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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1926, AND JANUARY TERM, 1927.

VOLUME CXV

HENRY P. STODDART,

OFFICIAL REPORTER

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For the benefit of the State of Nebraska.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1926

ESTHER M. JESSUP, ADMINISTRATRIX, APPELLANT, V. JOSEPH M. DAVIS, APPELLEE.

FILED NOVEMBER 19, 1926. No. 24265.

1. **Trial:** INSTRUCTIONS. In jury trials, plaintiff and defendant, alike, are entitled to have the issues of fact, presented by the pleadings, submitted to the jury without the introduction of extraneous evidence that may mislead them or divert their minds from a consideration of evidence pertinent to the real issues.

2. **Negligence:** AUTOMOBILES: GRATUITOUS CARRYING OF PASSENGER: CARE REQUIRED. Where the owner of a private motor vehicle gratuitously carries another person therein as a passenger, he owes such passenger the duty of exercising ordinary care in the operation of the vehicle, and will be liable in damages if his failure to exercise such care is the proximate cause of injury to his passenger.

3. ———: JOINT ENTERPRISE. Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects and purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other in respect thereto.

4. **Appeal and Error:** INSTRUCTIONS: APPLICABILITY. Instructions to a jury that are inapplicable to the proved facts, and which are calculated to, and probably do, mislead the jury, will, ordinarily, constitute reversible error.

5. ———: ———: ASSUMPTION OF FACTS. Ordinarily, it is error for the court in its instruction to assume the existence of a material fact as to which there is a conflict in the evidence.

6. **Trial: WITNESSES: CROSS-EXAMINATION.** "Where a plaintiff in a personal injury action seeks by appropriate interrogatories on the cross-examination to discover whether the defendant is indemnified from loss by an insurance company, it is error for the court to sustain an objection to interrogatories which tend to develop the fact on that question." *Miller v. Central Taxi Co.*, 110 Neb. 306, reaffirmed and promulgated as a rule of practice.

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

I. E. Montgomery and *James & Danly*, for appellant.

Stiner & Boslaugh and *Dressler & Neely, contra.*

Hall, Cline & Williams, W. C. Fraser, F. Hird Stryker and *Brogan, Ellick & Raymond, amici curiæ.*

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

EBERLY, J.

This action was brought by Esther M. Jessup, as administratrix of the estate of her deceased husband, Ursa S. Jessup, to recover damages for his death, alleged to have been caused by the negligence of defendant in so operating his automobile, while her husband was riding therein as an invited guest, as to cause the car to skid and overturn, thereby inflicting fatal injuries on Mr. Jessup.

In the answer it is admitted that while Mr. Jessup was riding with defendant in his car it overturned, and that Mr. Jessup received injuries which caused his death. Defendant denies that he was negligent, and alleges that the accident and resulting injuries were caused by the negligence of Mr. Jessup in grasping the steering wheel of the car and suddenly changing its course, thereby causing it to overturn. It is further alleged in the answer that plaintiff and defendant were both engaged in a joint enterprise at the time, and that because of such fact plaintiff is not entitled to recover. The issues of fact were submitted to a jury. De-

fendant had the verdict and judgment. Plaintiff appeals.

The pertinent facts out of which this controversy arises may be summarized as follows:

On June 26, 1922, Mr. Jessup and defendant, in the latter's Cadillac touring car, left Hastings, Nebraska, over the D. L. D. highway, intending to go to Clay Center, Nebraska. While driving eastward at a speed of from 30 to 40 miles an hour, defendant, on nearing an intersecting highway, observed another automobile traveling south at a moderate rate of speed, somewhat nearer to the intersection than the defendant. When defendant first observed the other automobile he was driving on the south or right-hand side of the traveled highway. In order to avoid a collision, he turned slightly to the left, applied his brakes, and passed to the rear of the south-bound car. The course of defendant's car was then changed slightly so as to head directly east and on the north or left-hand side of the traveled portion of the road. After having safely passed the intersection a distance of 25 or 30 feet, his car seems to have turned abruptly to the south, almost at right angles, and to have overturned, and Mr. Jessup received injuries from which he shortly afterwards died.

The acts of negligence complained of are that defendant was driving at an unlawful and reckless speed, particularly at the intersection of the highway, so that he lost control of his car; that he jumped from his car, leaving it without a driver and without any one to control it, and that, as a consequence, the car skidded and turned over. The evidence as to whether defendant jumped from the car at the intersection and before it overturned is in conflict. Defendant testified that he remained in the car until it overturned; that Mr. Jessup, sitting on the right-hand side of the car, without warning, suddenly grasped the steering wheel and turned it so as to turn the car abruptly to the right, thereby causing it to overturn. After the accident Mr. Jessup was unable to talk and died the next day without making any statement as to how the accident occurred. One C. J. Moger, who was on the highway about 300 yards north of the inter-

section and driving toward it at the time of the accident, testified that defendant jumped from the car at or near the northeast corner of the intersection. A number of witnesses, who examined the scene of the accident immediately after it occurred, testified that the tracks made by defendant's car showed that just before it entered the intersection it was traveling in a northeasterly direction; that the brakes had been applied so as to cause the wheels to lock and drag for a distance of from 50 to 65 feet; that this dragging mark extended about two-thirds across the intersection and did not thereafter appear, which would indicate that the brakes had been released. The highway was graded and there was a wide, shallow ditch on either side of the highway. Defendant's car at no time left the graded portion of the road, but as it passed over the intersection in going east it was very close to the north edge of the graded portion of the road, and only a few inches from the shoulder of the grade.

It is further disclosed that the defendant was the cashier of the Exchange National Bank of Hastings; that for a year or more Mr. Jessup had from time to time been collecting bad paper for the bank; that immediately prior to the accident he had been endeavoring to make collection on a note, secured by a chattel mortgage, and had ascertained that the maker of the note had disposed of the mortgaged property. Apparently, the maker of the note lived in Clay county. Mr. Jessup and defendant, at the time of the accident, were en route to Clay Center for the purpose of instituting a criminal action against the maker of the note for disposing of the mortgaged property. It appears that Mr. Jessup suggested this course as a means of enforcing collection on the note. It is also disclosed that Mr. Jessup had planned, prior to this time, to go to Clay Center, and had arranged with defendant, cashier of the bank, to accompany him, for the purpose of swearing to a criminal complaint. On previous trips Mr. Jessup had used his own automobile, but on the morning in question he stated to defendant that he did not have his car with him, that his

wife was using it, and asked defendant if he could take his automobile to which defendant assented.

Plaintiff complains of the court's fifth and seventh instructions to the jury, wherein they were informed that, if the drive to Clay county was made at the request of Jessup, and if Jessup and defendant had joint control over the movements of the automobile and were engaged in a joint enterprise, in which each had a financial interest, then any negligence of defendant would be imputed to Jessup and preclude any recovery by plaintiff. The instructions may be correct as abstract propositions of law. The facts, however, do not warrant the inference that defendant and Jessup had a joint financial interest in the drive, or that they had joint control over the movements of the car. It is true, both were desirous of going to Clay Center. Jessup was a gratuitous passenger. Both, in a sense, may have had some interest in the object of the trip, but it was not a joint financial interest. If the bank's note had been collected, Jessup would have received a commission; the bank would have received the benefit by the collection of its note, and defendant, as a stockholder, might have received an indirect benefit, but this does not constitute a joint enterprise in driving the car, within the meaning of the law of negligence. Defendant, not Jessup, was in control of the car. Jessup had no authority over defendant and no authority to direct the movements of the automobile. Defendant was a private, gratuitous carrier and, as such, owed Jessup the duty to exercise ordinary care in the operation of the automobile, and would be liable in damages if his failure to exercise such care was the proximate cause of injury to his passenger. From the evidence, the jury might have found that defendant jumped from the car while it was in motion, and that because the car was left without any one to control its movements it overturned and inflicted the injuries which caused the death of Mr. Jessup. We do not doubt that these facts would warrant a finding of actionable negligence.

There is a marked discord in the reported decisions as to what is necessary to constitute a joint enterprise, as applied to the law of negligence, and also as to what is essential to impute to a person riding in an automobile the negligence of the driver in the operation of the machine.

In *Lochhead v. Jensen,* 42 Utah, 99, plaintiff was riding in the rear seat of an automobile as an invited guest. The car was overturned, and the passenger met her death. In an action brought against the owner and driver, it was held that, since the passenger was exercising no control over or direction of the operation or handling of the machine prior to the time it was overturned, defendant's negligence in the operation of the machine could not be imputed to the decedent.

In *Crescent Motor Co. v. Stone,* 211 Ala. 516, it was held: "Parties are not engaged in a joint enterprise within the law of negligence, unless there is a community of interest in the objects or purposes of the undertaking and an equal right to direct and govern the movements and conduct of each other in respect thereto.

"Driver's negligence cannot be visited on a passenger, whether for reward or not, unless passenger has charge or control of vehicle or driver."

In *Cunningham v. City of Thief River Falls,* 84 Minn. 21, it was said: "Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto."

This court, in *Kepler v. Chicago, St. P., M. & O. R. Co.,* 111 Neb. 273, held: "One who is injured in a railroad crossing accident while riding in a private vehicle may recover from the railroad company if it was guilty of negligence proximately causing said accident notwithstanding that negligence on the part of the driver of the vehicle may have contributed thereto, providing that she was herself

free from negligence, and was not on a matter of joint enterprise or common concern with said driver, and had no authority or control over him." In that case the driver of the automobile was taking a relative to the village of Herman, Nebraska, for the purpose of mailing some letters.

In *Brubaker v. Iowa County,* 174 Wis. 574, it was held: "A husband and wife moving to another city, where the husband intends to teach and the wife to attend college, with a view to obtaining a position, are not engaged in a joint enterprise, so as to impute to the wife the negligence of the husband while driving in an automobile to the city to which they were moving." In that case stress was laid upon the point that the wife had no direction or control over the husband's movements or control of the car.

Instructions to a jury that are inapplicable to the proved facts, and which are calculated to, and probably do, mislead the jury, will, ordinarily, constitute reversible error. The instructions complained of were not applicable to the facts, were calculated to mislead the jury to the plaintiff's prejudice, and their giving constituted prejudicial error.

Error is predicated on the giving of the tenth instruction because it assumes it to be a fact that Jessup grasped the steering wheel of the car just before it overturned. The only direct evidence on that question was that given by defendant, who testified that Jessup did grasp the steering wheel. However, there was other evidence tending to show that, previous to this, defendant had jumped from the car and was not in a position to see or know whether Mr. Jessup grasped the steering wheel. Under such circumstances it was error for the court to invade the province of the jury and assume as a fact that which might, from the evidence, be determined either way.

Other instructions are complained of, but we have examined the instructions and think that, when taken in connection with the charge as a whole, they were not erroneous.

The foregoing opinion and the first five points of the syllabus, prepared by Good, J., were unanimously agreed

upon by the members of this court. The case must therefore be reversed. However, the sixth point in the syllabus, and the parts of the opinion pertaining thereto, have the approval of a majority only.

This court divides in this case solely upon the question of adherence to the doctrine announced in *Miller v. Central Taxi Co.*, 110 Neb. 306, stated as follows: "Where a plaintiff in a personal injury action seeks by appropriate interrogatories on the cross-examination to discover whether the defendant is indemnified from loss by an insurance company, it is error for the court to sustain an objection to interrogatories which tend to develop the fact on that question."

The district court failed to follow the rule above announced, and the plaintiff urges this fact as ground for reversal. Plaintiff's contentions are controverted not only by the defendant, but the interests and viewpoint of liability insurance companies generally, in opposition thereto, have been most ably presented in oral argument and by three written briefs filed by *amici curiæ*.

The question actually presented by the record in the case before us may be said to be somewhat limited in its scope. Considered as an adjudication merely, the opinion would necessarily be likewise limited, for the obvious reason that any conclusion announced by this court on matters not presented by the record itself would amount to *obiter dictum* only.

This case from the standpoint of *amici curiæ* is presented on the basis that "the general provisions of indemnity insurance contracts are familiar to every member of the court;" that, under existing conditions, to permit the introduction of evidence, and allow the suggestions to be made, that the defendant in a personal injury suit is protected by such insurance contracts operates not only to prejudice his case before the trial jury, but, as a practical matter, frequently results in a denial of justice; that the rule announced in *Miller v. Central Taxi Co., supra,* permitting this to be done, therefore should be wholly rescind-

ed. Notwithstanding the limited scope of the record in the case before us, we believe that the broader questions presented may properly be considered and now determined by the announcement of a rule to govern further proceedings in which the questions here presented may be involved.

In 1920 an amendment to the Constitution of Nebraska was adopted which appears as section 25, art. V, and which provides in part: "For the effectual administration of justice and the prompt disposition of judicial proceedings, the supreme court may promulgate rules of practice and procedure for all courts, uniform as to each class of courts, and not in conflict with laws governing such matters." This section was before this court in *Penhansky v. Drake Realty Construction Co.*, 109 Neb. 120. The doctrine was there announced: "The new constitutional provisions (Const., art. V, sec. 25) expressly conferring upon the court the power to change rules of practice 'not in conflict with laws governing such matters' (which we construe in this connection to mean 'statutes governing such matters'), the rule as to the contradiction of witnesses stated in *Blackwell v. Wright*, 27 Neb. 269, *Masourides v. State*, 86 Neb. 105, and *Merkouras v. Chicago, B. & Q. R. Co.*, 101 Neb. 717, is set aside and the foregoing adopted." See, also, *Nichols v. State*, 109 Neb. 335.

It is to be noted that, while this court has announced the adoption of "rules" in opinions referred to in disposing of cases before it, the language of the constitutional provision is broad and does not limit the rule announced to the facts of any case, but justifies the announcement of any rule "which the court may deem necessary for the administration of justice." With reference to the rule of practice, therefore, this court stands in the same relation that the legislature does with reference to substantive law. Within the limitation of the written law, the one consideration that controls is public policy. This conclusion seems to be supported by the history of the exercise of the rule-making power in all jurisdictions where such powers have been conferred since the adoption of the "Supreme Court of Judica-

ture Act, 1873," in England, and its amendments passed in 1875. Therefore, in view of the fact that the reversal of this case is in no manner affected by the decision of the points now presented, it is thought that public interests will be promoted by a consideration of the matter on the broad basis suggested by the *amici curiæ* and the determination of the majority of the court announced as a rule of practice.

The gist of the contention of those seeking the rescission of the rule announced in *Miller v. Central Taxi Co., supra,* is that in a personal injury action the discovery by the trial jury of an existing relation between insurer and assured, as to facts in controversy, operates to prejudice the jurors to such a degree as to assure the return of a verdict against the defendant irrespective of the preponderance of the evidence on the issues involved; and the mere suggestion of such condition by plaintiff's attorney is fraught with so serious consequence that the same should be deemed ample ground of mistrial.

Assuredly, a relation between parties to be prejudicial would depend in part, at least, upon what that relation actually is. It is obvious that, so far as the question before us is concerned, the contaminating relation is contractual. Section 7882, Comp. St. 1922, provides: "No insurance policy or certificate of any kind shall be issued or delivered in this state unless and until a copy of the form thereof has been filed with the department of trade and commerce and approved by it." The records of this department, therefore, will afford us all facts necessary for the determination of this matter as applied, of course, to the adoption of the proposed rule. We find that there are many similarities and substantial agreements in the provisions of the policies filed as required by the above act.

If we take a typical policy, we find the character of indemnity, provided by the policy, is set forth as an insurance "against loss or expense, arising or resulting from claims upon the assured for damages in consequence of an accident occurring within the limits of the United States and Canada

during the term of the policy, by reason of the ownership, maintenance or use * * * of the automobile or any of the automobiles enumerated and described herein resulting in" an injury to persons, or damage to property, the company's liability being ordinarily limited to $5,000.

It also provides: "In addition to the above, the company does hereby agree (1) to defend in the name and on behalf of the assured any suit brought against the assured to enforce a claim, whether groundless or not, on account of damages suffered or alleged to be suffered under the circumstances hereinbefore described; (2) to pay the expenses incurred in defending any suit described in the preceding paragraph, also the interest on any judgment within the limits of the insurance hereby granted and any costs taxed against the assured on account thereof; (3) to reimburse the assured for the expense incurred in providing such immediate surgical relief as is imperative at the time of any accident covered hereunder."

And the further paragraphs provide: "The company reserves the right to settle any claim or suit. The assured shall not voluntarily assume any liability; nor interfere in any negotiation or legal proceedings conducted by the company on account of any claim; nor, except at assured's own cost, settle any claim; nor, without the written consent of the company previously given, incur any expense, except as provided herein for immediate surgical relief at time of accident. Whenever requested by the company, the assured shall aid in securing information, evidence and the attendance of witnesses in effecting settlements and in defending suits hereinbefore referred to. The assured shall at all times render to the company all reasonable cooperation and assistance. In case of payment of loss and/or expense under this policy, the company shall be subrogated to all rights of the assured against any person, copartnership, corporation or estate as respects the amount of such payment, and the assured shall execute all papers required and shall cooperate with the company to secure to the company such rights."

While there is some diversity in the provisions of the policies on this subject, in many policies at least the assured is plainly indemnified against loss only, and not against liability. And if we consider the provisions of the policy, above quoted, in connection with "instructions to the assured," we may visualize the transaction which appears in the event of an accident, as follows: "Required for assured: Stop at once, obtain name and address of injured and where taken after accident. Obtain names, addresses and telephone numbers of witnesses, and, if other car involved, name and address of owner, license number, make and number of car and in what company insured. Telegraph or telephone the home office or the nearest branch office the above information, giving also the data regarding owner, car and policy appearing on the reverse of this card. Follow verbal report at the earliest opportunity with written statement on the claim blanks provided. Do not admit liability. Make no comment or statement regarding the accident to anyone except police or an identified representative of this company."

On the part of the insurer is necessarily involved, from the nature of the business in which it is engaged, its maintenance of a staff of attorneys, investigators and experts; on occurrence of an accident in which its policyholder is involved, upon "immediate notice" received, the prompt appearance of its efficient and paid investigators upon the scene, thorough investigations of the facts, interviews with all parties (if possible) and of all persons having knowledge of facts and full reports of the same, together with measures taken to preserve and secure favorable evidence, maps and photos. Thereafter the insurer settles or litigates, as the conditions of the accident, the situation and standing of the parties involved, views of monetary considerations, may deem wise.

If litigation follows, the defense is to be conducted "in the name of the defendant," it is true, but by the insurer's attorneys, along lines wholly determined by the insurer, and to the extent that the insurer's interests may determine.

The witnesses, whose testimony may be used in behalf of the defendant, are exclusively selected by the insurers, and are all obtained by efforts of its agents, and are necessarily in many cases employees, employed for the purpose of assuring success in expected litigation. If the resulting decision be finally adverse, to the extent of the policy, the insurer satisfies the judgment and defrays the cost of attorneys and expenses of litigation. Indeed, after the occurrence of the accident and notice to the insurer, the entire matter is within the absolute control of the insurance company. It litigates or settles as its interests may determine. The assured has, by his agreement, waived all right to object, influence, or in any manner control the ensuing proceedings whether of litigation or settlement. He, thereafter, acts and participates only to the extent and in the manner the insurer may request or direct.

As to its general nature it may be observed in passing that the transaction before us is clearly within the reason upon which the early English doctrine of champerty and maintenance was based. 11 C. J. 234, sec. 5. Even so, the fact of liability insurance of itself is not proof of negligence, and the mere fact of insurance alone should not be determinative in the return of a jury's verdict But, on the other hand, the existence of insurance should not deprive the injured of his ordinary rights of proof. To the extent of its policy the insurer must be considered as at least one of the real parties in interest. This court is now invoked to announce a rule of practice which would afford insurance companies, real parties in interest and actually controlling litigation, the benefits of a "benevolent judicial concealment" therein, so that their identity, presence and interest may remain totally unknown to the jurors before whom the litigation is tried. In justice to opposing litigants, can this request be complied with?

The acid test of truth in judicial proceedings is cross-examination. It is admittedly the most efficacious agency which the law has devised for the discovery of truth. The ordinary rule is, by cross-examination the situation of the

witness with respect to the parties in interest, and to the subject of litigation, his interest, his motives, his inclination and prejudices, may all be fully investigated and ascertained, and submitted to the consideration of the jury before whom he has testified, and who have had the opportunity of observing and determining the just weight and value of his testimony. 1 Greenleaf, Evidence (16th ed.) sec. 446.

Bias or interest of a witness is always recognized as proper to be considered by the jury. 5 Chamberlayne, Modern Law of Evidence, sec. 3752. And the fact of business relations with, or employment by, a party may be shown. 5 Chamberlayne, Modern Law of Evidence, sec. 3753.

Where the witness has received or has been promised any reward for giving testimony, it is a proper subject of cross-examination. *Matter of Will of Snelling,* 136 N. Y. 515; *Blenkiron v. State,* 40 Neb. 11.

In this connection it is not to be forgotten that one of the valuable considerations the defendant has given for his indemnity is his express promise to "at all times render to the company reasonable cooperation and assistance, and whenever requested by his company to aid in securing information and evidence *** and in defending suit brought."

In view of these obligations, can it be said that such a defendant does not sustain business relations with or employment by the real party in interest which would form a proper subject of cross-examination under the rule above quoted? So, too, when the "efficient investigator," the physician, and the hired expert witness, and other witnesses, all of whom may regularly and permanently be employed and compensated by the insurance company, whose real interests are involved in the suit, are by it produced and tendered as witnesses in its behalf as real parties in interest even though its identity as such is not shown by the record, does the fact that the defense, by secret agreement, is made in the name of the third party operate to suspend or change the rules of cross-examination?

And though these witnesses might truthfully answer that they were strangers to the named defendant, and were not employed by and, in fact, sustained no business relations whatever with him, does justice demand that such questions and answers should constitute the limit of the permitted cross-examination?

This appears to be the controlling reason upon which the opinions of this court, attacked in this proceeding, have been based. The last pronouncement of this tribunal is the case of *Miller v. Central Taxi Co.*, 110 Neb. 306. His honor, Judge Dean, in the course of the opinion approved by us in that case, stated the facts, upon which the syllabus was written, to be as follows: "Counsel complains of misconduct on the part of plaintiff in that he offered to show that Mr. Borsky, the president of the defendant company, went to the viaduct soon after the accident to make some measurements, and that he took with him an attorney for an insurance company (presumably the company interested in the suit) to assist him who was not an attorney employed by him in the present case. The offer was denied. The argument is that plaintiff sought by this means to convey to the jury the intelligence that the company was indemnified against loss by an insurance company. Complaint is also made in that an apparent attempt was made to convey the same intelligence to the jury in the cross-examination of Mr. Borsky. The witness was not permitted to answer. We think the court erred in its ruling. The question is not new in this state. We held in a like case that, if the defendant was not resisting plaintiff's demand in its own behalf, but that some insurance company was defending, under the cover of defendant's name, plaintiff had a right to make that fact known to the jury. *Egner v. Curtis, Towle & Paine Co.*, 96 Neb. 18."

Turning to the *Egner* case we find the following approved by us and placed in the syllabus: "(1) Where a defendant, in a personal injury action, is indemnified by an employers' casualty insurance company, it is proper for plaintiff's counsel to show such fact when impaneling the jury, and

to inquire of each juror upon his *voir dire* if he is a stockholder or agent, or in any manner interested in such company. (2) In an action for personal injuries plaintiff, to prove an admission of liability, may show a demand made on defendant for payment for his injuries, and that defendant, through its general manager or duly authorized agent, made such admission. (3) And in such a case, if such general manager or duly authorized agent puts a refusal of defendant to pay solely on the ground that it is insured and for that reason it cannot pay, plaintiff is entitled to have the conversation admitted and the evidence submitted to the jury, under suitable instruction, for them to determine what the true import of the conversation was."

We would suggest that if it is competent to prove such a statement by the appearing defendant, why would it not be competent to prove the real agreement between the insurer and the insured, as the contract certainly contains such a provision, and such a situation is presented to every court in such a case? As to this right under our holding, we are strengthened by paragraph 4 of the syllabus in the *Egner* case, wherein we held: "It appears that after plaintiff was injured a physician unknown to, and without authority from, him, was called to treat his injuries, and without any subsequent employment by plaintiff continued to treat him for a considerable period of time. Upon the trial plaintiff's counsel called such physician to the witness-stand, and attempted to show by him who employed him. *Held*, not misconduct on the part of counsel." In the course of the opinion we use the following language: "We are unable to give our assent to this contention for two reasons: First, in our judgment, it could not have prejudiced the defendant with the jury; second, the error of the court was in not over-ruling the objection, as it should have done. Upon this point we concede that the authorities, cited from other states, are conflicting; but we think the correct rule is the one announced in *Foley v. Cudahy Packing Co.*, 119 Ia. 246; *Brusseau v. Lower Brick Co.*, 133 Ia. 245; *Spoonick v. Backus-Brooks Co.*, 89 Minn.

354; *Antletz v. Smith,* 97 Minn. 217; *Citizens Light, Heat & Power Co., v. Lee,* 182 Ala. 561; *Swift v. Platte* (on rehearing) 68 Kan. 10; *Iroquois Furnace Co. v. McCrea,* 191 Ill. 340. In *Spoonick v. Backus-Brooks Co., supra,* it is said (p.359): 'It is no answer to this to say that the insurance company is not named as a party to this action, for the bias of the juror is not to be determined by this fact. Nor is it an answer to say that counsel may protect his client by using a peremptory challenge. It is his right first to learn the facts, and he must do so to exercise intelligently his right to challenge peremptorily. * * * In order to secure to litigants unbiased and unprejudiced jurors, we are compelled to hold that plaintiff's counsel had a right to ascertain whether there was such a relationship between the persons called as jurors and the insurance company, a corporation vitally interested in the result, which would disqualify these persons, because, by implication, they would be biased and prejudiced.' " In furtherance of such conclusion we cited *Anderson v. Duckworth,* 162 Mass. 251. The holding in the *Egner* case was followed in *Koran v. Cudahy Packing Co.,* 100 Neb. 693, wherein Judge Letton, in the course of the opinion, stated: "However, in *Egner v. Curtis, Towle & Paine Co.,* 96 Neb. 18, this court held that such examinations (on *voir dire)* may be permitted, and the district court was justified in following that decision."

It is to be noted that the *Egner* case was decided in 1914, and the case of *Miller v. Central Taxi Co., supra,* was decided in 1923. And though our biennial legislature has been in regular session, there has been no legislative protest or objection to the principles announced in these cases.

In fact, it seems to me that we are committed to the doctrine that the insurance company, under its contract of insurance with the defendant, becomes and is the sole interested party defendant, at least to the extent of its insurance. In a very recent case, to wit, *Cox v. Detroit United Ry.,* 208 N. W. 745 (234 Mich. 597) the following is announced as the law:

"In action by soldier in United States army for injuries in collision between motor vehicle, in which he was riding, and defendant's street car, defendant's evidence that plaintiff was not real party in interest because of War Risk Insurance Act, section 313, as added by Act Congress, Oct. 6, 1917 (U. S. Comp. St. Ann. Supp. 1919, sec. 514tttt), *held* erroneously excluded, though such defense was not specially pleaded; Comp. Laws 1915, sec. 12353, providing that every action shall be prosecuted in name of real party in interest, being mandatory."

We have a similar section providing that all actions shall be prosecuted by the real parties in interest. The reason for such a section is so that the actual status of the case may be apparent to the entire court, including the jury. If this is the reason, then why is it not just as important that the real parties in interest as defendants shall appear? We have heretofore arrived at the conclusion that the contract of insurance between the insurance company and the insured, in such a case as this, makes the insurance company the unquestioned party in interest, and, not only that, but the unqualified, controlling party interested in the defense. The sole object of such a contract as that existing between the insurance company and the insured, as well as the principle now contended for, is that the case may proceed in the name of an ostensible party controlled and directed by the insurance company, both as to himself and his witnesses, as well as the attorneys, and yet the court and the jury shall be wholly oblivious of that fact.

If motives, bias and interest of witnesses, and the situation of witnesses, with respect to parties and the subject of litigation, are each a proper and necessary subject for consideration of juries, cross-examination must proceed upon the basis of the actual facts of the case as to the real parties in interest who will be substantially affected by the outcome. What may be essential to the true development of the actual facts, in order that these actual relations may be shown, certainly is proper cross-examination. It would seem, therefore, that questions eliciting the fact of the ex-

isting insurance and the relations sustained by each witness to the insurance company must be permitted. If they are not permitted, the ordinary right of cross-examination is denied, and a litigant is thus deprived of his "rights of proof" to which the ordinary application of the rule entitles him.

It may be said in passing that this court is committed to the fact that, as a matter of law, where a party offers a witness in proof of his cause, he vouches for him, that is, represents him as worthy of belief. *Masourides v. State*, 86 Neb. 105; *Krull v. Arman*, 110 Neb. 70; *Nathan v. Sands*, 52 Neb. 660.

In the form of the proceeding before us the real defendant, though unnamed apparently, as a matter of fact, seeks to avail himself of the benefit of the vouchments of the ostensible party defendant. Under the terms of the contract of insurance, it cannot be said that the witness apparently called and vouched for, as to veracity and standing by the apparent defendant, is, in fact, his witness, when he is actually selected and called as the witness of the real party in interest, the insurance company, and entitled to no other vouchment. Indeed, the entire theory of legal procedure outlined in these contracts for liability insurance contemplates a proceeding carried on secretly, by a real, though unknown, party in interest, making use of concealment and deception. Its essential nature is therefore incompatible with an "open court" and judgments publicly and openly arrived at. To compel and permit such proceeding is to countenance and participate in what is tantamount to a fraud.

Lastly, it is thought the procedure contemplated in these liability insurance contracts, whereby the defense, though actually made and controlled by the insurance company, is concealed by the name of the ostensible defendant, is opposed to a just and enlightened public policy. It is certainly patent that for courts to encourage, recognize, enforce and aid, especially by means of a benevolent concealment, the carrying out of this portion of the contracts of

insurance companies, is to judicially invite, conceal and promote into the liability insurance world evils similar in nature to those referred to in *Lancashire Ins. Co. v. Bush,* 60 Neb. 116. In addition, the invitation thus extended would carry with it assurance to those tempted to wrong that there would be no relief for the unfortunates, and no retribution for the wrongdoer, because the wrongdoers would judicially be concealed, and in the records of our courts their names would not appear or be known. Still, underneath the veil of procedure, or behind the mask, maintained by precedent, will inevitably be developed in truth, with passing time, the same vexatious and oppressive resisting of payments, justly due, the same persistent endeavor to secure for themselves, under and in the name and shadow of the assured, an escape from just liability that characterized the fire insurance business of the recent past.

It would seem that the doctrine of "Open Court" with judgments openly arrived at and also "Equality before the law" are principles that public good cannot permit to be limited, qualified, or abandoned, openly or in secret, judicially or otherwise.

It follows, therefore, there must be one rule of cross-examination applied irrespective as to whether litigants are natural persons or corporate bodies, and that the rule in *Miller v. Central Taxi Co.,* 110 Neb. 306, is right and should be adhered to. Therefore, this court, under the provisions of section 25, art. V, of the Constitution of Nebraska, for the effectual administration of justice, reiterates and confirms the doctrine that, "Where a plaintiff in a personal injury action seeks by appropriate interrogatories on the cross-examination to discover whether the defendant is indemnified from loss by an insurance company, it is error for the court to sustain an objection to interrogatories which tend to develop the fact on that question." *Miller v. Central Taxi Co., supra.* And this rule is hereby promulgated as a rule of practice for all courts in this jurisdiction.

And indeed, on broader grounds, when we consider the enhanced efficiency of the automobile, the ever-increasing

numbers in active use, the increased improvements of our highways, and the increase in the number of protective policies of insurance issued to automobile owners, and then call to mind the astounding list of casualties on our public roads we are impelled to seek for the cause of this wreckage of property and destruction of life and limb. It cannot be the automobile, or the highway, alone. If not there, may it not rest in those who operate these machines of pleasure and usefulness on our public thoroughfares? The ever-increasing casualties are all out of proportion to the increasing number of automobiles used. Are we not thus driven to conclude that, when such insurance is arranged for, the feeling of liability, as well as responsibility, on the part of the individual insured is lessened, and that thereby recklessness or lack of ordinary care is bred, rather than ordinary care held *in statu quo* or greater care promoted? Should not such question be one for the jury or court trying the case as any other fact submitted for consideration, not as a question of intent on the part of the party causing the claimed injury, but as such fact may bear on the question of his care or lack of care or negligence in the particular case?

It follows that the judgment of the district court is reversed and remanded for further proceedings in conformity with this opinion.

REVERSED.

GOOD, J., dissenting.

For the reasons hereinafter set forth, I cannot concur in that part of the majority opinion which holds: "Where a plaintiff in a personal injury action seeks by appropriate interrogatories on the cross-examination to discover whether the defendant is indemnified from loss by an insurance company, it is error for the court to sustain an objection to interrogatories which tend to develop the fact on that question." It is true that this rule was previously announced in *Miller v. Central Taxi Co.*, 110 Neb. 306. In that case, however, no reason for the rule was given save that it was supposedly based on the holding of this court

in *Egner v. Curtis, Towle & Paine Co.*, 96 Neb. 18. In the latter case it was ruled that it is proper to inquire of the jurors, on their *voir dire*, if they are stockholders or otherwise interested in a company carrying insurance indemnifying defendant against loss from the accident or transaction out of which the action arose. This was on the theory that such information was necessary to enable plaintiff to prudently exercise his challenges. With that ruling I am in entire accord. The point decided, however, has no bearing on the question under consideration and is not authority for the rule announced in *Miller v. Central Taxi Co.*, *supra*. I do not wish to be understood as contending that it is in no case proper to bring before the jury evidence that defendant carries indemnity insurance. Cases may arise where such disclosure may be proper, for the purpose of showing the interest or bias of witnesses who may be stockholders, officers, agents or employees of the company carrying the indemnity insurance for defendant.

I have made a painstaking examination of the authorities upon the question and find that, where the precise question has been presented, a view, contrary to that expressed in the majority opinion, has been taken in practically every jurisdiction that has passed upon the question, save that of Nebraska. The courts of 27 of our sister states and the federal courts take a contrary view to that of the majority opinion. Among the decisions holding that it is error to permit the plaintiff, in an action for personal injuries, to offer evidence or make argument to the jury that the defendant in the action is protected by indemnity insurance are the following: *Standridge v. Martin*, 203 Ala. 486; *Steele-Smith Dry Goods Co. v. Blythe*, 208 Ala. 288; *Ex parte Woodward Iron Co.*, 212 Ala. 220; *Roche v. Llewellyn Iron Works Co.*, 140 Cal. 563; *Pierce v. United Gas & Electric Co.*, 161 Cal. 176; *Wilson v. St. Joe Boom Co.*, 34 Idaho, 253; *Mithen v. Jeffery*, 259 Ill. 372; *Ruwisch v. Knoebel*, 233 Ill. App. 526; *Martin v. Lilly*, 188 Ind. 139; *Ryan v. Trenkle*, 199 Ia. 636; *Danville Light, Power & Traction Co. v. Baldwin*, 178 Ky. 184; *Sawyer v. Arnold Shoe Co.*, 90 Me. 369;

Feins v. Ralby, 245 Mass. 228; *Kerr v. National Fulton Brass Mfg. Co.*, 155 Mich. 191; *Grubaugh v. Murphy Co.*, 209 Mich. 551; *Gracz v. Anderson*, 104 Minn. 476; *Gore v. Brockman*, 138 Mo. App. 231; *Wilson v. Blair*, 65 Mont. 155; *Herrin, Lambert & Co. v. Daly*, 80 Miss. 340; *Sutton v. Bell*, 79 N. J. Law, 507; *Simpson v. Foundation Co.*, 201 N. Y. 479; *Akin v. Lee*, 206 N. Y. 20; *Starr v. Southern Cotton Oil Co.*, 165 N. Car. 587; *Stoskoff v. Wicklund*, 49 N. Dak. 708; *Jones v. Sinsheimer*, 107 Or. 491; *Curran v. Lorch*, 243 Pa. St. 247; *Duke v. Parker*, 125 S. Car. 442; *Prewitt-Spurr Mfg. Co. v. Woodall*, 115 Tenn. 605; *Lone Star Gas Co. v. Coates*, 241 S. W. (Tex. Civ. App.) 1111; *Levinski v. Cooper*, 142 S. W. (Tex. Civ. App.) 959; *Bianchi v. Millar*, 94 Vt. 378; *Westby v. Washington Brick, Lime & Mfg. Co.*, 40 Wash. 289; *Walters v. Appalachian Power Co.*, 75 W. Va. 676; *Chybowski v. Bucyrus Co.*, 127 Wis. 332; *Smith v. Yellow Cab Co.*, 173 Wis. 33; *Remmel v. Czaja*, 183 Wis. 503; *Stewart & Co. v. Newby*, 266 Fed. 287. I do not desire to be understood as expressing the view that the action of this court should be ruled by a majority of the holdings of other courts, unless and except where they are based upon sound reason.

What was the purpose sought to be attained in offering such evidence to the jury? I think that all know that the purpose of the offer was not to elucidate any issue involved, but for the effect that it might have on the jury in rendering a verdict for plaintiff. In fact, the plaintiff in this case does not contend otherwise. What useful purpose could be served in the introduction of such testimony? Was it pertinent to any issue in the case? To ascertain this, perhaps it is desirable to state the issues that were presented by the pleadings. They are: (1) Was defendant guilty of negligence that proximately caused the death of Mr. Jessup? (2) Was Jessup guilty of contributory negligence? (3) Were defendant and Jessup engaged in a joint enterprise so that the negligence of defendant, if any, should be imputed to Jessup? (4) The amount of plaintiff's recovery, if any.

If defendant carried indemnity insurance, that fact would tend neither to prove nor to disprove any of the issues raised by the pleadings; nor would it throw any light on the question for the jury's consideration. The matter inquired about was collateral to and entirely outside of any issue presented by the pleadings. If the proffered evidence should have been received, then, would it not have been proper for the parties to disclose to the jury the amount of indemnity insurance carried by defendant, and to introduce in evidence his insurance contracts, so that the jury might know the exact extent, terms and conditions on which the defendant is indemnified? Would not the defendant be entitled to present to the jury any possible defense that might be made in an action by him against his insurer? Would it not be as pertinent for the jury to consider any possible defense that the insurance company might make in an action by the defendant? And, if the jury should consider such facts and should believe that any possible defense that the insurance company might attempt to make was untenable, and render a verdict accordingly, would such verdict be binding upon the insurance company? We think that no one would so contend. The defendant might be held liable because the jury believed that he was indemnified, when there might be a valid defense to an action brought by him against his insurer, and he might not be, in fact, indemnified. The verdict of the jury would in no wise be binding upon the insurance company. All this only the more clearly shows why any evidence, not pertinent to the real issues to be tried. should be excluded. In my view, the introduction of such evidence could serve no useful purpose and was likely to mislead the jury and divert their attention from the real issues in this case. This court and other courts generally condemn the admission of incompetent and irrelevant matters and condemn the submission to the jury of any issues not raised by the pleadings, because such evidence and such instructions tend to mislead and confuse the jury and are likely to lead to a wrong verdict.

In the majority opinion the terms of a supposed contract

of insurance are set forth and commented upon at great length. I use the terms "supposed contract" because no policy of insurance, nor the terms of any policy, are contained in the record. I take it for granted that every one will concede that there is a large number of companies writing indemnity insurance, and that some of the companies write many different forms of indemnity insurance contracts. There may be contracts of indemnity insurance containing the terms and conditions set forth in the majority opinion, but there is not a scintilla of evidence in the record of such a contract.

It is suggested in the majority opinion that the insurance company is the real party defendant, at least to the extent of the insurance carried by the defendant. This is mere assumption, based upon nothing appearing in the record. It also assumes that defendant will be able to recover his loss in an action against his insurer. This is mere assumption again.

It is further suggested that the insurance company is responsible for the entire conduct of the defense and calls such witnesses as it pleases, and that the party calling the witnesses vouches for their veracity; that therefore the jury should know that the insurance company is the one who vouches for the veracity of the witnesses called. It is a new doctrine to me that the veracity of a witness should be determined by the person who calls him. It may sometimes happen that a person of poor reputation or standing for veracity and probity may call as a witness one of high character and probity. On the other hand, a party of high character and standing may, by the exigencies of the situation, be required to call as a witness one who is not of that character. In the latter case, is, then, the witness to be given faith and credit because a person of high standing calls him as a witness; or is a reputable witness of high character and probity to be given little credence because of the character of the person who calls him as a witness? Certainly, no such rule obtains. Besides, the majority opinion assumes that the insurance company, or

those who control its policies and actions, are not of high character and standing. Again, this is mere assumption, not based upon any fact disclosed by the record.

I respectfully submit that the trial court's ruling in sustaining the objection is right. I think the correct rule should be that, unless there are disclosed good reasons for offering such evidence, it should be excluded, and if it is brought to the attention of the jury they should be instructed as to the purpose for which it was admitted, and to consider it for that purpose alone.

ROSE and DAY, JJ., concur in this dissent.

OSCAR NELSON V. STATE OF NEBRASKA.

FILED NOVEMBER 19, 1926. No. 25392.

1. **Criminal Law:** MISDEMEANORS: JURISDICTION OF DISTRICT COURT. A district court, in the exercise of its original, as distinguished from its appellate, jurisdiction, is empowered to try and determine misdemeanors.

2. ———: APPEARANCE: ISSUANCE OF WARRANT. Where an information is properly filed by the prosecuting attorney and duly served upon the defendant named therein, who is personally present in court and through his counsel attacks by motion the validity of the charges against him therein contained, the district judge may, in his discretion, call upon him to plead thereto, without previous issuance and service of warrant upon any "complaint" including such charges.

3. **Jury:** SELECTION OF PANEL. It is essential to fair and impartial administration of justice that the list of sixty names from which the jury is drawn shall not be selected by officers having an interest in the result of the litigation to be tried by such panel.

4. ———: ———. Where officers, who provide a jury list of sixty names, as required by section 9073, Comp. St. 1922, from which the jury panel challenged is drawn, at the time of the performance of such duties, in their individual capacities, in combination with members of a secret society, in which they also have memberships, engage in an endeavor to secure the conviction of a certain defendant, and for that purpose have

employed, or caused to be employed, and at their private expense are compensating a detective to secure evidence and act as complaining witness and to institute the necessary criminal proceedings against, and to assist in securing the conviction of, such defendant, and where objection is timely made, it is error to refuse to quash the panel.

ERROR to the district court for Phelps county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

S. A. Dravo and *Bernard McNeny*, for plaintiff in error.

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

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

EBERLY, J.

The defendant, Oscar Nelson, was charged by information, filed in the district court for Phelps county, Nebraska, with the following: (1) That the defendant "did * * * have, possess, and permit intoxicating liquor to be in, upon, and about his premises and buildings, other than his private dwelling house," etc.; (2) that the defendant did * * * carry and transport, for the purpose of sale, and did sell and deliver intoxicating liquor in an amount more than one pint, to wit, two pints," etc. The third count was an attempt to charge a second offense under the provisions of chapter 106, Laws, 1925. Trial was had to a jury. A verdict of guilty was returned on counts 1 and 2. From the sentence of the district court, upon the verdict, the defendant appeals.

The first question presented by the plaintiff in error, defendant below, is the right of the district court to hear and determine the case under the facts as they appear in the record. The record discloses that a complaint was filed in the justice court on December 24, 1925. The exact terms of the complaint do not appear. It appears that on the complaint a warrant was issued and defendant arrested. The record of the magistrate also shows that on December 24, 1925, defendant, Oscar Nelson, appeared, and upon read-

ing of the complaint he plead "not guilty," and waived examination, and was bound over to the district court for Phelps county, Nebraska. The court fixed a bond for his appearance at $2,000, which was furnished and approved. The information was filed in the district court on February 15, 1926, and served on defendant the same day. The journal entry of the district court, covering the trial of this case, discloses that on February 17, 1926, the defendant and his counsel being present, the cause came on to be heard. Then application was made and allowed for the appointment of H. S. Dungan as assistant to the county attorney in the prosecution of this action, which was granted, defendant excepting. Application was then made on the part of the county attorney for the indorsement of additional names of witnesses upon the information, which application was allowed, defendant excepting. The defendant then presented a motion to require the state to elect as between the information in this case and in another case of the docket of the court, which motion was denied. A motion followed by defendant to strike count 3 out of the information and to quash the information and remand the case to the justice of the peace for trial. The court quashed count 3 of the information, and held the defendant for trial in the district court upon the charges in counts 1 and 2, defendant excepting to the ruling.

The defendant contends that the district court had no jurisdiction to try him, no "complaint" being filed therein, and no warrant issued and served. But defendant was present in court with his attorney, participating in the proceedings.

In *Cohoe v. State,* 79 Neb. 811, which was a hearing in the district court of a complaint charging a crime, it was held: "When such complaint is filed in the district court and the person charged with crime in said complaint is present in court, the judge may in his discretion call upon the defendant to plead to the complaint, and proceed with the examination without the issuing of a warrant upon the complaint." The principle announced in this case last

cited applies to proceedings on information and is controlling here. Therefore, under the facts in this case, no objections to the jurisdiction of the district court may be properly founded upon the theory that the issuance of a formal warrant by that court was essential.

It being conceded that, after the third count of the information had been quashed, the two counts then remaining charged offenses amounting to misdemeanors only, did the district court have jurisdiction to try and determine these two counts, or should it have remanded the case to a justice of the peace or other magistrate for trial?

Section 10061, Comp. St. 1922, relating to grand juries, provides in part: "After the charge of the court, the grand jury shall retire * * * and shall proceed to inquire of and present all offenses whatever committed within the limits of the county in and for which they were impaneled and sworn." Section 10072, Comp. St. 1922, provides: "Indictments found by a grand jury * * * shall be filed with the clerk (of the district court), who shall indorse thereon the day of their filing, and shall enter each case upon the appearance docket, and also upon the trial docket of the term, as soon as the parties indicted have been arrested." Section 10073, Comp. St. 1922, in effect, provides that the trial of all indictments returned shall be had in the district court for the county in which the same were found.

