in this case are interlinked with each and all connected with it in such a way as to require the court not to disturb it, but to leave the parties as they are found. See *Langdon v. Conlin*, 67 Neb. 243; *Perry v. Berger*, 85 Neb. 753.

Deaver v. Bennett, 29 Neb. 812, and *Ward v. Holliday*, 87 Neb. 607, cited by claimant, each involved money wagered, and are without application to the question here under consideration.

As the receiver failed to cross-appeal from the allowance of this claim as a general one against the trust, we are without jurisdiction to deal with it. The judgment of the trial court is

AFFIRMED.

MORRISSEY, C. J., and DAY, J., dissent.