It is plain that the words "all offenses" embrace misdemeanors, and it follows, therefore, that when the procedure is by indictment the district court has exclusive jurisdiction to hear and determine prosecutions for misdemeanors.

Section 10086, Comp. St. 1922, provides: "The several courts of this state shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon information, for * * * misdemeanors, * * * to issue writs and process, and do all other acts therein, as they possess and may exercise in cases of the like prosecutions upon indictments." The language last quoted certainly empowers the district court to try a misdemeanor charged in the information as a proper exercise of its orig-

inal, as distinguished from its appellate, jurisdiction. This conclusion is supported by the further fact that section 9989, Comp. St. 1922, which vests magistrates with jurisdiction in all cases of misdemeanors (with certain limitations), expressly provides that the jurisdiction conferred is "concurrent with the district court." It being determined that the district court has original jurisdiction of the offense charged, the effect of the so-called waiver of preliminary examination, disclosed by the record, cannot be considered at the present time for the reason that no plea in abatement was filed. *Dinsmore v. State*, 61 Neb. 418; *Coffield v. State*, 44 Neb. 417; *Meyers v. State*, 104 Neb. 356; *Olsen v. State*, 114 Neb. 112.

It follows that the procedure followed in the district court in the present case is not vulnerable to objections made, and that, under the facts in this case, the court committed no prejudicial error in the appointment of an assistant to the county attorney.

The substance of the fourth paragraph of defendant's motion to quash the panel of the petit jury, the overruling of which he assigns as error, was based upon the alleged disqualifications of the officers who selected the sixty names from which the panel was drawn. Oral evidence was tendered by the defendant to support these objections made. Part of this was received, part excluded, and appears only in the form of offers of proof to which objections were sustained.

Briefly summarizing, the effect of defendant's record on this subject tended to establish that the "Imperial Order, Knights of the Ku Klux Klan, Jurisdiction of Nebraska," and an organization known as the "Ministerial Union of Holdrege," combined together, hired O. O. Goben as a detective for the purpose of investigating and detecting crimes against the liquor law, and "particularly against the defendent; that A. F. Swanberg, county clerk and *ex officio* clerk of the county board, and certain members of the board of county commissioners, all of whom were klansmen, together with other members of the klan, contributed to a

fund out of which $1,300 to $1,400 was paid to Goben as compensation for his services as a detective in the case against the defendant. Goben was the complaining witness in the instant case, and the officers complained of were the source of the jury list.

Goben states in his evidence that he had a talk, in connection with his employment, with Mr. Ward and Mr. Schrack, then with Mr. Boles and Mr. Swanberg (county clerk); that Swanberg represented the klan (the inference is that Schrack and Boles represented the ministerial union); that he had received the sum of $1,349.77 which was paid him by A. F. Swanberg; that he was also being paid the sum of $75 a week and expenses during the time spent in attending court of the present trial; that he had gone to the home of the defendant under an assumed name, and, with the money provided by Swanberg, acting for the societies named, induced the defendant to sell him a carton containing a half case of whiskey. This transaction forms the basis of the charge brought against the defendant for which he was tried and convicted.

Where officers, who are required by law to provide a jury list of sixty names, as required by sections 9073, 9074, Comp. St. 1922, from which the jury panel challenged is to be drawn, at the time of the performance of such duties, in their individual capacities, in combination with other members of a secret society, in which they have memberships, engage in an endeavor to secure the conviction of a certain defendant, and for that purpose have employed, or caused to be employed, and at their private expense, are compensating a detective to secure evidence and act as complaining witness, to institute the necessary criminal proceedings against, and to assist in securing a conviction of, such defendant, is such panel so selected thereby made subject to motion to quash?

This court is committed to the doctrine that it is essential to the fair and impartial administration of justice that a jury shall not be selected by an officer having an interest in the result of the litigation. *Policky v. State*, 113 Neb.

858, is a case wherein this court held: "A sheriff is disqualified to select and summon a special panel of jurors to serve in a criminal case in which he is the prosecuting witness."

The present case is not an instance of contributions to a fund being made without reference to a particular prosecution; the contributions were made for the prosecution of a particular case. And when this detective was employed by certain of the officers charged with the duties of selecting the jury list, and others, constituting the society in question, such detective so employed is and remains the agent for said officers, as well as all other members of the association, for the purpose of his employment.

The act of the agent is the act of the principal, and when this detective, in the course of his employment, secured the evidence and went upon the stand as a complaining witness, he was, in fact and in law, the *alter ego* of his employers. *Commonwealth v. Moore,* 143 Mass. 136. His presence on the witness-stand and his act in instituting the prosecution was, in legal effect, their presence and their act. As we held the jurors summoned by the sheriff, who was the complaining witness against the defendant, vulnerable to his challenge, so must we hold this jury, whose names were, in fact, designated by parties who were, in truth and in legal effect, complaining witnesses, vulnerable to the same objections.

It follows, therefore, that the court erred in refusing to receive the evidence tendered, and in not permitting defendant to establish, if he could, the fact of membership by the officers, whose acts were questioned, in the society then, theretofore, and thereafter engaged in prosecuting him; that these officers in their individual capacity, together with other members of the society, had hired a detective and contributed the funds, and that such detective was theretofore, and at the trial, still in the employ of the officers who prepared the jury list. *Harjo v. United States,* 1 Okla. Cr. Rep. 590; *Grisson v. State,* 16 Okla. Cr. Rep. 569; *Koontz v. State,* 10 Okla. Cr. Rep. 553.

The conviction had and sentence imposed is therefore set aside and the case reversed and remanded for further proceedings in the district court in accordance with this opinion.

REVERSED.

Note—See Criminal Law, 16 C. J. p. 153 n. 69; p. 298 n. 44—Juries, 35 C. J. p. 260 n. 89; note in 20 L. R. A. n. s. 1013; 16 R. C. L. 233.

C. J. LORD, APPELLEE, V. LENHART M. SHULTZ ET AL., APPELLANTS.

FILED NOVEMBER 19, 1926. No. 25409.

1. **Corporations:** TITLE TO LAND: STATE ALONE MAY QUESTION. Notwithstanding the provisions of chapter 60, art. V (secs. 5686-5690) Comp. St. 1922, where, in settlement of a *bona fide* indebtedness to a foreign corporation secured by a real estate mortgage and lawfully created, such corporation accepts and receives a transfer of real estate, situated in this state, in part other than that embraced in its mortgage, *held*, that its title to all or any portion of said land can be tested and challenged only by proceedings brought by the state for that purpose.

2. ———: CONVEYANCE OF LAND: BONA FIDE PURCHASER. Although a corporation may have acquired real estate in such a manner as to render it subject to be escheated to the state by proper action begun for that purpose, yet if such corporation shall, prior to the commencement of such proceedings to escheat, make a *bona fide* sale or conveyance of said real estate for value, the purchaser at such sale will take a good title thereto.

3. *Gould v. Board of Home Missions*, 102 Neb. 526, distinguished.

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

Morsman, Maxwell and *Haggart*, for appellants.

Kehoe & Verret, contra.

Heard before MORRISEY, C. J., ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ., and REDICK, DISTRICT JUDGE.

EBERLY, J.

This is an action in the district court for Douglas county, Nebraska, for the specific performance of a valid, written contract for the sale of the following real estate: The south half of the northeast quarter, the north half of the southeast quarter, the southwest quarter of the southeast quarter, and the southwest quarter of section 6, township 18 north, range 5 east of the 6th P. M. Plaintiff prevailed. From a decree in his favor, defendants appeal.

By agreement of the parties, the case is here presented in the form of a case stated under rule 14 (94 Neb. XIII) of this court. The question presented by the record for determination is whether a title to real estate, concededly otherwise good and merchantable, is to any extent or any degree impaired or invalidated by the following facts which appear as part of the record in the case.

On October 2, 1922, John Arthur, then owner in fee simple, mortgaged 200 acres of above land situated in east half of said section to the Thompson Realty Company, a foreign corporation, to secure the sum of $21,000 then due and payable from the mortgagor to the mortgagee. On November 21, 1923, pursuant to an agreement of settlement between John Arthur and the Thompson Realty Company, the 360 acres of land above described, including the 200 acres mortgaged, and the southwest quarter of the section, not described in the mortgage, were by deed of general warranty conveyed to the Thompson Realty Company in full satisfaction of the indebtedness of John Arthur, the mortgagor and grantor of the deed, and a release of the mortgage was contemporaneously executed and delivered and recorded by the Thompson Realty Company. On November 10, 1924, the title thus received by the Thompson Realty Company purports to have been conveyed by a deed of general warranty (and also by correction deed of later date) to the plaintiff herein.

At the time of the above transactions the Thompson Realty Company was a corporation duly organized under the laws of North Dakota, in 1903, and authorized and em-

powered by that state to do a general real estate and loan business, with its principal office located at Cando, North Dakota. It also appears that on March 25, 1926, John Arthur duly executed and delivered to plaintiff a quitclaim deed quitclaiming to plaintiff all right, title, and interest of the grantor in and to the premises first herein described. So far as the record discloses, no action to enforce an escheat has been commenced by the state. These transfers to and from the Thompson Realty Company are a part of plaintiff's chain of title upon which he relies to establish a good and merchantable title to said real estate, and the question for decision in this case is whether or not plaintiff, on the facts above set forth, has a "good and merchantable title" to the land.

The questions presented are not free from difficulty. The provisions of our statutes, relating to the matter, seem to be the following:

"Aliens and corporations not incorporated under the laws of the state of Nebraska are hereby prohibited from acquiring title to or taking or holding any land, or real estate, or any leasehold interest extending for a period for more than five years, or any other greater interest less than fee in any land, or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided." Comp. St. 1922, sec. 5687.

"This article shall not, nor shall anything in the statutes of Nebraska, prevent the holders, whether aliens or corporations not organized under the laws of the state of Nebraska, of liens upon real estate or any interest therein, whether heretofore or hereafter acquired, from holding or taking valid title to the real estate subject to such liens, nor shall it prevent any such alien or corporation from enforcing any lien or judgment for any debt or liability now existing, or which may hereafter be created, nor from becoming a purchaser at any sale made for the purpose of collecting or enforcing the collection of such debt or judgment: Provided, however, all lands so acquired shall be sold within ten years after the title thereto shall be per-

fected in such alien or foreign corporation, and in default of such sale within such time, such real estate shall revert and escheat to the state of Nebraska, as provided in this article." Comp. St. 1922, sec. 5690.

"Foreign corporations shall have the right to receive, take, purchase and hold, by mortgage or otherwise, any securities and liens executed, given or transferred or so intended to represent or secure loans upon or purchase-money of lands or other property situate or being in this state, and to sell, assign, transfer, and to sue upon, foreclose or otherwise enforce the same heretofore or hereafter acquired." Comp. St. 1922, sec. 641.

In a case between devisee and heir involving the effect of statutes, this court construed the provisions of sections 5687, 5690, Comp. St. 1922, and held: "Under section 6273, Rev. St. 1913, corporations not incorporated under the law of the state of Nebraska are prohibited from taking or holding lands in this state in trust for the use and benefit of another. The power to raise the question of the right of the corporation to take the property is not confined to the state, but the question may be raised by the heir or next of kin in an action to quiet title." *Gould v. Board of Home Missions*, 102 Neb. 526. From this determination, Letton and Hamer, JJ., dissented. In this connection we assume, but do not decide, that the clause in the statutes in force, at the time this decision was made, "and it shall be the duty of the county attorney in the counties where such lands are situated to enforce forfeitures of all such lands as provided by this article," relates to land acquired by corporations organized under the laws of other states as well as by land acquired by aliens, and for the purposes of this case it will also be assumed that specific performance of a contract will not be enforced at the instance of the vendor who fails to tender a "good and merchantable title" to all the lands. But, even on the basis above indicated, is the doctrine in *Gould v. Board of Home Missions, supra*, controlling in the present case?

The case cited, it is to be remembered, involves a will and arose between heirs of the deceased and his devisee. In the instant case the grantor, for a valuable consideration received from the grantee, executed a deed of general warranty which, in terms, conveys the fee simple title now questioned.

This conclusion challenges our attention to *Kennett v. Kidd,* 87 Kan. 652. In this case the supreme court of Kansas say: "Counsel for the defendant cite *Investment Co. v. Trust Co.,* 65 Kan. 50, holding that under the alien land act the state was the only party who could insist upon a forfeiture, but a different question was there involved and the decision is not applicable." It may be said in passing that the Kansas statute in force when *Investment Co. v. Trust Co., supra,* was decided resembled very much our present alien act, and, in fact, some of its provisions were identical. This act (Laws 1891, ch. 3, sec. 1) expressly provides: "That a nonresident alien, * * * or corporation incorporated under the laws of any foreign country, shall not be capable of acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise," except (the fact in the case of *Investment Co. v. Trust Co., supra,* did not bring it within any exception contained in this statute); nevertheless, the Kansas court held that a corporation, as owner of rights by purchase for valuable consideration in real estate or as purchaser for valuable consideration under the provisions of this act, could be challenged only by the state of Kansas, and that the state of Kansas only could insist upon forfeiture. Thus, it will be seen that the supreme court of Kansas, as well as other courts hereinafter referred to, concur in the view that a different rule applies where the party challenging the right of the opposing party to acquire, take or hold real estate, is an heir, and when the party challenging is the grantor or a person claiming by, through, or under some grantor.

Statutes of wills, it has been justly observed, are enabling acts, and prior to the statute of 32 Henry VIII (5 St.

at Large, cap. 1) there was no general power at common law to devise land. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. Our state has adopted the common law so far as applicable, and also has enacted a statute of wills. It would seem to follow that every person must therefore devise his lands in this state within the limitations of our statute or he cannot devise them at all; in other words, the power to devise must be exercised strictly in accord with the terms and conditions prescribed by the sovereign. *United States v. Fox*, 4 Otto (U. S.) 315.

It is also to be remembered that an ordinary devisee does not ordinarily occupy the position of purchaser for value. Nor is the heir of a testator as to land devised, subject to estoppels created by deed.

A will speaks only from the death of the testator; title is never in abeyance, but can be considered as passing only pursuant to a valid devise. Under these circumstances there would appear to be no legal obstructions to an heir rightfully challenging the validity of a devise of any of the provisions thereof. This is the foundation on which the opinion in *Gould v. Board of Home Missions, supra,* really proceeds. On the other hand, in principle, a grantor who has received a valuable consideration for property conveyed by his deed, executed and delivered, as well as all claiming by, through, or under him, would be estopped from interfering with the possession or the title of the grantee acquired thereby.

It should be noted in passing that the writer of the opinion in *Gould v. Board of Home Missions, supra,* cites, in support of the principle announced in the syllabus, hereinbefore quoted, the following cases: *United States v. Fox,* 4 Otto (U. S.) 315; *Kennett v. Kidd,* 87 Kan. 652; *Proctor v. Board of Trustees,* 225 Mo. 51; *Matter of Estate of McGraw,* 111 N. Y. 66; *De Camp v. Dobbins,* 31 N. J. Eq. 671; *Wunderle v. Wunderle,* 144 Ill. 40.

All of these cases involve the right of heirs claiming as such against persons and corporations disqualified to ac-

quire and hold real estate. In none of these cases were the opposing parties grantees for valuable consideration. Five of the six cases were between heir and devisee. In three of the cases above named the court, in the opinion, while determining that an heir could rightfully raise the question of the right of the opposing party to take and hold real estate by right of inheritance or devise, and finding that, where such opposing party was prohibited from doing so by statute, the devise was void and the heir was a proper party to present the question, also took occasion during the course of the opinion to distinguish the cases then before them from the cases wherein the grantor, or person claiming under him, seeks to recover from a grantee of a deed in conveyance executed and delivered. See *Matter of Estate of McGraw,* 111 N. Y. 66, *De Camp v. Dobbins,* 31 N. J. Eq. 671, and *Kennett v. Kidd,* 87 Kan. 652.

In short, not one of the cases cited in the opinion of *Gould v. Board of Home Missions, supra,* would be authority for the propositions of law therein laid down as applied to a grantee of a deed executed and delivered for a valuable consideration. But all of the cases cited are unquestionably in point as controlling authority in the case then before our court.

It may be said *arguendo* that under the provision of section 641, Comp. St. 1922, foreign corporations are given practically unlimited power to make loans, to take securities therefor, "to sell, assign, transfer, and to sue upon, foreclose or otherwise enforce the same heretofore or hereafter acquired." This is an independent act passed in 1911 and has never been construed by this court. There would seem no question in this view of our law of the right of the foreign corporation to make loans and enforce the same, not only by suits and foreclosures, but in addition to "otherwise" enforce the same. In view of this situation the following rule is of interest: "Such a provision is intended to prohibit the company from purchasing, holding, or dealing in real estate directly, and in a manner unconnected with the lawful and proper management and control of its

business, and not to prevent it from acquiring an interest in land incidentally whenever, in the proper exercise of its powers, it becomes necessary for it to do so in order to protect its legal rights." 2 Fletcher, Corporations, sec. 1088.

However, this view of the question has not been referred to or discussed by any of the briefs, and therefore in the determination of this suit we assume, though we do not decide, that while the Thompson Realty Company was owner of the title of the land involved in this action, especially the 160 acres not covered by the mortgage, its title and ownership was subject to successful challenge by the state.

However, the realty company has made a transfer of that title by properly executed deeds of conveyance to a purchaser for valuable consideration; and the second question to which we must address ourselves is: Does such purchaser take the title relieved from the claims of the state?

This court, in effect, determined the affirmative of this question in *Missouri Valley Land Co. v. Bushnell,* 11 Neb. 192, wherein it established the rule in this jurisdiction to be: "Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign only can object. It is valid until assailed in a direct proceeding for that purpose." See, also, *Coleridge Creamery Co. v. Jenkins,* 66 Neb. 129. This conclusion seems to be supported by the weight of authority. *State v. American Baptist Home Mission Society,* 96 W. Va. 447, 37 A. L. R. 200, and note; *State of Oklahoma v. Benevolent Investment & Relief Ass'n,* 107 Okla. 228, 37 A. L. R. 190.

This conclusion is in accord with the well-established principle of construction that all laws should be construed with the view of upholding, and not unsettling, land titles.

It follows, therefore, that the title vested in plaintiff under the facts in this record at the time of the commencement of these proceedings in the court below was a "good and merchantable title," and the judgment of the district court

in decreeing a specific performance is right and should be, and is,

AFFIRMED.

EUGENE L. BODGE, APPELLEE, V. SKINNER PACKING COMPANY, APPELLEE: H. C. LYDICK, INTERVENER, APPELLANT.

FILED DECEMBER 1, 1926. No. 24192.

1. **Appearance:** JURISDICTION: WAIVER. An objection to the jurisdiction of the court over the person of the defendant is waived by joining with it an objection to the jurisdiction over the subject-matter.
2. **Receivers:** OBJECTION TO JURISDICTION. An objection to jurisdiction over the person is personal to the defendant, and cannot ordinarily be urged by an intervener.
3. ———: PERMISSION TO SUE. A foreign receiver may be given permission to sue in the courts of this state.
4. ———: PARTIES. A foreign receiver is a proper party plaintiff in a proceeding for the appointment of an ancillary receiver in this state.
5. ———: ANCILLARY RECEIVERS. An appointment of a receiver is an ancillary and provisional remedy, and, ordinarily, will not be made upon an original application, except in aid of the relief sought in the main case upon which it is dependent; but, where a general receiver for a corporation has been appointed by a court of the state of its domicile, having jurisdiction, the courts of this state may, in the exercise of proper discretion, appoint ancillary receivers in aid of the court of primary jurisdiction.
6. ———: ———. The pendency of a cause in a foreign state, in which a receiver has been appointed, is sufficient to authorize the appointment of an ancillary receiver in this state.

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

Fay H. Pollock, for appellant.

Congdon & Finlayson and *William Ritchie, Jr., contra.*

Heard before MORRISSEY, C. J., ROSE, DAY, GOOD and THOMPSON, JJ., and REDICK, DISTRICT JUDGE.

PER CURIAM.

Eugene L. Bodge was duly appointed receiver of the Skinner Packing Company, a Maine corporation, by the courts of that state. He subsequently brought this action in the district court for Douglas county and prayed for the appointment of an ancillary receiver for the assets of the corporation located in Nebraska. In his petition he alleged that, by virtue of his appointment by the courts of Maine as receiver of the defendant corporation, he was authorized to bring actions in other states for the appointment of ancillary receivers, and alleges that the corporation was insolvent and threatened with numerous suits by stockholders, creditors and others. Defendant corporation entered a voluntary appearance, waived notice, admitted the allegations of plaintiff's petition, and joined in plaintiff's prayer for the appointment of an ancillary receiver. An ancillary receiver was thereupon appointed on December 28, 1923.

On January 25, 1924, one Lydick, a stockholder in defendant corporation, filed a petition of intervention and a demurrer on behalf of himself and all others similarly situated, by which he attacked the validity of the appointment of the ancillary receiver. He alleged that the Maine court had no jurisdiction to appoint a receiver, and therefore the Nebraska courts had no authority to appoint an ancillary receiver. He prayed that the appointment of the receiver in Nebraska be vacated and the cause dismissed.

The record shows that defendant corporation was organized in the state of Maine; that the corporation had been financed by the sale of corporate stock and was the owner of a valuable packing and cold-storage plant in the city of Omaha, Nebraska; but the corporation was unable to meet its obligations, and was temporarily insolvent, and was threatened with many suits based upon alleged fraudulent representations in the sale of its capital stock.

It appears that prior to the application to the courts of Maine for the appointment of a receiver, by two officers of the corporation, a receiver had been appointed by the federal district court for Nebraska, and such receiver was then in possession of the property of defendant corporation. The record also shows that the application for the appointment of a receiver that was made in Maine was for the purpose of conserving the assets of the corporation outside of Nebraska, and that the ancillary proceedings herein involved were brought after the discharge of the receiver appointed by the federal court and in pursuance of the authority and direction of a supplemental decree of the Maine court.

The trial court found that Lydick had the right to intervene and be heard in the premises, but that his petition of intervention was without merit, overruled his demurrer and dismissed his petition of intervention.

The intervener, as appellant in this court, makes a number of assignments of error which may be reduced to four propositions which will be considered.

1. The Maine court was without jurisdiction to appoint a receiver. Assuming that intervener may raise this question, the point is not well taken, as it appears from the record that the statutes of that state specifically authorize such action in cases of domestic corporations (Rev. St., ch. 51, secs. 82 and 83) and the decree of that court must be given full faith and credit. *Sands v. Greeley & Co.*, 88 Fed. 130.

2. The district court for Douglas county had no jurisdiction over the person of Skinner Packing Company. With this was joined an objection to the jurisdiction over the subject-matter. The company by its president and attorney entered a voluntary appearance in that court, and the principal point here is that, a receiver having been appointed in Maine and an injunction issued prohibiting the corporation and its agents from exercising corporate franchises and privileges, the subsequent election of Campbell as president and his voluntary appearance for the corporation were void. Whether either of these acts constituted an exercise

of corporate franchises and privileges we need not decide, as the right to question jurisdiction of the person is personal to the corporation defendant. Moreover, by objecting to jurisdiction of the court over the subject-matter and the filing of a general demurrer, all objections to jurisdiction of the person are waived. *Summit Lumber Co. v. Cornell-Yale Co.*, 85 Neb. 468; *Lillie v. Modern Woodman of America*, 89 Neb. 1. And, again, there can be no doubt a summons issued and served upon the president or other chief officer of defendant would have invested the court with jurisdiction of the person, and we perceive no good reason to attribute less efficacy to a voluntary appearance and answer.

3. The receiver appointed by the Maine court has no capacity to sue. No doubt the general rule is that the authority of a general receiver, to whom title to the assets of a corporation has not been transferred, has no authority, as such, beyond the jurisdiction of the court appointing him; but it is quite generally held that, with the consent of the courts of a foreign jurisdiction, he may sue or defend, and especially in actions for the appointment of ancillary receivers to assist in carrying out the decree of the court appointing him. *Shinney v. North American Savings, Loan & Bldg. Co.*, 97 Fed. 9; *Buswell v. Order of the Iron Hall*, 161 Mass. 224; *Bidlack v. Mason*, 26 N. J. Eq. 230; *Ward v. Foulkrod*, 264 Fed. 627. The only case brought to our attention as holding the contrary, *Mabon v. Ongley Electric Co.*, 156 N. Y. 196, is not in point. The appointment was refused in that case as unnecessary, as the foreign receiver had full authority to sue in New York.

4. The principal contention of intervener is that the district court had no jurisdiction to appoint a receiver. He says: "Except where statutes provide otherwise, receivership is a purely ancillary remedy, and a receiver is only appointed as an incident to the principal relief sought."

That ordinarily the appointment of a receiver is an ancillary remedy, for the purpose of aiding the court in the granting of appropriate relief in the main suit upon which

it is dependent, is well settled in this state. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 68 Neb. 222; *Smiley v. Sioux Beet Syrup Co.*, 71 Neb. 586. But the question of the appointment of an ancillary receiver in aid of a receiver appointed by the courts of a foreign state is new in this jurisdiction. In the federal courts the practice is well established to appoint ancillary receivers in cases where a receiver has been appointed by a state court or federal court of another state or district, when the defendant corporation has property in the district in which the application is made, and which is sought to be collected and preserved, in order to aid the court of primary jurisdiction to accomplish the purposes for which the original action was brought. *Haydock v. Fisheries Co.*, 156 Fed. 988; *Sands v. Greeley & Co.*, 88 Fed. 130; *Shinney v. North American Savings, Loan & Bldg. Co.*, 97 Fed. 9; *Williams v. Hintermeister*, 26 Fed. 889; *Ward v. Foulkrod*, 264 Fed. 627; *Lewis v. American Naval Stores Co.*, 119 Fed. 391. The same doctrine has been established in a number of states. *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Scaife v. Scammon Investment & Savings Ass'n*, 71 Kan. 402; *Irwin v. Granite State Provident Ass'n*, 56 N. J. Eq. 244; *Evans v. Pease*, 21 R. I. 187.

The petition in this case asked only for the appointment of an ancillary receiver, and therefore cases discussing the jurisdiction of the court to appoint receivers upon an original application therefor are not controlling. However, it is insisted that there must be a main case pending in aid of which this appointment is sought, and this may be conceded; but, so far as this point is concerned, it seems from all the cases above cited that the courts considered the pendency of appropriate proceedings in the foreign court as meeting this requirement, and it was expressly so stated in *Scaife v. Scammon Investment & Savings Ass'n*, 71 Kan. 402.

Finally, it being conceded that a foreign receiver has no standing in courts of another state, the doctrine of comity would seem to require either that such authority be granted,

or that the other state appoint its own receiver in aid of the court of primary jurisdiction, as otherwise it would be practically impossible to properly adjust the affairs of an insolvent corporation having property in several jurisdictions.

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. FARMERS STATE BANK OF ADAMS: E. J. DEMPSTER, RECEIVER, APPELLEE: UNION AUTOMOBILE INSURANCE COMPANY, CLAIMANT, APPELLANT.

FILED DECEMBER 1, 1926. No. 25267.

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

G. E. Hager and *L. R. Doyle*, for appellant.

C. M. Skiles and *Homer L. Kyle, contra.*

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

PER CURIAM.

This action arises out of the failure of the Farmers State Bank of Adams, Nebraska, and involves the question as to whether three certificates of deposit, issued by that bank to the Union Automobile Insurance Company, hereinafter called the claimant, should be allowed as preferred claims and ordered payable out of the depositors' guaranty fund.

Claimant presented to the receiver, for allowance as preferred claims, four certificates of deposit—two for $2,000 each and two for $1,500 each. The receiver objected to the allowance of any of the claims, on the theory that the certificates did not represent valid and *bona fide* deposits made in the bank, such as are entitled to priority and payment out of the guaranty fund. The court found and determined that one of the certificates for $2,000 was a valid deposit and entitled to preference and payment out of the

guaranty fund, but found that the other three certificates, aggregating $5,000, were not entitled to preference, but were allowable as general claims against the bank. Claimant has appealed.

The real question in controversy in this case is whether or not the three certificates represent deposits which were made pursuant to a collateral agreement and in contravention of section 39, ch. 191, Laws 1923, which was in force at the time of the transaction herein involved. Said section provides: "No state bank shall receive any deposit upon any collateral agreement or condition other than an agreement for length of time to maturity and rate of interest, and no money deposited in any such bank, upon any such collateral agreement or condition, shall be guaranteed by the depositors' guaranty fund."

There are several assignments of error, only two of which will be considered: First, that the allegations in the receiver's pleading, in the nature of an answer, are insufficient to present the defense that the deposits in question were made upon a collateral agreement. It is true that the allegations in this respect are quite general, but they were sufficient to advise claimant that the receiver was contesting the allowance of the claims as preferred, on the theory that they were not *bona fide* deposits, such as are entitled to the protection of the depositors' guaranty fund. Had claimant desired a more specific and definite statement of the receiver's defense, he should have made timely application therefor. This he failed to do. In view of the fact that the pleading was not attacked, it should receive a liberal construction. We are of the opinion that, in the absence of a request for a more definite statement of the evidence, the answer is sufficient to raise the defense relied upon.

The second assignment is that the judgment is not supported by the evidence. The judgment of the court, denying three of the certificates a preference, was undoubtedly based upon the belief that the deposits were made upon a collateral agreement. It is the contention of the receiver

that the deposits were made pursuant to an agreement with the insurance company that it would make such deposits in consideration of the cashier of the bank acting as agent for writing insurance in the company, and that the vice-president of the insurance company procured the $5,000 deposit to be made upon an agreement that the bank would loan him personally $2,500.

From the record it appears that in the early part of 1923, Larson, the cashier of the Farmers State Bank, was appointed agent of the Bankers National Life Insurance Company. Thereafter the said insurance company made time deposits in the bank as follows: April 12, 1923, $2,000, July 17, 1923, $5,000, for both of which certificates of deposit were issued. It further appears that, pursuant to an agreement between Larson and the vice-president of the insurance company, when insurance was written by Larson the premiums received were deposited in the bank to the credit of the insurance company, and there was an agreement between them that these premium deposits should remain for some time. The only tangible evidence as to any collateral agreement with reference to the two time deposits is the circumstance that the deposits were made shortly after Larson was appointed agent; that near the time when the $5,000 was deposited the bank made a loan of $2,500 to the vice-president of the insurance company, and a letter written by the vice-president to Larson on the 25th of June, 1923, from which the following is an excerpt: "In regard to the company drawing out money, we would not draw out any deposits we made with you, but simply withdraw that part of the deposit which was represented by premiums written, and this was according to my agreement with you." Larson was the only witness called, and he testified that this statement in the letter had reference to the premium account in the bank and had no reference to the time deposits. In this he is corroborated by the fact that shortly before the date of this letter the insurance company had withdrawn from the premium account in the bank the sum of $936. The whole tenor of the

letter indicates that the bank, or some of its officers, had protested against withdrawal of these funds; hence, the letter of the vice-president. A careful reading of the letter indicates that the language therein, referring to an agreement, has reference to the premium account, or deposit of premiums, in the bank, and not to the time deposits.

We think the evidence is wholly insufficient to show that either the $2,000 or the $5,000 deposit was made upon any collateral agreement. The positive testimony of Mr. Larson is to the contrary and this testimony is sufficient to overcome any suspicion that might arise from the circumstances detailed. These two certificates were sold by the Bankers National Life Insurance Company to the claimant in this case, and when they matured the bank issued to the claimant the four certificates of deposit forming the basis of the claim in controversy. The evidence clearly shows that the sums of $2,000 and $5,000 were deposited in the bank, and further shows that the deposits were not made under any circumstances which violate or transgress any provision of the bank guaranty law.

It follows that the judgment of the district court, in so far as it denies preference to the three certificates of deposit, aggregating $5,000, and adjudges that they are not payable out of the guaranty fund, is erroneous and should be reversed. On the record as presented, judgment should have gone for claimant on all four certificates, allowing them as preferred claims payable out of the guaranty fund.

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

REVERSED.

WILLIAM MYERS, APPELLANT, V. UNION NATIONAL BANK OF FREMONT, APPELLEE.

FILED DECEMBER 1, 1926. No. 24990.

1. **Fraud**: PROOF. "To maintain an action for damages for false representation, the plaintiff must allege and must prove what representation was made; that it was false and so known to be

by the defendant charged with making it, or else was made without knowledge as a positive statement of known fact; that the plaintiff believed the representation to be true; that he relied on and acted upon it, and was thereby injured." *Scovel v. Isham*, 113 Neb. 238.

2. ———: DIRECTION OF VERDICT. Evidence examined, and *held* insufficient to establish fraud as against the defendant; and that the court did not err in directing a verdict for the defendant.

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

Dolezal, Spear, Mapes & Stevens and *J. C. Cook*, for appellant.

Courtright, Sidner, Lee and *Gunderson*, *Contra.*

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

DAY, J.

As frequent mention will be made in the course of this opinion to the Union National Bank, the First National Bank, and the Fidelity Trust Company, all of Fremont, Nebraska, they will, for the sake of brevity, except as otherwise designated, be referred to respectively as defendant, the bank and the trust company.

The plaintiff brought this action to recover from the defendant $9,400, with interest thereon from September 5, 1921, as damages claimed to have been sustained by him by reason of certain representations made by the bank, which plaintiff relied upon and believed to be true in purchasing a debenture for $9,400 issued by the trust company; that the representations were false and that plaintiff was damaged thereby. The representations alleged to have been made by the bank were that the debenture was secured by first mortgages on real estate; that the mortgages were held in trust by the bank for the benefit of the debenture holders. There was also a charge of conspiracy between the bank and the trust company to issue the debenture of

the trust company for the purpose of defrauding the public and the plaintiff, by falsely representing that the debentures were secured by first farm mortgages and that the same were held in trust by the bank for the protection of the debenture holders. There is no charge of wrongdoing on the part of defendant, but it is sought to be held liable for the tortious acts of the bank by reason of a contract, to which future reference will be made.

The answer of defendant denied that any fraudulent representations were made by the bank, denied the existence of any conspiracy between the bank and the trust company, and denied generally the allegations of the petition, except the formal allegation respecting the corporate capacity of the several institutions. As an affirmative defense, the answer alleged that the bank, in assuming to act as trustee for the holders of the debentures issued by the trust company, was acting beyond the scope of its charter as a National Bank, and the acts of its officers in that regard were *ultra vires* and not binding on the bank.

At the close of the testimony on behalf of the plaintiff, on motion of the defendant, the court directed the jury to return a verdict for defendant, which was done, and thereupon judgment was entered dismissing plaintiff's action. From this judgment, plaintiff has appealed. The ruling of the court on the motion to direct a verdict presents the principal error complained of by the plaintiff.

At the outset it may be observed that the action is brought solely against the defendant, and its liability, if any, rests upon a contract by which it is claimed it assumed the tort liability of the First National Bank. It appears that the First National Bank failed and a receiver was duly appointed to wind up its business affairs. With the approval of the court, a contract was entered into between the defendant and the receiver by which defendant took over the assets of the failed bank, with certain exceptions, and in consideration thereof agreed to assume and carry out all of the liabilities and obligations of the failed bank, with certain exceptions not material to our present inquiry.

Under the issues tendered by the petition, in order to hold defendant liable, it was necessary for the plaintiff to establish actual fraud perpetrated by the bank in inducing the plaintiff to purchase the debenture, or the existence of a conspiracy between the bank and the trust company to commit the fraudulent acts complained of, coupled with proof of the fraud on the part of the trust company. If a conspiracy to commit the fraudulent acts had been shown, then the acts and doings of the several conspirators in carrying out the fraudulent scheme would be binding on the bank and the trust company alike.

The record shows that the bank was chartered under the banking laws of the United States and the trust company was organized in 1911 under the laws of this state. These two institutions, at the time of the happening of the matters complained of, had their respective places of business on the same floor of a large building, and while each had a separate street entrance the interior arrangement was such that there was ready access from one to the other both in front and behind the counter.

It appears that on March 5, 1920, the plaintiff called at the bank and inquired of one of the officers the amount of interest the bank would pay on deposits. In the course of conversation the officer suggested to the plaintiff that he see the trust company and inducted him to the door of that institution. The plaintiff then talked to Mr. Donahue, secretary and treasurer of the trust company, who told him that the trust company was issuing debentures secured by first farm mortgages upon which it paid 5 per cent. During the conversation between plaintiff and Donahue, none of the officers of the bank were present. We quote a part of the plaintiff's testimony: "Q. Now, then, Mr. Myers, with reference to the security back of it, the mortgages that secured it, what did Mr. Donahue say about that? A. I said, Donahue, when I put it in there I don't want it loaned on anything only first mortgages. Q. What did he say? A. He said if they found a second mortgage in

the building the doors would be closed, and when I found the doors were closed I supposed they had found one. He said the inspector would come around, and if there was a second mortgage in that building the doors would be closed, and when I heard of it I supposed they had found one. Now, sir, that is straight." He further testified in answer to a question: "He told me not to worry, not to lose any sleep, because I was perfectly safe. The trust company was perfectly safe, not to worry a minute. He said, 'The trust company is solid and all right.' And I took his word for it that far. Q. Now, with reference to the bank, what did Mr. Donahue tell you about the signature of the bank? Why was it to be signed by the bank? A. He went right in there and they signed it while I was still there, the same day it was wrote out. I stood right near the door when they signed it up." He further testified that when the debenture became due it was renewed for another twelve months. On cross-examination, he testified that he gave Donahue a check or draft or something of that kind on March 5, 1920; that Donahue made out the debenture and went to the forward part of the building and somebody in the bank signed it.

The debenture, delivered to the plaintiff March 5, 1920, and the renewal thereof in 1921 are identical in form. The debenture, upon its face, recited that the trust company had received from William Myers and Betsy Ann Myers $9,400 in trust, which it agreed to repay to either of the above named parties or the survivor on the surrender of the certificate March 5, 1921, with interest at 5 per cent. per annum, payable semiannually. The certificate was renewed March 5, 1921, due and payable one year from date. The record is silent as to what, if anything, was said at the time of the renewal. Both certificates also contained a recital as follows:

"The funds represented by this certificate are invested in notes secured by first farm mortgages which are deposited with and held by the First National Bank of Fremont, Nebraska, as trustee in trust for the owner and holder of

this debenture. The proportion of said notes equal to the first mentioned amount, together with a *pro rata* interest in the security given, is and shall be considered the collateral property of the owner and holder of this debenture, but no right herein set forth shall affect the right of said Fidelity Trust Company to accept payment on such deposited securities, to execute and deliver releases of mortgages paid, or to substitute securities of equal value with said trustee, provided that all such securities either in the initial deposit or in substitution for withdrawn securities shall be such as to comply with laws of the state of Nebraska governing the investment of funds of trust companies."

On the back of the debenture was a certificate as follows:

"Trust Deposit Certificate. Securities referred to in the within debenture have been deposited with us by the Fidelity Trust Company to be held in trust for the holder of the debenture and subject to its terms. (Signed) First National Bank, Fremont, Nebraska, by H. Beckman, Vice-president."

It appears that on March 5, 1920, when the debenture was issued the total amount of outstanding debentures was $270,234.46 and the outstanding mortgages held by the trust company, including those which had been deposited in trust with the Bank, were $350,633.75. The trust company kept no separate account of the mortgages and securities held by the bank in trust, but it appears from the statement made by the trust company to the banking department of the state June 30, 1920, that the bank was holding mortgages in trust for the debenture holders on that date amounting to $122,725. From this, we think it may fairly be assumed that the trust company did not have on deposit with the bank mortgages of the face value anywhere near equal to the amount of debentures issued March 5, 1920. On March 5, 1921, when the original debenture was renewed, the total outstanding debentures were $214,-418.63 and the total mortgage loans held by the bank $98,-563.75. In any view which may be taken of the evidence, it would seem that the trust company did not have on de-

posit with the bank first farm mortgages to secure the amount of debentures issued.

Both institutions closed their doors October 31, 1921, and receivers were appointed respectively to close up the business. By order of the court the receiver of the bank turned over to the receiver of the trust company mortgages and securities held by the bank in trust. These securities consisted of first mortgages, village warrants, certificates of deposit, bank stocks, bonds and miscellaneous securities of the approximate value of $275,000. Many of these securities were second mortgages, some were mortgages on city property, and a large amount of stock in corporations in which the president of the trust company was interested. At the time of the trial in May, 1925, the receiver of the trust company had been able to collect an amount sufficient to pay a 10 per cent. dividend on the outstanding debentures.

We think it a fair inference from the testimony that the stock securities amounting to many thousands of dollars were worthless. There is no testimony, however, as to the value of these stocks and bonds at the time they were placed in trust in the bank as security for the debentures. Whatever may be said of the fraudulent character of the transaction as between the plaintiff and the trust company, the question still remains as to whether the bank participated in the fraudulent representations. In *Scovel v. Isham*, 113 Neb. 238, the rule is stated as follows: "To maintain an action for damages for false representation, the plaintiff must allege and must prove what representation was made; that it was false and so known to be by the defendant charged with making it, or else was made without knowledge as a positive statement of known fact; that the plaintiff believed the representation to be true; that he relied on and acted upon it, and was thereby injured." An examination of the evidence fails to disclose that any actual representation was made by the bank, as an inducement to the plaintiff to invest his money in the debenture bond. The plaintiff's own testimony is to the effect that at no time

did he talk to any officer of the bank. It is true that there was an interlocking of directors in each institution. In 1921 there were nine common directors out of a total of fifteen. In 1920 the record as to who constituted the directors of the trust company is not entirely clear. At the time of the transaction there were no common officers in the two institutions. The trust company kept an account with the bank and there was frequent interchange of business between them.

It will be noted that the certificate of the bank on the back of the debenture recites: "Securities referred to in the within debenture have been deposited with us by the Fidelity Trust Company to be held in trust for the holder of the debenture and subject to its terms." On the face of the certificate is a recital that the debenture is secured by first farm mortages, but it also states that the trust company has the right to accept payment on such deposited securities, to execute releases of mortgages paid, or to substitute securities of equal value with the trustee, provided that the substituted securities shall be such as shall comply with the laws of the state of Nebraska governing the investment of trust funds. Section 8068, Comp. St. 1922, defines the power of trust companies. Subdivision 7 thereof prescribes what securities a trust company may hold, and, among others, designates state, county and municipal bonds, stocks, warrants, bills of exchange, notes, mortgages and other investment securities, with a limitation that a trust company may not hold bonds upon which the interest has been in default for a period of two years preceding the date of purchase, and stocks that have not earned annual dividends of at least 4 per cent. for at least three years just prior to the date of purchase. Construing the language of the debenture in connection with the statute, it would seem that the trust company had the right in good faith to substitute, for the first farm mortgages, the stocks, bonds, warrants and other securities found in the possession of the bank, and that the obligation of the bank was fulfilled by safely holding the securities deposited with it.

The bank had no discretion in the selection of the securities.

If we consider the plaintiff's case resting upon the parole representation of Donahue, it would seem quite certain that the bank would not be held for his fraudulent statement, because the evidence fails to show that the bank participated in the wrongdoing. If we consider the case as based upon the representations set out on the face of the debenture, together with the certificate of the bank on the back thereof, then, as hereinbefore shown, the trust company, in exercise of good faith in the substitution of the securities, had the right to do just what it did do.

Is there any evidence of conspiracy between the bank and the trust company so that the bank would become liable for the acts and representations of the trust company? There is evidence that the trust company kept a checking account with the bank, and several instances when the bank charged the trust company's account with certain notes aggregating large sums, and that some of the notes ultimately proved to be worthless, but the record does not show whether the trust company had previously received credit in its account for these same notes, or whether it was a sale of the notes by the bank to the trust company or whether the notes were regarded as good at the time of the transaction. The record also shows that an officer of the bank had sold to the trust company a large block of stock which proved to be worthless, but there is no proof as to its worth at the time of the sale. The mere fact that a majority of the directors were common to both companies does not in itself prove a conspiracy. These instances are referred to as showing the weakness of the evidence as tending to show a conspiracy to defraud the plaintiff.

From an examination of the record, we conclude that the proof fails to establish any misrepresentation on the part of the bank which induced the plaintiff to purchase the debenture, and that no conspiracy between the bank and the trust company has been proved, so that the bank became answerable for the wrongdoing of the trust company. It

appears that Betsy Ann Myers died before the maturity of the debenture and under its terms the plaintiff became the survivor.

The trial court directed the jury to return a verdict for defendant upon the theory that it was an *ultra vires* act for the bank to become a trustee and therefore in no event could the bank be held liable. A considerable portion of the briefs are taken up with the discussion of the legal question presented by the *ultra vires* plea. However, in the view we have taken of the evidence, we deem it unnecessary to discuss this question. Finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

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

FILED DECEMBER 1, 1926. No. 25428.

Appeal and Error: FINAL ORDER. When, in an equity case, this court upon an appeal directs the district court to enter a different judgment than the one appealed from, the defeated party may, within three days from the rendition of the judgment in the district court and within the term, file a motion for a new trial, under section 8825, Comp. St. 1922. In such cases an order granting a new trial is not a final order and no direct appeal will lie therefrom. If there is error in such ruling, it may be reviewed only after a final disposition of the case.

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

John P. Breen and *A. H. Murdock*, for appellant.

S. L. Winters, contra.

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

DAY, J.

This case is before us on a motion to dismiss the appeal for want of jurisdiction, the point being that there was no

final order of the district court, from which alone an appeal would lie. At the same time the motion was argued, counsel for the respective parties argued and submitted the case on its merits, to be considered only in the event of the overruling of the motion.

The action was originally brought in equity by Thomas B. Ward, administrator of the estate of James Carroll, deceased, against Thomas Geary, to recover a sum of money which the administrator claimed belonged to the estate of James Carroll, deceased. The petition was framed upon the theory that the money in the hands of Geary was a trust fund; prayed that it be so declared and that an accounting be held.

The defendant answered that the money in his possession was a gift from Carroll. Upon a trial of the issues presented by the pleadings, the lower court found in favor of defendant Geary and entered judgment accordingly. From this judgment the plaintiff took an appeal to this court, where, upon a trial *de novo*, the judgment of the district court was reversed, with directions to enter judgment in favor of the plaintiff for $9,940 with interest thereon from the time the action was begun until the entry of the judgment. *Ward v. Geary*, 114 Neb. 50.

On January 25, 1926, in obedience to our mandate, the district court entered judgment against defendant Geary for $13,940.85. On January 28, 1926, during the term at which the judgment was rendered and within three days from the entry thereof, Geary filed a motion for a new trial, alleging, among other grounds, newly discovered evidence which could not, with reasonable diligence, have been discovered and produced at the trial. On consideration of the motion and the showing in support thereof, the trial court sustained the motion and granted a new trial. From this order the plaintiff took a direct appeal to this court.

The precise question presented by the motion to dismiss the appeal is whether the order granting a new trial was such a final order that an appeal may be taken therefrom without awaiting a final judgment. It will be noted that

when the judgment was rendered on January 25, 1926, the defendant was for the first time the aggrieved party. Up to this time, he was satisfied with the judgment. Thereupon the defendant, within three days from the rendition of the judgment, and during the term, filed a motion for a new trial under the provisions of section 8825, Comp. St. 1922, alleging, among other grounds, "newly discovered evidence which could not, with reasonable diligence, have been discovered and produced at the trial." The section referred to provides in substance that a motion for a new trial may be granted an aggrieved party upon the ground of "newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial."

The rule is well established that, where a motion for a new trial is filed under the provisions of the statute above referred to, and a new trial granted, such a ruling is not a final order from which a direct appeal will lie to the supreme court. *Brown v. Edgerton*, 14 Neb. 453; *Artman v. West Point Mfg. Co.*, 16 Neb. 572; *Johnson v. Parrotte*, 46 Neb. 51. Our practice recognizes the propriety of filing a motion for a new trial in an equity case, although such motion is not ordinarily necessary. *Smith v. Goodman*, 100 Neb. 284.

Section 9160, Comp. St. 1922, makes provision for vacating a judgment within a limited time after the term at which it was rendered, upon the grounds named therein, among which are the same provisions as in section 8825, Comp. St. 1922, respecting newly discovered evidence. With respect to vacating judgments after the term under the provisions of section 9160, Comp. St. 1922, there has been some confusion in the decisions of our court, our former holding being to the effect that an order granting a new trial was not a final order and that an appeal would not lie from such ruling until a final disposition of the case. *Trimble & Blackman v. Corey & Son*, 86 Neb. 5. In a more recent case, *Wunrath v. Peoples Furniture & Carpet Co.*, 98 Neb. 342, the *Trimble & Blackman* case, *supra*, was

overruled, and it now seems to be fairly established that an order granting a new trial under the provisions of section 9160, Comp. St. 1922, is a final order which may be reviewed on a direct appeal to the supreme court. A clear distinction is drawn between proceedings under sections 8825 and 9160.

In *Smith v. Goodman,* 100 Neb. 284, an equity case, this court had before it a somewhat similar situation. In the course of the discussion the court used this language:

"It is said that, this court having directed specifically what judgment should be entered in the district court, this court alone would have jurisdiction to entertain a motion for a new trial. Appeal to this court from a judgment in an action does not deprive the district court of jurisdiction to grant a new trial of that action. *Hellman v. Adler & Sons Clothing Co.,* 60 Neb. 580. This practice has been frequently recognized by this court. We do not think that this objection is well taken. While this court upon appeal tries equity causes *de novo,* it tries them wholly upon the record presented and the evidence taken in the trial court, and determines what judgment should have been entered by the lower court. The judgment directed by this court is predicated upon the evidence already taken, and if that judgment is induced by perjury in the record, or if new evidence is discovered of such a nature as would require the district court to grant a new trial in ordinary cases of judgment in that court, there seems to be no reason why the district court might not entertain jurisdiction in the one case as well as in the other."

Upon a review of the record in the light of our decisions, we hold, when, in an equity case, this court upon appeal directs the district court to enter a different judgment than the one appealed from, the defeated party may, within three days from the rendition of the judgment in the district court and within the term, file a motion for a new trial, under section 8825, Comp. St. 1922. In such cases an order granting a new trial is not a final order and no direct appeal will lie therefrom. If there is error in such ruling,

it may be reversed only after a final disposition of the case. The motion to dismiss the appeal is sustained.

APPEAL DISMISSED.

BRYCE CRAWFORD ET AL., APPELLANTS, V. JAMES B. HOUSER ET AL., APPELLEES.

FILED DECEMBER 1, 1926. No. 24396.

1. **Mortgages:** DEFAULT: MATURITY. A stipulation in a mortgage, authorizing the mortgagee to accelerate the maturity of the mortgage debt, if interest thereon is not paid when due, or if the taxes on the mortgaged premises are not paid at or before the time they become delinquent, is not forbidden, by the statute, nor contrary to public policy, and may be enforced.
2. ———: ———: RIGHT TO FORECLOSE. After the holder of the mortgage has commenced an action to foreclose, for default in the payment of interest and taxes, pursuant to such acceleration clause, the bringing into court of the amount of accrued interest and evidence of the payment of delinquent taxes will not preclude the plaintiff from prosecuting the action to decree for the amount remaining unpaid.

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

Brome, Ramsey & Crawford, for appellants.

W. A. Stewart and *N. M. York, contra.*

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

GOOD, J.

On May 7, 1924, plaintiffs filed an action to foreclose a real estate mortgage given to secure a promissory note for $7,000, dated March 1, 1919, and due March 1, 1929, bearing interest at 5 per cent. from date until due, payable semi-annually. The note contained this clause: "If this note is not paid at maturity, principal and interest shall draw interest at the rate of ten per cent. per annum from matu-

rity until paid." As disclosed by an alleged copy of the mortgage attached to the petition and made a part thereof, it contains a clause providing for the acceleration of the maturity of the debt upon failure of mortgagors to pay the taxes on the mortgaged premises at or before the time that the same, by law, become delinquent, and for failure to pay any interest, when due, and, upon the happening of such default, the holders of the mortgage have the option to declare the whole debt due and payable at any time after such default, to maintain an action for foreclosure of the mortgage, and that the commencement of such action is the only notice required of the exercise of the option. Plaintiffs further pleaded default in the payment of taxes and interest. On May 27, 1924, mortgagors filed an answer in which they admitted the execution of a note and mortgage and admitted an allegation of the petition that interest had been paid to the 1st day of September, 1922. They alleged that they were unable to determine whether exhibits A and B, purported copies of the note and mortgage, were true copies thereof, and therefore denied that they were such, and further denied all of the other allegations of the petition.

On May 31, 1924, defendant Dawson County State Bank filed an answer somewhat similar to that of the mortgagors, but incorporated therein a cross-petition, asking the foreclosure of a second mortgage upon the same premises. On June 30, 1924, mortgagors filed a motion in which they requested the court to permit them to pay into court, for the use and benefit of the plaintiffs, all interest, penalties and costs of the action to date, and that plaintiffs be not permitted or allowed to foreclose their mortgage at that time, and requested the court to compute the amount of interest due, and, upon payment of the amount into court for the plaintiffs, that plaintiffs' action be dismissed. On July 14, 1924, the court, in effect, sustained the motion, fixed the amount of interest and penalties which were due up to the 1st of September, 1924, required the production of certificates, showing redemption of the premises from tax sale,

and the payment of taxes then due, and thereupon dismissed plaintiffs' action, but rendered a decree of foreclosure in favor of the Dawson County State Bank upon its second mortgage. Plaintiffs appeal.

The principal question presented is whether the court erred in dismissing plaintiffs' petition. We have not been favored with a brief on behalf of appellees and are therefore left to conjecture what their theory of the case is. We assume, however, that the basis of mortgagors' motion and the ruling of the court thereon is to be found in section 9218, Comp. St. 1922, which provides: "Whenever a petition shall be filed for the satisfaction or foreclosure of any mortgage, upon which there shall be due any interest on any portion or instalment of the principal, and there shall be other portions or instalments to become due subsequently, the petition shall be dismissed upon the defendant's bringing into court, at any time before the decree of sale, the principal and interest due, with costs."

It is quite clear that this section has reference to mortgages which fall due in instalments and where action is begun for the foreclosure only of the part due. The instant case does not fall within that class. By the terms of the mortgage the whole debt became due and payable, at the option of the holders of the mortgage, on default in payment of interest or taxes. According to the averments of the petition, there was a default, and the holders of the mortgage had exercised their option to declare the whole debt due and payable. In this situation the mortgagors were not entitled to a dismissal on payment of interest, costs and taxes. Under the statute, they were entitled to this relief only on "bringing into court, at any time before the decree of sale, the principal and interest due, with costs." According to the averments of the petition, the whole debt was due and payable. After the holder of a mortgage has commenced an action to foreclose, for default in the payment of interest and taxes, pursuant to an acceleration clause, the bringing into court of the amount of accrued interest and evidence of the payment of delin-

quent taxes will not preclude the plaintiff from prosecuting the action to decree for the amount remaining unpaid.

The precise question has been heretofore presented and determined frequently in this court in the following cases: *Beisel v. Artman,* 10 Neb. 181; *Northwestern Mutual Life Ins. Co. v. Butler,* 57 Neb. 198; *Hartsuff v. Hall,* 58 Neb. 417; *Plummer v. Park,* 62 Neb. 665; *Hockett v. Burns,* 90 Neb. 1; *Moorehead v. Hungerford,* 110 Neb. 315.

Since material allegations of plaintiffs' petition were denied and the court, by its ruling, permitted no evidence to be introduced, a decree cannot be entered in this court.

Plaintiffs also contend that the decree of foreclosure in favor of the Dawson County State Bank is excessive. It appears so to be. However, the mortgagors are not complaining, and if the allegations of plaintiffs' petition are true this fact would not be prejudicial to them, since they would be entitled to the first lien, and it would be immaterial to them whether a decree on a second lien was excessive or otherwise.

For the reasons given, the judgment of dismissal is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

EDWARD OSBORNE V. STATE OF NEBRASKA.

FILED DECEMBER 1, 1926. No. 25133.

1. **Criminal Law:** INSTRUCTIONS. It is the duty of the court on its own motion to instruct the jury as to the general rules of law applicable to the case, and in such a way as not, either by omission or by expression, to withdraw from the consideration of the jury an issue or essential element necessary for its determination.

2. ———: REQUEST FOR INSTRUCTION. If either party desires an instruction which would serve only to guide the jury in weighing certain features of the evidence in connection with the issues, he must request such specific instruction. The proper time to make the request is when the evidence is concluded, and

the proper manner of making it is by submitting in writing the instruction desired.

3. ———: QUESTION FOR JURY. Under our practice in a criminal case tried to a jury, no matter how strong the proof of an affirmative fact presented by the state, and notwithstanding there may be no contradiction thereof, still it is for the jury to say whether or not the fact is established.

4. **Indictment and Information:** INTOXICATING LIQUORS: PLEADING AND PROOF. Where the statute provides for an increased punishment for a second or subsequent conviction for a violation of the liquor laws, in the absence of a statute regulating the procedure, in order that the court may be authorized to impose such increased punishment, the fact of a prior conviction must be set forth in the indictment, or information, and it is imperative that such fact be established by proper evidence and passed upon by the jury.

5. **Criminal Law:** INTOXICATING LIQUORS: INSTRUCTIONS. Under section 3288, Comp. St. 1922, the first offense is a misdemeanor, the second a misdemeanor with enhanced punishment, and the third a felony. In a prosecution under such statute, the defendant may be acquitted of the felony, but convicted as for a first or second offense. The instructions of the court should be given upon that theory, and the verdict of the jury responsive thereto.

6. ———. Section 3241, Comp. St. 1922, is complete within itself, both as to the misdemeanor and the punishment therefor, and section 3288 is without application.

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

Thomas, Vail & Stoner, 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.

THOMPSON, J.

In this case the plaintiff in error, hereinafter called the defendant, was informed against and prosecuted in the district court for Seward county on an information charg-

ing him: First count, being found "in a state of unlawful intoxication," and also charging the previous convictions set out in the third count; second count, transportation of intoxicating liquor (which was *nolle-prossed* at the close of the state's evidence); third count, so far as is necessary for our consideration, is as follows:

"That on the 4th day of September, A. D. 1925, at and within the county of Seward and state of Nebraska, Edward Osborne, then and there being, was then and there in the unlawful possession of intoxicating liquor, to wit, two pints of whiskey; he, the said Edward Osborne, having previously violated the provisions of chapter 187 of the liquor laws of the year 1917, as amended in 1921, and as contained in the provisions of chapter 33 of the Compiled Statutes of Nebraska for the year 1922, by having been convicted of the crime of unlawful possession of intoxicating liquor on the 3d day of January, 1922, in the justice court of George A. Emrick, justice of the peace within and for Seward county, Nebraska; * * * and having been convicted on the 4th day of August, 1919, for the unlawful sale of intoxicating liquor in the justice court of George A. Emrick, justice of the peace within and for Seward county, Nebraska. By reason of said prior convictions the defendant Edward Osborne is guilty of a felony under the laws of the state of Nebraska."

To each of these counts the defendant pleaded not guilty, and the case proceeded to a trial to a jury. No evidence was introduced on the part of the defendant. The jury returned a verdict which was, omitting formal parts, as follows:

"We, the jury, duly impaneled and sworn in the above entitled case, do find the defendant guilty on both the first and third counts of the information in the manner and form as charged therein."

On this finding of guilty the defendant was sentenced on the first count to pay a fine of $50, and on the third count to imprisonment in the state penitentiary for a term of one year. From this judgment the defendant prosecutes error

to this court, and for a reversal relies upon certain alleged errors which will be presented as considered herein.

As heretofore indicated the first count charged the defendant with being "in a state of intoxication" under section 3241, Comp. St. 1922, and also charged him with the same previous convictions contained in the third count as quoted. As neither of such previous convictions was for being found "in a state of intoxication," they were not within the provisions of such section, and as such section is complete within itself, both as to the misdemeanor and the punishment therefor, section 3288 is without application, as it is controlling only in cases where no other penalty is expressly provided. The trial court did not err in treating such plea of previous convictions in count one as surplusage, and rendering judgment as it did.

Our further consideration will be given to the third count only. The evidence as to the prior convictions was that of the Justice mentioned in the information, who still held such office and the custody and control of the judgment dockets, proof of which fact was by him shown, also that he knew the defendant personally, and that the defendant in this instant case was the same and identical person who was defendant in the other respective cases charged in the third count, such previous convictions having been had and entered on the 4th day of August, 1919, and on the 3d day of January, 1922; that he prepared and entered such original judgments, each of which was identified, the pages on which they appeared removed from the dockets, and received in evidence. Such judgments were identical in form except as to the offenses charged therein, designated the court in which they were rendered, set out the entire complaint in each case, the trial of the case, to wit, the reading of the complaint to the defendant, his plea of guilty thereto, the judgment and sentence entered thereon, and the satisfaction thereof on the part of the defendant. The complaints, proceedings and judgments respectively, as so shown by the record, are each in usual form. The evidence above revealed stands without contradiction, and,

further, no objection was lodged to any question propounded to such witness.

To the introduction of such judgment dockets the following objection was lodged and overruled: "The defendant objects to the introduction of this evidence for the reason that at this stage of the state's case the evidence offered is incompetent, irrelevant and immaterial, no sufficient foundation laid for the introduction of the same. The intention on the part of the state, apparently, at this time is to show prior convictions, and the evidence upon counts 2 and 3 of the complaint being insufficient to sustain a verdict against the defendant, Osborne, at this time either for transportation or possession" (as charged in the instant case). The objection lodged was of too general a nature to call for serious consideration of the court while the trial was in progress, and before the evidence was closed. In order that error may be predicated upon an objection to a question, or to the introduction of certain evidence, such objection should be sufficiently explicit to indicate the specific reason for the interposition thereof. *Miller v. Drainage District,* 112 Neb. 206. Further, the objection went to the entire record offered. Certainly, under any theory the record, so far as the trial, findings and judgment are concerned, was competent. A judicial record of this state may be proved by the producing of the original or a duly and legally certified copy thereof. Section 8919, Comp. St. 1922.

However, if the objection was broad enough to cover the question of the admissibility of this copy of the complaint as entered on the docket and embodied in the judgment before offering or accounting for the original, are we not correct in concluding that such record as offered was sufficient and competent to prove every fact necessary to be proved, including that of jurisdiction? While the law requires the justice to enter the judgment on his docket, it leaves the form of such judgment largely to the discretion of such court. Section 9482, Comp. St. 1922, provides: "The provisions of this Code, which are in their nature applicable and in respect to which no special provision is

made by statute, shall apply to proceedings before justices of the peace." Section 9483 provides, in part: "Every justice must keep a book, denominated a docket, in which must be entered by him: First. The title of every action in which the writ is served, or where the parties voluntarily appear. * * * Third. The filing of the bill of particulars of either party and nature thereof, and when not of too great length, the same shall be entered at length on the docket." Section 9984 provides: "It shall be the duty of every magistrate in criminal proceedings to keep a docket thereof as in civil cases." A complaint in a criminal case occupies a position similar to that of a bill of particulars in a civil case. Hence, as the complaint so extended in such record forms the basis of such judgment, it becomes and is an integral part thereof. Being an integral part of such judgment, in determining whether or not such limited court has jurisdiction, the consideration of such complaint extended at length in the docket is a proper element. That this was the intent of the law-making body is clearly implied from the above statutory enactments, if not expressly so stated therein. This holding is not in conflict with that in *King v. State,* 18 Neb. 375, or even those cases holding that mandatory entries prove themselves. While, as suggested by defendant in his brief in this court, but not at the trial in the district court, it would have been perfectly competent, and perhaps the better practice, to have followd the procedure indicated by section 10004, Comp. St. 1922, providing that a brief statement of the conviction shall be certified by the magistrate to the county clerk, and that the same or a certified copy thereof shall be competent evidence, or procure a duly and legally certified copy of the judgment and files upon which such judgments are based, as provided in section 8919, Comp. St. 1922, yet prejudicial error was not committed by the introduction of the original judgments identified and proved as above indicated, including the copy of the complaint embodied therein, and such judgments are competent evidence as to

the jurisdiction of the court, as well as to the subject-matter.

The next challenge to be considered is: Did the trial court commit reversible error by failing to embody within its instructions one limiting the effect of the evidence introduced of prior convictions? The only instance as reflected by his record wherein a request for such an instruction could even be implied is wherein the defendant's attorney, when complaining of the misconduct of the attorney for the state, and as a part of the challenge to such conduct, stated: "The defense further at this time asks the court to instruct the jury that the evidence introduced here to show previous convictions goes solely to the penalty that may be fixed, and that they, the jury, have no right to consider said convictions as evidence on the violation of September 4, 1925, but solely in connection with the penalty and not as to the question of guilt." As above indicated, this is the only instance where the defendant's attorney or any one in defendant's behalf suggested the qualifying instruction herein considered. While other instructions were offered by defendant, some of which were given, the qualifying instruction here being considered was not included therein. Neither was there an exception taken to the instructions given for the reason that the same did not include such a qualifying instruction, or other suggestion of any kind made to the court that such an instruction was desired.

It is the duty of the court on its own initiative to instruct the jury as to the general rules of law applicable to the case, and in such a way as not, either by omission or by expression, to withdraw from the consideration of the jury an issue or essential element necessary for its determination. However, if an instruction is desired by either party which would serve only to guide the jury in weighing certain features of the evidence in connection with the issues, then in such case it devolves upon such party to request such specific instruction. "The proper time to make the request is when the evidence is concluded, and the proper

manner of making it is by submitting in writing the instruction desired." *Carleton v. State,* 43 Neb. 373, 404. Thus, we have heretofore construed Criminal Code, section 478 (now section 10144, Comp. St. 1922), and also the Civil Code. This rule of construction, as well as of practice, is approved, announced, or affirmed in *Hill v. State,* 42 Neb. 503; *Housh v. State,* 43 Neb 163; *Carleton v State,* 43 Neb. 373; *Dolan v. State,* 44 Neb. 643; *Pjarrou v. State,* 47 Neb. 294; *Maxfield v. State,* 54 Neb. 44; *Martin v. State,* 67 Neb. 36; *German Nat. Bank of Hastings v. Leonard,* 40 Neb. 676; *Jeffries v. Chicago, B. & Q. R. Co.,* 88 Neb. 268; and *Schroeder v. Lodge* No. 188, I. O. O. F., 92 Neb. 650. As to such holding no impelling reason has been suggested, and neither are we aware of any, warranting a departure therefrom or a modification thereof.

We recognize, as has been called to our attention by attorneys for defendant, that in certain of our decisions we have used the word "request" without the amplifying words used in *Carleton v. State, supra,* and other cases cited. However, where we have so used the word "request" without giving it the full force and meaning herein expressed, it was inadvertently done, and that without an intent on our part to announce a rule of practice different from our holding herein. As an illustration of the foregoing, in the case of *Taylor v. State,* 114 Neb. 257, in the course of the opinion, we said: "In the case before us, no instruction was asked with reference to the purpose of the evidence of similar offenses, and error cannot be predicated upon the failure of the court to instruct upon that phase of the case." And in the syllabus we held: "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." Hence, considering the syllabus in connection with the opinion, such syllabus should be read as if there was added thereto the words, "if proper request is made." Thus, we are impelled to hold that error was not committed by reason of the omission of such qualifying instruction.

As to the motion presented on the part of the defendant at the close of the evidence for an instructed verdict for the defendant, as the case will be sent back for a retrial, as further shown in this opinion, in answer to this objection we will simply say that the evidence was sufficient to warrant the submission of the case to the jury, and error was not committed in so doing.

The defendant complains of the giving of instructions Nos. 9 and 14, given by the court on its own motion, which were as follows:

"No. 9. You are instructed that, before you can convict the defendant on the third count of the information, it will be necessary to first find, from the evidence, beyond a reasonable doubt, that on or about the 4th day of September, 1925, at and within the county of Seward and the state of Nebraska, the defendant did unlawfully have in his possession certain intoxicating liquor, to wit, whiskey, as charged in said count, of said information; but, if you believe from the evidence beyond a reasonable doubt that the defendant did so have said intoxicating liquor in his possession, then, before you can convict the defendant on said third count, you must further find, from the evidence, beyond a reasonable doubt, that he had been previously convicted of the crime of unlawful possession of intoxicating liquor on the 3d day of January, 1922, in the justice court of George A. Emrick, justice of the peace, within and for Seward county, Nebraska, and that he had been convicted on the 4th day of August, 1919, for the unlawful sale of intoxicating liquor in the justice court of George A. Emrick, justice of the peace, within and for Seward county, Nebraska."

"No. 14. You are instructed that, if you believe from the evidence, beyond a reasonable doubt, that on or about the 4th day of September, 1925, the defendant, at and within the county of Seward and state of Nebraska, did unlawfully have possession of intoxicating liquor, to wit, whiskey, as charged in said information, and that he had previously thereto been convicted of the crime of unlawful possession

of intoxicating liquor on the 3d day of January, 1922, in the justice court of George A. Emrick, justice of the peace, within and for Seward county, Nebraska, and that he had been convicted on the 4th day of August, 1919, for the unlawful sale of intoxicating liquor in the justice court of George A. Emrick, justice of the peace, within and for Seward county, Nebraska, then you should find the defendant guilty as charged in the third count of the information."

The question for our consideration is: Did such instructions properly submit to the jury the law applicable to the issues raised by a plea of not guilty, as entered to the third count? The section of the statute under which this conviction is sought is section 3288, Comp. St. 1922, which, so far as is material to this case, is as follows:

"Any person who shall by himself or through his agent violate any of the provisions of this act, shall, except where another penalty is otherwise expressly provided, be deemed guilty of a misdemeanor, and upon conviction thereof shall, for the first offense, be fined the sum of one hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than sixty days, and for the second offense, shall be imprisoned in the county jail not less than sixty days nor more than ninety days, and for the third and all other subsequent offenses shall be guilty of a felony, and shall be imprisoned in the penitentiary not less than six months nor more than two years, and shall in all cases pay the costs of prosecution."

It will be seen that the third count under such section 3288, in apt terms, charges the defendant with three offenses: First, with a misdemeanor; second, with a misdemeanor with enhanced punishment; third, with a felony. The plea of not guilty put each of such charges in issue. The instructions given took away from the consideration of the jury the first and the second, and by their terms denied the defendant the right of a determination thereof, and compelled the jury to render their verdict solely on the felony charge. The jury should have been permitted,

under proper instructions, to find that the defendant did or did not commit such first offense; if they found that he did not, then their verdict should be not guilty; if they found him guilty of the first offense, but not guilty of the second or third, they should so state in their verdict; if their finding was guilty of the first offense and but one of the previous convictions, they should designate the one, and return in their verdict a finding of guilty of the first and second offenses as charged, but not guilty of the third; if they found defendant guilty of the instant charge, and also of each of such previous convictions, then their finding should be guilty of the first, second, and third offenses, as charged in such third count, thus responding to each issue raised. As the instructions given limited the jury's consideration to the felony charge, and denied to the defendant the right to have submitted and considered separately by the jury the misdemeanor covered by the instant charge, and the misdemeanor covered by the enhanced punishment, and as we have found that it was the duty of the court on its own initiative to instruct as to the law of the case applicable to the issues raised, and the duty of the jury to respond by way of its verdict to such issues, such failure of the court to submit such respective issues, and such failure of the jury to respond thereto, impel us to conclude that, by reason of such respective irregularities, reversible error was committed. This conclusion is in harmony with our holding in *Wozniak v. State,* 103 Neb. 749, wherein in construing section 56, ch. 187, Laws 1917 (being the section under consideration herein), it is said: "The first and second offenses are misdemeanors with different penalties attached, and the third offense is a felony. In a prosecution for felony under the act, the defendant may be acquitted of the felony but convicted as for a first or second offense. The instructions should be given upon that theory." It has been suggested on the part of the state that the above quotation is followed in the same paragraph of the syllabus with the following: "Especially when the evidence as to former offenses is more doubtful

than as to the principal offense charged." The addition of such clause was perhaps added as reflecting the facts presented in that particular case. Under our practice and procedure it is axiomatic that the jury are the sole judges in the first instance of the evidence and the weight thereof, which includes the credibility of the witnesses. Under such rule the court determines the admissibility of the evidence, the jury its weight. In *Heldt v. State,* 20 Neb. 492, we held: "Where the defendant in a criminal case has pleaded not guilty, the jury, in order to convict him of the offense charged, must find from the evidence that he is guilty, and the court has no authority to say to them that certain allegations are uncontradicted, and therefore may be by the jury considered as proved. The credibility of the witnesses must be submitted to the jury." This holding is supported by *Goldsberry v. State,* 66 Neb. 312. Where the statute provides for an increased punishment for a second or subsequent conviction for a violation of the liquor laws, in the absence of a statute regulating the procedure, in order that the court may be authorized to impose such increased punishment, the fact of a prior conviction must be set forth in the indictment, or information, and it is imperative that such fact be established by proper evidence and passed upon by the jury. *State v. Findling,* 123 Minn. 413. Hence, we conclude that as to whether or not the evidence as to a former offense is more doubtful than that as to the principal offense charged, such evidence is for the consideration of the jury under proper instructions, as is also the question of the identity of the defendant. As said in *State v. McBroom,* 238 Mo. 495: "Under our practice, however, no matter how strong the proof may be of an affirmative fact presented by the state, and notwithstanding there may be no contradiction thereof, still it is for the jury to say whether or not the fact is established." While in some of our previous opinions a different holding has been indicated, we are impelled to conclude that the above announcement is the better rule and more in harmony with our practice.

As a new trial is to be had, the other claimed errors will not likely reoccur, and are therefore not considered.

The judgment of the trial court as to the first count is affirmed; and as to the third count is reversed and the cause remanded for further proceedings.

AFFIRMED IN PART AND REVERSED IN PART.

Note—See notes in 34 L. R. A. 398; 24 L. R. A. 432; 8 R. C. L. 276; 4 R. C. L. Supp. 544.

HAROLD BAILEY V. STATE OF NEBRASKA

FILED DECEMBER 1, 1926. No. 25318.

1. **Criminal Law:** INSTRUCTIONS. It is the duty of the court, without a request, to instruct the jury as to the law of the case.
2. ———: ———. Where the court in its instructions seeks to detail to the jury the material allegations necessary to be proved and by them considered, such statement of the court must embody therein every material fact essential to a recovery or conviction.
3. **Receiving Stolen Goods:** "CONCEAL" DEFINED. The word "conceal," as used in section 9612, Comp. St. 1922, relating to poultry stealing, means "to secrete with intent to deprive the owner of his property."

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

Joseph E. Daly, for plaintiff in error.

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

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

THOMPSON, J.

This action is one brought in the district court for Dodge county wherein the plaintiff in error, hereinafter called the defendant, was charged with receiving stolen chickens

in the first count, of which he was found not guilty by the jury; and charged in the second count, so far as necessary for our consideration, as follows: "That Harold Bailey, at and within the county of Dodge and state of Nebraska, on or about the 2d day of December, 1925, then and there being, did then and there unlawfully and feloniously conceal certain chickens, to wit, 6 Ancona hens, of the value of $5, 18 White Leghorn hens, of the value of $11, and one mixed breed rooster, of the value of $.50, of the aggregate value of $16.50, the personal property of John Betkie, said chickens having theretofore been stolen by other persons, and the said Harold Bailey, then and there well knowing the said chickens to have been stolen, with the unlawful and felonious intent of him, the said Harold Bailey, by concealing said stolen chickens to defraud the owner thereof." Upon this count he was found guilty and sentenced to imprisonment in the county jail for a period of six months. Each count was lodged under section 9612, Comp. St. 1922. To reverse this judgment as to the second count, the defendant prosecutes error to this court.

As reasons for a reversal many claimed errors are interposed. As to the challenge that the court erred in not sustaining the motion to quash, and in overruling the demurrer to the information, we find each thereof to be without merit.

However, a more serious question is presented by the challenge to instruction No. 4, given by the court on its own motion, which, so far as is necessary for our consideration, reads as follows: "The material elements of the second count of the information are as follows, to wit: (1) That the chickens in question were actually stolen. (2) That the defendant, Harold Bailey, knew said chickens were stolen at the time of his connection with the affair. (3) That the said offense occurred at or about the time alleged in the information, in Dodge county, State of Nebraska."

Such section 9612, *supra*, provides: "Whoever steals any chickens, * * * of any value, or receives or buys any chickens, * * * that shall have been stolen, knowing the same to have been stolen, with intent, by such receiving or buying, to defraud the owner; * * * or conceals any chickens * * * knowing the same to have been stolen, shall be imprisoned in the county jail not less than ten days nor more than six months or in the state penitentiary for not more than three years nor less than one year."

It will be noticed that the essential elements of the crime charged in such second count are as contained in the instruction quoted, and in addition that the defendant concealed such chickens. Thus, the instruction quoted omits to include therein a material, if not the most material, fact necessary to be proved and found by the jury before a conviction could be had, to wit, that the defendant as charged concealed such chickens.

It is elementary that it is the duty of the court, without a request, to instruct the jury as to the law of the case. It is also equally elementary that, where the court in its instructions seeks to detail to the jury the material allegations ncessary to be proved and by them considered, such statement of the court must embody therein every material fact essential to a recovery or conviction. Otherwise, only a part of the case is submitted to the jury, when by their verdict they must respond to the entire issues raised. The omission and effect thereof make it plain to us that the learned judge at the trial simply failed to notice the above suggested omission. Such omission, however, is not qualified or amplified by the other instructions given. Hence, we must conclude that prejudicial error has been committed by the giving of such faulty instruction, and it is not within the province of a reviewing court to conclude to the contrary.

However, as we have concluded that a new trial must be had, it might be well to inquire as to the import of the word "conceal" as used in such statute, as above quoted. In construing a similar section of the federal statute, in

Driskill v. Parrish, Case No. 4089, 7 Fed. Cas. 1100, 3 McLean (U. S. C. C.) 631, it was held: "To harbor or conceal under the statute, there must be a manifest design to elude the claim of the master." In insurance, "Concealment is the designed and intentional withholding of any fact material to the risk, which the assured in honesty and good faith ought to communicate" to the insurer. *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416. These interpretations to us seem to be forceful. It certainly could not have been the intention of the legislature to have held as a criminal one who had found such chickens in a crate on the highway, and had taken them home with him with the intention of caring for the same until the owner could be apprised thereof, or the proper officers notified, even if such person in the meantime concealed the chickens from the view of any and all; or if an officer of the law became possessed of such chickens in a similar way and secreted them for the same purpose, certainly he could not be found guilty of criminally concealing them. The intention running all through the statute here under consideration seems to be to punish one who has, by either of the acts covered thereby, unlawfully and intentionally deprived the owner of his property, or sought to do so by such acts. While it would have been sufficient to have lodged the charge in the language of the statute, yet the county attorney did not err by including in the second count of the information the words, "with intent to defraud the owner," as such words were in law covered by, and included within, the word "conceal" as used. The added words, "with intent to defraud the owner," were but a means of making that which was plain to the court and the lawyer equally plain to the jury which was to try and determine the issues presented. It seems, in all fairness, that such interpretation of the word "conceal" should have been carried to the jury by way of a proper instruction, even if not so expressed in the information.

The other claimed errors presented are not likely to occur on a retrial, and are therefore not considered herein.

The judgment of the trial court as to the second count is reversed and the cause remanded for further proceedings.

REVERSED.

DEAN, J., dissents.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, APPELLEE, V. AMERICAN STATE BANK ET AL., APPELLEES: BANKERS AUTOMOBILE INSURANCE COMPANY, CLAIMANT, APPELLANT.

FILED DECEMBER 1, 1926. No. 24817.

1. **Appeal in Equity:** PROCEDURE ON REMAND. "Where, in an equitable action, the decree of the trial court is reversed, and the case remanded generally, the situation of the parties is the same as at the beginning of the trial, and, in the exercise of a sound discretion vested in the trial court, amendments of the pleadings may be made, not inconsistent with the opinion of the appellate court, and a trial of all the issues had *de novo*." *Miller v. Ruzicka*, 111 Neb. 815.
2. **Judgment:** LAW OF THE CASE. "The rule of the 'law of the case' does not apply to questions of fact determined by this court between the same litigants in the same cause of action, when there is a material and substantial change in the testimony reviewed at the different hearings." *Phelps County Farmers Mutual Ins. Co. v. Johnston*, 66 Neb. 590.
3. **Evidence** examined, and *held* to support the judgment and decree of the district court.

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

Marcus L. Poteet and *Sterling F. Mutz*, for appellant.

O. S. Spillman, Attorney General, Claude S. Wilson, C. M. Skiles and *Albert S. Johnston, contra.*

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

EBERLY, J.

This is the second appearance of this case in this court. Our former opinion is reported in 112 Neb. 182, to which reference is made for a history of the litigation then had in this court. In our former opinion the judgment of the district court was reversed and the cause remanded. The journal of this court also discloses that the reversal was not, by its terms, limited in its effect to so much of the judgment of the district court appealed from as denied to claimant the benefits of the guaranty fund law.

The claim of the Bankers Automobile Insurance Company (hereafter referred to as insurance company) was based upon a certificate of deposit, dated June 18, 1921, for $13,000, issued by the American State Bank. Dwiggins, then managing officer of the bank, and, at the same time, secretary of the insurance company, acted in behalf of the bank, and the transaction was with one Charles Maixner, then president of the insurance company. Upon retrial of this case, after reversal by this court, the district court permitted amendments to be made by the receiver of the bank to the "objections to allowance" upon which the case was first tried. These amendments were based upon certain facts discovered since the prior trial. The district court also overruled the motion of the insurance company for judgment on the mandate.

After the introduction of further and additional evidence, not found in the record of the first appeal, the district court found, first, generally in favor of the receiver of the bank; second, that the original certificates, of which the one in suit was, in part, a renewal, had been issued fraudulently; that these certificates did not represent a deposit of money or its equivalent; that certain notes were left by Maixner, at the time of the original transaction, with the bank for collection; that while these notes were there a certificate of deposit was issued for Maixner's accommodation, only until such notes had been collected. The court further found that all but three of the notes had been,

in fact, collected. But the court found that, at the time of the original transaction, the notes uncollected had been fraudulently included in the amount of $8,158 which was in excess of their value at the time of the transaction. The court further found that the three original notes still uncollected, which had been tendered into court for the use of the plaintiff, were the property of the insurance company, and that, deducting the amount thereof from the face of the certificates, there remained the sum of $5,078.82 which represented funds in the hands of the receiver to which the claimant was entitled. And said sum was further adjudged payable from the state guaranty fund of the state of Nebraska.

The claimant below, appellant here, insists that the court erred in permitting the amended objections to be filed; that the issues presented by the amended objections have been adjudicated by the decision in supreme court; that the pleadings were insufficient in form; and that the judgment of the court is not sustained by the evidence in the record.

In view of the fact that the judgment had been reversed as an entirety and generally, and the case sent back for retrial, the action of the district court was proper.

"Where, in an equitable action, the decree of the trial court is reversed, and the case remanded generally, the situation of the parties is the same as at the beginning of the trial, and, in the exercise of a sound discretion vested in the trial court, amendments of the pleadings may be made, not inconsistent with the opinion of the appellate court, and a trial of all the issues had *de novo*." *Miller v. Ruzicka*, 111 Neb. 815. See, also, *Pinkham v. Pinkham*, 60 Neb. 600; *Badger Lumber Co. v. Holmes*, 55 Neb. 473; *Troup v. Horbach*, 57 Neb. 644.

If further appearing from the record that new issues of fact are raised in the present case which were not presented in the former adjudication, and the evidence in the record tends to support the new allegations of fact, the

situation presented is one in which the doctrine of *res judicata* or "law of the case" has no application.

"The rule of the 'law of the case' does not apply to questions of fact determined by this court between the same litigants in the same cause of action, when there is a material and substantial change in the testimony reviewed at the different hearings." *Phelps County Farmers Mutual Ins. Co. v. Johnston,* 66 Neb. 590. See *Missouri P. R. Co. v. Fox,* 60 Neb. 531.

While the evidence now in the record is conflicting yet considered as a whole, in connection with the facts and circumstances surrounding the transaction, it fairly sustains the conclusion stated by the district court and the judgment rendered in this case, in so far as the judgment of the district court is complained of by the appellant here. As to the judgment of $5,078.82 rendered against the state guaranty fund of the state of Nebraska, the defendant below is not complaining here, so that matter merits no consideration at our hands.

The judgment of the district court is

AFFIRMED.

PETER FROHNEN ET AL., APPELLEES, V. SANITARY SEWER DISTRICT NO. 1 OF MINDEN ET AL., APPELLANTS.

FILED DECEMBER 29, 1926. NO. 25339.

Municipal Corporations: SPECIAL ASSESSMENTS: INJUNCTION: LACHES. A suit to prevent the collection of instalments of special assessments levied by a city to pay the cost of a sewage system legally constructed and accepted may be dismissed for laches, where plaintiffs, pursuant to legal notice, appeared before the mayor and council, a body having jurisdiction to levy in some form the necessary taxes or assessments for special benefits, made objections to the special assessments of their property, failed without excuse to exercise the right of appeal, paid instalments without protest, and neglected to seek equitable relief for more than three years, while property owners generally paid their assessments in full or their instalments as they fell due.

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

J. L. McPheely and *King & Bracken,* for appellants.

Lewis C. Paulson and *J. H. Robb, contra.*

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

ROSE, J.

This is a suit for an injunction to prevent the collection of special assessments against real estate owned by plaintiffs in the city of Minden. The assessments were levied by the mayor and council to pay the contract price of a sewage system consisting of a main, a number of laterals and a disposal plant. The entire city was included in the sanitary district and the real estate therein generally was charged with special benefits. The amounts levied were certified to the county treasurer for collection. Several lot-owners are plaintiffs. The defendants are the sanitary district, the city of Minden, the mayor, the members of the council and the county treasurer. Invalidity of the assessments is pleaded as a ground for an injunction. Plaintiffs aver that the main and the laterals are not available to them, that their assessed property is not benefited by the sewage system, and that the greater portion of the funds to pay for the improvement can be raised only by general taxes based on the value of the assessable property in the sanitary district. The suit was defended on the grounds that the proceedings for the establishment of the sewage system and for the payment of the contract price were regular, legal and valid; that plaintiffs had an adequate remedy at law by appeal from the action of the city, and that relief in equity was defeated by laches—failure to appeal from the assessments and levy and delay in bringing suit. The district court found that the assessments were void and granted an injunction to prevent defendants from collecting them. Defendants appealed.

Were plaintiffs entitled to the equitable relief granted? They argue the affirmative of the question and invoke the following rules announced in *Hurd v. Sanitary Sewer District,* 109 Neb. 384:

"The erection of a sewage disposal plant is a general improvement the cost of which cannot be levied upon real estate by special assessment for benefits.

"The cost of main sewers in excess of special benefits can only be paid for by means of general taxation.

"All taxes for general purposes must be levied by valuation uniformly and proportionately.

"Special assessments for construction of sewers should be confined to abutting property."

Defendants insist that plaintiffs were not entitled to equitable relief and that the decision herein should follow *Weilage v. City of Crete,* 110 Neb. 544, where the court held:

"Where, in the making of assessments for local improvements and the levy therefor, property owners have opportunity to present their objections to the municipal body and to there have a hearing and pursue proceedings for review of the final decision of that body whether by error or appeal, they cannot fail to do so and then, in the absence of a substantial jurisdictional defect in the proceedings, question the proceedings collaterally by an independent suit to restrain the making of the levy."

Should equitable relief have been denied on the ground of laches? The material facts are not in dispute. It is conceded that the main and the laterals, with a single exception, do not extend to the properties of plaintiffs, but this and other pleas do not necessarily destroy laches as an equitable defense to the suit for an injunction. The assessments were payable in instalments covering periods of five or ten years. All of the plaintiffs except two paid one or more instalments. The assessments for the main, intersections and disposal plant aggregated $65,855.18. Instalments amounting to $39,477.44 were paid by property owners generally. Payments have been made on 676 as-

sessed properties. The assessments on 276 lots have been paid in full. Six or more instalments on the remainder of the lots, 400 in number, remain unpaid. No payment was made under protest. Ten plaintiffs acquired assessed property after the levies were made. Five purchased assessed property under an agreement to pay the assessments. The municipal proceedings for the construction of the sewage system, prior to the assessments at least, were regular and valid. The mayor and council, after the construction and the acceptance of the sewage system, had jurisdiction and power to levy in some form assessments to pay the contract price. They gave due notice of a meeting to hear and consider objections and to make and equalize assessments. At least ten of the plaintiffs appeared at that meeting and objected to proposed assessments for special benefits. The levies assailed in the suit for the injunction followed. Though there was an appellate remedy it was not pursued. The evidence does not disclose any excuse for the failure to appeal. There appeared to be a general acquiescence in the proceedings of the mayor and council. The special benefits were assessed September 24, 1921. From that date until the petition for the injunction was filed, January 12, 1925, plaintiffs slept on their rights. In the meantime property owners generally paid their instalments. If the assessments levied were void—a question argued but not determined—the city in that event had jurisdiction to raise the necessary funds by assessment or taxation in some other form. The evidence does not show that the latter course would have lessened the municipal burdens on the properties of plaintiffs. Under the circumstances the defense of laches was clearly established. The judgment of the district court is therefore reversed and the cause dismissed.

REVERSED AND DISMISSED.

PETERS TRUST COMPANY, TRUSTEE, V. JOSEPH D. MISKIMINS ET AL.: JAMES F. O'DONNELL, APPELLEE: WILLOW GROVE LAND & CATTLE COMPANY, APPELLANT.

FILED DECEMBER 29, 1926. No. 24292.

1. **Parol Evidence:** ASSUMPTION OF MORTGAGE. The grantee in a deed containing a clause that the grantee assumes and agrees to pay certain mortgages on the land is ordinarily not estopped from denying such recital, and may show by parol evidence that, in fact, he never made such an agreement.
2. **Mortgages:** ASSUMPTION: INSUFFICIENT EVIDENCE. Evidence examined, and *held* not to support the theory of cross-petitioner, O'Donnell, that the defendant Willow Grove Land & Cattle Company assumed and agreed to pay his mortgage on the land.

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

O. M. Walcott, James C. Quigley and *James J. Harrington,* for appellant.

W. B. Haley, J. A. Donohoe and *M. F. Harrington, contra.*

T. B. Dysart, for Peters Trust Company.

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

DAY, J.

The only question involved in this appeal is whether the defendant, Willow Grove Land & Cattle Company, hereinafter called the cattle company, is liable for the payment of a certain mortgage held by James F. O'Donnell by reason of an assumption clause in a deed in which the cattle company is grantee.

The judgment of the trial court was to the effect that the cattle company was liable for any deficiency which might exist in the payment of the O'Donnell mortgage, after the sale of the mortgaged premises.

The action was originally brought by the Peters Trust Company against Joseph D. Miskimins et al. to foreclose a

mortgage for $28,000 upon 2,831 acres of land in Cherry county, Nebraska. James F. O'Donnell as the holder of the second mortgage on the land and the cattle company as the holder of the fee title were made parties defendant. No question is raised as to the correctness of the decree in so far as it relates to the Peters Trust Company mortgage. On March 28, 1919, the Miskimins people, who executed the Peters Trust Company mortgage, sold the land in question to Karl Ferrin and, in closing up the transaction, Ferrin executed two notes, one for $11,500 to Joseph D. Miskimins and one for $11,500 to Elizabeth Miskimins, secured by a second mortgage upon the tract of land above mentioned. On April 15, 1919, in due course of business, the two notes above mentioned and the mortgage securing the same were sold and assigned to James F. O'Donnell one of the defendants in this action.

On July 7, 1919, Ferrin and wife conveyed by warranty deed the land in question to the cattle company. This deed contained a clause as follows: "Subject to a mortgage of $28,000 given the Peters Trust Company, also a second mortgage of $22,000 to Elizabeth Miskimins and Joseph D. Miskimins and which the said Willow Grove Land & Cattle Company hereby assumes and agrees to pay together with the interest thereon from July 7, 1919." It is without dispute that the term $22,000 should have read $23,000. O'Donnell filed a cross-petition alleging ownership of the two notes for $11,500 each, together with the mortgage securing the same, and alleged facts which entitled him to foreclose his mortgage. He also set out the deed from Ferrin to the cattle company and prayed for a foreclosure of his mortgage, and if upon the sale of the mortgaged premises there was a deficiency, that judgment be rendered against the cattle company for the amount thereof by reason of the assumption clause in the deed.

The cattle company, in answer to O'Donnell's cross-petition, admitted that it was the owner of the title to the land; admitted that its deed contained the assumption clause as set forth in the cross-petition, but denied that it

ever assumed or agreed to pay the mortgages on the land or either of them; that the words, "and which the said Willow Grove Land & Cattle Company hereby assumes and agrees to pay together with the interest thereon from July 7, 1919," were no part of the contract of purchase and were written in the deed by mistake of the scrivener and without the knowledge and consent of the grantor or grantee; that the cattle company purchased the land subject to the mortgages, but did not assume or agree to pay them or either of them. O'Donnell's reply pleaded matters intended to be an estoppel.

The case before us is one in equity, and under our statute requires us to try the case *de novo* upon the evidence presented in the bill of exceptions and to reach an independent conclusion without reference to the conclusion of the district court.

It will be observed that O'Donnell purchased the notes and received an assignment of the mortgage securing the same several months before the execution of the deed from Ferrin to the cattle company. Under the circumstances, therefore, it could not be said that O'Donnell relied upon the assumption clause in the deed in purchasing the notes and mortgages. In *Hare v. Murphy*, 60 Neb. 135, the purchaser of the mortgage debt had relied upon an assumption clause in a deed which had been duly recorded. The court held: "An agreement to pay a debt, although evidenced by a recorded instrument, is not conclusive in favor of a party who, in purchasing a lien against property, has acted on the faith of the record," and that "The grantee in a deed containing an assumption clause is not estopped from denying the validity of the contract of assumption as against a party who, relying on the recital in the instrument as spread upon the public records, purchased the debt secured by a mortgage on the land." Upon the authority of the above case, it seems clear that a recital in a deed whereby the grantee agrees to pay a mortgage is no essential part of the deed of conveyance, and such recital may be disputed by parol evidence.

It is the settled doctrine in this jurisdiction that, where a grantee in a deed assumes and agrees to pay a mortgage upon the land conveyed, the assumption contract inures to the benefit of the holder of the mortgage and he may sue thereon. The recital in a deed that the grantee assumes and agrees to pay the mortgage is not indisputable and may be contradicted by parol. One of the witnesses, who was the real estate agent who negotiated the exchange of the lands between Ferrin and the cattle company, testified that the agreement was that the cattle company was to take the Ferrin land subject to these two mortgages, and that it was no part of the agreement that the latter company was to assume and agree to pay the mortgages or either of them. The real estate agent represented both sides in bringing about the exchange of lands.

The scrivener who prepared the deed testified that the parties came in and had the deal all worked out and a memorandum of the transaction, "and in this transaction there were mortgages against the Ferrin ranch, a first mortgage to the Peters Trust Company for $28,000 and a second mortgage of $22,000 or $23,000 to Mrs. Miskimins. So they wanted to transfer that land to Kreycek subject to these mortgages." Kreycek was an officer of the cattle company. Witness further testified: "In the agreement there as I understood it, they were to take over their equity in the ranch. Q. In the Ferrin ranch? A. In the Ferrin ranch. And they left the matter of drawing up these papers all to me. * * * So this clause was simply a form I had always used in transactions of that kind where owners of land were transferring title where there were mortgages on them, and I just simply included that in it." He further testified that Ferrin was to pay the interest up to July 7, 1919, but not afterwards.

James S. Kreycek, who represented the cattle company in the deal, testified that it was no part of the consideration of the agreement that the cattle company was to assume or agree to pay either of these mortgages. He testified: "We were simply to take them subject to the mortgages." Fer-

rin, the grantor, testified in part as follows: "Q. In the deal, who was to pay that mortgage to the Peters Trust Company? A. There was nothing said to me about who was to pay it. * * * Q. They assumed the mortgages on this ranch. You were not to pay them, were you, Mr. Ferrin? A. They took the ranch subject to the mortgages, and there was nothing said to me about the mortgages. I suppose we talked it over in the bank. * * * Q. Let me ask you, then, if, in any of your preliminary conversations leading up to the completion of this deal, what your conversations were with relation to whether or not the Willow Grove took your ranch subject to mortgages or whether the Willow Grove was to take your land, assuming and agreeing to pay the mortgage lien? A. To my knowledge they never agreed to assume this loan, to the best of my knowledge. * * * Q. And isn't it a fact that with relation to the final payment of these mortgages you figured that the land itself would pay the mortgages in full? A. Yes; we thought the land was well worth the money."

Every one who was a witness in the case and cognizant of the details of the transaction seems to agree that the cattle company took the land subject to the mortgages, but did not assume and agree to pay them or either of them. Counsel for O'Donnell strongly urged that certain letters written by the cattle company indicate an intention on the part of the cattle company to pay the mortgage debt, and argue that these letters are corroborative of the assumption clause in the deed. It is true that the cattle company paid the interest on the O'Donnell mortgage, paid the taxes on the land, and probably intended to ultimately pay the two mortgages and save to itself the ranch property. To retain possession of the property, it was necessary probably that it pay the taxes and interest on the mortgages. The cattle company even wrote a letter to O'Donnell asking how much discount he would accept in settlement of his mortgage; but, as the cattle company had in mind a settlement of about 50 per cent. of the debt, the negotiations ceased. The conduct of the cattle company in regard to the pay-

ment of interest and taxes and the negotiations for a settlement was not at all inconsistent with its position that it did not assume the payment of the mortgages. It is quite probable that the cattle company intended, when it purchased the ranch, to pay the incumbrances, as at that time land values were advancing, but that is a far different matter from agreeing to do so. There is some proof that in former litigations the cattle company took a position which seems a little inconsistent with its present position, but the matter referred to did not rise to the dignity of an estoppel. It is a circumstance, however, to be considered in determining whether the assumption clause spoke the truth. O'Donnell did not change his position by reason of these facts. In our opinion, the most that can be said of the cattle company's position at that time is that it tended to corroborate the assumption clause in the deed. The mere fact that the cattle company took no steps to have the deed reformed after knowledge of the assumption clause is not at all conclusive. The principles herein stated find support in our own decisions. *Hare v. Murphy*, 60 Neb. 135; *Green v. Hall*, 45 Neb. 89; *Durland Trust Co. v. Payne*, 106 Neb. 135. The facts in *Cruzen v. Pottle*, 3 Neb. (Unof.) 453, are so different from these in the case before us as to be easily distinguished. In that case the mortgagee changed his position by giving the grantee in the deed an extension of time in which to pay the mortgage.

After reviewing the entire record and giving due weight to the assumption clause in the deed and the conduct of the cattle company, we are quite convinced that the cattle company never in fact assumed and agreed to pay the O'Donnell mortgage. We think the district court was wrong in holding the cattle company liable to O'Donnell for any deficiency which might arise after the sale of the mortgaged premises. The judgment of the district court is reversed and the cause remanded, with directions to so modify the judgment that the cattle company will not be held liable for the payment of any part of the mortgage debt.

REVERSED.

OSCAR W. VANDERPOOL V. STATE OF NEBRASKA

FILED DECEMBER 29, 1926. No. 25320.

1. **Evidence** examined, and *held* sufficient to submit to the jury the question of the guilt or innocence of the accused.

2. **Witnesses:** CROSS-EXAMINATION: IMPEACHMENT. Under section 8848, Comp. St. 1922, providing that a witness may be interrogated as to his previous conviction for a felony, but that no other proof is competent except the record thereof, a defendant in a criminal prosecution becoming a witness in his own behalf may be asked on cross-examination whether he has previously been convicted of a felony, and if he answers in the affirmative further examination along that line should cease. If he answers in the negative, he may be impeached only by the record of his conviction.

3. ———: ———: ———. When a defendant in a criminal prosecution becomes a witness in his own behalf and on cross-examination, in response to any inquiry by the county attorney made under the provisions of section 8848, Comp. St. 1922, admits that he has previously been convicted of a felony, it is error for the court to permit the county attorney, over objections, to inquire as to the character of the offense or to permit the record of the conviction to be introduced.

4. **Criminal Law:** ACCUSED AS WITNESS: CROSS-EXAMINATION. Under the record in this case, *held*, it was prejudicial error to permit the county attorney to inquire into details or to introduce in evidence the record of previous conviction of defendant after he had admitted conviction of a felony.

5. ———: ———: INSTRUCTIONS. It is the better practice for the court, even when no request is made, to instruct the jury that evidence as to the previous conviction of the accused of a felony is to be considered as affecting his credibility as a witness, and not as tending to prove the crime charged.

6. **Witnesses:** COLLATERAL MATTERS: IMPEACHMENT. "When a witness is cross-examined on a matter collateral to the issue, he cannot, as to his answer, be subsequently contradicted by the party putting the question." *Johnston v. Spencer*, 51 Neb. 198.

7. ———: ———. "The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea?" *Johnston v. Spencer*, 51 Neb. 198.

ERROR to the district court for Gage county: WILLIAM J. MOSS, JUDGE. *Reversed.*

Guy T. Tou Velle, for plaintiff in error.

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

Heard before ROSE, DEAN, DAY, THOMPSON and EBERLY, JJ.

DAY, J.

Oscar W. Vanderpool, hereinafter designated as defendant, was convicted in the district court for Gage county of an assault upon one L. E. Shurtleff with intent to inflict great bodily injury. By the judgment of the court, he was sentenced to serve a term of three years in the penitentiary. Alleging there was error upon the trial, defendant, as plaintiff in error, has brought the record of his conviction to this court for review.

It is first urged by defendant that the evidence is insufficient to sustain the verdict and the judgment. It appears that on the afternoon of December 10, 1925, defendant drove his automobile into the barnyard of one Lee Feerhusen, turning his car around so as to face the gate leading into the premises. He was alone and had 30 gallons of rye whiskey in his car. As he sat in his car, he engaged in conversation with Mrs. Feerhusen, and, among other things, stated that he had heard the officers had searched their place and asked if it were true. He was told they had. After some general conversation, defendant said to Mrs. Feerhusen: "If any one drives in, you go to the house." A few minutes later, L. E. Shurtleff, deputy sheriff, and Richard Steele, his assistant, who had suspected that defendant was engaging in the unlawful sale of intoxicating liquor and had been trailing him most of the day, drove into the yard. According to the state's testimony, as the car in which the officers were riding came to a stop near defendant's car, Shurtleff alighted and, going to the left of defendant's car and the side on which he was

sitting, opened the car door and asked; "Is this Mr. Vanderpool?" Without further ado, defendant drew a revolver and pointed it at Shurtleff's breast, saying: "Who in the hell are you?" Shurtleff answered: "I am Mr. Shurtleff, deputy state sheriff." Defendant then stated that no deputy state sheriff could take him alive and that he would blow his heart out. Shurtleff advised him that if he felt that way about it he could drive on. At this instant defendant's attention was diverted and he momentarily turned his face to the right, whereupon the sheriff, taking advantage of the situation, seized defendant's hand and gun and forced it back. During the struggle defendant attempted to reach another gun which lay on the seat beside him. Shurtleff thrust the gun against the side of defendant's head and face, dazing him and producing a wound from which blood flowed freely. He then pulled defendant out of the car, got possession of defendant's gun and ordered him to surrender.

After being subdued, defendant stated that he was a bootlegger and boasted of the fact; that he had sold 60 gallons that morning, and further stated: "It is a good thing the little girl was standing right behind you when you came up to the car or you would have been a dead man." Both revolvers were loaded. The one which defendant pointed at Shurtleff had the safety down and was ready for action. Other witnesses on behalf of the state tended to corroborate the evidence above outlined.

Defendant testified in his own behalf. In giving his version of the transaction, he stated that he was a bootlegger and carried the guns to protect himself against highway robbers and hijackers; that when Shurtleff and Steele came toward him he thought they might be highwaymen and drew his gun for self-protection. Steele had a gun in his hand. Defendant testified: "As they came up, I just opened the door and stuck my gun out like that (indicating) and said, 'Back up there and tell who you are.'" At that time Shurtleff was within three feet of the car. He stated

that he was deputy state sheriff. Witness then stepped out of the car and said: "That is a different question. If you are the honorable sheriff, I will surrender like a man, I am not fighting the law, I am dodging them." He also stated that, as he turned to lay his gun on the running-board of of the car to surrender, Shurtleff seized him and in the struggle defendant was struck on the head with an automatic gun. Witness denied that he stated he would have killed Shurtleff but for the presence of the little girl and generally denied the state's testimony.

Under this state of the record, we are of the view that the question of whether there was an unlawful assault to inflict great bodily injury was for the jury to determine. It is an assault for a person to unlawfully point a loaded revolver at another in a menacing or threatening manner. Whether such act is done with intent to inflict great bodily injury must be determined by all of the facts and circumstances of each particular case. The mere fact that defendant did not shoot when he had the opportunity does not necessarily show that he did not intend to do so. The intent of the assault and not the act in fact committed, provided there was an assault, constitutes the gist of an assault with intent to inflict great bodily injury.

In discussing the general question of intent to inflict great bodily injury, the rule is stated in 5 C. J. 740, sec. 218, as follows: "To constitute the offense under consideration there must be an assault which must be unlawful and coupled with a present ability to injure, but no battery need occur. As has been noted, the intent of the accused and not the act committed determines the character of the assault. * * * Therefore it has been held that the assault may be committed with an unloaded firearm, the intent being present, as where the assailant believed his weapon to be loaded." In *Keefe v. State*, 19 Ark. 190, defendant drew his pistol, pointed it toward the heart of the complaining witness, and said: "If you do not pay me my money, I will have your life." Complaining witness told defendant that if he would go back to the house he would

try to borrow the money and pay the debt. They went back to the house, defendant still holding the pistol in his hand, and complaining witness borrowed the money and paid the defendant, who went away and made no other attempt to use his pistol or injure the witness. These facts were held sufficient to sustain a conviction of assault with intent to inflict great bodily injury. In *State v. Mitchell,* 139 Ia. 455, it is held: "A conditional threat of injury with a deadly weapon, together with an act calculated to put the person assailed in fear, and the present ability to inflict the threatened injury, is sufficient to constitute the crime of assault with intent to inflict great bodily injury."

It is next urged that the court erred in giving certain instructions. We deem it unnecessary to prolong this opinion by a discussion of the criticisms addressed against the separate instructions. It is true certain instructions standing alone are faulty, but when construed as a whole the instructions correctly state the law. It is a well-established rule that instructions must be construed together. *Clary v. State,* 61 Neb. 688.

It is also urged that the court erred in permitting evidence to be introduced, over the objections of the defendant, pertaining to the details of a previous conviction of the defendant for felony. Defendant was a witness in his own behalf and as such subjected himself to the same rules as to cross-examination as apply to any other witness. Section 8848, Comp. St. 1922, provides: "A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof." Acting under the provision of the statute and over the objections of the defendant, which are omitted, but which are full and ample to preserve defendant's rights, the county attorney made this record: "Q. Mr. Vanderpool, have you ever been convicted of felony or pleaded guilty to a felony? A. Yes, sir. Q. When? A. Well, its, let's see, it has been quite a number of years back. Q. What was the charge? A. For fighting. Q. Is it not a fact that it was cutting with intent to kill?

A. It has been so long ago that I have forgot just how the charge read, but it happened when I was a boy under age. We were at Cortland, Nebraska, at a dance and I was defending myself." On motion of the county attorney, the latter part of the answer was stricken as self-serving. "Q. I want to know what the charge was. A. Well, as I say, I don't remember just how it was written on me, but I was charged with cutting and using a knife at a dance hall up here at Cortland, Nebraska." The state, over objections, then introduced the record of the conviction of defendant which charged him, with two others, of the crime of stabbing with intent to kill in one count and with stabbing with intent to wound in the other count, and that the defendant pleaded guilty to the charge, and being 16 years of age was sentenced to serve a term in the boy's industrial school. Defendant being a witness in his own behalf, it was competent to show that he had been previously convicted of a felony for the purpose of affecting his credibility. It is quite apparent that the line of inquiry after the first question above quoted was not intended for the purpose of laying the foundation for impeaching the witness, but rather for the purpose of showing that defendant was prone to engage in acts of personal violence. Defendant having admitted his previous conviction, the further inquiry upon the subject was improper. It is a well-recognized doctrine in criminal law that, ordinarily, previous conviction cannot be received in evidence as tending to establish guilt of the offense for which the accused is being tried. The right to inquire as to a previous conviction rests on the statute and is for the purpose only of affecting the credibility of the witness. A fair interpretation of the statute seems to permit the question whether the witness has ever been convicted of felony. If the witness answers in the affirmative the inquiry should end there, and thereafter it is improper to inquire into the nature of the crime or the details of the offense. If the witness denies or does not remember that he has been previously convicted of a felony, then he may be impeached on this point only by the production of the

record of his conviction. This view of our statute finds support in *Leo v. State,* 63 Neb. 723, *Ford v. State,* 106 Neb. 439, and in Iowa under a statute in exact terms as our own, *State v. Concord,* 172 Ia. 467.

We think the trial court erred in permitting the county attorney to press his cross-examination upon the question of the previous conviction of defendant beyond the point contemplated by the statute, and that under the facts and circumstances in this record the defendant was prejudiced by the ruling. While no request was made by defendant for an instruction on the question of the previous conviction of defendant, we think the better practice to be that the court should instruct the jury that evidence as to previous conviction of the accused of a felony is to be considered only as affecting his credibility as a witness and not as tending to prove the crime charged. Without such an instruction the jury are apt to regard the previous conviction as a circumstance tending to prove guilt of the offense for which accused is being tried. In *Keating v. State,* 67 Neb. 560, it is held: "By virtue of the statute, a prior conviction of a felony may be proved for the purpose of affecting the credibility of a witness, and the court may properly instruct the jury as to the purpose of such evidence."

It is also urged that the court erred in permitting certain witnesses called by the state, on rebuttal, to contradict certain evidence of witnesses for defendant, which was collateral to the main issue. Some of these instances are of a trivial character and we would not feel justified in reversing the judgment on that ground alone. The rule is well settled, however, that, "When a witness is cross-examined on a matter collateral to the issue, he cannot, as to his answer, be subsequently contradicted by the party putting the question. The test as to whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea? *Ferguson v. State,* 72 Neb. 350; *Johnston v. Spencer,* 51 Neb. 198.

Other questions are discussed in the brief for defendant, but they are not likely to occur upon a retrial of the case and will not be considered. For the reasons above set forth, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

LUCIUS B. PHELPS, APPELLEE, V. SNOW E. WILLIAMS ET AL., APPELLANTS.

FILED DECEMBER 29, 1926. No. 25342.

1. **Former Case Approved.** The principles of law announced in *Phelps v. Williams*, 112 Neb. 667, adhered to.
2. **Pledges.** Where a party holds two or more different collateral securities for a debt, he may proceed against any one or all of them at his election, and, in the absence of contract, is not required to exhaust one before proceeding against the other.
3. **Instructions** examined, and *held* to have properly submitted the issues to the jury.
4. **Evidence** examined, and *held* sufficient to sustain the verdict and judgment.

APPEAL from the district court for Franklin county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

George J. Marshall and *Bernard McNeny*, for appellants.

George Losey, contra.

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

DAY, J.

Plaintiff, Lucius B. Phelps, indorsee, brought this action against Snow E. Williams and P. A. Williams, defendants, upon a promissory note executed by defendants. The trial resulted in a verdict and judgment for the plaintiff for the full amount of the note with interest. Defendants have appealed.

This case was before us on a former occasion, being reported in 112 Neb. 667, wherein a judgment in favor of the plaintiff was affirmed. On a rehearing and reargument in that case, we vacated our judgment of affirmance, for reasons therein stated, reversed the judgment of the district court and remanded the case to the district court for further proceedings. 112 Neb. 671. In our two former opinions, the law of the case is fully discussed, and we are satisfied with the principles therein announced.

It appears that on October 10, 1920, the defendants executed their negotiable promissory note for $10,000 due in one year, in which Harry Newman was named as payee. On December 4, 1920, Newman indorsed this note and pledged it to the plaintiff as collateral security for a loan of $19,250 which Newman had borrowed from plaintiff and which was evidenced by Newman's note to the plaintiff for the amount of the loan. Newman failed to pay his note to the plaintiff when due and plaintiff brought this action against defendants on their note.

Defendants admitted the execution of the note, and by way of defense alleged want of consideration; that the note was procured by false and fraudulent representations on the part of the payee; denied that the plaintiff purchased the note for value; denied the indorsement by Newman; alleged that payment had been made on Newman's note to the plaintiff in the sum sufficient to discharge the same; that Newman's note to plaintiff was tainted with usury; that plaintiff was not a *bona fide* purchaser for value, and had notice of the fraud in the inception of the note. The same issues are before us as were presented upon the former trial. In that case, the following principles were announced:

"Where the payee of a negotiable promissory note, before maturity, in the usual course of business indorses and delivers it to a third person as collateral security for an usurious loan, the mere fact that such third party contracted for usurious interest will not deprive him of the character of an innocent holder.

"In an action on a negotiable promissory note by an indorsee, the question as to whether plaintiff is an innocent holder in due course, where the evidence is in conflict, is one of fact for the jury." *Phelps v. Williams,* 112 Neb. 667.

On the rehearing, we announced: "Where, in an action on a promissory note, the law imposes on the plaintiff the burden of proving that he acquired the title to the note without notice of defense, and the transaction by which he acquired title was conducted by his agent, it is necessary to prove that such agent was, at the time, without notice of defense." *Phelps v. Williams,* 112 Neb. 671.

In *Stephenson v. Perry,* 112 Neb. 294, in discussing the question of fraud in the inception of a note, the court used this language: "Upon the trial the defendant introduced testimony tending to prove that there was fraud in the inception of the note. It was incumbent upon the plaintiff, therefore, in making out his case to show that he was a *bona fide* holder. The rule is well settled that where fraud in the inception of a note is pleaded as a defense, and proof has been offered sufficient to make out a *prima facie* case, in an action by an indorsee against the maker, the burden is on the plaintiff to show that he is a *bona fide* holder." See *Central Nat. Bank v. Ericson,* 92 Neb. 396; *Ostenberg v. Kavka,* 95 Neb. 314; *Auld v. Walker,* 107 Neb. 676.

The testimony in behalf of the plaintiff, as well as his agent who conducted the negotiations of the loan from plaintiff to Newman and the taking of defendants' note as collateral to the Newman loan, was to the effect that neither of them knew of any infirmities against defendants' note or the consideration for which it was given; that it was taken in due course of business for the Newman loan.

Defendants again urge, as they did upon the former trial, that the evidence shows that Newman's note to the plaintiff had been paid out of other collateral given by Newman for his indebtedness to plaintiff. The evidence shows that Newman, after giving his note to plaintiff, transferred to plaintiff's brother certain real estate and assigned a lease. The securities were transferred as collateral to the

note and not in payment of it. In transferring these collateral securities, it was agreed that, after paying the charges of maintenance, taxes, and care of property, upon the sale of the property the remainder should be credited to the Newman note. The evidence shows that the amount collected on the lease and property did not equal the expense incident to the care of the estate and, at the time of trial, nothing had been realized by plaintiff on the securities. Criticism is made that the cost incident to the care of the property was unreasonable and exorbitant. That question could not be determined in this case as the parties interested in that question are not parties to this action. The rule is well established that, where a party holds two or more different collateral securities for a debt, he may proceed against any one or all of them at his election and, in the absence of contract, is not required to exhaust one before proceeding against the other.

The questions presented by defendants' answer were submitted to the jury under proper instructions and the jury found adversely to defendants' contention. Complaint is made of the failure of the court to direct a verdict in favor of defendants. Under the evidence, the court would not have been warranted in so doing. The case was fairly submitted to the jury and no reason has been pointed out why we should disturb their verdict.

No error appearing in the record, the judgment of the district court is

AFFIRMED.

DEAN, J., dissents.

WALLACE BEATTY, APPELLEE, V. JAMES H. CASSELMAN ET AL., APPELLANTS.

FILED DECEMBER 29, 1926. No. 24304.

1. Injunction: DISMISSAL: ACTION ON BOND. The dismissal by plaintiff of an action in which he has procured the issuance of a temporary injunction gives rise to a cause of action upon the injunction bond.

2. ———: ———: EFFECT. Where a defendant in an action was enjoined from removing sand and gravel from the premises of plaintiff, and the action was voluntarily dismissed by the plaintiff, without prejudice to a future action, such dismissal does not adjudicate or determine that the defendant possessed the right to remove sand and gravel from the plaintiff's premises.

3. ———: DAMAGES. In an action upon an injunction bond, the defendant therein may plead as a counterclaim damages sustained in and growing out of the transaction which gave rise to the issuance of the injunction.

4. ———: DISSOLUTION: DAMAGES: ATTORNEY'S FEES. "The necessary and reasonable expenses for attorney's fees incurred in procuring the dissolution of an injunction wrongfully issued are recoverable as an element of damages. But when the right to an injunction is ancillary, and not the main issue in the case, such damages are limited to the expenses incurred in securing the dissolution, as distinguished from the expenses incurred in the trial of the principal issues involved." *Darling v. McBride*, 86 Neb. 481.

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

R. O. Canaday, Honnold & Clarke and *Field, Ricketts & Ricketts,* for appellants.

Mothersead & York, contra.

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

GOOD, J.

This is an action upon an injunction bond in which plaintiff recovered the full amount of the bond. Defendants appeal.

The record discloses that defendant Casselman, principal obligor on the bond, was the owner of certain lands adjacent to the Platte river, in Scotts Bluff county; that plaintiff was removing therefrom sand and gravel which he was furnishing to contractors engaged in constructing some public improvement; that a controversy arose be-

tween Casselman and plaintiff over the right of the latter to take sand and gravel from the premises of the former; that Casselman commenced an action in the district court to enjoin the plaintiff in this action from removing sand and gravel and for an accounting for that which he had theretofore removed; that Casselman procured the issuance of a temporary injunction and gave a bond of $1,000, conditioned to pay all damages which the defendant might sustain by reason of the injunction, if it were finally determined that it was wrongfully issued; that some time thereafter Casselman dismissed the action, without prejudice, and thereupon this action was brought upon the injunction bond.

In this action plaintiff averred in his petition that he was engaged in the business of furnishing sand and gravel under contract to other parties; the issuance of the temporary injunction, which interfered with the furnishing of sand and gravel under his contract; that by reason thereof he was compelled to remove his machinery to another place, at great expense, in addition to attorney's fees of $250, which he had incurred in securing the dissolution of the temporary injunction. Defendant Casselman filed an answer, in which he alleged that he was the owner of certain lands; that plaintiff had been trespassing thereon, to his damage in a considerable sum; admitted the commencement of the action by him; the issuance of the temporary injunction and the giving of the bond; averred that plaintiff was removing sand and gravel from defendant's premises without any right, and prayed for damages by reason of the trespass committed by the plaintiff. All of the allegations of Casselman's answer, relating to the removal of sand and gravel without authority so to do, and the allegations in the nature of a counterclaim for trespass were, on motion of plaintiff, stricken, and defendants denied the right to introduce evidence in support of such allegations. These rulings of the court, in part, form the basis of defendants' assignments of error.

It appears from the record that, while the temporary in-

junction was in force, Casselman leased to the United States the premises from which sand and gravel were being taken, and that plaintiff, under this lease, reentered the premises and resumed the taking of sand and gravel. In all, the plaintiff was excluded from the premises for a little more than 30 days. Apparently, the trial court adopted plaintiff's theory that the dismissal of the injunction action was a complete determination of the plaintiff's right to take gravel and sand for the full period for which he was excluded, and that he was entitled to whatever damages he had sustained by reason of being excluded for that period; also that he was entitled to recover attorney's fees incurred in the injunction action.

The rule is well established, and it is conceded by both parties to this action, that the dismissal by plaintiff of an action in which he has procured the issuance of a temporary injunction gives rise to a cause of action upon the injunction bond. *Gyger v. Courtney,* 59 Neb. 555; 10 Ency. Pl. & Pr. 1124; 32 C. J. 450, sec. 774.

While the dismissal of the injunction action, without prejudice, gave rise to a cause of action for damages on the injunction bond in favor of plaintiff, the dismissal did not, of itself, determine that plaintiff was rightfully removing sand and gravel from the particular portion of the premises described in the temporary injunction; much less did it decide he was entitled to remove sand and gravel for the period of more than 30 days. An examination of the petition in the action brought by Casselman discloses that no facts were alleged which would warrant the issuance of an injunction. The action was brought for an accounting, as well as for an injunction. The temporary injunction enjoined plaintiff in this action from only a part of Casselman's land. The voluntary dismissal of the action in which the injunction was allowed adjudicated nothing more than that the injunction was not rightfully issued. Since the dismissal did not adjudicate the right of the plaintiff in this action to remove sand and gravel from that part of the premises from which he was enjoined, it follows that the

defendants in this action were entitled to plead facts which would show that plaintiff was not damaged by being precluded from removing sand and gravel. If plaintiff had not acquired and did not possess the right to remove sand and gravel from that part of the premises from which he was enjoined, it could not be urged that he was entitled to damages because he was enjoined from doing something that he had no right to do. Whether he was entitled to go upon the premises and remove sand and gravel and had the right so to do were questions of fact which the defendants had a right to have put in issue, and they had the right to offer their evidence upon the issues thus tendered.

It follows that the trial court erred in sustaining the motion to exclude those portions of defendant Casselman's answer in which he pleaded that plaintiff was taking sand and gravel without right or authority. If, upon a subsequent trial, the evidence shows that plaintiff was a trespasser, then we think defendant Casselman has the right to set forth in a counterclaim and recover any damages for the trespass upon the premises growing out of the transaction. It is unnecessary to require two actions to adjust the rights between these parties, when it may be done in one action. Courts look with favor upon the adjudication of all the rights of the parties in one action, when it can be properly done.

Another assignment of error relates to the allowance of attorney's fees as an item of damages. The rule applicable to this situation is correctly stated in *Darling v. McBride,* 86 Neb. 481, wherein it is said: "The necessary and reasonable expenses for attorney's fees incurred in procuring the dissolution of an injunction wrongfully issued are recoverable as an element of damages. But when the right to an injunction is ancillary, and not the main issue in the case, such damages are limited to the expenses incurred in securing the dissolution, as distinguished from the expenses incurred in the trial of the principal issues involved." As heretofore noted, the action was for an accounting, as well as for an injunction. In such case, only

attorney's fees incurred in procuring the dissolution of the injunction are recoverable. Some evidence of an expert nature was offered as to the value of such services, but no facts were proved which would form the basis for an expert opinion. In other words, there was no proof of the facts, assumed to be true, which were submitted in the hypothetical question put to the expert witness; nor is there anything in the record from which it can be determined that any motion to dissolve the temporary injunction was ever filed or submitted to the court, and it only inferentially appeared that an attorney was employed for the purpose of procuring a dissolution of the injunction.

The judgment of the district court is erroneous and is, therefore, reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

Note—See Injunction, 32 C. J. 362 n. 52, 450 n. 87, 474 n. 92, 475 n. 98, 482 n. 4; 14 R. C. L. 475.

JOHN SCHARMAN V. STATE OF NEBRASKA.

FILED DECEMBER 29, 1926. No. 25452.

1. **Criminal Law:** ACCESSORIES: Section 9541, Comp. St. 1922, as amended by chapter 89, Laws 1923, which provides that an aider, abettor, or procurer, whether present or not, shall be subject to the same prosecution and punishment as his principal, construed to mean: That the same rule as to the information, conduct of the case, and punishment, heretofore applicable to a principal, should thereafter govern his aider, abettor, or procurer, and that no additional facts need be alleged in an information against such accessory before the fact than are required against his principal.

2. **Indictment and Information:** ACCESSORIES. The abrogation of the distinction between principal and accessory as contained in section 9541, Comp. St. 1922, as amended by chapter 89, Laws 1923, does not contravene section 11, art. I of our Constitution, affording the defendant in a criminal case "the right * * * to demand the nature and cause of accusation."

3. ———: SUFFICIENCY. An information which, in ordinary terms, charges the defendant with the theft of personal property, and as explanatory thereof states that the theft was committed by others through the procurement of the defendant, constitutes but one offense, to wit, that of stealing.

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

Ruby & Tucker, 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.

THOMPSON, J.

John Scharman, hereinafter called defendant, was informed against in the district court for Cherry county, under section 9603, Comp. St. 1922, as amended by chapter 104, Laws 1925, and section 9541, Comp. St. 1922, as amended by chapter 89, Laws 1923; the former making cattle stealing a felony regardless of the value of the cattle, the latter subjecting an aider, abettor, or procurer, whether present or not, to the same prosecution and punishment as his principal. The trial resulted in a conviction, and defendant was sentenced to the state penitentiary for a term of not less than three years nor more than ten years. To reverse this judgment, defendant prosecutes error to this court.

The information, excluding the formal parts, in substance, charges the defendant with the unlawful and felonious taking and carrying away of ten head of cattle, the property of Albert H. Metzger, on or about August 1, 1925, without such owner's consent, with the intent to convert such cattle to a use other than that of the owner; that such theft was so committed by such defendant by reason of his having, on or about July 31, 1925, procured William Mogle and Edison Herron to so steal, take and carry away such cattle, which they, at such time, place, manner, and

form, did, in pursuance of such procurement. To this information a motion was filed by defendant asking that the state be required to separately state and number the crimes sought to be lodged against the defendant, also a motion requesting that the state be required to elect as to which crime it would prosecute, and also a demurrer to the information for the reason that it was void for duplicity, each of which in their order were overruled.

This brings us to a consideration of section 9541, Comp. St. 1922, as amended by chapter 89, Laws 1923. The uniform holdings of this court heretofore have been that, in order that an accessory before the fact could be held as principal, the evidence must show that he was personally present at the time of the theft, or in close proximity thereto, aiding and abetting therein. *Lamb v. State,* 69 Neb. 212; *Skidmore v. State,* 80 Neb. 698; *Guignon v. State,* 101 Neb. 587; *Neal v. State,* 104 Neb. 56. This rule we uniformly followed up and until the session of our legislature of 1923, when such section 9541 was amended by chapter 89, Laws 1923, to read as follows: "Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." Before such amendment such section 9541 provided: "Whoever shall aid, abet, or procure any other to commit any felony, shall, upon conviction thereof, be imprisoned in the penitentiary for any time between the respective periods for which the principal offenders could be imprisoned for the principal offense; or, if such principal offender would on conviction, be punishable with death, or be imprisoned for life, then such aider, abettor, or procurer shall be punished with death or be imprisoned for life, the same as the principal offender would be"—thus making an accessory before the fact, if present aiding and abetting and procuring, a principal; if not present, but aiding, abetting, or procuring, guilty of a substantive offense, which could not be proved under a charge of stealing. That this distinction was without reason for its basis

was indicated by us in *Skidmore v. State, supra,* where, in the course of the opinion, we said:

"In many states the old common-law distinction between principals and accessories before the fact has been abolished by statute. This seems to be a step in the general direction of reform by simplifying the law and abolishing technicalities; but the legislature of this state has seen fit to abide by the ancient and technical distinctions."

Thus it was indicated that such common-law rule should be abrogated by the legislature. We conclude that, in furtherance of this suggestion on the part of the court, chapter 89, Laws 1923, was enacted, and, further, that it was the intention of the legislature by such enactment to abrogate all distinction heretofore existing between such aider, abettor, or procurer and the one committing the act, and to provide that each should be prosecuted and punished as principals; that is, that the words "prosecuted and punished," as used in such section, mean that the same rule as to the information, conduct of the case, as well as the punishment, heretofore applicable to principals, should thereafter govern such aiders, abettors, or procurers, and that no additional facts need be alleged in an information against an accessory before the fact than are required against his principal. Thus applying the law applicable to the trial of one charged with a misdemeanor, or with high treason, where there are no accessories, to that of a charge of felony. In so construing this enactment the legislature did but adopt the suggestions of this court as above indicated, and followed the rule of advanced thought, for, if there ever was a forceful reason for drawing a distinction between such procurer and doer, such reason has ceased to exist. Certainly, where one procures another to do a criminal act, such act is in effect the act of the procurer as well as that of the doer; that is, one who does an act by the agency of another does the act himself, and thus becomes a principal, and, in a proper case, should be informed against as such.

While the information in this instant case, as set forth

in the forepart of this opinion, describes the manner in which the theft charged was committed, such descriptive allegations, while proper but not necessary under the statutes as they now exist, do not render such information vulnerable to the charge of duplicity, nor give rise to prejudicial error, nor contravene section 11, art. I of our Constitution, which provides, among other things, that "the accused shall have the right * * * to demand the nature and cause of accusation."

In the conclusions herein reached we are supported by the following authorities: *Francis v. State,* 111 Neb. 580; *People v. Bliven,* 112 N. Y. 79; *Hanoff v. State,* 37 Ohio St. 178; *Hronek v. People,* 134 Ill. 139; *State v. Hessian,* 58 Ia. 68; *People v. Outeveras,* 48 Cal. 19; *State v. Steeves,* 29 Or. 85; *Griffith v. State,* 90 Ala. 583; *State v. Geddes,* 22 Mont. 68; *Sanditen v. State,* 22 Okla. Cr. Rep. 14; *State v. Kent,* 4 N. Dak. 577. In the last three cases cited the constitutional question involved herein was considered.

It is urged that *State v. Geddes, Sanditen v. State,* and *State v. Kent, supra,* are not applicable to the Nebraska statute here under consideration, for the reason that in such respective cases they were construing statutes which provided, in substance, that no additional facts need be alleged in an information against an accessory than are required against his principal. As we view such clause, it is not a material part of such respective statutes, other than to make more plain the legislative intent. Such intent is made plain as to our 1923 act, not only by the act itself, but also by its purpose and its history as hereinbefore considered.

We have given careful consideration to all claimed errors presented, and while the material facts in issue were not as definitely stated in the instructions as they might have been, they were, however, sufficiently explicit to inform the jury as to the issues submitted for their consideration. The verdict of the jury is amply sustained by the evidence,

and reversible error was not committed either by the giving or refusing of instructions, or otherwise. The judgment of the trial court is

AFFIRMED.

ST. PAUL ENGLISH LUTHERAN CHURCH ET AL., APPELLANTS, V. EMIL A. STEIN, APPELLEE.

FILED DECEMBER 29, 1926. No. 25497.

Religious Societies: POWERS. When a church is so organized as to be a nonsynodical body, strictly independent of all other ecclesiastical connections or associations, and is governed solely within itself, its governing body being its membership, working by and through an elective church council, its property and support being derived from the voluntary and gratuitous contributions of its members, such contributions being solely for the use of such church, a majority of such membership may, ordinarily, control the right to the use and title to such property; and in furtherance of its design, as an ecclesiastical body, such church organization may call a pastor, and may discharge him, and transact such other or different business as may be consonant with the objects and purposes of its organization.

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

C. P. Anderbery and *Stiner & Boslaugh,* for appellants.

Bernard McNeny and *J. S. Gilham, contra.*

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

THOMPSON, J.

This action was brought in the district court for Franklin county by the appellants, hereinafter called plaintiffs, against the appellee, hereinafter called defendant, seeking an injunction preventing the defendant from attempting to officiate as pastor of the plaintiff church, or from exercising any of the rights, functions or prerogatives as pastor of such church, or from longer using or occupying the par-

sonage and other buildings forming a part of such church property. After the issues were duly joined, the suit coming on to be heard, judgment was rendered in favor of the defendant and against the plaintiff; to reverse which judgment plaintiffs appeal.

The facts as we find them reflected by the record are: That the plaintiff church is, and has been for more than four years prior to the commencement of this action, a duly, legally organized and existing religious society, as indicated by its name, composed of about 40 members, owning, controlling and using a parsonage and a church building and equipment in Hildreth, Franklin county, and the lands comprising the tract upon which such church building, parsonage, and other outbuildings are situate; that such properties were acquired by voluntary and gratuitous contributions of the members of such church at a cost and value of about $14,000; that some time in August, 1921, the plaintiff church employed the defendant as its pastor, as we construe the record being considered, for an indefinite period, at a compensation of $1,200 a year, together with the use of the parsonage, terminable at the option of either of the contracting parties upon fair and reasonable terms, upon giving notice, on either party becoming justly dissatisfied; that such pastor took possession of the parsonage and the equipment thereof, which he has ever since occupied, and began, and has continued, to exercise the powers and rights of a pastor in reference to such church and property; that for about a year prior to the institution of this suit a serious and continuous lack of harmony between the members of such church and their pastor arose, and has ever since existed, deterring the growth of the church membership, and that to the extent of defeating the objects and purposes for which such church was organized and the property purchased and dedicated; that friendly efforts on the part of the officers of such church and its members, looking to an amicable adjustment of all matters involved, were made to induce the defendant to withdraw as pastor of such church and vacate such par-

sonage, which were without avail; that in furtherance of such desire, on or about the 12th day of September, 1925, the church council, the body clothed with authority to so act, at a meeting thereof duly called and held, passed a resolution demanding the discharge of such pastor; that such action of such church council was carried to defendant and to the congregation, and looking to the consummation of such resolution, and after due notice given, the same was presented to the congregation and members of such church at a special meeting called for such purpose and held on the 15th day of September, 1925, and the question of such dismissal and vacation of premises was put to a vote of such members, a majority of whom were present, and the resolution previously adopted was, by a unanimous vote of all the members of such church and congregation attending such meeting and voting on such question, approved and the defendant dismissed as pastor of such church and all his rights and prerogatives by reason of such employment terminated, and ordered to vacate such premises and surrender the keys thereto within 30 days from such date; that by reason of such acts of such officers and membership defendant ceased to be the pastor of such church, was divested of all rights, privileges and prerogatives connected with such employment, and his services as pastor terminated; that, notwithstanding the foregoing, the defendant has refused to vacate the premises, and threatens to and will continue to perform the duties, rights and functions of a pastor unless in this proceeding prevented; that, by reason of such wrongful acts on his part, the respective members of such church have refused to contribute to its support, notwithstanding such church is indebted in the sum of $5,500, which sum is long past due and which debt was created as an aid to the acquiring of such property; that the holders of such indebtedness threaten to proceed to enforce collection thereof, and that the church is by reason of the foregoing without means to meet such debt or to care for the same without sale of the property or otherwise diverting it from the uses and purposes for which it was

dedicated; that the right and authority to remove and discharge such pastor has at all times been vested in the church council and the membership of such church, and that such right of removal has been properly exercised; that plaintiffs are without an adequate or speedy remedy at law; and that unless relief is immediately granted great and irreparable damage will be done, not only to the property, but also to such church as an organization, and its usefulness and purpose rendered futile.

It is admitted on the part of all parties to the suit, and if not admitted it is sustained by the record, that this congregation is a nonsynodical body, and strictly independent of all other ecclesiastical connections or associations. It is claimed by the defendant, and alleged as a part of his defense, that the Lutheran church of both Iowa and Nebraska, by and through a synodical body, has sole and exclusive jurisdiction of the question here presented, as well as others of a similar nature, and that in the early part of this unfortunate situation the pastor, as well as those contending against him, submitted the question to such synodical body, and that it was by such body determined, after due consideration, in favor of the defendant, and that thereby, and by reason thereof, these plaintiffs are estopped from contending to the contrary. As to this, it may be admitted that, if this plaintiff church was a member of such synod, possibly the conclusion contended for by defendant should be sustained. However, as we find from the record, before such plaintiff church could become a member of such synodical body, or come under its jurisdiction, it was a condition precedent that it must sign a written or printed application directed to certain officers of such synodical body, asking to be received within its jurisdiction. Such application was not made or had. Hence, the mere attempt on the part of the minister and the congregation, acting through its proper officers, to adjust conditions in a friendly and Christian way could in no manner estop either from proceeding in a different manner if the action of the synod was not satisfactory, for, as testified to by the highest

officers of such synod, its actions at best were but advisory. Such an attempt on the part of the congregation and its pastor was laudable, but could not be said to be more than an attempt at perfecting a settlement, and it should not be by us given further or more binding force.

It is further urged on the part of the defendant that in seeking a pastor the plaintiff church applied to such synod, and that the synod, acting in harmony with its usual custom, assigned the defendant to plaintiff church as pastor. This, however, did not bring the plaintiff organization within the synod, and did no more than leave the pastor, defendant Stein, under the direction of such synodical body. The plaintiff church being a nonsynodical body, the law as announced by us in *Kenesaw Free Baptist Church v. Lattimer,* 103 Neb. 755, is controlling, and not that as announced in *Pounder v. Ashe,* 44 Neb. 672, where a synodical body was under consideration. From the foregoing it will be seen that the evidence amply sustains the contentions of the plaintiffs as against those of the defendant. Hence, we conclude that the trial court erred wherein it found that the acts of the plaintiffs estopped them from prosecuting this action, and for that reason refused to grant the relief sought by plaintiffs.

While other claimed errors are urged on the part of the defendant, we are constrained to believe that this little struggling congregation, as well as Reverend Stein, have had trouble sufficient, and that the record here should be left in such a way as to prove an inducement to each to continue their efforts in their respective fields, rather than to intensify the situation by a discussion of such claimed errors. It is sufficient to say that we have considered each thereof, but find them not to be of such potential nature as to defeat the plaintiffs' right to the relief prayed. As we view the questions involved in this case, each thereof should have been resolved in favor of the plaintiffs, and the trial court erred in not so concluding.

It follows that the decision of the trial court should be,

and is, reversed, and the cause remanded, with directions to enter judgment in harmony with this opinion.

REVERSED.

Note—See Religious Societies, 34 Cyc. 1159 n. 18, 1188 n. 67; 8 A. L. R. 105; 23 R. C. L. 454.

MICHEL KNOTHE V. STATE OF NEBRASKA

FILED DECEMBER 29, 1926. No. 25583.

1. **Statutes:** "BOOTLEGGING." The term "bootlegging" has acquired, as a matter of common knowledge, a definite import and embraces certain well-understood characteristics. The use of the word "bootlegging" in the title of chapter 106, Laws 1925, in connection with the words "providing penalties for first, second and subsequent convictions for bootlegging," does not therefore render the amendment indefinite or uncertain in such degree as to invalidate the act.

2. ———: CONSTITUTIONALITY. Chapter 106, Laws 1925, examined and held to be an amendatory act evidencing a definite intention of the legislature, the provisions of which are consistent with its title, and with the title and subject-matter of the original law to which it applies, and therefore not enacted in contravention of section 14, art. III of the Constitution.

3. **Criminal Law:** BOOTLEGGING ACT: CONSTRUCTION. Chapter 106, Laws 1925, construed, and *held* to provide penalties for first, second and subsequent convictions for bootlegging, which it defines, and to the punishment of which its penalties are limited.

4. **Indictment and Information:** SUFFICIENCY. The rule in this state is that, to charge a statutory offense, information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent.

5. ———: ———. The language of the information in the instant case, "did then and there sell intoxicating liquor," does not charge "bootlegging," nor an offense to which the penalties of the amendment above referred to apply. It charges, however, an offense under section 3238, Comp. St. 1922, punishable exclusively as provided by section 3288, Comp. St. 1922.

6. ———: ———. The words, "contrary to the form and provisions of chapter 106, Laws 1925," appearing in the instant complaint are, at most, an argumentative statement of the legal results of the facts previously stated, and this mere legal conclusion cannot cure any defects in the premises on which it assumes to be predicated.
7. **Criminal Law:** SENTENCE. In view of the terms of the instant complaint, and the trial court having no jurisdiction under section 3288, Comp. St. 1922, to impose a penalty of both fine and imprisonment, its attempt so to do is in excess of its powers and renders such sentence wholly void.
8. ———: ———. Under the facts in the record, it appears that the trial court on the remand of this case has ample powers to proceed to assess any of the penalties provided by section 3288, Comp. St. 1922.

ERROR to the district court for Merrick county: FREDERICK W. BUTTON, JUDGE. *Reversed, with directions.*

Elmer E. Ross, for plaintiff in error.

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

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

EBERLY, J.

The defendant, upon entry of a plea of guilty, was sentenced by the county court of Merrick county, Nebraska, to pay a fine of $100 on the first count of an information charging unlawful possession of intoxicating liquor, and to pay a fine of $100 and be imprisoned in the county jail for 60 days upon the second count thereof, which information charged "that Michel Knothe, then and there being, * * * on or about the 15th day of April, 1926, did then and there unlawfully sell certain intoxicating liquor, contrary to the form and provisions of chapter 106, Laws 1925." The defendant prosecuted a proceeding in error to the district court from so much of the sentence as imposed both fine and imprisonment, under the second count above

quoted. From an adverse determination of the proceeding in the district court, defendant appeals.

The defendant first contends here that chapter 106, Laws 1925, entitled "An act to amend section 3239, Compiled Statutes of Nebraska for 1922, relating to intoxicating liquors; providing penalties for first, second and subsequent convictions for bootlegging; to repeal said original section; and to declare an emergency," is null and void for the reason that the enactment thereof was in contravention of section 14, art. III of the Constitution. This contention we cannot sustain.

In view of the original title under which chapter 33, Comp. St. 1922, was enacted, had the provisions now questioned appeared in that act at the time of its original adoption, it unquestionably would not have been subject to challenge because they are not embraced in the title of the act of which it would then form a part.

The title of chapter 106, Laws 1925, discloses that its purpose is (1) to amend section 3239, Comp. St. 1922, and in terms limit the penalties which its terms provide; (2) to provide penalties for first, second and subsequent convictions for bootlegging. The language of this section before it was amended appeared to be as follows: "Bootlegging. It shall be unlawful for any person to, in any manner, knowingly carry, transport or deliver any intoxicating liquor to or for any person to be kept, stored, sold, furnished, given, traded or otherwise disposed of in violation of law." These terms disclose that section 3239, Comp. St. 1922, was the "bootlegging section" of our liquor law at the time of its original passage by the legislative department of our government. True, it did not purport to punish "bootlegging" *eo nomine*. But under that term as a section or subtitle, certain acts, each so defined as to embrace the essential elements of bootlegging, as commonly understood, were enumerated and punished. The transaction thus punished was so described as to be wholly differentiated from section 3238, Comp. St. 1922, and all other proscribed acts of that general law. A fair construction

of the amendatory provisions of chapter 106, Laws 1925, discloses that both as to title and substance, properly construed, the amendment pertains wholly to the subject of "bootlegging" and applies to section 3239, Comp. St. 1922, only, and does not relate to, modify, or affect or qualify section 3238, Comp. St. 1922, or any other provisions of the liquor law. The title, therefore, of the amendatory act is sufficient; the effect of the amendatory act is restricted to the section amended, and is within the limits of its title. It follows, therefore, that the validity of the amended section 3239, Comp. St. 1922, must be sustained.

The second question presented is: Does the second count of the complaint, which we have heretofore quoted, charge an offense under section 3239, Comp. St. 1922, as now amended?

Prior to the adoption of chapter 106, Laws 1925, the proscribed acts before us, charged in the second count of the information in this case, were embraced in the language employed in section 3238, Comp. St. 1922, viz.: "It shall be unlawful for any person to * * * sell * * * any malt, spirituous, vinous and intoxicating liquors, except * * * only as hereinafter provided."

The crime thus defined, as a first offense, was punishable under section 3288, Comp. St. 1922, by a fine of $100 or imprisonment in the county jail not less than 30 days nor more than 60 days. Neither of the sections last referred to appear to have been, in terms, amended, and remain unchanged.

The county court adopted the view that the offense charged in the second count was embraced in the language of chapter 106, Laws 1925, the penalties of which rendered the imposition of both fine and imprisonment mandatory. The district court concurred in this conclusion. In this branch of the case, therefore, two questions are presented: (1) Does a charge that the defendant "did * * * unlawfully sell certain intoxicating liquor," standing alone, state an offense punishable under section 3238, Comp. St. 1922, or

punishable under section 3239, Comp. St. 1922, as amended by the act of 1925? (2) If this language quoted be insufficient to bring the charge within the provisions of the latter section, do the words "contrary to the form and provisions of chapter 106, Laws 1925," with which the complaint closed, supply the necessary elements of the crime and suffice so to do?

Prior to the adoption of the amendment of 1925 referred to, the "unlawful sale of intoxicating liquor" was described and embraced in section 3238, Comp. St. 1922, and the penalties therefor provided under section 3288, Comp. St. 1922, exclusively. Therefore, the answer to the queries propounded is to be found in the proper construction of chapter 106, Laws 1925.

Section 3239, Comp. St. 1922, as amended, is as follows: "Liquor, Sale, Transportation. Any person, who shall by himself, or through his agent, carry or transport, for the purpose of sale, sell, give away, trade, deliver or otherwise dispose of, any intoxicating liquor contrary to law, shall, for the first offense, be guilty of a misdemeanor, and be fined the sum of one hundred dollars ($100) and be imprisoned in the county jail not less than sixty (60) days, nor more than ninety (90) days; * * * provided, however, the carrying or transporting of more than one pint of intoxicating liquor shall be *prima facie* evidence that such liquor is being carried or transported for the purpose of sale."

The defendant presents the contention that neither in the amendment under consideration nor elsewhere in the statutes of this state is the term "bootlegging" defined; that the use of this word in the title of the act before us in connection with the words "providing penalties for first, second and subsequent convictions for bootlegging," renders the amendment indefinite and uncertain to such a degree as to invalidate the act. We are not of that opinion. The court takes judicial notice of the fact that the word "bootlegging" has acquired, as a matter of common knowledge, a definite import and is a term embracing certain

well-understood characteristics. Webster's Dictionary defines it as follows: "To carry liquor about on the person and sell it in places where the sale of liquor is prohibited."

The supreme court of Kansas has defined bootlegging as follows: "Drawing upon our judicial knowledge of that specimen of the *genus homo,* a bootlegger is a person who sells intoxicating liquors on the sly, not from any particular business location, but carrying his wares in his bootleg, in his pockets, or keeping them in some flitting hole-in-the-wall of easy access to himself and provokingly hard of discovery to the officers of the law. When such a person establishes himself in a definite place of business where by skilful legerdemain he can sell or pretend to sell the innocent juice of the apple as well as beer—both 'near' and 'far'—and other intoxicants, the niceties of the Kansas language designate him as a 'jointist,' and no longer in the mere plebeian class of 'bootlegger.'" *Scriven v. City of Lebanon,* 99 Kan. 602, L. R. A. 1917C, 460.

We note also that our neighboring state of Iowa enacted a "bootlegger" statute in the following terms: "Any person who shall, by himself, or his employee, servant, or agent, for himself or any person, company, or corporation, keep or carry around on his person * * * any intoxicating liquor as herein defined, with intent to sell or dispose of the same by gift or otherwise, * * * shall be termed a bootlegger." Code of Iowa, 1924, sec. 1927. See *Barr v. Neel,* 151 Ia. 458.

Section 3, ch. 187, Laws 1917, which appears as section 3239, Comp. St. 1922, at the time of its enactment, carried as part of itself as a section title the word "bootlegging." It cannot be gainsaid that, from the substantial agreement which appears between the language in the Nebraska statutes and all of the definitions heretofore referred to as to the essential elements which constitute bootlegging, it is patent that the term is one in common use and of definite import, and as constituting part of the title of the amendatory act is not subject to the charge of indefiniteness or uncertainty. Therefore, accepting the act as valid, what leg-

islative intent does it express? It must be conceded that legislative intent, properly expressed, is controlling. Certainly justice demands that the amendatory act be construed according to the plain import of the language in which it is written, for in that sense common people understand. So it is also true that "the provisions of a penal statute will not be extended by construction so as to apply to persons not clearly within its terms." *State v. Dailey*, 76 Neb. 770.

Our Constitution provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." Const., art. III, sec. 14.

The act must also be construed with reference to its title, for the words of the act will be restrained or qualified by it. Indeed, the title limits the sphere within which the enacting clause can operate. 1 Sutherland, Statutory Construction (2d ed.) sec. 135. So, too, "broad language should be confined to lawful objects. The subject or object expressed in the title fixes a limit to the scope of the act, and provisions not germane but foreign to such subject will be excluded as unconstitutional and void." 2 Sutherland, Statutory Construction (2d ed.) sec. 340.

However, within the limitations mentioned, attention must be given, if possible, to every word, clause and sentence of a statute, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another. 2 Sutherland, Statutory Construction (2d ed) sec. 380.

The language employed in the body of chapter 106, Laws 1925, it may be conceded, presents two possible constructions. The first, as applied to the second count of the complaint before us, would be proper if the words used were taken as the expression of the following: "Any person who shall * * * carry or transport, for the purpose of sale, * * * any intoxicating liquor contrary to law;" and second, if "any person * * * shall * * * sell * * * any intoxicating liquor contrary to law," he shall be subject to penalties in said amendment provided.

The learned district judge who determined the error proceedings set forth his opinion in writing. His interpretation of the effect of the amendment is, substantially as determined by this court, that a simple unlawful sale of intoxicating liquor is punishable as an offense defined in section 3238, Comp. St. 1922; that to charge an offense under section 3239, Comp. St. 1922, as amended, it is necessary to charge, in addition to a "simple sale," transportation or its equivalent; but that the addition of the words found in the complaint "contrary to the form and provisions of chapter 106, Laws 1925," charges the equivalent of transportation, and therefore brought the case within the amendment. The state in its brief here dissents from both of these conclusions. It concedes, however, that count 2 charges only the crime of unlawful sale of intoxicating liquor, but insists upon a construction of section 3239, Comp. St. 1922, as amended, at variance with the determination of this court made herein. On the matter of pleading, we are of the opinion that the district court erred and the state is correct. The language of the title to section 3239, Comp. St. 1922, restricts penalties to "convictions for bootlegging" only. And, as we have already determined "bootlegging" involves, as necessary elements, facts in addition to a simple sale. A simple sale is therefore not "bootlegging." It follows also the charge of a mere sale of intoxicating liquor would not be within the limitations prescribed by the title of the amendment, where penalties are limited as applicable to the crime of bootlegging only.

Then, too, the construction first suggested would violate the canon of construction that requires the language to be so construed, if possible, that no part of the law of which it forms a part be deemed inoperative, or superfluous, void, or insignificant, and so that one section will not destroy the other. The instant construction, contended for by the state, would effectually and wholly eliminate and void the words, "it shall be unlawful for any person to * * * sell," from section 3238, Comp. St. 1922.

The alternative construction is to accept the language of chapter 106, Laws 1925, as defining a single offense committed by any of several methods set forth. *Winkelmann v. State,* 114 Neb. 1. This theory supplies nothing by way of construction except the obviously omitted connective whose absence is indicated by commas, and whose effect and presence understood, the act, as an entirety, necessarily implies. Certainly, we do no violence to the language employed when we accept the connective "and" as indicated by the peculiar punctuation of the act. Indeed, the ordinary rule of construction expressly permits not only the word "and" to be supplied by an omission, indicated by a comma, but goes further and permits the substitution of "and" for "or" when the latter word is actually implied, and the sense of the language construed, as an entirety, indicates the former was intended. *People v. Rice,* 138 N. Y. 151.

Bearing in mind the restrictions contained in the title of the act before us, seeking to give each word therein its full and complete meaning, the whole legislative intent appears to be as follows: "Any person, who shall by himself, or through his agent, (1) "carry or transport for the purpose of sale;" (2) (carry or transport) (and) "sell;" (3) (carry or transport) (and) "give away;" (4) (carry or transport) (and) "trade;" (5) (carry or transport) (and) "deliver;" "or" (6) (carry or transport) (and) "otherwise dispose of" "any intoxicating liquor," shall be punished.

The rule in this state is that, to charge a statutory offense, information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent. *Barton v. State,* 111 Neb. 673; *Newby v. State,* 75 Neb. 33; *Altis v. State,* 107 Neb. 540; *Gaweka v. State,* 94 Neb. 53.

Such indictment or information or complaint must charge explicitly all that is essential to constitute the offense. It cannot be aided by intendment, nor by way of recital, or inference, but must positively and explicitly state what the accused is called upon to answer. *Moline*

v. State, 67 Neb. 164; *Gaweka v. State, supra; Jones v. State,* 112 Neb. 710.

The words "contrary to the form and provisions of chapter 106, Laws 1925," are nothing more than the formal conclusion of the complaint or indictment: Their omission would not invalidate if the pleadings were otherwise sufficient. Comp. St. 1922, sec. 10074.

Our Criminal Code was adopted from Ohio in 1873. In 1859 the supreme court of that state discussed a similar proposition and said: "The allegation purports to be, and is, nothing more than an argumentative statement of the legal result of the facts previously stated; and this mere legal conclusion cannot cure any defects in the premises on which it assumes to be predicated." *Hagan v. State,* 10 Ohio St. 459. The following cases in principle support the proposition just stated: *Biskind v. United States,* 281 Fed. 47; *Williams v. United States,* 168 U. S. 382; *United States v. Nixon,* 235 U. S. 231.

It therefore appearing that the charge contained in the complaint is the general crime of unlawful sale of intoxicating liquor, punishable by section 3288, Comp. St. 1922, the sentence complained of is excessive and void. However, all proceedings up to the sentence imposed are regular and valid. Nothing that defendant did or failed to do could validate any portion of the punishment adjudged, in view of the fact that the sentence imposed, considered as an entirety, was wholly unsupported by law.

It follows, therefore, that the situation is wholly unaffected by the payment of the fine, if such was done. A void sentence is no sentence. It remains for the trial court to inflict the punishment, by law provided, not for bootlegging as defined by section 3239, Comp. St. 1922, as amended, but for the unlawful sale of intoxicating liquor as defined in section 3238, Comp. St. 1922, viz.: A fine of $100, *or* that the defendant be imprisoned in the county jail not less than 30 days nor more than 60 days, and shall, in any event, pay the cost of prosecution. *McCormick v. State,* 71 Neb. 505.

The judgment of the district court is therefore reversed and the cause remanded, with directions to the district court to sustain the proceedings in error from the county court so far as sentence imposed by that court was concerned, and to remand the cause to the county court of Merrick county, with directions to impose a sentence in accordance with this opinion.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1927.

I. SIBBERNSEN, APPELLEE, V. EDWARD PETERSON ET AL., APPELLEES: FARMERS & MERCHANTS BANK OF LINDSAY, APPELLANT.

FILED JANUARY 13, 1927. No. 24514.

Judicial Sale of land by undivided halves and distribution of the proceeds in the manner indicated in the opinion, *held* not erroneous.

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

Albert & Wagner, for appellant.

Vail & Flory and *O. M. Needham, contra.*

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

PER CURIAM.

This action was commenced by I. Sibbernsen, plaintiff, to foreclose a mortgage on a half section of land in Boone county. Edward Peterson and Fred B. Nelson each owned an undivided half interest in the entire tract. The interests of both were incumbered by a first mortgage of $500 in favor of plaintiff and by a second mortgage of $17,500 in favor of the Travelers Insurance Company. The undivided half interest of Peterson was not otherwise incumbered, but the half interest of Nelson was further mortgaged to the Farmers & Merchants Bank of Lindsay for $1,850; to the Farmers State Bank of St. Edward for $6,500; and to the Genoa National Bank for $500; round numbers being thus used. Sibbernsen is the only plaintiff.

The Farmers & Merchants Bank of Lindsay, other mortgagees, Peterson and Nelson are defendants. A trial resulted in a foreclosure decree which was subsequently modified to direct the sheriff to offer the entire tract for sale and at the same time to offer separately the undivided halves and to accept the bid or bids offering the most for the whole. The return of the sheriff to the order of sale shows these facts: He offered the half section as an entirety and received therefor a bid of $21,000. At the same time he offered Nelson's undivided half and received therefor a bid of $10,300. He also offered at the same time Peterson's undivided half and received therefor a bid of $12,000. For the half interests separately the bids aggregating $22,300, being in excess of the single bid of $21,000 for the whole, were accepted and consequently Nelson's undivided half was sold to Peterson and Peterson's undivided half was also sold to Peterson.

There were objections to the confirmation of the sale on the grounds that the price was inadequate and that a resale under the decree would result in a price of $24,000, which would have been realized at the sale already made except "for confusion and misunderstanding and statements made by the defendant Peterson and the sheriff and others at the sale." These objections were overruled and the sale confirmed.

In distributing the proceeds the district court directed the sheriff to pay the costs and the principal and interest due on the first mortgage of plaintiff and to pay also the second mortgage of the Travelers Insurance Company, both being liens on the entire half section. The method of computation employed below left a remainder of $1,610.72, which the district court awarded to Peterson. The Farmers & Merchants Bank of Lindsay, a mortgagee having a third lien limited to the undivided half interest of Nelson, is the only appellant.

That part of the decree directing a sale of the land in undivided halves is challenged as invalid. Appellant is not entitled to a reversal on this ground. There is no appeal

from the decree of foreclosure or from the modification directing the sheriff how to make the sale. In the district court the notice of appeal is directed alone to the distribution of $1,610.72—proceeds remaining after payment of the liens covering the entire half section. In the supreme court the præcipe states that the appeal is from the confirmation and the distribution. There is nothing in the record to show that the order for the dual offer for bids was void and it is not now reviewable.

It is next argued that the court erred in confirming the sale. In offering the land the sheriff followed the directions of the decree, from which there was no appeal. The showing in favor of the objections was made by appellant in an affidavit of its president to the effect that the sheriff and Peterson chilled bids; that, in the presence of prospective bidders, Peterson stated he would bid $50,000 on his undivided half, if necessary; that appellant was led to believe Peterson would not bid on the land as an entirety or on Nelson's undivided half, but that a bid of $21,000 which appellant made for the whole would be accepted; that the sheriff said the sale in halves and the distribution of the proceeds would be confusing and that he thought the sale would be set aside. The affidavit contains also the statement that appellant relied on what Peterson and the sheriff said and refrained from further bidding. On the showing made, was a resale the only alternative? The district court made the sale through the office of the sheriff. It was no part of the officer's duty to belittle the decree under which he was acting or to declare the law as to the validity of the sale or to anticipate the future rulings of the district court. The decree of foreclosure was not confusing and refuted the showing in that respect. It also directed the sheriff to accept bids for the halves, if higher than the bid for the tract as a whole. The distribution of the proceeds was a judicial question which neither Peterson nor the sheriff was called upon to decide. All this was known to the bidders. Appellant was a party to the action and was bound by the plain terms of the decree

from which no one had appealed. The sheriff in his official acts complied with the decree while making the sale. Bidders had no right to disregard the decree and rely on idle talk of other bidders or of the person acting as sheriff. At the sale appellant was represented by its president. He was free to bid on Nelson's half until the proceeds of the sale would pay his lien. He could hear the bids of Peterson and had a right to protect his own interests by better bids. With the decree contradicting the showing and the parties free to protect their liens, the affidavit does not disclose circumstances under which appellant had a right to rely on the extraneous utterances of the sheriff and Peterson.

Complaint is also made because the district court distributed proceeds of $1,610.72 to Peterson. The point does not seem to be well taken. To apply any part of this sum to appellant's lien would amount to taking proceeds of the sale of Peterson's half to pay the individual debt of Nelson, though the mortgage lien securing the debt of Nelson was limited to his half. Error does not affirmatively appear in the proceedings.

AFFIRMED.

CATHERINE DOUGHERTY ET AL., APPELLANTS, V. A. L. WHITE, APPELLEE.

FILED JANUARY 13, 1927. No. 25257.

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

Kingsbury & Hendrickson, for appellants.

J. J. McCarthy and *W. V. Steuteville, contra.*

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

PER CURIAM.

This case was before this court, and determined by us

as reported in 112 Neb. 675, to which reference is here made for a statement of the issues, as well as for the facts determined and the law of the case announced. It is sufficient to say, however, that in such determination certain facts were conclusively found, and the law governing the case as an entirety announced, and the case was remanded with specific directions as to other facts indicated by the opinion and mandate issued, which were to be determined by the trial court on additional evidence, if so desired, and the trial court was directed to enter judgment in harmony with such opinion. In furtherance of which, additional evidence was taken, findings had, and judgment rendered, from which the plaintiffs appeal.

The case was submitted to Commission Division No. 2, opinion rendered modifying the judgment of the trial court, motion for rehearing then lodged and case set for hearing before the court on such motion. For reversal, plaintiffs challenge the judgment of the trial court for the following reasons, in substance: First, for errors occurring at the trial in the introduction of evidence; and, second, that the respective findings of the trial court upon which judgment was entered are not supported by the evidence. We have carefully considered the entire record, together with the able briefs presented, and conclude: That the findings of fact, and the law applied, by the trial court at such second hearing are in strict harmony with the law as announced in such previous opinion; that such findings of fact are supported by the weight of the evidence so introduced, and clearly cover the issues presented by the pleadings in the case, which pleadings are the same as those upon which the original trial was held; and that error was not committed by such trial court in excluding the evidence offered by the plaintiffs.

It therefore follows that the judgment rendered on the opinion of the commission should be, and is, vacated, and the judgment of the trial court, in all things,

AFFIRMED.

G. W. POLLARD, APPELLANT, V. ANDREW J. LARSON ET AL., APPELLEES: C. W. WAGNER, APPELLANT.

FILED JANUARY 13, 1927. No. 24281.

1. **Appearance.** In a suit by a vendor to require specific performance of a contract to purchase land, a vendee objecting to jurisdiction enters a general appearance, where he seeks affirmative relief by pleading a cause of action for damages resulting from vendor's breach of the same contract.

2. **Venue.** Where a vendee pleads a cause of action against vendor for damages resulting from a breach of contract to convey land and vendor files therein a cross-petition for specific performance of the same contract, the law does not deprive the court of equitable jurisdiction to grant such relief, merely because the vendee resides in another county.

3. ———: SPECIFIC PERFORMANCE. Specific performance is a transitory action and may be brought in any county where service of summons may be had.

4. ———: ———. In providing by statute that an action for specific performance may be brought in the county where defendants or any of them reside, the legislature did not use the word "may" in the sense of "must." Comp. St. 1922, sec. 8557.

5. **Parties.** Under the law of Nebraska, "the court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others." Comp. St. 1922, sec. 8547.

6. **Vendor and Purchaser:** CONTRACT: ASSIGNMENT: LIABILITY OF VENDEE. Vendee in a contract to purchase and pay for land does not escape liability for those obligations merely because they are assumed by one to whom the contract is sold and assigned.

7. ———: RESCISSION. Under a contract to purchase and pay for land, a vendee in default of payments, renouncing his own contractual obligations while in possession of the land with rents and profits in his hands, cannot maintain an action for rescission of the purchase and for damages resulting from vendor's failure to furnish a warranty deed and an abstract showing good and sufficient title.

8. **Specific Performance:** LACHES. Where time is not an essential element of a contract for the purchase of land, the right of specific performance at the suit of vendor is not necessarily

lost by his failure to tender to a vendee first in default a warranty deed and an abstract showing a good and sufficient title at the appointed time.

9. ———. A school site on a half-section of land which the owner agreed to sell *held* insufficient to prevent specific performance at the suit of vendor under the circumstances outlined in the opinion.

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

Hainer, Craft, Edgerton & Fraizer, Beeler, Crosby & Baskins and *J. W. James,* for appellants.

Halligan, Beatty & Halligan and *W. A. Stewart, contra.*

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

ROSE, J.

This action was commenced in the district court for Lincoln county March 22, 1923, by G. W. Pollard, plaintiff, against Andrew J. Larson and his wife, Lula Larson, defendants and vendors, to recover damages for failure on their part to perform a contract to convey to plaintiff by good and sufficient warranty deed a half section of land in Lincoln county. The vendors had agreed in writing October 27, 1919, to sell and convey the land to C. W. Wagner, vendee, for $500 in cash and a deferred payment of $7,500—$8,000 in all. The contract required the vendors to furnish an abstract "showing good and sufficient title" in themselves, "before final payment." The date fixed by the contracting parties for the "final payment" of $7,500 was March 1, 1923, but they did not in specific terms or otherwise make time an essential element of the contract. Pollard, also in the attitude of vendee, alleged that he bought the contract from Wagner January 25, 1922, and thus acquired the latter's interests and rights under the purchase; that he went into possession of the premises February 1, 1922, and retained it during the times mentioned in his pe-

tition; that the vendors did not furnish the required abstract or convey the land by good and sufficient warranty deed, but furnished an abstract showing that Josephine Peterson owned an undivided one-seventh interest in half the land; that he had been ready and willing to perform on his part the vendee's contract and that his damages by nonperformance of the vendors were $7,200. For this sum Pollard, vendee, demanded judgment.

By order of the district court Wagner was summoned as a party defendant on motion of Andrew J. Larson.

The land in controversy is the west half of section 20, township 10, range 26, Lincoln county. There had been a separate abstract for each quarter section. The northwest quarter was incumbered by a mortgage. The abstract for that portion of the tract was in the hands of the mortgagee. It was available for the purposes of a transfer at the appointed time, and disclosed a merchantable title. The objections to title were directed to the abstract for the southwest quarter.

The vendors denied the charge that their title was defective and that they had violated their contract. Their answer offered performance on their part. In a cross-petition vendors also pleaded a cause of action for the deferred payment and interest, for taxes paid by them while out of possession, and for specific performance of the contract alleged by Pollard to have been violated by them. The pleadings of vendors applied to both Larson and Wagner as vendees.

Allegations by vendors that Pollard and Wagner were bound to perform the latter's contract of purchase were traversed by a formal answer of each vendee, praying for affirmative relief, after Wagner had interposed objections to the jurisdiction of the district court for Lincoln county.

Upon a trial of the issues the district court made findings against both Pollard and Wagner; denied the relief sought by each of them; entered judgment against them for $9,344.50, the amount due the Larsons, including interest and taxes, ordered specific performance, and decreed fore-

closure of the contract itself. Pollard and Wagner, vendees, have appealed.

The challenge to the jurisdiction of the district court to decree specific performance is first presented. On this question the position of vendees is untenable. The district court acquired jurisdiction over them and also over the subject-matter of the litigation. The land is in Lincoln county. Pollard brought an action at law therein to recover damages for breach of the contract of purchase. The vendors appeared, but did not confine their cross-petition to specific performance. They also invoked a legal remedy to recover a general judgment for the deferred payment, the interest and the taxes. These were obligations of Wagner for which Pollard was also bound after he purchased the interests of the former, accepted the assignment of the contract and took possession of the land. Wagner was summoned in Hall county. He did not confine himself to his objections to jurisdiction or to a denial of liability under the terms of his contract. After the trial court overruled his challenge to jurisdiction he affirmatively invoked judicial power to recover a money judgment in his favor against vendors for $1,382.42 in damages for failure on their part to furnish the abstract and deed required by the very contract on which the plea for specific performance is based. This demand for affirmative relief under the circumstances amounted to a general appearance in the equitable cross-action for specific performance. Pollard commenced the suit as plaintiff and Wagner made a general appearance as defendant. The district court therefore acquired jurisdiction over both vendees. *Edgar v. Anthes*, 109 Neb. 546; *Linton v. Heye*, 69 Neb. 450.

Jurisdiction of the district court over the subject-matter of the cross-action for specific performance is equally clear. Each of the parties to the litigation prayed for a judgment at law for damages resulting from nonperformance of the same contract. The law did not require the district court to separate the actions for damages from the suit in equity

for specific performance and send the parties to Hall county, where Wagner resides, to pursue the litigation.

Specific performance is a transitory action and may be brought in any county where the necessary parties are properly before the court. Comp. St. 1922, sec. 8557; *Scow v. Bankers Fire Ins. Co.*, 109 Neb. 241; *Fall v. Fall*, 75 Neb. 104, 120. According to the statute cited, the action "may be brought in the county where the defendants or any of them reside," but the word "may" as thus used does not mean "must." *Atchison, T. & S. F. R. Co. v. Drayton*, 292 Fed. 15. That provision does not deprive the district court of jurisdiction under the circumstances of the present case, where the necessary parties are before it, though residing elsewhere. *Miller v. Ruzicka*, 109 Neb. 152.

The controversy over the necessary parties to the litigation seems to involve also Charles L. Rich, who was not brought before the court, though included in the motion to make Wagner a defendant. The record shows that the absence of Rich does not affect the regularity of the proceedings. He was not a necessary party. While the evidence indicates that he had entered into a prior contract April 4, 1918, to purchase from the Larsons the land in dispute, he subsequently sold his contract of purchase to Wagner and quitclaimed his interests to Andrew J. Larson with the understanding of the three persons named that a new sale by the Larsons to Wagner would follow. This latter arrangement was carried into effect and resulted in the making of the contract foreclosed in the court below. The controversies before the court were determinable without prejudice to the litigants or to Rich, within the meaning of the statute which provides:

"The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others." Comp. St. 1922, sec. 8547.

Were Pollard's action and Wagner's cross-action against the Larsons to recover damages for breach of the contract of sale properly dismissed? The record conclusively answers the question in the affirmative for the following rea-

sons: Wagner, by his assignment to Pollard, did not escape the liabilities imposed by the contract of purchase. Both were liable to vendors for the unpaid purchase price. The evidence will not admit of any other conclusion. Long before expiration of the time fixed by the contracting parties for the final payment and for the furnishing of the abstract, Pollard gave notice to vendors that there was an incurable flaw in their title; renounced his contractual obligations as a vendee; failed to make a valid tender of the unpaid purchase price, though in possession of the premises under his purchase; collected and retained rentals; failed to make full payment of interest and taxes according to his agreements and never restored possession to vendees. In these respects Wagner likewise failed to comply with the terms of his purchase. Both breached their contract as vendees before the stipulated time for performance on the part of vendors expired. Vendees were the first to break the contract. While themselves in default, they attempted to rescind their purchase and sued for damages without surrendering possession or accounting for the rents and profits. They were not at the same time entitled to both possession and rescission. Their suits for damages, therefore, were properly dismissed. *Watkins v. Harrison*, 110 Neb. 439; *Schlake v. Healey*, 108 Neb. 35.

A formidable argument is directed to the proposition that vendors were not entitled to specific performance because they did not tender on or before March 1, 1923, the date fixed for mutual performance, a warranty deed and an abstract showing a good and sufficient title. The reasoning is based principally on the unwarranted premise that there could be no legal foreclosure after that date without a previous tender of a warranty deed and of an abstract showing a good and sufficient title. Vendees sometimes share the responsibility for delay. Courts of equity often enforce contracts at the suit of vendors who failed to tender a good title and a warranty deed at the appointed time. Good conscience, equity and justice control in the light of circumstances. In the present instance the contract was

made in good faith. It was performed in part by all the parties. Vendors at all times meant to furnish a good title and so informed vendees. There was a timely tender of an abstract. A flaw in the title was properly pointed out. Vendors procured a decree purporting to remedy the defect. The abstract for the quarter section in controversy was again presented early in January, 1923, and again rejected on the ground that the decree did not clear the title, but the abstract was not returned until November 1, 1923—eight months after the stipulated date for final payment. In the meantime vendors commenced another suit to quiet their title, made the southwest quarter a party, procured a decree correcting the flaw to which objection had been made and tendered in court May 28, 1924, a warranty deed and an abstract showing a good and sufficient title. While vendees were themselves first in default, as already explained, while they were holding possession of the land by themselves, their tenants or their successors in interest, Pollard, one of the vendees, commenced this litigation March 23, 1923, twenty-one days after the time appointed for performance, to recover damages for breach of contract on the part of vendors. In the same case Wagner, the other vendee, commenced a similar cross-action. Time was not made an essential element of the contract of purchase. Vendees were not required to make the deferred or "final" payment before the furnishing of a proper abstract and a warranty deed. They were protected during the delay. They were in possession, retaining rents and profits. They never restored possession. They continuously received and retained benefits under their contract of purchase until after they brought their actions for damages. They demanded strict performance by vendors before the stipulated time therefor, renounced their own liability while in default and attempted to rescind while in possession without restoring vendors to their former situation. In addition the evidence shows that a tender of a warranty deed and of an abstract showing a good and sufficient title would not have been accepted March 1, 1923. These are circum-

stances under which a delay, like the one disclosed, will not defeat specific performance. *Miller v. Ruzicka*, 109 Neb. 152. Vendees owed the debts for which judgment was rendered. The remedy by foreclosure in equity was properly administered by the district court.

It is further insisted that the decree of foreclosure is erroneous for the reason that a half acre in the southwest quarter had been conveyed to a school district. The use of the half acre for school purposes was obvious to vendees. They procured and retained their possession without objection on that ground. There is nothing in the testimony of witnesses to indicate that the school site had anything to do with the objections to the abstract or with the failure of vendees to perform their contract. For anything appearing in the evidence a school on the premises, available to tenants, may have been an inducement for the purchase. Besides, the abstract shows that the school site will revert to the owner of the fee if abandoned for school purposes. There is no sufficient reason for reversing the judgment below.

AFFIRMED.

Note—See Specific Performance, 36Cyc. 700 n. 84, 772 n. 37, 773 n. 48—Vendor and Purchaser, 39Cyc. 1422 n. 30, 1526 n. 99, 1671 n. 88, 1686 n. 20, 2086 n. 75.

WILLIAM T. WHITEHEAD V. STATE OF NEBRASKA.

FILED JANUARY 13, 1927. No. 25429.

1. **Homicide.** According to the Criminal Code, "Whoever shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree." Comp. St. 1922, sec. 9545.
2. ———: ELEMENTS: PROOF. A purpose to kill and malice are material elements of murder in the second degree and, under a charge therefor, both must be proved beyond a reasonable doubt.
3. ———: INSTRUCTIONS. Where the evidence does not prove a higher grade of homicide than manslaughter, it may be preju-

dicial error to submit to the jury the issue of murder in the second degree, though the trial results in acquitting accused of the graver offense and in finding him guilty of the lesser.

4. ———: ———. Where eye-witnesses in a prosecution for murder testify to the circumstances surrounding the homicide, it is error to instruct the jury that there is a presumption of malice from the homicidal act.

5. Criminal Law: MISCONDUCT OF JUROR. Misconduct of the county attorney in an argument to the jury and misconduct of a juror in repeating to other jurors a rumor not in evidence, disapproved.

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

R. S. Norval and *Harry L. Norval,* for plaintiff in error.

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

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

ROSE, J.

In a prosecution by the state it was charged that William T. Whitehead, defendant, in Seward county, purposely feloniously and maliciously struck Andrew Blevins on the head with a pitchfork July 24, 1925, that as a result Blevins died July 25, 1925, and that defendant thus committed murder in the second degree. Defendant pleaded not guilty. Upon a trial he was convicted of manslaughter and for that felony was sentenced to serve a term of seven years in the penitentiary. As plaintiff in error he presents for review the record of his conviction.

It is first argued as a ground for reversal of the conviction that the trial court erred in submitting to the jury the issue of murder in the second degree, since, as contended, there was no evidence of the homicidal purpose and the malice essential to that felony. Murder in the second degree is defined by statute in the following language:

"Whoever shall purposely and maliciously, but without

deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree." Comp. St. 1922, sec. 9545.

According to this statute a purpose to kill and malice are material elements of murder in the second degree and, under a charge therefor, the burden is on the state to prove both beyond a reasonable doubt. Where the evidence does not prove a higher grade of homicide than manslaughter, it may be prejudicial error to submit to the jury the issue of murder in the second degree, though the trial results in acquitting accused of the graver offense and in finding him guilty of the lesser. *Botsch v. State,* 43 Neb. 501; *Williams v. State,* 103 Neb. 710; 30 C. J. 398, sec. 642.

Did the state prove beyond a reasonable doubt malice and the purpose to kill? Eye-witnesses for the state testified in detail to the circumstances surrounding the homicide. The tragedy occurred in a field on the farm of Ed Welch where grain-threshing was in progress. From a hayrack on a low wagon defendant pitched a load of bundles into the thresher, turned his team, drove a few feet away, stopped, and called Blevins who, at the time, was on a grain wagon at the spout of the thresher. Responding to the call, Blevins dismounted, walked to defendant's wagon, and leaned against the hayrack. At the time defendant was in a stooping posture on the wagon. Both were unarmed. Conversation ensued for perhaps two or three minutes. Blevins used violent language and called defendant a "liar." Defendant seized a pitchfork near him on the hayrack and with it struck Blevins a blow on the head. Blevins fell backward on the ground, apparently unconscious, and died a few hours later. When he fell, defendant jumped off the wagon, stuck the pitchfork in the ground, attempted to raise his victim's head, fanned him with a hat later, asked a bystander to call a physician, and gave still further assistance. Blevins wore overalls with two outside hip pockets. He had previously carried a revolver and had shot a man. These facts had been communicated to defendant. The circumstances outlined were disclosed by witnesses for

the state. There was also testimony by defendant tending to prove that his purpose in calling Blevins was to talk in a friendly way about a rumor that the latter did not want defendant to pitch bundles for him. The theory of the defense was that, at the critical moment, Blevins moved his right hand toward his right hip pocket, that defendant thought he was reaching for a revolver, intending to shoot, and that the fatal blow was struck at the right arm of Blevins in self-defense, but accidentally struck him on the head. Defendant testified to this effect as a witness in his own behalf. Malice and a purpose to kill, essential elements of murder, were not shown. There was evidence of a conversation, perhaps two weeks earlier, in which the privilege of defendant to procure ice from Blevins was discussed, but there was then no indication of such ill feeling as would justify an inference of malice or homicide. The circumstances seemed to indicate that defendant was appalled at the result of his blow and his conduct in attempting to restore Blevins tends to repel the inference of a purpose to kill. The conclusion, therefore, is that there was no evidence to justify the submission of the issue of murder in the second degree.

Did the error in submitting the case to the jury prejudice defendant in his right to a fair and impartial trial? The erroneous instruction permitting the jury to find defendant guilty of murder in the second degree was emphasized by supplying them with a form of verdict containing a finding of guilty under that charge. The error was further accentuated by the giving of the following erroneous instruction:

"Upon the question of intent you are instructed that the law presumes a sane man to intend the reasonable, probable and natural consequences of any act by him intentionally and voluntarily done, and this presumption will always prevail, unless, from a consideration of all the evidence bearing upon this point, you entertain a reasonable doubt whether such intention did exist."

The effect of this instruction was to charge the jury that

the presumption of a felonious intent and a purpose to kill might be inferred from the homicidal act, to permit them to impute to defendant by inference a moral turpitude not shown by the evidence, and to cast on defendant the burden of disproving two elements of murder in the second degree. Contrary to the instruction quoted the correct principle under the Criminal Code is:

"The law implies malice in cases of homicide if the killing alone is shown, but, if the circumstances attending the homicide are fully testified to by eye-witnesses, it is error to instruct the jury that there is a presumption of malice from the fact of the killing." *Lucas v. State,* 78 Neb. 454.

For such an erroneous charge alone, when the circumstances of the tragedy were detailed by eye-witnesses, convictions have been reversed time and again. *Vollmer v. State,* 24 Neb. 838; *Botsch v. State,* 43 Neb. 501; *Whitner v. State,* 46 Neb. 144; *Kennison v. State,* 80 Neb. 688; *Davis v. State,* 90 Neb. 361; *Flege v. State,* 90 Neb. 390; *Franco v. State,* 98 Neb. 746; *Egbert v. State,* 112 Neb. 129.

The error in submitting the issue of murder in the second degree was aggravated further by the misconduct of a juror who repeated in the jury room a report that defendant had offered to plead guilty to manslaughter. It was without support in the evidence adduced at the trial. It deprived defendant of the right to confrontation, to have the witness testify under oath in open court and to cross-examination. It would have been inadmissible at the trial. The jury deliberated more than 20 hours and did not reach a conclusion until after the rumor was repeated. While the jurors afterward stated that they were in no wise influenced by it in arriving at their verdict, they cannot, as a matter of law, thus excuse such misconduct or commit the trial court or the reviewing court to their own views on the effect of the objectionable rumor repeated in secret.

The defense was still further discredited by inflammatory remarks of the county attorney in addressing the jury—remarks having no foundation in the evidence.

Error prejudicial to defendant affirmatively appears on the face of the proceedings.

REVISED AND REMANDED.

Note—See Homicide, 29 C. J. 1119 n. 90 New, 1120 n. 2, 4; 30 C. J. 290 n. 26, 292 n. 58, 347 n. 93, 399 n. 44, 404 n. 1; 38 L. R. A. n. s. 1094; 13 R. C. L. 777.

HENRY E. BARTLETT V. STATE OF NEBRASKA.

FILED JANUARY 13, 1927. No. 25287.

1. **Criminal Law:** EVIDENCE OF ATTEMPT TO ESCAPE. Evidence in a criminal case tending to prove that the accused attempted to escape from peace officers is relevant and may be considered by the jury as tending to show consciousness of guilt.

2. ———: FELONY: PROOF. Where a person is charged with the commission of a felony, a conviction may rest on the uncorroborated evidence of an accomplice, when, considered with all the testimony, it satisfies the jury beyond a reasonable doubt of the guilt of the accused.

3. **Homicide:** SUFFICIENCY OF EVIDENCE. In a criminal case, where it is sought "to make the act of killing murder in the first degree, it is only necessary to establish that it was done with deliberation and premeditation, of which there being some evidence before the jury, their verdict fixing that as the degree of criminality is conclusive on that point." *Schlencker v. State*, 9 Neb. 241.

4. **Criminal Law:** WITNESSES: CREDIBILITY: WEIGHT OF EVIDENCE. "In criminal cases, as in civil, the credibility of witnesses and the weight to be given their testimony are matters for the determination of the jury. It is for the jury to determine whether it is convinced beyond a reasonable doubt of the defendant's guilt, not for the reviewing court to say whether it is so convinced. A reviewing court can only inquire whether the evidence was sufficient to warrant the jury in finding the defendant guilty." *Carleton v. State*, 43 Neb. 373.

5. ———: EVIDENCE OF CONDUCT OF ACCUSED. It is proper to admit evidence in respect of the conduct of an accused person while under arrest or in jail awaiting trial. *King v. State*, 108 Neb. 428.

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

Adams & Zimmerman and *Herman Ginsburg* for plaintiff in error.

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

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

DEAN, J.

Henry E. Bartlett was informed against, tried and convicted of having murdered Asa Ransom in Kearney county. The jury brought in a verdict of first degree murder and imposed the death penalty. A new trial was denied. Thereupon the court sentenced defendant to suffer death by electrocution. Alleging error, defendant's counsel have brought the record here for review.

The state submitted evidence which discloses substantially the following material facts: Soon after midnight, in the very early morning of October 19, 1924, some person, then unknown, burglariously broke and entered a Minden hardware store. Asa Ransom, aged 44, was then chief of police of Minden. Within about an hour after the burglary was discovered, officer Ransom and John Peterson, a young man of 28, left Minden in Peterson's car in search of the burglar. They drove out about 12 miles east of Minden and, finding no trace of a suspect, they faced about, and on their return, while yet about 4 miles from Minden, they met two men, strangers to both, driving east in a Ford sedan. When the cars met they stopped and stood front to front and about 20 feet apart. Both cars, under the rule of the road, were on the wrong side of the highway. Peterson testified that as soon as his car stopped Ransom got out and walked directly to the north door of the sedan carrying a flash light and a revolver. Almost immediately, the evidence discloses, two shots were fired from out of

the north side of the sedan, where Ransom stood, and from one of these he received his death wound. One of the witnesses testified that the shooting began in 20 seconds after Ransom came up to the sedan, the other that it began in about a minute. Peterson then immediately got out of his car, and Ransom, though mortally wounded, ran back to the Peterson car shooting at the sedan as it drove away to the east. Peterson had with him "an automatic shotgun and an automatic rifle, * * * a very efficient firearm, and very high power," and he testified that he joined Ransom in the shooting and fired the contents of his gun at the receding car. In respect of a statement by Ransom, Peterson testified: "Q. What did Ransom say, if anything, to you? * * * He says, 'They got me; you go and get them. * * * Leave me and go and get those other fellows.' " These were Ransom's last words. In about two minutes he sank to the ground and died. In this connection it may here be observed that, on Peterson's cross-examination, it was developed that Ransom, while he stood at the north door of the sedan, held his gun "down by his side," and that the man in the sedan, "sitting next to the driver," immediately after Ransom was shot, turned and fired at him, Peterson, from the south door of the sedan "at least five times" before the car moved away, and that the overcoat which he then wore, which is in evidence, was perforated by some of the bullets. A physician testified that, upon examination of Ransom's wound, in the region of the heart, in his opinion, he might have lived one or two minutes after he was shot.

A diligent search by citizens and by state and county peace officers was at once begun for a clue that would lead to the arrest of Ransom's slayer. But it was not until about six months after Ransom's death, namely, on April 22, 1925, that Henry E. Bartlett, the defendant here, and Charles Sealing, implicated with him, were arrested. Sealing first gave the information which led to the arrests. When arrested Bartlett was 35 and he and his family then lived at Kearney, where he was employed by a firm which

dealt in memorial tablets and the like. For his defense Bartlett interposed and relied on an alleged alibi. Sealing was 27 when the arrests were made. He and his family lived at Hastings, where he was a business college student. Sealing turned state's evidence.

Bartlett and Sealing became acquainted about four or five years before the homicide. Sealing testified that his evidence was voluntarily given and without any promise of immunity. He is not a party to this action. From Sealing's evidence the record discloses substantially the following material facts. And in part it corroborates the material evidence submitted by Peterson on the part of the state. Sealing testified that on October 18, 1924, Bartlett ate supper with him and his family at their Hastings home at about 6 o'clock.

In respect of their subsequent movements that night Sealing testified: "Q. Did you leave in a car for any place? A. Yes, sir. Q. Whose car? A. Mine. * * * Q. Which way did you go after you left Hastings? A. West. Q. Did he (Bartlett) say anything after you left Hastings about where he wanted to go? A. He said, 'Let's go to Minden. I have a shotgun spotted there that I want to get.'" Sealing admitted that he knew Bartlett intended to steal the gun. And he admitted that he took a revolver along, which he carried in a holster, because Bartlett advised: "You might get in trouble with me because I am pretty well known." But he testified that, unknown to Bartlett, his revolver was not loaded. About midnight, at Minden, Bartlett said to Sealing: "I am going to get the gun and we will go home." It was about this hour that the crash of breaking glass, in the rear of a Minden hardware store, attracted the attention of the police officers. Sealing suspected this crash was occasioned by Bartlett, but he held his peace. The night watch, however, finding Sealing near-by, arrested him and imprisoned him in the city jail, to be held for investigation. Sealing made no resistance. Bartlett evaded arrest and shortly came up to the jail and, finding Sealing inside, he shot the lock off the jail door and both men hasti-

ly left town in Sealing's car. The jail, called a "calaboose," was a flimsy structure and was ill adapted for its intended purpose. Hence, the escape was easily made.

Sealing's story of the ill-fated midnight venture in part, as above noted, corroborates that of Peterson. He testified that, as they travelled east from Minden, he drove the sedan and Bartlett sat at his right, and when the cars met, Ransom stepped up to the Sealing car and, upholding his gun and holding a flash light in their faces he said: "You are the birds we want." According to Sealing the shooting by defendant began in about 20 seconds. Upon further inquiry Sealing testified: "Q. Who fired the shots from your car? A. Henry E. Bartlett. Q. Then what did you do immediately after the shooting? A. Started to drive. Q. Were there any shots fired after your car started? A. There was. Q. Who by? A. Some man behind us. * * * Q. After you got some distance east from where the shooting occurred, what did Bartlett say? A. The first thing he said, 'Drive as fast as you can; they are shooting at us.' * * * Q. What did he say about himself? A. After we had gone probably a half mile further than that he said, 'I never told you this before, but,' he said, 'I have done time before twice, and I am wanted now, and if they get me I am in for it.'" And that Bartlett also said: "I fired two shots to the left (north) first, and emptied my gun to the right." This evidence tends to support the state's argument that one of the two shots that Bartlett "fired * * * to the left" was the shot that killed Ransom, and that it was when he "emptied" his "gun to the right" that Peterson's overcoat, as Peterson testified, was perforated by the bullets that came from that direction. And these were all, of course, questions of fact for the jury.

As they drove rapidly away from the scene of the tragedy, Bartlett complained two times to Sealing that he had been shot in the back and, both times, at Bartlett's urgent request, he examined Bartlett's person, but failed to locate the "bullet," or the "shot," or the "missile" that Bartlett persistently protested was embedded in his flesh. But the

state, upon obtaining this information, procured an X-ray picture of Bartlett's back to be taken, while he was in custody, by a practicing physician who was an X-ray operator. This physician testified that, in the lower back part of Bartlett's body, the X-ray plate, which is in evidence, revealed certain small, irregularly shaped foreign bodies of metallic type of either lead or steel, and that several smaller fragments were also imbedded in the soft tissue. And besides, the state sheriff found "holes in the back of the (front) seat" of Sealing's car and he "took a piece of lead" therefrom. This bit of lead is a battered fragment of a leaden bullet. And Sealing's car was so badly dented with bullets that, to avoid embarrassing inquiries, he testified that he filled the bullet holes and covered the filling with paint. From whence, then, came the diminutive bodies of metallic type, the leaden slivers, that were embedded in Bartlett's back? Clearly it was for the jury to determine what relation, if any, the furious fusillade of bullets from Ransom's gun and Peterson's "very high power" automatic rifle that followed the fleeing sedan that fateful night bore to the shot or to the diminutive particles of lead and steel in Bartlett's person of which he made complaint to Sealing.

So well did the participants in this crime succeed in eluding discovery that it was about six months before an arrest was made. And when Bartlet was arrested he was working in the stonecutters' yard of his employer at Kearney. An officer approached and asked him if his name was Bartlett. Defendant denied his identity and, pointing to another workman at some distance away, he said: "That man is Bartlett." Upon discovering his ruse one of the officers said: "You are Mr. Bartlett, and we are officers, and we want you." Bartlett again denied his identity and attempted to escape, but, after a strenuous struggle with the officers, he was subdued and taken in a car to his own home near-by. Evidence that the accused attempted to escape from peace officers is relevant and may be considered by the jury as tending to show consciousness of guilt. 16 C. J. 554, sec. 1073. Upon arrival at defendant's home

Bartlett told his wife to let no one talk to the children. The officers, having first obtained a search warrant, found in Bartlett's house a "38 Colt's automatic" gun, and another firearm and a supply of bullets, and some 38-calibre loaded shells. And some empty 38-calibre shells were found in the highway at the scene of the murder. An empty 38-calibre shell, and also the broken lock, were both found at the prison door where the lock was shot away. These exhibits were not alone, of course, conclusive as against defendant, but they were properly for consideration by the jury.

In his attempt to establish an alibi, Barlett professed the utmost ignorance of all that had to do with the murder of Asa Ransom. He admitted that he ate supper at Sealing's home the evening of October 18, and testified that he left there after the evening meal and was at his own home at Kearney, with his family, from about 9 o'clock that night until early in the following forenoon. And to support his evidence he called his wife, and an aged aunt, who testified that she was at defendant's home that night. And other relatives, a sister and her husband, testified that they met Bartlett at the home of a friend, or a relative, in the forenoon of Sunday, October 19, and that neither in his movements nor in a word that he said was there anything to indicate that he had been shot, nor to indicate that slivers from bullets had been embedded in his body. Of course, it may be presumed, and naturally so, that Bartlett's wife and his sister, and the other relatives who testified in his behalf, were vitally interested in the outcome of the trial. But it may be recalled that almost a year elapsed between the date of the homicide and defendant's trial, and this may, in part, in view of all the incriminating evidence, have caused the jury to believe that these witnesses had in mind facts pertaining to a different date than that to which they testified. The defendant also introduced evidence in an unsuccessful attempt to convince the jury that an undersized tramp, who limped as he walked, was Sealing's companion on the night of October 18, instead of Bartlett. And a vain effort was also made to convince the jury that a

young man of 19 was "with Sealing * * * that night" at the scene of the murder, and that Sealing "fired the fatal shot." But the evidence of the witnesses who saw and talked with Sealing, when he was imprisoned in the Minden jail, disclosed that the man who was seen with Sealing that night resembled Bartlett in size and general appearance.

An application for a change of venue was denied the defendant and this is assigned as reversible error. But defendant admits in the brief that, in view of the "affidavits made and filed" in support of their application, they "could hardly insist upon a change of venue or that the court erred in not granting it." We do not think the court erred in denying a change of venue.

It is contended that the court erred in giving the following instruction: "You are instructed that, while it is a rule of law that a person accused of crime may be convicted upon the testimony of an accomplice or accomplices, still a jury should always act upon such testimony with great care and caution, and subject it to careful examination, in the light of all the other evidence in the case, and the jury ought not to convict upon such testimony alone, unless after a careful examination of such testimony they are satisfied beyond a reasonable doubt of its truth and that they can safely rely upon it." But this instruction was given to the jury in *Lamb v. State*, 40 Neb. 312, and we there held, in an opinion by Norval, C. J.: "A conviction may rest on the uncorroborated evidence of an accomplice, when, considered with all the testimony, it satisfies the jury beyond a reasonable doubt of the guilt of the accused." We adhere to the rule announced in the *Lamb* case and hold that it is applicable here. *Hutter v. State*, 105 Neb. 601.

We do not agree with counsel's contention that in no event should a verdict have been returned for punishment in excess of life imprisonment. The argument is that premeditation was not shown. Clearly the argument is not based on the evidence. Premeditation clearly appears. Defendant not only armed himself that he might be prepared

for any resistance that might be encountered, but he also told Sealing to bring his revolver along, as noted above, because he, Bartlett, was "pretty well known," and, hence, there might be trouble. We think the evidence of premeditation and deliberation was sufficient to be submitted to the jury and that it sustains the verdict. *Schlencker v. State,* 9 Neb. 241; *Carleton v. State,* 43 Neb. 373.

As tending to show the type or character of the defendant, the record discloses that, some time after his arrest, for safe-keeping, Bartlett was taken from the Minden jail to the state penitentiary there to await his coming trial at Minden. In his direct examination the fact was developed that, while so confined there, he joined with two convicts, who were in the penitentiary awaiting execution for murder, in an attempt to effect an escape. These three occupied adjoining cells. In respect of this attempt at jail-breaking Henry Tiehen, a cell-house night guard, testified that on a certain evening when he was about to lock the prisoners in their cells he discovered that one of the cell doors "was left open just a little bit;" that when he entered the end cell, which was Bartlett's, two convicts and Bartlett "all grabbed ahold of me. * * * And Bartlett stood guard over me with a pair of scissors raised up like that (indicating)." The three men then threw Tiehen into one of the cells and, he continued: "They proceeded to tie me up; tied my legs with wire and my hands, and gagged me with some rags and stuffed rags in my mouth, and then tied a rag around my head. * * * Q. After you were down on the floor, what, if anything, did Bartlett say to you? A. 'Well,' he says,—'now, * * * keep quiet, * * * by keeping quiet,' he says, 'you can save your life.' He says, 'That is what we are trying to do, is save ourselves.' Q. Where did he have the scissors? A. Well, he held them over me. He was a kind of a guard over me, and threatening me with the scissors." One of the convicts "had a short, pointed knife that he tried to use. Well, he didn't use it, but he held it up on me. Bartlett says that he hated to kill me on

account of having a family, and if I kept quiet it wouldn't be any use." The evidence, in respect of this attempt to break jail, it will be recalled, was introduced by Bartlett in his direct examination.

Bartlett further testified in his direct examination that, when he was taken from the penitentiary to Minden for trial, a knife was found in his trousers pocket. This exhibit is a made-over and somewhat shortened case knife which was ground to a keen-cutting edge and sharpened to a dagger point. And on his cross-examination he admitted that he joined in the attack on the night watchman, Tiehen, and corroborated Tiehen's evidence in part, in an admission that he stood guard over Tiehen in a "threatening attitude." These admissions, when considered with all of the submitted evidence, were properly submitted to the jury. It follows that reversible error was not committed in receiving the knife in evidence over defendant's exception. And we have held that it is proper to admit evidence in respect of the conduct of an accused person while in jail awaiting trial. *King v. State,* 108 Neb. 428. See, also, 16 C. J. 554, sec. 1071; *State v. Clark,* 166 Ia. 123.

"In criminal cases, as in civil, the credibility of witnesses and the weight to be given their testimony are matters for the determination of the jury. It is for the jury to determine whether it is convinced beyond a reasonable doubt of the defendant's guilt, not for the reviewing court to say whether it is so convinced. A reviewing court can only inquire whether the evidence was sufficient to warrant the jury in finding the defendant guilty." *Carleton v. State,* 43 Neb. 373.

We have examined all the assignments of alleged error to which our attention has been directed by defendant, but we do not find it necessary to discuss such assignments further than we have already done. Reversible error has not been pointed out by counsel for defendant. It follows that the judgment of the district court must be and it hereby is in all things affirmed. Friday, April 29, in the year

of our Lord, 1927, between the hours of sunrise and sunset is the day and the hour in which it is ordered that the sentence of the district court shall be carried into effect.

AFFIRMED.

WILLIAM NELSON MATHEWS V. STATE OF NEBRASKA.

FILED JANUARY 13, 1927. No. 25513.

1. **Criminal Law:** FLIGHT OF ACCUSED: QUESTION FOR JURY. Where a defendant in a criminal action flees beyond the jurisdiction of the court, or conceals himself, the proof relating thereto is for consideration of the jury, to be given such weight as it deserves, in view of the attending circumstances of the individual case.
2. **Incest:** "LICENTIOUSLY COHABIT." The defendant was convicted under section 9763, Comp. St. 1922, relating to incest, of having licentiously cohabited with his own daughter. The legislative intent in the use of the words "licentiously cohabit" contemplates one or more acts of sexual intercourse of a father with his own daughter.
3. **Criminal Law:** INCEST: SUFFICIENCY OF EVIDENCE. Where a father is charged, under section 9763, Comp. St. 1922, relating to incest, with having had sexual intercourse with his own daughter, the weight of the evidence is for the jury, and the verdict will not be disturbed where, as in the present case, such verdict is supported by sufficient evidence.

ERROR to the district court for Pawnee county: MASON WHEELER, JUDGE. *Affirmed.*

Robert R. Hastings, for plaintiff in error.

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

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

DEAN, J.

William Nelson Mathews, defendant, was informed against in Pawnee county and there charged with having

licentiously cohabited with the prosecutrix, who is his own daughter. In the first count of the information it is charged that the crime was committed on or about January 25, 1925, and in the second count that a like offense was committed on or about February 25, 1925. The jury found defendant guilty, as charged in the first count of the information. A motion for a new trial was overruled. Defendant was thereupon sentenced to serve a term of 20 years in the penitentiary at hard labor. Alleging error, the defendant has brought the record of his conviction to this court to have it reviewed.

This prosecution was brought under the provision of section 9763, Comp. St. 1922, which reads:

"If a father shall licentiously cohabit with his own daughter, the father shall, on conviction, be punished by confinement in the penitentiary for a term not less than twenty years."

When the incestuous crime was alleged to have been committed, the prosecutrix was a high school student of 18 years, and her father was about 49 years of age. Defendant's wife, now deceased, was the mother of defendant's eight children. When the youngest child was born, the mother died in childbirth, January 14, 1925, and this was less than two weeks before defendant, as the state contends, committed the first lascivious act, namely, on or about January 25, 1925. The prosecutrix has five sisters, whose ages range from infancy to 17 years or thereabouts, and two brothers, one of whom, aged 21, is married. Defendant's infant child, so recently born, was adopted by a family in the neighborhood immediately after the death of its mother.

Omitting an avalanche of sordid details, which it is not necessary to repeat here, the evidence of the prosecutrix, in respect of the first count, tends to establish the following material facts: She testified that the offense was committed January 25, 1925, about midnight, when the prosecutrix and a sister, aged three, and defendant slept in the same bed, and that defendant, under a pretext that the prosecutrix was cold, she having just returned from a

basket ball game, moved over to her side of the bed and committed the incestuous act of which complaint is made. In a prosecution for incest, under the facts before us, it is not incumbent on the state to prove resistance. Hence, the question of force will not be discussed here.

The two-story farm house in which it is alleged the crime was committed is a fairly commodious structure and the entire family slept in four beds in two upstairs rooms. The size of the north room is 10 by 20 feet and that of the south room is 14 by 20 feet. Three beds were in the north room and, on the night of January 25, 1925, one of the beds was occupied by defendant's married son and his wife, and a cot bed was occupied alone by defendant's 7-year old daughter, and three daughters aged 5, 9, and 13, respectively, together occupied the remaining bed in the north room. Only one bed was in the south room. Defendant's 13-year old daughter testified that her father and the prosecutrix and her 3-year old sister generally slept together in the bed in the south room, and that after her mother died the three continued to sleep together there. The eldest son was called by the state and he testified that the 3-year old daughter and the prosecutrix and defendant slept together "some of the time."

About three weeks after the death of defendant's wife, the family moved to Table Rock. The eldest son testified that, early in the morning of April 7, 1925, he drove defendant from Table Rock to Seneca, Kansas, and left him there, but none of the family were advised as to their destination, nor that they were about to leave town; that he did not then know anything about the offense charged against his father, but that afterward, in July, 1925, he met his father at his uncle's place in Sherman county, but his father did not return with him to Table Rock, nor did he see him again until long afterward, when he was arrested and brought back for trial to Pawnee county by the sheriff, and he was then in the sheriff's custody.

Defendant testified in his own behalf. He denied that he was guilty. He testified that the prosecutrix was dis-

obedient and that he reprimanded her for fondness for high school basket ball and the like, and that this, and some other trivial circumstances which he submitted to the jury, caused some trouble between them. But the testimony in respect of the alleged troubles, aside from that for which he was arrested, related to trifling incidents, and these were evidently explained by the prosecutrix to the entire satisfaction of the jury. In respect of his departure from Table Rock, defendant testified that he left because some of the Table Rock people were trying to get him to give up his children and this caused him to suspect they were going to take him before an insanity board. But the evidence fails utterly to support this plea and the jury were perfectly justified in finding that it was a mere self-serving pretext. And on his cross-examination defendant fairly admitted that he never at any time had any substantial reason for entertaining a fear that he would be taken before an insanity board. He frankly admitted that he did not want his family to know where he was going, and that he did not care where he went when he left Table Rock; that he went to Seneca, Kansas, as that "was just as good a place as any other," and that he stayed at Seneca a week and sawed wood, and from thence he went to St. Joseph, Missouri, where he stayed several months, and then went to a brother's farm in Sherman county, where he was told that they were "going to end this suit." Subsequently he went to Kansas and afterward to South Dakota, where he remained several weeks, and then returned to Sherman county, where he first learned, he testified, that in July, 1925, a warrant was issued for his arrest. But at no time did he inform the sheriff of Pawnee county of his whereabouts, nor did he voluntarily return to his home. Defendant also testified that he went away to let his son "straighten this up, if that was the fact, to straighten this up, that is why I left Table Rock." Continuing, the defendant testified in respect of the charge that he occupied a bed with the prosecutrix: "Well, I think that she, up until just after

her mother was buried, for two or three nights we were in there taking care of those children. Q. A part of the time you would occcupy the same bed while you were taking care of the children, would you? A. Well, we lay down on the bed, certainly, I don't deny that." Defendant called some of his relatives to impeach the evidence of the prosecutrix in an attempt to show that at the preliminary examination her evidence differed materially from her evidence at the trial. But the jury refused to credit the testimony of the impeaching witnesses.

That defendant fled from the scene of the crime and was gone about six months appears to have been fairly established. And the rule appears to be that, if the evidence in a criminal case shows that the defendant fled beyond the jurisdiction of the court, or concealed himself, such evidence is for the jury, and it may give it such weight as it deserves, in view of the attending circumstances of the individual case. 1 Abbott's Criminal Trial Brief (2d ed.) 458; *Hubbard v. State*, 65 Neb. 805; *Woodruff v. State*, 72 Neb. 815; *Bridges v. State*, 80 Neb. 91; *State v. Hetland*, 141 Ia. 524.

We conclude that, where a father is charged, under section 9763, Comp. St. 1922, relating to incest, with having had sexual intercourse with his own daughter, the weight of the evidence is for the jury, and the verdict will not be disturbed where, as in the present case, such verdict is supported by sufficient evidence.

Counsel argues that "the verdict is contrary to the law." The argument does not appeal to us. The legislative intent, in the use of the words "licentiously cohabit," contemplates one or more acts of sexual intercourse of a father "with his own daughter." To give any other interpretation to section 9763, Comp. St. 1922, under which this action was brought, would leave this state without an incest statute for the punishment of a father who debauched the person of his own daughter by having a single act of sexual intercourse with her. We will not so construe the act. *State v. Lawrence*, 19 Neb. 307, so far as inconsistent with

the views herein expressed is disapproved. In brief, the act, as amended, and as it now reads, contemplates that one, or more than one, violation of the act, on the part of a father, renders him liable to the punishment therein provided, as hereinbefore pointed out.

It will be presumed that the jury considered all of the evidence, and among other this: Defendant's daughter was yet a person of immature years. She was not yet wise to the ways of the despoiler of innocent young womanhood. And to add to her perplexity in this trying situation, her assailant was an unnatural father, to whom, in her bewilderment, this motherless girl, so recently orphaned, may have entertained the thought that, even under the unspeakable facts herein disclosed, she owed implicit obedience. 31 C. J. 377, sec. 13, and notes. The jury saw and heard and observed the demeanor of the presecutrix, and it took all of that into account which, under the practice and decisions in this state, it was not only its privilege but it was its duty to consider. That the jury, and not the reviewing court, is the trier of disputed questions of fact is firmly established in this jurisdiction. Defendant tendered five instructions, all of which were refused. The court gave seven instructions, and to each of them defendant filed objections. But, neither in respect of the instructions given by the court, nor in respect of the refusal to give those tendered in defendant's behalf, is there any substantial, reviewable, or reversible error of the court pointed out in defendant's brief. The jury was fairly instructed, under the law, in respect of every controverted fact which was submitted for its consideration. *Carleton v. State*, 43 Neb. 373.

The defendant had a fair and impartial trial. Reversible error has not been pointed out. The judgment must be, and it hereby is,

AFFIRMED.

MORRISSEY, C. J., dissenting.

There are matters disclosed by the record, but not discussed in the opinion, which constrain me to the view that

the guilt of defendant has not been established according to law. I, therefore, dissent from the majority opinion.

ROY A. JAMES, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED JANUARY 13, 1927. No. 23491.

1. **Commerce:** EMPLOYERS' LIABILITY ACT: TEST OF EMPLOYMENT. The test of the employment and the application of the federal employers' liability act is, "Was the employee, at the time of the injury, engaged in interstate transportation, or any work so closely related to it as to be practically a part of it?"
2. ———: ———: ———. The test of jurisdiction in repair cases is whether the rolling stock, engine, or car is withdrawn from service at the time the repairs are made, as distinguished from being interrupted in the course of an interstate haul to go on.
3. ———: ———: APPLICATION. A machinist's helper, under the facts in this record, injured, while making repairs in the roundhouse, upon an engine which had been used in hauling over the railway company's lines freight trains carrying both intrastate and interstate freight, and which was used in the same way after the accident, was not then employed in interstate commerce within the meaning of the federal employers' liability act of April 22, 1908, governing the liability of an interstate carrier for injuries to its employees when employed in interstate commerce.

APPEAL from the district court for Douglas county: CARROL O. STAUFFER, JUDGE. *Reversed.*

Wymer Dressler, Robert D. Neely and *Paul S. Topping*, for appellant.

Arthur F. Mullen, John O. Yeiser, John J. Shannon and *John O. Yeiser, Jr., contra.*

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

EBERLY, J.

Roy A. James brought this action in the district court for Douglas county against the Chicago & Northwestern Railway Company under the provisions of the "federal employers' liability act" for personal injuries claimed to have been received by him as results of accidents, the first occurring April 24, 1921, and the second on March 27, 1922, each separately stated as a cause of action, both alleged to have been caused by the negligence of the defendant.

The defenses interposed were (1) denial of injury and of negligence; (2) that plaintiff's condition was due wholly to disease (syphilis); (3) assumption of risk; (4) and that as to injury on March 27, 1922, settlement and release.

The trial resulted in a verdict and judgment in favor of the plaintiff for $25,000, to review which the defendant appealed.

As to the circumstances of the occurrences of the injuries, plaintiff's theory of the evidence is as follows: As to the first, occurring April 24, 1921, it is conceded that the plaintiff, as to employment, was within the terms of the federal statute. In view of the disposition of this case hereafter made, to recite the details of the transaction would therefore serve no purpose. As to the accident which occurred March 27, 1922, it appears that it was due to the breaking of a frame of a block and tackle in the roundhouse at Chadron, Nebraska, where plaintiff was employed as a machinist helper. On the day in question he was assisting a machinist engaged in repairing locomotive No. 1159. Plaintiff, by direction of this machinist, handed up to him, as the latter was standing on this engine, a chain hoist (block and tackle) which this machinist then attached to a hook suspended from the roof of the roundhouse for that purpose. This lifting device was then engaged to a portion of said engine, and the plaintiff, directed by the machinist referred to, was told to tighten up the chain. While complying with the directions thus given, the frame of the device broke or parted and the heavy pulley or wheel, descending, struck plaintiff on the head

causing the objective injury set forth in his petition. After the accident, on examination, the break in the chain hoist appeared clean and new and without a flaw in the metal. The roundhouse foreman testified that he knew of no imperfection appearing in this metal, and knew of no previous inspection having been made.

Previous to a consideration of the question whether the injuries which the plaintiff was suffering from, at the time of the trial in the court below, was the result of which these accidents were the proximate cause, there is presented for determination, as to the second cause of action, the question whether or not it comes within the terms of the federal employers' liability act of 1908.

Under the issues as claimed by the pleadings, the plaintiff has the affirmative in this matter and must carry the burden of proof. It is to be remembered that the test of the employment and application of the act above referred to is, was the employee, at the time of the injury, engaged in interstate transportation, or any work so closely relating to it as to be practically a part of it. *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556; *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177; *Southern P. Co. v. Industrial Accident Commission*, 251 U. S. 259. On this point we find the parties to the case are at variance in their interpretation of the part of the evidence in the record relating to it. On this subject the plaintiff first introduced evidence that a number of workmen were employed in making repairs on engine No. 1159. One witness testified that he was engaged three days in making "heavy repairs" on engine No. 1159, but that he did not know how many other workmen were like employed or the total time consumed in making the repairs. Plaintiff also introduced evidence which tended to show that every train that was made up at Chadron, where the roundhouse in question is located, was constituted in part of interstate cars, or carried freight having an interstate destination, and that engine No. 1159, prior to the repairs, was engaged in hauling such trains

and was in like manner employed after the repairs in question were made.

The defendant introduced in evidence, without objection, certain entries in the roundhouse register disclosing that engine No. 1159 arrived at the roundhouse, Chadron, Nebraska, March 18, 1922, 10:05 p. m. and next departed therefrom April 12, 1922. The defendant also introduced in evidence, without objection, a form, No. 788, being a monthly report or statement for March, 1922, made up at the close of that month in the ordinary course of business of the defendant, showing the amount of work accomplished in the line of classified or authorized unclassified repairs other than running repairs at the Chadron roundhouse shop. This statement or report disclosed that No. 1159, "Date at shop" "March 18," "Date in shop" "March 18," "Date out shop" "March 31." The evidence is not contradicted that the repairs were "class 5 repairs" and were wholly made and completed at the Chadron shop and were intended to put the engine in condition for quarter-term service; that is, to cover a mileage of 50,000 to 60,000 miles. An "X and O" record, or sheet, was also introduced in evidence without objection which contained an itemized list of the repairs actually made on engine No. 1159 at the time referred to, and the cost thereof, amounting to $2,336-.58. Of this, the cost of labor expended in making these repairs appeared to be $366.18. The cost of the material used was $1,806.83.

The defendant sought to discredit the recitals of the "roundhouse register" showing arrival and departure of engines by cross-examination largely based on the fact of the existence of rule or custom by which defendant's engine inspectors performed their duty ordinarily on the arrival of engines at the roundhouse, and also on two inspectors' reports, one dated March 17, 1922, and one March 20, 1922, each of which disclosed that on the date mentioned No. 1159 was inspected. Reference was also made in the cross-examination to an inspector's report dated March 24, 1922, supposedly made under the same conditions, but this report

does not appear in evidence. The effect attained by this cross-examination is a matter of controversy.

Yet, even if this be given its most favorable construction, the fact still indisputably remains that engine No. 1159 was withdrawn from service on or after March 18, 1922, for a sufficient length of time to make class 5 repairs thereon to the extent of $2,336.58, including $366.18 expended for labor, and all of which were completed by March 31, 1922, inclusive.

And it would further seem that the plaintiff has wholly failed to meet the burden of proof imposed upon him by the issues and to establish the fact that, while engaged in making these repairs, he was engaged in interstate commerce within the meaning of the rule already quoted.

The evidence of the record, given the most favorable construction for the plaintiff, establishes no more than that No. 1159, a pool freight engine, "class R," and one without a definite run assigned, which, previous to the making of repairs, was engaged in pulling freight trains from and to Chadron, Nebraska, carrying both interstate and intrastate freight, and that after the repairs were completed it was continued in the same business of drawing such freight to and from Chadron, Nebraska, and that the interstate freight in car-load lots, or otherwise, formed a portion of each of the trains thus drawn, both before and after the time the repairs were made, and that the exact period of time occupied in the repair work was somewhat shorter than disclosed by defendant's evidence.

It must be remembered that "An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other." *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353.

Counsel, however, contend that the case of *Law v. Illinois C. R. Co.*, 126 C. C. A. 27, 208 Fed. 869, L. R. A. 1915C,

17, sustains plaintiff's contention, and that the instant case is even a stronger case than the one last referred to. This may be conceded. The doctrine of *Law v. Illinois C. R. Co.* may be fairly set forth in the following excerpts: "In the instant case the engine was in the shop for what is called 'roundhouse overhauling.' It had been dismantled at least 21 days before the accident. Up to the time it was taken to the shop it was actually in use in interstate commerce. It was destined for return thereto upon completion of repairs. It actually was so returned the day following the accident. It clearly did not lose its interstate character from the mere fact that it was not at the time actually engaged in interstate movement, no more than did the dining car in *Johnson v. Southern P. Co.*, 196 U. S. 1. * * * Were the repairs being made in the roundhouse between two regular daily trips, the engine, while under such repair, would clearly not lose its character as an instrumentality of commerce; and plaintiff, in such case, would have been engaged in interstate commerce. We have not here a case of original construction of an engine not yet become an instrumentality of interstate commerce. It had already been impressed with such use and with such character. Its preservation as such was not a matter of indifference to defendant, so far as its interstate commerce was concerned. * * * Under the existing facts, can the length of time required for the repairs change the legal situation? If so, where is the line to be drawn? How many days temporary withdrawal would suffice to take it out of the purview of the act? And is it material whether the repairs take place in a roundhouse or in general shops? Is not the test whether the withdrawal is merely temporary in character?" The court then cites the case of *Northern P. R. Co. v. Maerkl*, 117 C. C. A. 237, 198 Fed. 1, to sustain the conclusion. And, based on the premises hereinbefore recited, the court, in the *Law* case, found that the employees were within the purview of the federal employers' liability act at the time the repairs were made under the conditions set forth herein. And it may be conceded that, if this is the law, it ap-

plies to the plaintiff's case herein and sustains his contention.

The case of *Chicago, K. & S. R. Co. v. Kindlesparker*, 234 Fed. 1, save only as to the question of time consumed in making repairs, being 79 days instead of 21 days, presents essentially the same facts as the *Law* case states. On these facts the circuit court of appeals held Kindlesparker was engaged in interstate commerce at the time of the injury. However, this decision was reversed by the supreme court of the United States, 246 U. S. 657, "upon the authority of *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353." This must be construed to be at least an implied repudiation of the doctrine set forth in the *Law* case.

The doctrine of the *Law* case came directly before the supreme court of the United States in the case of *Industrial Accident Commission v. Davis*, 259 U. S. 182. In discussing this *Davis* case, Mr. Justice McKenna, in delivering the opinion of the court, proceeds as follows: "We may assume, though the fact is contested, that the engine was sent from exclusive employment in interstate commerce to the repair shops. It was sent there for general overhauling December 19, 1918, and was, to a certain extent, stripped and dismantled. It was estimated that the work upon it would be finished January 30, 1919, but it was not actually completed until February 25, 1919. The accident occurred on February 1st of that year. After the repairs were finished, the engine was given a trial trip, and finally put into service in interstate commerce. * * * The court, we are prompted to say, had precedents in *Northern P. R. Co. v. Maerkl*, 198 Fed. 1, and *Law v. Illinois C. R. Co.*, 208 Fed. 869, and it was natural to regard them as persuasive, as they were decisions of circuit courts of appeal. * * * The facts in the *Law* case do identify it with the case at bar. The period of repairs in it was 21 days, and it was cited as a precedent in *Chicago, K. & S. R. Co. v. Kindlesparker*, 234 Fed. 1. * * * And it is this separation that gives character to the employment, as we have said, as being in or not in commerce. Such, we think, was the situation of

the engine in the present case. It was placed in the shop for general repairs on December 19, 1918. On February 25, 1919, after work upon it, it was given a trial, and it was placed in service on March 4, 1919. The accident occurred on February 1st of that year, the engine at the time being nearly stripped and dismantled. 'It was not interrupted in an interstate haul to be repaired and go on.'" The court then cites *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353, and *Chicago, K. & S. R. Co. v. Kindlesparker*, 246 U. S. 657. The supreme court thereupon reversed the judgment of the court below on the basis of the principles referred to herein. This, in effect, was direct repudiation of the doctrine of the *Law* case.

It will be noted from the preceding discussion that the opinions of the supreme court all proceed on the basis that the doctrine announced in the *Winters* case is controlling. And this case now presents itself for our consideration. It was a proceeding in error from the supreme court of the state of Minnesota, where the case had been twice determined, to the supreme court of the United States. The facts, as shown by the reported cases, are that the plaintiff received his injury while engaged in the work of putting new tires on an engine belonging to the defendant, the work being done in the roundhouse of the latter. It may be said that the present record discloses that class 5 repairs included this identical work. The engine had, prior to being sent to the roundhouse for repairs, been engaged in interstate commerce, it being stipulated that for several months prior to the injury the locomotive in question was used in hauling freight trains over defendant's line of road in Iowa and other states, hauling both interstate freight and intrastate freight; that it was so used after plaintiff's injury; that the last time prior to the injury when the engine was used was on October 18, 1912, when it came into Marshalltown, Iowa, pulling a freight; "and that the first time it was used after the injury was on October 21, 1912, when it pulled a train carrying such freight out of Marshalltown."

Winters v. Minneapolis & St. L. R. Co., 126 Minn. 260. These facts are identical with the instant case. Even if the plaintiff is given the advantage of every possible suspicion which his cross-examination might create or tend to create, still the fact remains that engine No. 1159 was being repaired in a similar manner, and that the period which was occupied for this purpose was more extended than in the case now being considered. The opinion was rendered by Justice Holmes of the supreme court of the United States and may be epitomized by stating that, under the facts herein recited, it was held: A machinist's helper, injured, while making repairs in the roundhouse, upon an engine which had been used in hauling over the railway company's lines freight trains carrying both intrastate and interstate freight, and which was used in the same way after the accident, was not then employed in interstate commerce within the meaning of the federal employers' liability act of April 22, 1908 (35 St. at Large, 65, ch. 149) governing the liability of an interstate carrier for injuries to its employees when employed in interstate commerce. *Minneapolis & St. L. R. Co. v. Winters, supra.*

It, therefore, necessarily follows that the facts relating to the second cause of action, as disclosed by the record, were insufficient to establish a claim under the federal statutes against the defendant, and plaintiff is necessarily relegated to whatever right he may have under the provisions of the Nebraska law.

Plaintiff contends that, though this court determine that he has failed in his proof necessary to bring his second cause of action within the provisions of the federal employers' liability act, still the verdict and judgment should be sustained as though rendered in an action based on negligence at common law. In support of his contention he cites *Corbett v. Boston & M. R. Co.*, 219 Mass. 351. In this case it may be said that the plaintiff sued, first, under the terms of a state liability act in her individual capacity. Thereafter she was appointed administratrix of her husband's estate and brought an action under the terms of the federal

employers' liability act. Issues were properly made up under the terms of the state statute in one case, and under the terms of the federal employers' liability act in the other. These cases were consolidated for trial. On the trial of this consolidation of causes, the trial judge entered a judgment in favor of the defendant in plaintiff's action brought in her individual capacity, deeming himself deprived of jurisdiction to hear the same because of pendency of the case based on the federal statute. The supreme court of Massachusetts held that this was error, and that the true rule was that the plaintiff could not be compelled to elect which action she will pursue, where deceased was engaged in both interstate and intrastate commerce, until the evidence develops in which employment the injury occurred.

We have no occasion to dissent from the reasoning in this Massachusetts case, but it is wholly inapplicable to the question before us. Plaintiff's second cause of action was pleaded as governed by the provisions of the federal employers' liability act. Whether it was or not was one of the disputed questions in the case, and which has now been resolved against the contentions of plaintiff.

It is to be noted further that the federal employers' liability act by its terms eliminates certain defenses that exist at common law, and qualifies others. To concede plaintiff's contention would be to permit him to take advantage of the benefits of these provisions in an action to which the law itself did not apply. This court cannot say that, deprived of the advantages which the federal employers' liability act confers, the plaintiff would have prevailed in the trial had in the district court. For, indeed, not only the issues, but the proof, might well have been quite different. It follows, therefore, that for the purposes of this case the plaintiff must stand or fall on the basis which he himself determined for the bringing of his lawsuit.

In conclusion, it may be said that the verdict before us was a general one, and is based upon two causes of action

which appear in plaintiff's petition. This court has no means of determining the extent which either of these causes of action is reflected in the amount of the verdict returned. The cause, therefore, must be reversed and remanded for a new trial. We have not overlooked the other contentions presented by the appellant in his brief, and argued to the court. However, in view of the fact that a new trial must be had, it is thought that no good would arise from further discussion.

REVERSED.

STATE, EX REL. FRANK A. HIGH, APPELLANT, V. FRANK M. DINEEN, APPELLEE.

FILED JANUARY 13, 1927. No. 25382.

Affirmed on authority of *Knothe v. State, ante,* p. 119.

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

Charles Haffke and *Brown & Dibble,* for appellant.

W. C. Dorsey and *John F. Moriarty, contra.*

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

EBERLY, J.

From a final judgment in the district court for Douglas county, Nebraska, sustaining a demurrer of the defendant to the petition and to the alternative writ of mandamus and dismissing his case, Frank A. High, as relator, appeals.

The record discloses that on the 10th day of March, 1926, a complaint was filed in the police court of Omaha, Nebraska, in which Frank M. Dineen, municipal judge of the city of Omaha, Nebraska, was then and there presiding, in which, in due form, John McMullen was charged with the "illegal sale of intoxicating liquors as a first offense." Mc-

Mullen was arrested and pleaded guilty, and was sentenced by the respondent, as sitting judge, to pay a fine of $100 and costs of prosecution. This fine and costs were paid.

By the institution of this action, the relator, Mr. High, sought to compel the defendant, as municipal judge, to resentence McMullen, not only to the payment of $100 and costs, as a fine, but with the added penalty that the defendant, John McMullen, in addition thereto, be imprisoned in the county jail not less than 60 days nor more than 90 days.

The following provisions of our statutes were in point at the time of the transactions referred to in the petition. Section 3238, Comp. St. 1922, provides: "It shall be unlawful for any person to * * * sell * * * any malt, spirituous, vinous and intoxicating liquors, except only certain liquors, for medicinal, mechanical, scientific or sacramental purposes by persons specially authorized in the manner and to the extent only as hereinafter provided."

Section 3288, Comp. St. 1922, provides: "Any person, who shall by himself or through his agent violate any of the provisions of this act, shall, except where another penalty is otherwise expressly provided, be deemed guilty of a misdemeanor, and upon conviction thereof shall, for the first offense, be fined the sum of one hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than sixty days."

Section 3239, Comp. St. 1922, as amended in 1925 (Laws 1925, ch. 106) provides: "Any person, who shall by himself, or through his agent, carry or transport, for the purpose of sale, sell * * * any intoxicating liquor contrary to law, shall, for the first offense, be guilty of a misdemeanor, and be fined the sum of one hundred dollars and be imprisoned in the county jail not less than sixty days, nor more than ninety days."

The fundamental question therefore is, properly construed, which of the above sections, above set forth, is applicable under the facts disclosed by the record in this case?

This court, in the case of *Knothe v. State, ante,* p. 119, has determined that the penalties provided by section 3239,

Comp. St. 1922, as amended by chapter 106, Laws 1925, are limited in their application to "first, second, and subsequent convictions for bootlegging;" that the charge of "unlawful sale of intoxicating liquors" is not a charge of "bootlegging."

Therefore, it follows that, in view of the doctrine of the case last referred to, the penalties now appearing in section 3239, Comp. St. 1922, as amended, have no application to the crime described in plaintiff's petition in this case. It also follows that the penalty for the offense appears in section 3288, Comp. St. 1922. Under this section the penalty imposed, $100 fine and costs, is strictly within the proper exercise of the judicial discretion vested in the presiding judge. This basic conclusion renders all other questions presented in the able briefs of counsel moot, and hence they are not discussed.

It follows, therefore, that the judgment of the district court for Douglas county, in sustaining a demurrer to relator's petition and dismissing his action, was correct and is

AFFIRMED.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT, V. ELI G. SKAGGS, ADMINISTRATOR, ET AL., APPELLEES.

FILED JANUARY 13, 1927. No. 25451.

Evidence in the record sustains the action taken by the trial court.

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

Wymer Dressler, Robert D. Neely and *Paul S. Topping,* for appellant.

Arthur F. Mullen, John O. Yeiser, John J. Shannon and *John O. Yeiser, Jr., contra.*

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

EBERLY, J.

This is a suit in equity in the nature of a bill of review to vacate and set aside the judgment in an action at law entered in a case, entitled Roy A. James v. Chicago & N. W. R. Co., in the district court for Douglas county, Nebraska. In this action James recovered a judgment against the defendant company for $25,000 for personal injuries.

The action is based on alleged newly discovered evidence disclosed by an autopsy performed on the body of Roy A. James after death, which, it is claimed, establishes that his death and previous disability were due wholly to disease, and not due to any injury received while in the employment of the railway company.

Issues were joined on the petition of plaintiff, and there was a hearing in the district court for Douglas county, which resulted in that court refusing to order a new trial or vacate the judgment attacked. This is an appeal from that determination.

The record in the present case has been carefully examined with the resulting conclusion that the so-called newly discovered evidence is cumulative in character, and is not sufficient to warrant the exercise of the extraordinary powers of the district court sought to be invoked in this proceeding. Consideration of other questions presented, therefore, are unnecessary to the determination of the case.

The action of the district court for Douglas county, in denying to plaintiff the relief prayed for in this case, is approved, and the judgment is

AFFIRMED.

NEBRASKA WHEAT GROWERS ASSOCIATION, APPELLANT, V. ROY C. SMITH ET AL., APPELLEES.

FILED JANUARY 13, 1927. No. 25516.

1. **Findings Approved.** Certain findings of fact and of law made by district court set out in opinion and approved.
2. **Contracts:** SEPARATE INSTRUMENTS. The general rule is that, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for

the same purpose, when in course of the same transaction, are, in the eyes of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance.

3. **Agriculture:** MARKETING AGREEMENT. Contracts in suit set out construed to embrace articles of incorporation, by-laws, and standard marketing agreement; and that the object and purpose of the transaction set forth therein was the conferring on the defendant membership in the corporate body referred to in the contract and defining the rights and duties arising by reason of the relation thus created.

4. ———: ———: CONSTRUCTION. Whether the breach of the contract, as alleged by the defendant, is so material as to justify the injured party in refusing to proceed further, and suing for rescission of or for damages for breach of the entire contract, or whether the breach is severable giving rise to a claim of compensation, but not to a right to treat the whole contract as broken, must be determined by the terms of the contract as above defined and the circumstances of the case.

5. **Contracts:** BREACH: RESCISSION. "Not every breach of a contract by one party thereto will authorize the other to treat it as rescinded. The failure to perform an independent stipulation collateral to the main consideration, not amounting to a condition precedent, and not such as to prevent the performance by the party so in default, of the principal undertaking, although attended by some loss or inconvenience to the other party, does not absolve the latter from liability, or authorize him to treat the contract as abandoned." *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434.

6. **Corporations:** SELECTION OF OFFICERS. It is the duty of the members of a corporation to select competent officers to direct the corporate affairs, and, failing to do so, they will not be heard to complain if those chosen for that purpose prove to be incompetent or inattentive to the trust reposed in them.

7. ———: MISMANAGEMENT: RIGHT OF WITHDRAWAL. The mere mismanagement of the affairs of a corporation by its officers or agents does not warrant the withdrawal therefrom of its members or the repudiation of obligations assumed by them as such.

8. **Agriculture:** MARKETING CORPORATION: SALE OF PRODUCTS. The managing officers of this corporaton, subject to the control and direction of its membership, to be exercised as provided for in articles of incorporation, by-laws, and standard marketing

agreement, possessed, under the terms of this contract, the right and power to sell the products of its membership delivered to the corporation for that purpose to the best advantage in view of the circumstances which confronted it, and they were not, by the terms of the contract, precluded from selling the same by or through the ordinary agencies of the public market in the usual course of trade, when such course was by them in good faith deemed advisable.

9. **Damages.** Evidence examined, and it appearing that it would be impracticable and extremely difficult to fix the actual damages resulting from a breach of the contract pertaining to the sale and delivery to such corporation of the products by its membership as required by the terms of said agreement, and it further appearing that the amount of damages stipulated in the contract is not, in view of the facts of the record, disproportionate to the probable damages, the provisions for liquidated damages therein contained are hereby approved and sustained as valid.

APPEAL from the district court for Deuel county: J. LEONARD TEWELL, JUDGE. *Reversed, with directions.*

Corcoran & Sprague, for appellant.

Halligan, Beatty & Halligan and *L. O. Pfeiffer, contra.*

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

EBERLY, J.

This is an action for specific performance of a cooperative agreement, commonly known as the "standard marketing agreement," entered into between plaintiff and defendants as members of the plaintiff association in 1923, covering the years 1924, 1925, 1926, 1927, and 1928. By the terms of this writing the plaintiff agrees to buy, and the grower (defendant) agrees to sell and deliver to the association all the wheat produced by or for him, or acquired by or for him as landlord, or lessor, during the years mentioned. The wheat of each year was to be pooled and be sold by the plaintiff in accordance with the terms of the contract, and the proceeds, after deduction of certain ex-

penses as charges, was to be shared by the producers of the wheat, constituting the pool of that year, in proportion to the amount contributed by each. The prayer of the petition before us, in substance, is that the defendants be enjoined from selling any portion of their wheat grown in 1925, except as provided by the terms of the contract in suit, and also for an accounting of the amount of the 1925 crop sold by the defendants to persons other than the plaintiff, and the recovery as liquidated damages in the sum of 25 cents a bushel for the amount so sold. The form in which the action was brought was approved by this court in *Nebraska Wheat Growers Ass'n v. Norquest,* 113 Neb. 731.

Two cases are consolidated by stipulation of the parties. The defendants admit by their pleadings the refusal to sell and deliver the wheat in controversy, and plead fraud in the inception of the contract which they allege nullified their obligations, and also certain facts occurring after execution of the contract which were alleged to be a breach of the same by the plaintiff and to release the defendants from further performance of the terms thereof. They also contest the right of plaintiff to liquidated damages. In addition to this answer, the defendants, by cross-petition, sought to have the contract in suit wholly rescinded and their membership in the plaintiff association terminated. Replies were filed. The trial court, after hearing the evidence, denied specific performance and dismissed the action, from which judgment the plaintiff appeals.

The plaintiff herein is the same, and the terms of the standard marketing agreement, which appear attached to plaintiff's petition as a part thereof, as well as the demand for relief, are substantially identical with the terms of the contract and pleadings before the court in *Nebraska Wheat Growers Ass'n v. Norquest, supra.* The plan of this association contemplated the creation of certain pools of wheat grown each year during the continuance of the agreement by the members of the association. The wheat of the pool was to be sold as provided by the terms of the con-

tract before us. Each of these pool years was a distinct unconnected transaction, the results of which spell success or failure for the twelve months involved to the parties concerned in said pool, but in no manner affect the results of the other pools contemplated or carried out.

The district court made certain special findings as part of the judgment entered. From these the defendants have prosecuted no appeal. After a careful examination of the record, as well as the authorities cited by counsel in their respective briefs, the following findings of the district court are by us adopted and approved, viz.: "That no fraud existed in the inception of the contract set forth in plaintiff's petition, and that said contract, when the same was entered into between the said plaintiff and the defendants, was a binding contract of which a court of equity would compel specific performance. * * * That as a matter of law failure of the other members of said plaintiff's association other than the defendants herein to perform like contracts is, in fact, no excuse for either the plaintiff's or the defendants' failure to perform the contract according to its intention as set forth in said petition." Without determining whether the defendants received less for their 1924 crop as a result of the 1924 pool than they would have received by selling the same to persons other than the plaintiff, this court finds that if the said defendants did receive less for their 1924 crop than they would have received by selling the same to persons other than the plaintiff, the fact is wholly "immaterial and furnishes no excuse to defendants for failure to perform the contract as set forth in the petition of the said plaintiff."

The defendants, Smith and Schutte, base their defense upon an alleged rescission of the written instruments attached to plaintiff's petition, justified by certain alleged defaults of the plaintiff during the pool year 1924. And, as a matter of fact, both concede that they, individually, breached the standard marketing agreement during the pool year, one, by selling 514 bushels of wheat in violation of its terms, and the other, in a similar manner by selling

96 bushels of wheat grown in 1924. 2 Williston, Sales (2d ed.) 1205, sec. 467*g*. Both also executed and caused to be served upon the plaintiff a notice of rescission of the contracts in suit and of their memberships in plaintiff association.

The rights of the defendants to rescind and as to defense must therefore be sustained, if at all, wholly by the events and happenings and the business transactions of the 1924 pool year. Any breaches of the marketing agreement by the plaintiff association or of the contract of membership, if such there were in the 1925 pool year, would not be available to the defendants as an excuse or justification for the action which they took. *California Bean Growers Ass'n v. Rindge Land & Navigation Co.*, 199 Cal. 168.

It would seem from an analysis of the pleadings, evidence, and briefs, that the fundamental principles on which the defendants rest their contention include the proposition that the "standard marketing agreement" in evidence here measures the rights of the parties to this lawsuit, are exclusive and are wholly unaffected by any duty or obligation resting upon the defendants by reason of membership in plaintiff association, and that it is to be regarded as an "entire," as distinguished from a "severable" or a "divisible," contract. In other words, it is to be considered as embracing a single object; one in which the parties thereto intend that each covenant shall be connected with every other covenant therein contained or connected therewith. And therefore the violation by one party to an "entire" contract of one of the several parts or divisions of his contract would operate to release the others wholly from further performance thereunder.

True, the transactions here presented contemplate that the wheat growers each year under these agreements shall, together with the other wheat growers of that year (parties who have executed similar contracts), constitute a separate, distinct, and unconnected pool of wheat to be marketed over a period of twelve months as an entire and complete trans-

action, and that the proceeds of such disposition, less contract charges, should be divided between the wheat growers contributing such pool, in proportion to the amount furnished by each. Thus, there was a complete apportionment of the net proceeds of each pool to the wheat growers furnishing the wheat embraced in the same as the complete purchase price thereof. Though the fact that the consideration is apportioned, by the parties, among different covenants, is generally sufficient to show, in absence of other provisions in a contract indicating a contrary intention, that the different covenants form severable contracts (*Wilcox v. Badger Motor Car Co.*, 99 Neb. 189), we assume for the purpose of this case only that we are dealing with an "entire" contract. 5 Page, Law of Contracts (2d ed.) sec. 3002.

It would also seem that it must be conceded that if, under the circumstances of the instant case, such arrangements constituted an "entire" contract, it must also be admitted that it must be regarded as a contract to deliver by stated instalments. It would necessarily follow that the delivery of wheat for each pool year and its payment made as provided by the "standard marketing agreement" would be, in truth, a delivery and payment of an instalment thereunder.

It is conceded by the record that the plaintiff properly accounted to the defendants for the amount of all wheat delivered by them to the 1924 pool, and as purchase price out of the proceeds of said pool paid to the defendants approximately $1 a bushel. Defendants, however, contend that such payment was insufficient, and because its insufficiency was due to certain alleged violations of contracts in the manner of handling the wheat sold, plaintiff thereby breached the contract. They assert as to the first instalment, the 1924 pool, the plaintiff breached the contract by failing to properly "store," "mix" and "process" the same, and sold the wheat as fast as received through the ordinary channels by employment of paid agents, and did not sell

the same itself directly to miller, exporter, or other primary consumers of wheat as contemplated by the agreement, and that in addition thereto the charges and deductions made by plaintiff were excessive and unjustified by the terms of the agreement in question.

Conceding, for the purpose of consideration only, that the defendants' contentions as to these facts are supported by the record, are they entitled to the relief granted by the decree appealed from which, in effect, if not in form, amounts to a rescission of the contract in its entirety, At most, the facts complained of by the defendants amount to a partial default in the payment of the purchase price for the 1924 instalment of wheat. Even so, it must also be conceded that the defendants themselves breached the same contract by failure to make the delivery required thereby prior to the ultimate breach by the plaintiff herein, for the defendants failed to deliver a portion of the 1924 wheat as required by the terms of the contract, thus contributing to the default upon which they base their right of rescission.

It is true this court has held that, where a contract of sale provides for delivery in instalments and for the payment of any instalment as delivered, or within a stated time thereafter, the refusal or neglect of the buyer to make payment of each or any instalment is such a breach of the contract as to entitle the seller to rescind it as an entirety. *Spiegal & Son v. Alpirn,* 107 Neb. 233. In this case just cited there was no prior or contemporaneous default on the part of the plaintiff. And it must be remembered that it was determined November 26, 1921. It was based upon and involved a contract of sale dated June 29, 1917. Our uniform sales act was passed in 1921, and became effective in July of that year. In express words it provided: "None of the provisions of this act shall apply to any sale, or to any contract to sell, made prior to the taking effect of this act." Comp. St. 1922, sec. 2546.

Our uniform sales act was, in truth, the adoption by our legislature, with certain minor modifications, of the

"Sale of Goods" act as passed by the British parliament on February 20, 1894. The latter was an act to codify the law relating to the sales of goods in that nation.

In this connection, in 1884, the House of Lords determined an appeal in the case of *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.*, 9 Law Rep. App. Cas. (Eng.) 434. In this action there was presented a case where, under a contract for sale, the Mersey company had bought of the Naylor company 5,000 tons of steel, company's make, to be delivered 1,000 tons monthly, commencing January, 1881, payment to be within three days after shipping documents were received. On February 2, 1881, because of error, but in good faith, the Naylor company refused to pay for the instalment delivered. The Mersey company elected to consider it a breach of contract which released them from further liability on the contract of sale. This conclusion, it will be noted, is in strict accord with the doctrine of *Spiegal & Son v. Alpirn, supra.* However, the court of appeals of England determined to the contrary, and held that such a breach did not operate to terminate the contract, nor in any manner impair its enforcement by the defaulting parties. This view was sustained by the House of Lords. In substance the holding in this *Mersey Company* case was that payment for a previous delivery was not a condition precedent to the right to claim the next delivery. Nor did the default terminate the contract as an entirety, and that, under the circumstances of that case, the party injured by the default was relegated to his action for damages. The gist of that decision appears in the "Sale of Goods" act, Statutes 1893 (Eng.) in possibly a somewhat qualified form in the following language: (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments. (2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or

refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

In connection with the *Mersey Company* case cited, the Earl of Selborne, L. C., in his opinion, makes use of the following language: "It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract, by the delivery of the undelivered steel." *Mersey Steel & Iron Co. v. Naylor, Benzon & Co., supra.*

It must be conceded, however, that the doctrine of the *Mersey Company* case did not receive a favorable reception from the judiciary of this nation. The great overwhelming weight of authority on this side of the Atlantic was in accord with the doctrine announced by our own case of *Spiegal & Son v. Alpirn, supra,* and *Norrington v. Wright,* 115 U. S. 188. However, in our uniform sales act, our legislature substantially adopted in qualified form the doctrine announced in the *Mersey Company* case which our American judiciary had but with few exceptions repudiated. In the section of that act, section 2514, Comp. St. 1922, corresponding to section 31 of the "Sale of Goods" act of England, 1893, we find almost the exact language employed, the sole difference being that for the words, "whether the breach of contract is a repudiation of the whole contract," found in the English statute, there are substituted, "whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract." The result of this legislative action is that the statutory rule has changed the

current judicial pronouncement, and that now a total default in payment of an instalment does not *ipso facto* at the election of the injured party terminate a contract of sale, but that its legal effect depends "on the terms of the contract under the circumstances of the case."

It may also be said that, while the words substituted in the Nebraska statute may not be deemed the exact equivalent of the language of the English act whose place they supply, still at most the difference in the test adopted, if any, is that we now weigh the effect of the default, and adjust the rigor of the remedy to the gravity of the wrong. *Helgar Corporation v. Warner's Features*, 222 N. Y. 449.

The "terms of the contracts" before us in this case are in writing, and each comprises a written offer followed by a written acceptance. They are substantially identical and the language of one will serve for both. They are as follows:

"Application for Membership.

"The undersigned wheat grower hereby applies for membership in The Nebraska Wheat Growers Association.

"The undersigned states that he has read the articles of incorporation, by-laws, original association agreement, and standard marketing agreement of the association; and that he understands and approves them and accepts them as binding upon him in all their terms.

"The undersigned agrees to perform all of the obligations of the by-laws and marketing agreement. (Here follow date, place and signature.)

"Accepted at Hastings, Nebraska, 8/11/1924.

"The Nebraska Wheat Growers Association, by O. P. Heald, Secretary-Treasurer.

"The following attached contract, approved and accepted by the association by authority of an express resolution of the board of directors, dated at Hastings, Nebraska, this 11th day of August, 192—: (Here follows at length a copy of the standard marketing agreement referred to above.)"

The "articles of incorporation," "by-laws," and at least

the "standard marketing agreement," are thus included in the controlling contract by direct reference.

"The general rule is that, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance." *Thompson v. Jost,* 108 Neb. 778. See, also, *Nebraska Hardware Co. v. Humphrey Hardware Co.,* 81 Neb. 693; *Tate v. Kloke,* 93 Neb. 382.

Thus construed, the object and purpose of the present transaction was the conferring of plaintiff's membership in the corporate body referred to in the contract and defining the rights and duties arising by reason of the relations thus created. The terms of the contract thus construed and the circumstances of the case must determine the fact of default, and if such appears the effect thereof.

It is admitted by the pleadings that the plaintiff is a Kansas corporation, and it appears that it was formed under the cooperative marketing laws of that state. And this court has determined that it was properly doing business in this state. It may be noted in passing that the statutory provisions relating to cooperative marketing appears as chapter 17, art. XVI, Rev. St. of Kansas, 1923. Among its provisions are: That twenty or more persons engaged in the production of agricultural products may form a nonprofit, cooperative association with or without capital stock; that such association may be organized and engaged in any activity connected with the marketing or selling of the agricultural products of its members, or with processing, filling, storing, handling, shipping, or the utilization thereof; that these organizations must, by two-thirds vote of its membership, adopt by-laws for its management "not inconsistent with the powers granted by this act;" that regular meetings shall be held annually; that special meetings may be called at any time by the board of directors, and are required to be called at any time

10 per cent. of the stockholders file petition stating specific business to be brought before the association, of which special meeting previous notice shall be given to all stockholders; that management of corporation affairs shall be by a board of directors elected from the membership thereof; that directors are to be subject to removal at any time by the membership with procedure of such removal specified; that additional safeguards providing that, upon the demand of one-third of entire board of directors, any matter which has been approved and passed upon by such board shall be referred to the entire membership for final determination; that these associations are especially empowered to become a member of any corporation or organization engaged in storing or handling grain, or marketing agricultural products at terminal markets to the extent of one-twentieth of the stock of such corporation or organization.

In 1925 the further act was passed (Laws of Kansas 1925, ch. 6) and by its terms "lawfully formed and conducted cooperative associations of producers" were assured the full exercise of right to engage in the cash grain business without limitation in the same manner and upon like terms and conditions then imposed upon others in such business.

The statutes under which plaintiff was organized, it may be said in passing, are but another evidence of that change in public policy in regard to combinations of farmers for the purpose of marketing their products which has not only been universally accepted but is an accomplished fact. This is to be seen, not only by the Clayton act and the many other recent acts of congress treating farmers as a distinct class, but also appears in the regulations of the executive department of the federal government. The legislatures of more than 30 of our states, including our own, have enacted substantially similar legislation to the Kansas act before us. These evidences of uniform opinion disclose that by universal consent it is now conceded that the basic economic

condition of agriculture at the present time requires the remedies contained in the acts referred to, and that their application is deemed reasonable and just, and to operate for the good of the entire nation and every citizen thereof. *Tobacco Growers Cooperative Ass'n v. Jones,* 185 N. Car. 265. Therefore, the Kansas statute above referred to and the proceedings authorized thereby are remedial in their nature, and this court is warranted in giving the statute a liberal and effective construction. *Buckmaster v. McElroy,* 20 Neb. 557; *McIntosh v. Johnson,* 51 Neb. 33.

Then, too, it is obvious that the public policy announced has for its aim the advancement of the agricultural classes by promoting self help which, in turn, must be wholly based upon the sanctity of contracts and the integrity of engagements, not only as between cooperative corporations and third parties, but as between the membership thereof.

A corporation may be said to be an artificial person created by or under legislative enactment. The constating act under which the plaintiff was organized contains two possible forms, "stock" and "nonstock." Plaintiff is a nonstock corporation.

In a stock corporation, membership is created and the corporation sustained by the purchase or ownership of stock which evidence the right the owner has in the management, profit, and ultimate assets of the corporation, and from the proceeds of which, received by the corporation, its business may be transacted. In a nonstock corporation, the right which a member has in its management, profit, and ultimate assets is evidenced ordinarily by its contract of membership. But both stock and nonstock forms of corporation activity are created on the foundation of a contribution of money or property by its membership to be used by and through these "artificial persons" in the transaction of business for which they are organized for common profit by and of the owners thereof.

It would seem to necessarily follow that the question of the legal enforcibility involved in the agreement of a stockholder to furnish money or property through the device of

a stock subscription, and the same question arising by a corporate member in a like agreement to furnish property or money for the use of the corporate party by the device of a contract of membership, entails the application of identical principles.

Referring to the claims of defendants on which they base their defense, it is to be noted that at most the default alleged constitutes "mismanagement of the affairs of the corporation" in violation of the stipulation of what constitutes a part of their membership contract.

In the case of *American Building & Loan Ass'n v. Rainbolt,* 48 Neb. 434, 448, a similar contention between members of a "stock company" was before this court. The association, a Minnesota corporation, secured subscriptions for building and loan stock in Nebraska, it was alleged, pursuant to a contract by the terms of which it was agreed on behalf of the association that all money paid by the subscribers for their stock in the city of Norfolk and certain contiguous territory, after the payment of necessary expenses, should be formed into a "loan fund" which should be applied exclusively in payment of the stock of such subscribers, and that the business of loaning the funds of the association in Norfolk and vicinity should be carried on under the approval of a local board at Norfolk, Nebraska, to be made up from such Nebraska subscribers. This alleged agreement the association finally repudiated. And in passing upon an action brought to abrogate these subscriptions for the stock and to recover the money paid to the corporation, this court, on the theory that such a contract, in fact, existed, said: "Another fatal objection to the right of rescission in this case is that the abolition of the local board, like the alleged failure to transfer surplus money to the loan fund, amounts to no more than a mismanagement of the affairs of the association. It is the duty of the members to select competent officers to conduct the corporate affairs, and, failing to do so, they will not be heard to complain if those chosen for that purpose prove incompe-

tent or inattentive to the trust reposed in them." Syllabus: "The mere mismanagement of the affairs of a corporation by its officers or agents does not warrant the withdrawal therefrom of stockholders or the repudiation of the obligations assumed by them as such." See, also, Cook, Corporations (8th ed.) sec. 188.

The conclusion therefore is that, assuming, but not deciding, that as to plaintiff's claimed defaults, the record sustains the defendants, still, "in view of the contract and the circumstances of the case," "the breach of the contract" is "not" so material as to justify the injured party in refusing to proceed further. Plaintiff was entitled to the specific performance of the contracts in suit, and, in the denial of the injunction prayed for, the district court erred. *Pittman v. Tobacco Growers Cooperative Ass'n,* 187 N. Car. 340; *Washington Cooperative Egg & Poultry Ass'n v. Taylor,* 122 Wash. 466; *California Prune & Apricot Growers Ass'n v. Baker,* 246 Pac. (Cal. App.) 1081; *Tobacco Growers Cooperative Ass'n v. Jones, supra; Arkansas Cotton Growers Cooperative Ass'n v. Brown,* 168 Ark. 504.

Nor do we find, in view of the evidence in the record, that there has been in fact a violation of the contract by the plaintiff that would sustain or give rise to a just claim of compensation in behalf of the defendants. The controlling rule of construction already announced precludes the application of the doctrine of *ejusdem generis* contended for by the defendants. Indeed, the terms of the contract as a whole, as that word has been defined herein, particularly in the light of public policy involved, plainly indicates that it was the intent of the parties to employ the language contained in the writings in a general and not in a restricted sense. 13 C. J. 537, sec. 501. Therefore, even though one year after we determined certain transactions ill-advised, we could not say that the error in judgment was in excess of the discretion conferred or power possessed. It is deemed that managing officers of this corporation, subject to the control and the direction of its membership, to be exercised as heretofore indicated, possessed

the right and power to sell its products to the best advantage in view of the circumstances which confronted them, and that they were not precluded from selling the same by or through the ordinary agencies of the public market in the usual course of trade. If they erred in judgment, it may be said the good faith of their transactions is not impeached by the evidence in the record. The error is one, therefore, if mistake there was, which imposes no liability upon the corporation as such.

The plaintiff asks for a judgment for liquidated damages in the sum of 25 cents a bushel for each bushel of wheat which the defendants should have delivered. This amount is stipulated in the contracts, and liquidated damages are authorized by the terms of the Kansas act under which the plaintiff was organized. Chapter 80, Laws 1925, recognizes the necessity of such provisions under the circumstances of the case before us.

From the nature of the association and its agreements with its members, it is apparent that it would be impracticable and extremely difficult to fix the actual damages resulting from such a breach of agreement by its members. It does not appear, in view of the amount of damages stipulated and the facts of the record, that the damages are disproportionate to the probable damages. It is therefore sustained as valid. *California Bean Growers Ass'n v. Rindge Land & Navigation Co.*, 199 Cal. 168; *Edgar v. Anthes*, 109 Neb. 546; *Lorius v. Abbott*, 49 Neb. 214.

The judgment of the district court is therefore reversed and the cause remanded, with directions that the district court proceed in accordance with this opinion to determine the amount of wheat grown in 1925 and covered by the contracts in suit still in possession of either defendant, and that as to such grain judgment be entered against the defaulting party as prayed in plaintiff's petition; and that the district court further determine the amount of said wheat of 1925 crop disposed of by either of said defendants in violation of the aforesaid contracts, and to

the extent of his defaults judgment be entered against each of the parties violating said contracts for liquidated damages provided for in said agreements in suit.

REVERSED.

Note—See Agriculture, 2 C. J. 998 n. 31 New; 25 A. L. R. 1113; 33 A. L. R. 248.

STATE OF NEBRASKA V. ANDY HALBERT.

FILED JANUARY 13, 1927. No. 25720.

1. **Indictment:** ESSENTIAL ALLEGATIONS. The general rule in this state is that, to charge a statutory offense, the information or indictment must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent, and that an information so doing is ordinarily sufficient.
2. **Gaming:** INDICTMENT: ALLEGATIONS. In charging an offense under section 9803, Comp. St. 1922, it is not essential to include therein a charge that the defendant gambled on the device with others, or permitted others to gamble thereon.
3. **Indictment:** NEGATION OF EXCEPTION. In charging a statutory crime where the statute contains an exception, the general rule is that the information should properly negative such exception, but where the allegation covers the affirmative part of the statute and clearly involves a negation of the other, no further negative need be added, and it is unnecessary for the pleader to refer to the exception.
4. **Information** in this case examined and *held* sufficient.

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

F. N. Prout, for plaintiff in error.

John C. Mullen, contra.

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

EBERLY, J.

In this case a grand jury presented an indictment against the defendant consisting of three counts covering three separate transactions occurring on three separate dates. They were drawn under the provision of section 9803, Comp. St. 1922. The language of each count, excluding the element of time, was identical, and charged that the defendant "did then and there unlawfully and feloniously set up and keep a gaming table, adopted, devised and designed for the purpose of playing with dice, a game of chance for money." To this indictment the district court sustained a motion to quash. The grounds upon which this motion was based are set forth in eight paragraphs thereof, which, so far as importance in this proceeding is concerned, may be epitomized as follows: That the indictment did not state facts sufficient to constitute an offense of either the grade of felony or misdemeanor or notify the defendant of the offense to which he was required to answer. Exceptions to this ruling were taken by the county attorney, and under section 10192, Comp. St. 1922, were presented to this court, John C. Mullen, Esq., appearing under appointment of the trial judge to argue the case against the prosecuting attorney.

The principle of constitutional law "that in all criminal prosecutions the accused shall have a right to demand the nature and cause of accusation and to have a copy thereof" is not questioned in this proceeding. The real issue is, has the constitutional provision been properly interpreted and applied in the instant case?

The general rule in this state is that, "to charge a statutory offense, the information or indictment must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent." *Barton v. State,* 111 Neb. 673. See, also, *Newby v. State,* 75 Neb. 33; *Altis v. State,* 107 Neb. 540; *Gaweka v. State,* 94 Neb. 53; *Jones v. State,* 112 Neb. 710; *Moline v. State,* 67 Neb. 164.

The question presented is strictly a matter of pleading, and to it the discussion will be limited.

In support of the position of the district court, we are cited to *State v. Wade,* 267 Mo. 249; *State v. Brown,* 118 Kan. 603.

In *State v. Wade, supra,* the information charged that the defendant "did then and there wilfully, unlawfully and feloniously set up and keep a certain table and gambling device, commonly called a crap table, which said crap table was then and there and on said other days and times a gambling device adapted, devised and designed for the purpose of playing games of chance for money and property; and did then and there * * * unlawfully and feloniously induce, entice and permit certain persons, to wit, * * * to bet and play at and upon a game played on and by means of such gambling device."

"The information in this cause is bottomed on section 4750, Revised Statutes 1909, which is as follows: 'Every person who shall set up or keep any table or gaming device commonly called A B C, faro bank, E O, roulette, equality, keno, slot machine, stand or device of whatever pattern, kind or make, or however worked, operated or manipulated, or any kind of gambling table or gambling device, adapted, devised and designed for the purpose of playing any game of chance for money or property, and shall induce, entice or permit any person to bet or play at or upon any such gaming table or gambling device, or at or upon any game played or by means of such table or gambling device or on the side or against the keeper thereof, shall, on conviction,' " etc.

The evidence discloses that the tables in actual use were pool tables with a crap layout on them and that craps was actually being played thereon. In the opinion it is said: "In construing statutes we have so frequently applied the familiar rule of *ejusdem generis,* that we would not now be warranted in departing therefrom. We have said this doctrine meant that, when an enumeration of certain specified things in a statute is followed by general words or phrases, such words or phrases of general description shall be deemed to mean things of the same class and kind, and

not include things wholly different from those specifically mentioned, or otherwise expressed; that when general words follow particular words they must be construed as applicable only to the things of the same general class as the particular words by which they are preceded." *State v. Wade, supra.*

If it be conceded that the application of this rule is required by the terms of the Missouri statute and that certain kinds of "gambling tables" or "gambling devices," appropriately described by its general language, were not of the same general class as "A B C, faro bank, E O, roulette, keno," etc., it would logically follow that the language of the information in *State v. Wade, supra,* was broader than the statute on which it was based and therefore defective. To that extent this case sustains defendant's contention.

As to the case of *State v. Brown,* 118 Kan. 603, so far as it applies to the question of pleading here presented, it does not at all sustain the defendant's contention.

It is true that the terms of the Missouri statute substantially appear as the Kansas act before the court in the case last mentioned. But the Kansas court, in answer to the contention that the doctrine of *ejusdem generis* was controlling in the interpretation of the Kansas statute, expressly repudiated that doctrine of the supreme court of Missouri, holding that *ejusdem generis* "had no place in the interpretation of the Kansas statute;" that, where the subject for consideration was a "device" of a kind not expressly enumerated in the statute, the general provisions of the Kansas act should be read as "though they stood alone;" that an information in the following language (omitting formal parts), "That * * * one M. Brown did * * * knowingly permit and allow to be set up and maintained gambling device and devices, composed of tables used for gaming and playing cards, the same being then and there adapted, devised and designed for the purpose of playing a game and games of chance, commonly known as 'poker'

and other games of chance for money and other property (description of premises)," was held "sufficient," though a similar information was held defective in *State v. Wade, supra.* This was because, "though the exact language of the statute was not followed, it was substantially so."

We cannot accede to the proposition advanced by the defendant "that the indictment against Halbert does not charge that he gambled on the table with others, or that Halbert permitted others to gamble on the table," and therefore insufficient. A similar question before the supreme court of Illinois received the following treatment: "It is next contended that the allegation descriptive of the purposes for which the slot machine was used is faulty. The indictment charges that plaintiff in error did 'keep a certain slot machine, the same then and there being a device upon the result of the action of which money or other valuable thing is staked.' It is claimed that this last allegation should be, 'upon the result of the action of which money or other valuable thing was then and there staked.' The allegation of the indictment is in the language of the statute, and that is sufficient." *Bobel v. People,* 173 Ill. 19.

This court has long been committed to the rule that generally a charge in the language of the statute defining the offense, in the indictment, is sufficient. *Goff v. State,* 89 Neb. 287; *State v. Lauver,* 26 Neb. 757; *Leisenberg v. State,* 60 Neb. 628; *Peterson v. State,* 64 Neb. 875; *Cordson v. State,* 77 Neb. 416; *Cuthbertson v. State.* 72 Neb. 727; *Newby v. State,* 75 Neb. 33. We find no good reason why this rule is not applicable in the instant case.

It therefore follows that the exceptions of the county attorney must be sustained, unless we are to approve the last proposition advanced by the defendant in error, which is that the indictment is bad because it failed to negative the exception in the statute. It will be noted that the words "except billiard tables" appear in our statute. If these words form a portion of the description of the offense, so that the ingredients thereof cannot be accurately and definitely stated if the excepted words are not negatived, the

defendant's contention must be sustained. But, even so, has not the rule been complied with in the present case?

"As a rule any words which exclude the exception with certainty are sufficient. An express negation is not necessary where the charge preferred, from its nature, conclusively imports a negation." 31 C. J. 725, sec. 270.

Or, as expressed by this court: "In charging a statutory crime, where the statute contains an exception, the general rule is that the information should properly negative such exception; but, where the allegation covering the affirmative part of the statute clearly involves a negation of the other, no further negative need be added, and it is unnecessary for the pleader to refer to the exception." *Holmes v. State*, 82 Neb. 406. Such is the case before us.

It follows, therefore, that, the indictment properly charged a crime under the laws of Nebraska, and in the quashing of the same the district court erred.

EXCEPTIONS SUSTAINED.

Note—See Indictment and Information, 31 C. J. 703 n. 86, 705 n. 1, 708 n. 29, 717 n. 25, 720 n. 57, 725 n. 90, 726 n. 91; 14 R. C. L. 185.

LINCOLN SAVINGS & LOAN ASSOCIATION, APPELLEE, V. CARL L. ANDERSON, APPELLANT.

FILED JANUARY 24, 1927. No. 24385.

1. **Appeal:** MORTGAGE FORECLOSURE: REDEMPTION. During the pendency of an appeal from a decree of the district court confirming a judicial sale of property, and prior to the issuance of a mandate on affirmance by this court of such decree, this court is vested with jurisdiction to hear and determine an application to redeem, and to fix the amount of redemption money necessary for that purpose.

2. **Judicial Sales:** PLAINTIFFS. The word "plaintiff," as used in redemption clause reading as follows: "And in case the said real estate has been sold to any person not a party plaintiff to the suit"—of section 9012, Comp. St. 1922, means those parties to the suit granted affirmative relief against the property in

question, and this whether actually appearing as plaintiffs or defendants.

3. **Mortgages:** FORECLOSURE SALE: REDEMPTION. One seeking to redeem such property from such a purchase is required to satisfy the decree running in favor of such purchaser, as well as each and every lien in suit prior thereto; and, in such a case, where redemption is sought and granted, the court should direct that the money paid in by such purchaser be returned to him.

4. **Appeal:** MORTGAGE FORECLOSURE: SATISFACTION OF DECREE IN SUPREME COURT. If the party seeking redemption desires satisfaction of such judgment to be had in this court, he must file herein a certificate of the clerk of the district court showing that all conditions necessary to redemption have been by him complied with.

5. **Bankruptcy, as Affecting Decree of Foreclosure.** A decree entered in a court of competent jurisdiction foreclosing mortgage on real property and ordering sale thereof, and the right of redemption therefrom, are neither affected by the discharge in bankruptcy of the mortgagor.

6. **Mortgages:** FORECLOSURE SALE: REDEMPTION. In a case where the property is bid in by a third party, then the one seeking redemption, under section 9012, Comp. St. 1922, should pay into court a sum equal to such bid to be applied on the liens impressed by the decree in the order of their priority, together with 12 per cent. interest on such bid from its payment to the date of redemption, for the use and benefit of the bidder; and if redemption is had, such interest, together with the bid, should be by the court ordered paid to such bidder by the clerk of such court.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Redemption permitted.*

C. C. Flansburg, for appellant.

Burkett, Wilson, Brown & Wilson, contra.

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

THOMPSON, J.

Carl L. Anderson and wife executed two notes running

to the Lincoln Savings & Loan Association, plaintiff and appellee, hereinafter called the association, and secured each thereof by mortgage on the lot in controversy. Neither of which mortgages having been paid, such association commenced foreclosure proceedings as to each thereof in the district court for Lancaster county, making the Farmers State Bank of Davenport a party defendant, which last named bank interposed a cross-petition on a mortgage running to it on the same property from such Andersons, and praying foreclosure thereof. Issues were duly joined, and decree had on June 22, 1923, by which it was adjudged that there was due and owing such association on its first mortgage $3,223.66 with interest at the rate of 10 per cent. per annum from that date, being the first lien in suit, and on its second mortgage $522.88 with interest thereon at 10 per cent. per annum, being the second lien in suit; and further found that there was due and owing the Farmers State Bank of Davenport the sum of $2,850, which bore interest at the rate of 8 per cent. per annum from the date of decree, and that such amount was a third lien on such premises. It was further ordered that the premises be sold and the proceeds applied in payment of the liens as above indicated. Defendants Anderson interposed a request for a stay of nine months, which was granted. Later, an order of sale was issued, property sold, and bid in by the Farmers State Bank for the sum of $5,000, which sale was afterwards confirmed, supersedeas bond filed and approved, and appeal taken to this court, by the Andersons, which appeal was perfected on September 8, 1924, and judgment affirmed on November 19, 1926. (No written opinion.) In the meantime, to wit, January 20, 1925, voluntary bankruptcy proceedings were instituted by Carl L. Anderson, resulting in his discharge on June 25, 1925. In such bankruptcy proceedings the notes heretofore referred to were each listed as indebtedness owing by the bankrupt. However, neither of the mortgagees appeared in such proceedings, but each relied on the decree of the trial court

and their rights thereunder. Shortly after such confirmation in the trial court, and more than four months prior to the filing of the petition in bankruptcy, Anderson and wife sold and conveyed to Ira C. Deats and W. C. Muirhead all their right, title and interest in and to such lot, together with their right of redemption from such sale. Afterwards, to wit, December 27, 1926, and within the forty days allowed for a motion for rehearing, and before the mandate on such affirmance by this court had been issued, Deats and Muirhead applied to this court, by way of a motion filed in this case, for an order fixing the amount necessary to redeem the land from such decree and sale, which motion came on for hearing January 6, 1927, and case submitted.

The contention of the moving parties is that, as the bid was sufficient to satisfy the association's respective claims, and $854.24 of the claim of the Farmers State Bank, and as the remainder unpaid to the latter, and for which such bank would have been entitled to a deficiency judgment against such Anderson but for such bankruptcy proceedings, was satisfied in full by reason of such proceedings in bankruptcy, such moving parties now have a right to redeem from such sale by paying into court the amount of such bid with interest thereon at 7 per cent. per annum from the date of its payment into court, which so far as this record is concerned is the date of such sale, or if such bank is not under the statute a "plaintiff", then such $5,000 with 12 per cent. interest.

As to these contentions on the part of Deats and Muirhead the Farmers State Bank interposes the following objections in substance, to wit: (1) That, as no motion for a rehearing was filed within the forty days allowed for such purpose, this court is without jurisdiction to consider either proposition presented; (2) that the bankruptcy proceedings could in no manner affect the decree of this court or the rights of the parties under the same as to the securities there involved, or of the procedure to be had thereunder as indicated by section 9012, Comp. St. 1922; (3)

that, if it should be determined that redemption in this case could be had, then and in that case Deats and Muirhead would be compelled to pay to the clerk of the district court for Lancaster county for the use of the Lincoln Savings & Loan Association the sum of $4,019.66 with interest at 10 per cent. per annum from the date of decree to the date of payment, and for the use of the Farmers State Bank of Davenport the amount of its decree, to wit, $2,850, with 8 per cent. interest per annum thereon from the date of such decree to the date of payment to the clerk; and that such bank is entitled to a return of the money, to wit, $5,000 paid by it into the office of such clerk as the purchase price, and that decree should be so entered herein, and, in addition thereto, that Deats and Muirhead be required to pay before redemption is had, and at the same time as above indicated, the costs of this suit, both in this and the trial court.

We have heretofore held in construing section 497*a* of the Code of Civil Procedure, now section 9012, Comp. St. 1922, in *Philadelphia Mortgage & Trust Co. v. Gustus*, 55 Neb. 435, as follows: "If from an order of confirmation of a sale of real estate under a decree of foreclosure of a mortgage there has been perfected an appeal to this court, also the execution and approval of the proper appeal bond, the mortgagor may redeem from the sale at any time prior to the decision or decree of this court, by which the order of confirmation may become of force and operative." And in *Thesing v. Westergren*, 75 Neb. 387, we held: "During the pendency of an appeal from a judgment of the district court confirming a judicial sale, the supreme court is vested with jurisdiction to entertain an application to redeem and to determine the amount of redemption money required for that purpose."

The affirmance by us of the judgment of the trial court was not effective to deprive the moving parties herein of their right to redeem, and this court did not lose jurisdiction by reason thereof, and did not and would not at least until the mandate was issued thereon.

As to the question of the effect of the proceedings in bankruptcy upon the rights of the parties to redeem, it is sufficient to say that such proceedings in no manner affected the *res* in question so far as the right to redeem as herein presented is involved. Such an adjudication would neither restrict nor extend the rights of these mortgagees or of the purchaser at such mortgage sale. Their rights would remain as they were before such bankruptcy proceedings were had, governed solely by the decree and section 9012, Comp. St. 1922.

As redemption may not be had, it may be well to state we do not determine the effect that such discharge in bankruptcy, if pleaded, would have as against a motion for a deficiency judgment, as such question is not before us.

As we have found that this court has jurisdiction, and that the matters in controversy here were in no manner affected by the bankruptcy proceedings, the sole question remaining for our consideration is the proper construction to be given to such section 9012, as applied to the facts heretofore related. It will be seen that such section is somewhat involved; that the legislative intent must be ascertained to some extent at least from the purpose of the act, and by so doing thus give the section a reasonable rather than a literal construction. Such section provides, in part, that redemption may be had "from the lien of such decree or levy at any time before the sale of the same shall be confirmed by a court of competent jurisdiction by paying into court the amount of such decree or judgment, together with all interests and costs." Thus, to give the words here used a literal construction, the statute leaves us without a provision as to what shall become of the money that was bid at the sale of the premises and paid into court. If the party redeeming is to pay in such a case only the debt, then the purchaser is left without remedy as to that which he bid and paid and has parted with, a condition which the legislature could not have intended should arise. Therefore, it is concluded by us that the legislative intent was that one seeking to redeem in such a case must pay into

court the amount due and owing the plaintiff, as hereinafter defined, by reason of his mortgage, together with interest thereon from the date of the decree to the date of redemption at the rate provided in such decree, and costs of suit.

Such section further provides: "And in case the said real estate has been sold to any person not a party plaintiff to the suit, the person so redeeming the same shall pay to said purchaser twelve per cent. interest on the amount of the purchase price from the date of the sale to the date of redemption, or deposit the same with the clerk of the court where the decree or judgment was rendered." Thus again, if we give such section a literal construction, such clause would apply solely to the actually named plaintiff in the case, and would not apply to other lien holders who are made defendants and interpose what we term "cross-petitions" seeking foreclosure of mortgages or liens on the premises held by such cross-petitioners. This could not have been the intention of the legislature, but the word "plaintiff" must have been intended to mean and include those who were actually plaintiffs, and such as are connected with the suit as cross-petitioners who might have properly been made or became plaintiffs; that is, the word "plaintiff" means those parties to the suit who were granted affirmative relief against the property in question. Applying these conclusions to the facts, the rule that would apply to the one who actually was made plaintiff should be applied to a case where the property is bid in, as in this case, by a cross-petitioner who is found to be a subsequent lien holder, as in law for the purpose of such redemption the purchasing cross-petitioner and all lien holders prior to him are one. Thus, if such subsequent lien holder bids in the property, then in order to redeem the party seeking redemption would be compelled to pay the entire debt of such subsequent lien holder, as determined by the decree, and also the debt so determined as to each and every lien holder in suit prior to that of such purchaser, together with interest on each thereof as provided in such decree from the date of the entry thereof

until the date of payment, and in addition the entire costs of the suit, and further that in such a case the clerk of the district court, or the sheriff, as the case may be, should be ordered to return to such subsequent purchasing lien holder the entire amount of his bid which he has paid by reason thereof.

Hence, if Deats and Muirhead desire to redeem, such right is hereby granted upon their paying to the clerk of the district court for Lancaster county in this case, within 30 days from the adoption of this opinion, the respective amounts as found due and owing by the trial court, with interest, on that due the Lincoln Savings & Loan Association at the rate of 10 per cent. per annum from the date of the decree until the date of payment, and on the lien of the Farmers State Bank of Davenport interest at the rate of 8 per cent. per annum from the date of such decree to the date of such payment; and the costs of suit, including those of the trial court as well as those of this court; and, further, that the clerk of the district court in such case return to such Farmers State Bank of Davenport the $5,000 heretofore paid into such court by it as its bid.

If, after each and all of such conditions are complied with, and within such 30 days, Deats and Muirhead desire the judgment satisfied in this court, then in that case they shall procure and file herein a certificate of the clerk of such district court showing such compliance; and in the meantime mandate will not issue.

It might be well to state that, where the property is bid in by a third party, then the one seeking redemption, under such section 9012, should pay into court a sum equal to such bid, to be applied on the liens impressed by the decree in the order of their priority, together with 12 per cent. interest on such bid from its payment to the date of redemption, for the use and benefit of the bidder; and, if redemption is had, such interest, together with the bid, should be by the court ordered paid to such bidder by the clerk of such court.

REDEMPTION PERMITTED.

CEVILLA MCMONIES ET AL., APPELLEES, V. JOHN H. LINDGREN ET AL., APPELLEES: GUSTAF A. ANDERSON, APPELLANT.

FILED FEBRUARY 1, 1927. No. 24549.

Mortgages: FORECLOSURE: PLEADING AND PROOF. "In a suit in equity to foreclose a mortgage on real estate, plaintiff is required by statute to allege that no proceeding at law to recover the debt has been instituted, and it is necessary to prove that fact, if denied by defendant in his answer." *Young v. Thompson*, 114 Neb. 804.

APPEAL from the district court for Burt county: WILLIAM G. HASTINGS, JUDGE. *Reversed.*

J. A. Singhaus, for appellant.

Herbert Rhoades, contra.

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

ROSE, J.

This is a suit in equity commenced by Cevilla McMonies and C. E. McMonies, plaintiffs, to foreclose a mortgage for $48,200, on 320 acres of land in Burt county. The mortgagors were John H. Lindgren and Anna Lindgren. Their equity of redemption was acquired by Gustaf A. Anderson. All three and other interested parties were sued as defendants. Anderson objected to jurisdiction over him, but subsequently filed a general denial after his objections were overruled. Upon a trial of the issues the district court decreed a foreclosure. By supplemental proceedings, resisted by Anderson, a receiver for the mortgaged premises was appointed and he is in charge of the property in litigation. Anderson alone appealed.

Failure to prove material allegations of the petition is urged as a ground for the reversal of the decree of foreclosure. The petition contained the allegation that there had been no proceeding at law for the recovery of the debt secured by the mortgage. This allegation was required by a technical provision of statute. Comp. St. 1922, sec. 9212. The burden was on plaintiffs to prove what they had thus

pleaded. Neither the plaintiffs nor the courts are at liberty to disregard the requirements of the statute. *Young v. Thompson,* 114 Neb. 804. The bill of exceptions does not contain evidence that no proceeding at law to recover the debt has been instituted. For this failure of proof, therefore, the decree of foreclosure is erroneous.

Other questions presented are failure to make personal service of summons on Anderson or to bring him into court by proper publication of notice and assigned error in the appointment of a receiver without cause. An examination of the evidence from every standpoint leads to the conclusion that the objections to jurisdiction were properly overruled and that the power of the district court to appoint a receiver was properly exercised under the circumstances. Anderson was not prejudiced. His interests were protected by counsel, though urging objections to jurisdiction.

For failure of plaintiffs to prove their allegation that no proceeding at law to recover the debt had been instituted, the decree of foreclosure is reversed and the cause remanded for further proceedings.

REVERSED.

JAMES L. THOMPSON, APPELLEE, V. CITY OF ALBION, APPELLANT.

FILED FEBRUARY 1, 1927. NO. 24606.

Municipal Corporations: INJURY TO FIREMAN: LIABILITY. A municipal corporation exercising grants of sovereign power is not liable at common law for the negligent acts of its fire department, and this rule of law applies to negligence of and injuries to members of a city fire department and to members of a volunteer fire department.

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

Williams & Williams and *W. J. Donahue,* for appellant: *Vail & Flory, contra.*

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

ROSE, J.

This is an action at law to recover $25,000 in damages for personal injuries caused by negligence of the city of Albion, defendant. Plaintiff was a member of its volunteer fire department. Responding to a fire alarm October 9, 1922, he assisted in vertically hoisting the door to the fire apparatus, intending to enter the building in which it was housed. While in the open doorway, the door broke loose from cables on which it was suspended above by heavy weights and struck him below his left knee, resulting in subsequent amputation. The cables ran in concealed perpendicular slots in the walls and were negligently constructed and maintained. Plaintiff was without knowledge of their dangerous condition. The fire apparatus was stored in a room in the city hall. Though the room and the fire apparatus were under the control of the volunteer fire department, they belonged to the city and were instrumentalities of the municipal government. When injured, plaintiff was at work incidental to the operation of the fire department pursuant to a fire alarm.

The answer to the petition contains the plea that the city is entitled to immunity arising from the exercise of governmental functions for the sole benefit of the public without exacting compensation for the services of the fire department. The answer contains also a general denial in addition to other pleas.

Upon a trial of the issues the district court permitted plaintiff to recover damages. The jury returned a verdict in his favor for $7,000. From a judgment therefor defendant appealed.

Assuming that negligence and resulting damages were pleaded and proved, was plaintiff entitled to a verdict? More than a third of a century ago the supreme court of Nebraska announced the following rule:

"A city is not liable at common law for the negligent acts of the members of its fire department." *Gillespie v. City of Lincoln,* 35 Neb. 34.

The law thus stated has been consistently followed.

Burke v. City of South Omaha, 79 Neb. 793; *Tewksbury v. City of Lincoln,* 84 Neb. 571; *State v. Love,* 89 Neb. 149; *State v. City of Lincoln,* 101 Neb. 57; *Rooney v. City of Omaha,* 104 Neb. 260; *State v. City of Omaha,* 112 Neb. 694.

It is now well settled by precedent that protection from fire in an incorporated city is a function of government. What is done by the fire department in extinguishing fires is the exercise of governmental power. In furnishing fire protection the city did not receive any pecuniary benefit. The governmental function exercised by the fire department differs from that of a municipal water or lighting plant which exacts compensation for services in the field of private or corporate enterprise. Negligence of firemen in the performance of their duties, though resulting in damages, is not actionable in a suit against the city, unless made so by statute. Plaintiff was injured in the line of his duties while responding to a fire alarm. The statutes have not been changed to authorize an action for damages based on negligence of the city or its fire department under such circumstances. The rule of nonliability applies to negligence of employees of a fire department. *Pettingell v. City of Chelsea,* 161 Mass. 368, 24 L. R. A. 426; *Long v. City of Birmingham,* 161 Ala. 427; *Wild v. City of Paterson,* 47 N. J. Law, 406; *Peaty v. City of New York,* 67 N. Y. Supp. 276; *Peterson v. City of Wilmington,* 130 N. Car. 76, 56 L. R. A. 959; *Lynch v. City of North Yakima,* 37 Wash. 657, 12 L. R. A. n. s. 261; *Miller v. City of Macon,* 152 Ga. 648; *City of Hattiesburg v. Geigor,* 118 Miss. 676.

Immunity extends also to negligence of and injury to members of volunteer fire departments. *Torbush v. City of Norwich,* 38 Conn. 225; *Yule v. City of New Orleans,* 25 La. Ann. 394; *Lawson v. City of Seattle,* 6 Wash. 184.

Though there are dissenting opinions in some of the cases cited and diverse decisions in others, the weight of authority supports the principles of law stated.

While the noble impulses of plaintiff in voluntarily serving the public without compensation are worthy of admi-

ration and while the distressing injuries which he could not foresee or avoid appeal to human sympathy, the courts are without power to make laws authorizing an action for the damages sustained by him, the law-making power having been committed by the Constitution to the legislative department of government.

The district court should have directed a verdict in favor of defendant. The judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

SUSIE ROBB STUART, APPELLEE, V. FANNIE B. DURLAND ET AL., APPELLANTS.

FILED FEBRUARY 1, 1927. No. 24537.

1. Usury: MORTGAGES. A mortgage which, by its express terms, requires the mortgagor to pay the maximum legal rate of interest on the debt which it secures, and, in addition, to pay the taxes upon the mortgagee's interest in the mortgaged premises, is usurious.

2. ———: PLEADING. Where, in an action to foreclose a mortgage, the plaintiff sets forth in his petition facts which show that the mortgage is subject to the defense of usury, it is not necessary for the defendant to plead the same facts in his answer. In such case, he may avail himself of that defense by claiming the benefit of the usury statute.

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

Sinclair & McDermott, for appellants.
N. M. York, contra.

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

GOOD, J.

This is an appeal from a decree of foreclosure. The only defense tendered was that of usury. The trial court found that there was no usury and entered a decree for plaintiff

for the full amount of the mortgage, accrued interest, and taxes, paid by plaintiff upon the mortgaged premises, which became delinquent after the date of the mortgages. Defendants appeal.

Three mortgages are in controversy, all running for a period of five years, bearing interest from date at the rate of 10 per cent. per annum, and executed by the same mortgagors to the mortgagee; but each mortgage being on a separate tract of realty. In fact, the three mortgages represented a single loan. One of the mortgages was for $10,000, and the other two for $5,000 each. Each of the mortgages contained a clause requiring the mortgagors to pay all taxes and assessments levied upon the mortgaged premises, or upon the mortgage or note which it secured, before the same would become delinquent, and a further proviso that if the mortgagor failed to pay the taxes the mortgagee might pay the same and the amount so paid or advanced for taxes should be secured by the mortgage and bear interest at 10 per cent. per annum.

Defendants contend that the mortgage contracts are, on their face, usurious, because, by their terms, they require the mortgagors to pay, in addition to the maximum rate of interest permitted by statute, the taxes that may be assessed or levied on the notes and mortgages or assessed on the mortgagee's interest in the mortgaged premises. On the other hand, plaintiff argues that the provisions referred to do not make the contracts usurious and contends that the question is not presented, for the reason that there are no facts alleged in the answers which would show that the contracts are usurious, and that, in the absence of such allegations, the defense of usury is not available to the defendants.

This court has not heretofore determined whether a mortgage contract is usurious which, by its terms, requires the mortgagor to pay, in addition to the maximum legal rate of interest, the taxes that may be assessed against the mortgage and note thereby secured, or against the mortga-

gee's interest in the mortgaged premises. The question has been passed upon by the courts of other jurisdictions. There is some lack of harmony in the decisions.

The supreme court of Alabama takes the view that the statute, permitting a clause in a mortgage requiring the mortgagor to pay the taxes upon the mortgage or the mortgage debt, was purely a revenue measure and was not intended to affect the rate of interest allowed to lenders, and that a mortgage which provided for the maximum legal rate of interest and the payment of such taxes was not usurious. *Dubose v. Parker*, 13 Ala. 779. The supreme court of Idaho holds that such a clause in a mortgage does not render it usurious, but the decision of that court is based upon a statute which renders such a clause in a mortgage absolutely void. *First Nat. Bank of Hailey v. Glenn*, 10 Idaho, 224. The same view is held in the state of Oregon, upon the theory that a provision in a contract requiring the payment of taxes is void. *United States Mortgage & Trust Co. v. Marquam*, 41 Or. 391. The last two cases cited have no bearing on the question under consideration, because we have a statute permitting the insertion of such a clause in a mortgage. Comp. St. 1922, sec. 5952.

The supreme court of Michigan holds: "A contract to pay the highest rate of interest allowed by law and in addition thereto the taxes upon the indebtedness represented by the contract is usurious." *Stack v. Detour Lumber & Cedar Co.*, 151 Mich. 21; *Green v. Grant*, 134 Mich. 462. The supreme court of Virginia, in *Meem v. Dulaney*, 88 Va. 674, holds that a contract to pay the lender the highest legal rate and, by a separate contract, to indemnify him for any taxes that might be imposed on his note or bond is usurious. The same view is taken in *Norris v. Belcher Land Mortgage Co.*, 98 Tex. 176, and in *In re Elmore Cotton Mills*, 217 Fed. 810.

In determining the question in this jurisdiction, we should first consider the statutory provisions and the former decisions of this court as to what constitutes usury. In this

state, by statute, the maximum rate of interest that may be taken or reserved by a lender is 10 per cent. per annum. Prior to 1911 the owner of real estate was required to pay taxes on the full value thereof, without regard to the fact that it might be incumbered by a mortgage, and mortgages and notes secured by mortgages were subject to assessment for taxes to the holder thereof. In 1911 section 5951, Comp. St. 1922, was enacted, which provides:

"For the purpose of assessment and taxation, a mortgage on real estate in this state is hereby declared to be an interest therein. The amount and value of any mortgage upon real estate in this state when taxable to the mortgagee shall be assessed and taxed to the mortgagee or his assigns, and the taxes levied thereon shall be a lien on the mortgage interest. The value of the real estate in excess of any mortgages taxable to and taxed to the mortgagee shall be assessed and taxed to the mortgagor or owner. The mortgagee or his assigns may pay the tax levied on the interest of the owner and have a lien thereon secured by the mortgage to the extent of the amount so paid with lawful interest thereon. The mortgagor or owner may pay the tax levied on the mortgage interest, and the amount so paid shall be claimed and held to be a payment on the indebtedness secured by the mortgage, and it may be offset against any interest due thereon."

Section 5952, Comp. St. 1922, provides, among other things, that the mortgage interest and the value of the real estate in excess thereof shall be assessed separately. Said section further provides that when any mortgage contains a condition that the mortgagor shall pay the taxes levied upon the mortgage, or the debt secured thereby, the mortgage shall not be entered for separate assessment and taxation, but both interests shall be assessed and taxed to the mortgagor or owner of the real estate.

In *Menzie v. Smith*, 63 Neb. 666, it is held: "To make a contract usurious, there must be an agreement between the borrower and the lender by which the latter receives

or reserves a greater rate of interest than the law allows. There must be an intent on the part of the borrower to give, and of the lender to receive, interest in excess of the legal limit."

Had the mortgages in question not contained the provision relative to the payment of taxes, the mortgagee would have been liable for the tax on his mortgage interest in the mortgaged premises, and the mortgagors would have been liable for the tax on their interest therein, which would have been the full value of the premises, less the amount of the mortgage. The insertion of this clause in the mortgage had the effect of shifting the burden of the tax on the mortgage interest from the mortgagee to the mortgagor. This clause, therefore, required the mortgagor to pay, in addition to the maximum legal rate of interest, the amount of the tax so transferred to him.

Usury is the reserving or contracting to reserve and take, for the use of money, a greater sum or rate of interest than is permitted by law. When a contract, by its terms, requires, for the use of money, the payment of a greater sum than the maximum legal rate of interest it is, in fact, usurious. The contracts in question show that there was an intent on the part of the borrower to give, and an intent on the part of the lender to reserve and take, interest in excess of the maximum legal limit. We are forced to the conclusion that the contracts in question are usurious. It follows that the decree is erroneous in so far as it allows interest on the mortgage debt, proper.

The contention of plaintiff that usury as a defense cannot be urged in this case, because the facts which make the contracts usurious are not set forth in the answer, does not appear to be sound. We are aware that many courts hold that usury is an affirmative defense which is waived unless pleaded, and that the defendant must set forth in his answer the facts on which he relies to constitute the defense. Ordinarily, in an action upon an usurious contract, the fact that it is tainted with usury does not appear either on the

face of the contract or in the petition of plaintiff. In such a case, of course, it is incumbent upon the defendant to set forth the facts and claim the benefit of the usury statute.

Where the facts on which the defendant relies to show that the contract is usurious are set forth in plaintiff's petition, it would be a useless thing to require him to repeat the allegations in an answer. If the facts appear from the plaintiff's petition, all that it is necessary for the defendant to do is to claim the benefit of the usury statute. That the defendant did in this case, and the trial court passed upon the question of usury. It follows that the court erred in the decree entered. The decree should have been for the amount of principal, together with the taxes paid by plaintiff upon the mortgagors' interest in the real estate, with interest upon the latter item at the rate of 10 per cent. per annum. Defendants, however, are entitled to credit upon the principal for $250 paid as advance interest.

In the instant case the taxes paid by plaintiff on the three mortgages aggregate about $2,000, which are the taxes upon the interests of both the mortgagors and the mortgagee in the premises. The record does not disclose what proportion of these taxes is upon the mortgagors' and what upon the mortgagee's interest.

Plaintiff is not entitled to recover any part of the taxes which he paid and which accrued on his mortgage interest in the premises. He is entitled to recover so much of the taxes by him paid as accrued on the mortgagors' interest in the premises, together with interest thereon. The debt created by the payment of the tax on the mortgagors' interest is not tainted with usury, because there was no agreement to pay an illegal rate of interest on the debt so created. It is true that the mortgage provided for the creation of this debt upon the contingency that the mortgagors failed to pay the tax before it became delinquent; but the debt, created by payment of the tax, did not arise until the plaintiff actually paid the tax. There was no agreement to pay usurious interest on this debt, and plain-

tiff is therefore entitled to recover interest at the rate of 10 per cent. per annum on the amount of tax acruing on mortgagors' interest in the premises from the date of the payment of the tax.

We do not wish to be understood as holding that a mortgage containing such a clause as appears in the present case is usurious, where the stipulated rate of interest, exclusive of the taxes, is less than the legal maximum rate. It is probable that such a contract would not be usurious, even when the aggregate of the stipulated interest and taxes exceeded 10 per cent., unless, at the time of the making of the contract, both parties knew or believed that the tax and other stipulated interest would be in excess of 10 per cent. However, that question is not now before us and of course is not decided.

The judgment of the district court is reversed and the cause remanded, with directions to permit further evidence to be taken to ascertain what part of the amount paid for taxes accrued on mortgagors' and what on the mortgagee's interest in the real estate, and to enter a decree in accordance with this opinion.

REVERSED.

Note—See Usury, 21 A. L. R. 880; 27 R. C. L. 203, 223; 3 R. C. L. Supp. 1509; 4 R. C. L. Supp. 1746; 39 Cyc. 888 n. 4, 946 n. 79, 984 n. 79, 1040 n. 62.

GOTTFRIED WESTPHALEN, APPELLEE, V. EMMA WESTPHALEN, APPELLANT.

FILED FEBRUARY 8, 1927. No. 25441.

1. **Divorce**: APPEAL: EFFECT. An appeal lodged in this court from a decree rendered in a suit for divorce suspends such decree and brings the case here for trial *de novo*, and the marital relations continue unchanged until a final determination of such appeal is had.

2. ———: FINAL DECREE. In such a case, it is not the interlocutory decree entered by the trial court that is controlling,

but the final decree entered by this court or directed to be entered in the trial court.

3. ———: ABATEMENT. A suit for divorce abates on the death of either party before final judgment, and is not subject to revivor.

APPEAL from the district court for Douglas county: L. B. DAY, JUDGE. *Motion sustained, and cause remanded, with directions.*

J. C. Travis, for appellant.
Jamieson, O'Sullivan & Southard, contra.

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

THOMPSON, J.

In this case the appellee, hereinafter called the plaintiff, instituted a suit against appellant, hereinafter called defendant, praying that he be granted a divorce from the defendant, his petition being in usual form. The defendant answered admitting the marriage and other preliminary facts necessary to be pleaded in such suit, and interposed a cross-petition in which, after setting forth necessary facts, she prayed that she be granted a divorce from plaintiff, suit money, attorney fees, and alimony. After the issues were joined, the suit was tried, and decree of divorce granted plaintiff, in which decree plaintiff was ordered to pay the defendant alimony in the sum of $350, suit money $15, and attorney fees $50, and costs. The defendant then for reversal brought the suit to this court by way of appeal. After such appeal was duly lodged, and before the same was reached for hearing, the plaintiff died. After such death an administrator was appointed for plaintiff's estate, but he found himself hampered by reason of the pendency of this suit. Defendant then filed herein a motion seeking an order of this court directing that all moneys paid into court by the plaintiff, save and except those necessary to pay the costs of the trial court, be ordered paid to such administrator, and that the case be dismissed, suggest-

ing in such motion the death of plaintiff, and further that, as the action is one in equity, it is here for trial *de novo*, and hence this court is vested with exclusive jurisdiction, and further that, the suit being one for divorce, revivor cannot be had. Each and all of the parties interested, so far as this record shows, have entered their voluntary appearance, have waived time to further plead, and each thereof joins the defendant in such motion. Briefs were filed, and the motion submitted for our consideration.

The effect and purpose of such appeal are governed by section 9150, Comp. St. 1922, which 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 as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof." In such a case, it is not the interlocutory decree entered by the trial court that is controlling, but the final consideration thereof and decree entered by this court or directed by this court to be entered in the trial court, which annuls or continues the marital relations of the parties; and until such final consideration or decree, such original marriage relation continues. As such appeal when perfected vests this court with jurisdiction to try the case *de novo*, such jurisdiction must and does continue until a final disposition thereof is made by us.

The construction herein given to such statute is in harmony with our previous holdings. *Goldenstein v. Goldenstein*, 110 Neb. 788; *Brown v. Stroud & Co.*, 112 Neb. 210; *Miller v. Baker*, 112 Neb. 375.

As to the right of revivor in a case like this, section 8546,

Comp. St. 1922, is controlling, and provides, in part, as follows: "An action does not abate by the death, or other disability of a party, or by the transfer of any interest therein during its pendency, if the cause of action survive or continue." That such cause of action does not survive or continue in a strictly divorce action is self-evident. *Chase v. Webster,* 168 Mass. 228; *Faris v. Hope,* 298 Fed. 727; *Estate of Seiler,* 164 Cal. 181; 9 R. C. L. 414, sec. 214; *Holmberg v. Holmberg,* 106 Neb. 717; *Sovereign Camp, W. O. W., v. Billings,* 107 Neb. 218.

As we have found that the appeal brought the case here for trial *de novo,* and further that the death occurred before our determination of such action, we conclude that the rule should be applied to this case that we have applied where the death occurred within six months from the rendition of such decree, and prior to the perfecting of an appeal, as in *Holmberg v. Holmberg, supra,* wherein we held: "Where a divorce was granted and one of the parties died before the expiration of six months thereafter, such divorce decree never became effective, and as to such divorce the action abated." And as in *Sovereign Camp, W. O. W., v. Billings, supra,* wherein we held: "Where a decree of divorce has been entered, under section 1606, Rev. St. 1913, now section 1555, Comp. St. 1922, the marriage status of the parties continues until the decree becomes operative to dissolve it, and, where the husband dies within six months after the entry of such decree, the relation of the surviving wife to the husband and to his estate is *held* not to be so fixed and altered by such decree that the wife is, in practical effect, a divorced wife, so as to be prevented from taking as a beneficiary under a certificate of insurance, where a by-law denies a divorced wife the right to the proceeds."

The motion is sustained, and the cause remanded, with directions to the trial court to enter judgment requiring the plaintiff to pay the costs of the trial therein, and the defendant to pay the costs of the trial in this court, and that

the money heretofore paid to the clerk of the district court, as alimony, be returned to plaintiff by paying such money to the administrator of the estate of plaintiff, and that, upon such payments being made, this action be dismissed.

MOTION SUSTAINED, AND CAUSE REMANDED, WITH DIRECTIONS.

JOHN C. ALLEN, APPELLEE, V. OMAHA & SOUTHERN INTERURBAN RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 14, 1927. No. 24584.

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

2. **Negligence:** COMPARATIVE NEGLIGENCE. Under the facts disclosed by the record, and set out in the opinion, *held*, that the negligence of the plaintiff was more than slight, as compared with the negligence of the defendant, and precludes plaintiff from a recovery.

3. ———: ———: DIRECTION OF VERDICT. Where the facts show beyond reasonable dispute that the plaintiff's negligence was more than slight, as compared with the negligence of the defendant, it is the province of the court to direct a verdict for the defendant.

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

John L. Webster, for appellant.

Stout, Rose, Wells & Martin, contra.

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

GOSS, C. J.

This is an action to recover damages for personal in-

juries suffered by the plaintiff in a collision of his automobile with defendant's train at a crossing of the public highway and the railway tracks of the defendant.

At the conclusion of plaintiff's proofs, the defendant moved for a verdict in its favor, but did not press the motion; decision was reserved until the end of the trial, when the motion was renewed and overruled. The trial resulted in a verdict and judgment for plaintiff, and defendant appealed.

The collision occurred in the open, comparatively-level, farming country within the corporate limits of Bellevue, but a considerable distance from the main collection of houses, commonly considered as that village, and on the line of the railway between Bellevue and Fort Crook. Plaintiff, a farmer then about 40 years old, residing on a farm about two miles north of Bellevue, was returning from a business errand to a point about two miles south of Fort Crook. He had gone over this route on his way; had been over it five or six times between March 1 and October 6, 1919, the date of the accident, and knew the conditions at the crossing. He knew there was no flagman and no mechanical signal. The street on which he was driving is the main highway between the village of Bellevue and Fort Crook, and it runs east and west. The railway runs slightly southwest at that point. Plaintiff had picked up a guest, whom he did not know, and they were riding east, but were not conversing.

At the north side of Twenty-fourth street and west of the tracks was a cornfield with corn 7 or 8 feet high, reaching within 30 or 35 feet of the west line of the track, and weeds, somewhat higher than the corn, were east of the cornfield up to within 12 or 15 feet of the track. There had been a mudhole in the street, the east end of which came about 30 feet from the west line of the car track. It had about dried up. The day was clear.

Plaintiff was driving a two-year old Ford touring car, equipped with winter top, but with the windows open and

his windshield clean. He testified that he had been driving about 12 to 15 miles an hour, but that, when he came to the location of the mudhole, he slowed down to 8 or 10 miles an hour, and then proceeded until the collision occurred; that heretofore he had always been afraid of this crossing and had always stopped to look; that on this occasion he looked only once for the train and that was when he was 20 or 30 feet west of the tracks, and from the point where he looked he could see 100 feet up the track; that, at the speed at which he was then moving, he could have stopped his car in 8 or 10 feet, but, after looking for the train, he started to go over the track, looking straight ahead toward the east; and that he did not see the train, nor hear the whistle. The testimony of his guest, who was riding with him, is substantially the same as that of plaintiff in respect of the conditions and failure to hear any signals or warning.

Defendant has a Nebraska charter as a commercial railway, and runs trains between South Omaha and Fort Crook at frequent intervals. The train which collided with plaintiff's car consisted of passenger car in front and the rear car for baggage, freight and express. It was moving south. Twenty-fourth street was a stopping place if there were passengers to get off or on. There were none such at the time of the accident, and the train, whose speed was about 20 to 30 miles an hour, did not intend to make a conventional stop.

The testimony of the motorman, and of various others who were on the railway passenger car, was to the effect that the regular whistles — two long and two short — were given for the Twenty-fourth street crossing, and that then a couple of short toots were given by the motorman as he was approaching Twenty-fourth street and saw plaintiff's automobile coming toward the railroad track. After the motorman discovered that plaintiff was not stopping, but was about to drive on the tracks, he tried unavailingly to stop the train. It was stopped within about 100 feet after the impact.

The charges of negligence submitted to the jury were that defendant was operating its train at excessive speed, or in a reckless manner, or without giving any warning of its approach.

There were various errors assigned, but the substantial issue is this: Is the evidence sufficient to support the verdict? If not, then the court should have sustained defendant's motion for a directed verdict.

The plaintiff testified that he looked to the north only once for an approaching train, when he was 20 or 30 feet from the track, and that he could then see up the track past the obstructive corn and weeds 100 feet. He admits that he could have stopped his car within 8 or 10 feet at his current speed. Had he looked continuously, or looked again, when within 15 feet, he could, as shown by the indubitable, physical facts in this case, have seen the oncoming train and stopped his automobile with a safe clearance. Had he listened as ordinary prudence would have dictated to one admittedly familiar enough with the crossing to know its dangers, he would have heard the signals as several witnesses heard them. "A mere glance occupying but a fraction of a second would have sufficed to warn him of the approaching train." *Haffke v. Missouri P. R. Corporation*, 110 Neb. 125.

We have repeatedly held that it is the duty of a traveler on a highway approaching a railroad crossing to look and listen for approaching trains; that he must look, where, by looking, he could see, and listen, where, by listening, he could hear; that it is the duty of one approaching in an automobile a railroad crossing with which he is familiar, where his view is obstructed until he gets within a short distance of the track, to keep his car under control and to drive at a speed which will enable him to stop in time to avoid a collision after discovering a train; and that a speed which prevents such control under the circumstances is negligence as a matter of law. *Rickert v. Union P. R. Co.*, 100 Neb. 304; *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266;

Seiffert v. Hines, 108 Neb. 62; *Stanley v. Chicago, R. I. & P. R. Co.*, 113 Neb. 280; *Haffke v. Missouri P. R. Corporation*, 110 Neb. 125; *Tyson v. Missouri P. R. Corporation*, 113 Neb. 504.

And where, as in this case, it was shown beyond reasonable dispute, by the testimony offered by plaintiff and by the circumstances surrounding the collision, that the plaintiff's negligence was more than slight as compared with that of the defendant, it was the duty of the court, under the rules laid down in *Morrison v. Scotts Bluff County*, 104 Neb. 254, to enter a judgment of dismissal.

Under the evidence, plaintiff is not entitled to recover and the trial court should have sustained the defendant's motion made at the close of the evidence. There have already been two trials of this case. The facts have been so developed and so fixed that another trial would avail plaintiff nothing. The judgment of the district court is therefore reversed, with directions to dismiss the action.

REVERSED.

LEE BROWNE V. STATE OF NEBRASKA.

FILED FEBRUARY 14, 1927. NOS. 25384, 25826.

1. **Burglary:** SUFFICIENCY OF EVIDENCE. Evidence examined and outlined in the opinion *held* sufficient to sustain a conviction for burglary.

2. **Criminal Law:** INSTRUCTIONS. Whether an instruction to the jury is a correct statement of law applicable to the issues must be determined from an examination of the whole charge to the jury, and not from an isolated sentence in a single instruction.

3. ———: REFUSAL OF INSTRUCTION. Error cannot be predicated upon a refusal by the court to give an instruction requested by the defendant when in another instruction the jury are correctly informed respecting the points covered by defendant's requested instruction.

4. ———: MISCONDUCT OF JURY. Evidence examined as to alleged misconduct of a juror and *held* not to show misconduct.

5. ———: NEW TRIAL: NEWLY DISCOVERED EVIDENCE. A new trial should not be granted a party on the ground of newly discovered evidence, unless he makes it appear that the newly discovered evidence could not by the exercise of reasonable diligence have been discovered and produced at the trial.

ERROR to the district court for Thurston county: MARK J. RYAN, JUDGE. *Affirmed.*

Robert G. Fuhrman and *George A. Gorder,* for plaintiff in error.

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

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

GOSS, C. J.

The defendant, with another, was charged with breaking and entering. He was tried separately, was convicted and was sentenced under the indeterminate law to a term of one to ten years in the penitentiary. He prosecuted error to this court. Afterward he applied to the trial court for a new trial based chiefly on the ground of newly discovered evidence. The application was overruled and he prosecuted error thereon, docketing that as a separate case. On the oral argument before the court it was agreed, the court consenting, that both proceedings should be argued and heard together, which was done.

In the main case the assignments of error may be grouped under the heads of (1) insufficient evidence, (2) error in instructions, (3) misconduct of juror, (4) refusal to strike testimony, and (5) excessive sentence.

There is competent evidence in the record to show that on the night of January 1, 1926, the store of C. E. Armstrong, at Thurston, Nebraska, was burglarized and a quantity of merchandise was stolen and removed in a truck. Later the police of Sioux City apprehended in that city two

men, one of them a codefendant of Browne, driving a Dodge truck loaded with a considerable quantity of the goods stolen. A third man escaped. The officers then went to the defendant's home in Sioux City, arrested the defendant, and found in the only bedroom in the house a trunk containing some of the goods stolen from the Armstrong store; and other articles so stolen were found in the basement of the same house. Witnesses identified the defendant and two other men as eating a late supper in a café at Emerson, which is a few miles from the scene of the burglary. They testified that these men had there the Dodge truck that was taken by the officers in Sioux City with the stolen goods in it and which, at the time of the trial, was in the sheriff's custody. Other witnesses testified to seeing this truck near Thurston on the night in question. This circumstantial evidence was sufficient basis for the verdict of the jury, if submitted under proper instructions.

Complaint is made of the first sentence of instruction No. 6, reading as follows: "The jury are instructed that the possession of stolen property recently after the larceny thereof, when unexplained, may be sufficient to warrant the jury in inferring the guilt of the party in whose possession it is found." This was followed by a charge leaving the question of fact exclusively to the jury. It is claimed that there were two prejudicial errors in the part of the instruction above quoted; first, that it misstated the offense by calling it "larceny," and, second, that the instruction assumes that the defendant was in possession of stolen goods and that his possession was unexplained. Considered in connection with the statement of the case and of the elements of the offense as given in other instructions, and in consideration of the fact that goods taken in breaking and entering are larcenously taken, the use of the word "larceny" did not mislead the jury.

That the court did not assume that the possession was unexplained and that it left that question to the jury is perfectly apparent and was made emphatic to the jury by

instruction No. 7 in which the court defined at length what were the elements necessary to be proved before the defendant could be found by them to be in possession of the stolen goods. Two paragraphs of a charge, one immediately following the other, will be treated as one, when they relate to a particular phase of the case, and each is plainly complemental of the other. *Dunn v. State*, 58 Neb. 807. In determining the correctness of instructions, they should be considered as a whole; and if, as a whole, they are free from error, an assignment predicated on isolated paragraphs, or portions, which, standing alone, might be misleading, must fail. *Clark v. State*, 79 Neb. 473; *Bode v. State*, 80 Neb. 74; *Clements v. State*, 80 Neb. 313; *Cate v. State*, 80 Neb. 611; *Shumway v. State*, 82 Neb. 152; *Kenyon v. State*, 111 Neb. 175; *Simmons v. State*, 111 Neb. 644.

The refusal of the court to give an instruction requested by the defendant relating to possession is assigned as error. There is a question whether the instruction requested stated the law correctly, but we deem it unnecessary to go into that as the instructions given by the court covered the case fully and fairly and without prejudice to the rights of the defendant. In such circumstances it was not error for the trial court to refuse the instruction requested.

The night before the jury session began, one of the jurors rode from Walthill to Pender with a deputy sheriff who afterwards was called as a witness for the state. There was no mention of the case by either of them then or later until after the verdict was returned. There was no error here.

It is claimed that the court erred in refusing to strike the testimony of the sheriff. On examination of the testimony we think some of the testimony was then admissible, and that in its form the motion as made might have been overruled. The motion was not made until after the witness had testified at length without objection and had been cross-examined. The ruling of the court was reserved with the statement by the court that if the testimony objected

to was connected up it might stand, but that otherwise it would be stricken. The motion was not renewed later in the trial, and in the absence of any indication we cannot say that it was not considered by all parties as having been connected up. At least, the failure to call the attention of the court to the matter later in the trial was a waiver of the right of defendant to insist upon it now.

Lastly, it is assigned as error that the sentence was excessive. The defendant might have been given a sentence of ten years He was given an indeterminate sentence of one to ten years. We find nothing in the record to warrant us in modifying the judgment of the trial court in this respect.

Defendant was sentenced on March 11, 1926, and on April 8, 1926, he filed his petition in error and transcript in this court. October 25, 1926, within the term at which he was sentenced, he made application for a new trial, which, on November 3, 1926, was overruled.

In these supplemental proceedings, separately docketed, but presented and considered with the main case, error is assigned on the refusal of the trial court to grant a new trial on the ground of newly discovered evidence.

The evidence relied on for a new trial consisted of the *ex parte* affidavits of defendant and thirteen others. Three of these affiants testified in the main trial. An analysis of the statements of two of these, who were witnesses for the state, indicates a lessening of certainty in their testimony as to the identification of the defendant; but the identification of the defendant was not based on their testimony alone. The trend of the rest of the affiants is to prove an alibi for the defendant. This defense was presented at the trial and was submitted to the jury. The effect of the affiants is to seek to obtain a new trial on cumulative evidence that the defendant at, or about, the time of the burglary was at such a distant place that he could not have participated in it. There was a lack of reasonable diligence on the part of the defendant in not producing these alibi wit-

nesses at the trial. *Cunningham v. State,* 56 Neb. 691; *Neal v. State,* 104 Neb. 56. Altogether the trial court was justified in refusing a new trial on the ground of newly discovered evidence.

For the reasons stated, we find no error in either case and conclude that the judgments of the district court should be affirmed.

AFFIRMED.

STATE, EX REL. FRANK J. KOBES ET AL., APPELLANTS, V. JAMES J. GRIMM ET AL., APPELLEES.

FILED FEBRUARY 14, 1927. No. 25678.

1. **Elections:** CANVASSING BOARD: DUTIES MINISTERIAL. The duties of an election canvassing board are purely ministerial.

2. ———: ———: ———. An election canvassing board is not clothed with judicial power.

3. ———: DIRECTORY PROVISIONS OF STATUTE. The provisions of of a statute which affect the mode and manner of conducting the mere details of an election are directory.

4. ———: CANVASSING BOARD: REFUSAL TO ACT. The refusal of a majority of an election canvassing board to perform a duty imposed by law shall not be permitted to disfranchise the citizens whose votes are thereby rejected.

5. **Statutes:** CONSTRUCTION. Where a statute requires an official act to be done by a given day, for a public purpose, it must be construed as merely directory in regard to the time of performance.

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

John E. Mekota and *Thomas J. Dredla,* for appellants.

Bartos, Bartos & Placek, Robert R. Hastings and *Grant G. Martin, contra.*

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

DEAN, J.

A special election was held in Saline county to determine whether $175,000 in bonds of the county should be issued for the erection of a county courthouse. Joseph M. Korbel, the county clerk, and James J. Grimm, and Robert R. Hastings were the duly qualified and acting members of the county canvassing board. The controversy here, under circumstances to which reference is hereinafter made, has to do with the rejection, by a majority of the board, of two certain ward tally lists, namely, those in respect of the vote cast in the first ward and the third ward in the city of Crete, "and what effect ought to be given to them," as noted by an agreement of the parties before the trial commenced.

Frank J. Kobes and Ralph M. Pflasterer are qualified residents, taxpayers and electors of the first and third wards of Crete, respectively. As relators they began this suit in mandamus to compel the respondents to reassemble in their official capacity and canvass, and to include in the official returns, the tally lists of the votes cast in the two Crete wards in question. The court denied the writ and the relators appealed.

The special election was held June 4, 1926. June 10 the canvassing board met, but adjourned until June 14, to await the arrival of the mail vote, and on that date the canvassing board met and finally canvassed all returns except those from the first and third wards of Crete. And in respect of the returns from these two wards, other than that they were finally rejected, the official action of the board, in the present state of the record, is not altogether clear. It does appear, however, that two members of the canvassing board finally determined that the tally lists of the first and third wards of Crete should not be included in the final returns. But the tally lists of both these wards were in the hands of the canvassing board June 15 and June 18, respectively.

It appears from Hasting's evidence that, on June 14, county clerk Korbel produced such election boxes of the

various voting precincts as had been returned, and on that day the board adjourned until 1:30 in the afternoon of June 15, to the end that Hastings, as a member of the canvassing board, might go to Crete for the missing tally lists. He made the trip and returned with the first ward tally list. Thereupon the board reconvened at the courthouse, and Grimm, upon examination, informed the board that the tally list from the first ward in Crete seemed to be properly certified, and added: "We might just as well canvass this return." The tally list of the first ward, which is attached to the record, shows that 16 votes were cast for the courthouse bonds and that 646 votes were cast against the bonds. Mr. Hastings also testified that on or about the noon hour of June 18, after having made a second trip to Crete, he returned with the tally list of the third ward and filed it in the office of the county clerk, and that he then informed Grimm of the fact, and that Grimm replied that, by advice of counsel, he doubted if he would canvass them. But Grimm went with Hastings to the courthouse and on arrival there both Korbel and Grimm refused to join Hastings in a canvass of the tally lists of the omitted wards then on file. Hastings further testified that he, as a board member, insisted that the first and third wards be canvassed "along with the rest" and duly certified, and he subsequently filed a separate and individual return. And it appears from Hastings' evidence that the election returns submitted by Korbel and Grimm were filed in the afternoon of June 18, a little more than an hour after he, Hastings, returned from Crete with the tally list of the third ward and after it had been filed with the county clerk. It appears, too, that county clerk Korbel placed the numerals, which he later erased, that showed the number of votes cast in the third ward in a column after the number of votes cast. This tally list shows 9 votes for the bonds in the third ward and 723 votes against the bonds.

James J. Grimm testified on the part of the respondents. On the cross-examination his evidence discloses the follow-

ing material facts: "Judge, you did canvass the votes of the first ward that day? A. On the 15th (of June) we did; yes, sir. * * * Q. And you signed it as members of the canvassing board, didn't you, Judge? A. Yes, sir. * * * Q. Those votes were canvassed just as much as any ward in the precinct, weren't they, at that time? A. I rather think that they would be considered so; yes, sir." Grimm's evidence also discloses that after the meeting of June 10 the board adjourned to June 14, and on that date, without a formal adjournment, the board "gave Mr. Hastings time in which to get the (Crete) returns." And it also appears that on June 18 the tally list of the third ward of Crete was brought in by Hastings and on that day the board held a meeting. Grimm further testified: "Q. And you looked at these tally lists that were brought in? A. I did. Q. And after that, then what did you do? A. Well, we simply declined to canvass, that is all. Q. Then after that what did you do? A. Adjourned. Q. You adjourned after you had seen those and it had been presented to your board for canvass? A. Yes, sir."

It may here be observed that the canvassing board once, during its session, included the first ward tally list in its proposed return of the tally lists then in its hands. But the record shows that Korbel and Grimm, as members of the board, reconsidered their action and, over the protest of Hastings, its action in respect of the return of this tally list was rescinded.

In the language of the decree of the learned trial court, "there is no intimation here that there has been any intentional wrong-doing shown." "There is no substantial dispute in the evidence as to the facts out of which this case arises; no fraud appears or is charged in it and none has been proved or attempted."

Under the count disclosed by the omission of the tally lists for the first and third wards in Crete, as contended for by respondents, the total vote for the bonds was 3,561 and against the bonds the vote was 2,511, making a majority,

under that enumeration of 1,050 for the issuance of the bonds. Under the enumeration contended for by the relators, which includes the first and third wards of Crete, 3,586 votes were cast for the issuance of the bonds and 3,879 votes were cast against the issuance of the bonds, making a majority, under this enumeration of 293 votes against the adoption of the courthouse bond proposition. From a consideration of the facts it clearly appears to us that the tally lists of the first and third wards should have been included in the returns made by the canvassing board.

It must be conceded, as pointed out by the decree of the district court, that neither intentional wrong-doing nor fraud appears on the part of the election canvassing board. And in our decision we merely hold that the refusal of a majority of the board to perform a duty imposed by law shall not be permitted to disfranchise the citizens whose votes were rejected.

A review of the record does not disclose a trace of dishonesty or intentional wrong-doing on the part of any member of the county canvassing board. And it is unthinkable that the citizen who casts an honest vote shall be deprived of his franchise solely by the negligence, or the indifference, of a county canvassing board or by the application of a technical rule of practice by the court. To have his vote fairly counted for the candidate or for the proposition for which his vote was regularly cast is a sacred heritage of the citizen and, from the earliest beginning of our country, this has been heralded as one of the safeguards of American liberty.

It is elementary that the duties of an election canvassing board are purely ministerial. *Long v. State,* 17 Neb. 60. An election canvassing board is without judicial power and may be compelled by mandamus to perform its ministerial duty. *Hagge v. State,* 10 Neb. 51; *State v. Dinsmore,* 5 Neb. 145. "In determining the effect of irregularities due to the mistake of election officers, it should be remembered that all statutes tending to limit the citizen in the

exercise of the right of suffrage are to be construed liberally in his favor." 9 R. C. L. 1092, sec. 102. The provisions of a statute which affect the mode and manner of conducting the mere details of an election are directory and the will of the majority is to be respected even when irregularly expressed. The electors are not to suffer on account of the default of their agents. McCrary, Elections (4th ed.) sec. 228.

In connection with the rule above pointed out, it may be observed that county clerk Korbel's cross-examination very frankly disclosed that the first and third ward tally lists from Crete were both filed in his office before the board finally adjourned, and that there was nothing "on the face of those tally lists to make them irregular," and no evidence of any change of the marking that was originally made, and that they refused to canvass them "just because they were presented out of time and by Mr. Hastings, one of the members of the board, instead of one of the officers of the election at Crete." McCrary in his work, above cited, at section 282, says:

"In general, where a statute requires an official act to be done by a given day, for a public purpose, it must be construed as merely directory in regard to the time. Accordingly, it is uniformly held that a statute requiring an officer or board to certify the result of an election, or in any way to make known the result, or to issue a commission on or before a given day, or within a given number of days after the election, is directory and not mandatory. Such acts are valid though performed after the expiration of the time. This doctrine has been uniformly maintained by the courts, and nothing is better settled."

The same author, in section 269, observes that, where an election board has improperly adjourned without performing its duties, it may be compelled by mandamus to reassemble and complete its work. And in the same paragraph an opinion by Judge Brewer is cited, wherein the learned jurist declares that a refusal by an election canvassing

board to canvass a part of the returns is equivalent to a refusal to canvass any of the returns. And the opinion goes so far as to point out that, even though the board has adjourned *sine die*, mandamus will lie to compel appropriate action on the part of the board.

Respondents have directed our attention to other features of the case which we do not discuss because, in view of the facts and the authorities, we do not think they are material.

The judgment is reversed and the cause is remanded, with directions that the writ of mandamus be granted as prayed by the relators, and that the election canvassing board be required by the district court to reconvene, forthwith, in an official capacity and complete the canvass in accordance with the views herein expressed by including the tally lists from the first and third wards of the city of Crete with their returns as required by law.

REVERSED.

GILTNER STATE BANK, APPELLEE AND CROSS-APPELLANT, V. CHRISTINA TALICH, APPELLANT AND CROSS-APPELLEE: CITIZENS BANK OF GILTNER ET AL., GARNISHEES: FRED C. FOSTER ET AL., INTERVENERS, CROSS-APPELLEES.

FILED FEBRUARY 14, 1927. NOS. 24923, 25074.

1. **Husband and Wife:** CONTRACT OF MARRIED WOMAN: JUDGMENT: ENFORCEMENT. Where a money judgment in general form is rendered against a woman, upon a contract executed during coverture, wherein she binds her separate estate, but which is not made with reference to her own separate trade, business, or profession, such judgment can be enforced only against the property or the proceeds thereof she possessed at the time of executing the contract.

2. ———: ———: ———: GARNISHMENT: DEFENSES. Where a money judgment in general form is rendered against a woman, upon a contract executed during coverture, wherein she binds her separate estate, and where property acquired by her

after the execution of the contract is seized by execution or garnishment to satisfy the judgment, it is proper practice to move to quash the execution or garnishment, to enjoin the seizure of such property or by any appropriate proceedings to challenge the attention of the court to the fact that property of the defendant, which is not liable therefor, is sought to be subjected to the payment of the judgment.

3. ———: ———: ———: AFTER ACQUIRED PROPERTY. The mere fact that a money judgment, in a suit upon such an obligation, is in general form does not necessarily reflect an intention of the court to charge defendant's property generally to the payment of the judgment, but such judgment should be construed in the light of the pleadings to determine the true operation and effect of the judgment. Where it appears from the entire record that the judgment is based upon a contract executed by a married woman, wherein it is sought to seize her properly acquired after the execution of her contract, in satisfaction of the judgment, the court in an appropriate proceeding will prevent the after acquired property from being appropriated to the payment of the judgment, notwithstanding the fact that the judgment is general in form.

4. ———: ———: ———. The general practice of the district courts of the state, in entering judgments in general form upon contracts executed by a married woman, wherein she binds her separate estate, is approved.

5. **Attorney's Lien.** The judgment of the court on the claim of interveners, praying an attorney's lien, examined, and *held* to be sustained by the record.

6. *Jones v. Knosp*, 91 Neb. 224, in so far as it runs counter to this opinion, is overruled.

APPEAL from the district court for Hamilton county: HARRY D. LANDIS, JUDGE. *Affirmed in part, and reversed in part.*

Fred C. Foster, Thomas, Vail & Stoner, O. K. Perrin and *S. M. Kier*, for appellant.

Hainer, Craft, Edgerton & Fraizer and *C. M. Skiles, contra.*

Joseph F. Berggren, amicus curiæ.

Heard before DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

DAY, J.

It was stipulated by the parties that the two appeals, docketed as Nos. 24923 and 25074, arise in the same cause of action, involve the same question, and may be briefed and submitted together "and treated in all respects as one appeal." Case No. 24923 being an appeal from an order of the court dated April 16, 1925, and case No. 25074 being an appeal from an order of the court made on June 17, 1925, and another dated July 3, 1925.

By this action the Giltner State Bank, plaintiff, seeks by garnishment proceedings to subject certain money and indebtedness in the possession of the garnishees, Farmers State Bank of Aurora, Archie D. Marvel, John S. Marvel, George F. Washburn, and the Citizens Bank of Giltner, to the payment of a deficiency judgment obtained by plaintiff against Christina Talich who, except as otherwise indicated, will be referred to as defendant. Mrs. Talich denied the right of the plaintiff to subject the property in question to the payment of the deficiency judgment against her on two main grounds: (1) That she was a married woman at the time she executed the notes which form the basis of the deficiency judgment, and that the property in the possession of the garnishees was acquired by her long after the date of the execution of the notes and was therefore not subject to be seized to satisfy the judgment; and (2) that the property in the possession of the garnishees represents the proceeds of life insurance policies on the life of her husband, Joseph Talich, in which she was named as beneficiary, and that the proceeds thereof were exempt to her under the provision of section 7881, Comp. St. 1922. Attorneys Fred C. Foster and the firm Thomas, Vail & Stoner intervened and claimed a lien upon the property in the possession of the garnishees, the Citizens Bank et al. The plaintiff resisted the attorneys' lien upon the ground that it was exorbitant and excessive.

The court overruled defendant's contention that the money in the possession of the garnishee was exempt from seizure because it was acquired by her after she executed

the notes upon which the deficiency judgment was based, but sustained her contention, in part, that the money in the possession of the garnishee was exempt to her as insurance money under the provision of section 7881, Comp. St. 1922. The court ordered the garnishee, Farmers State Bank, to pay into court $131.50, and ordered the Citizens Bank to pay into court $5,439.75 with interest at 7 per cent. from November 26, 1924, said sums to be applied upon the plaintiff's judgment against defendant. There seems to be some discrepency in the amount ordered to be paid into court by the garnishees and the amount which the court found was not exempt from seizure. This is not material, however, in view of our ultimate conclusion. The court also found that the intervening attorneys were entitled to a lien upon the property in the possession of the Citizens Bank in the amount claimed by them. From the judgment of the trial court, determining the issue against her, defendant filed a supersedeas bond and appealed to this court. From the judgment sustaining the attorneys' lien, the plaintiff has taken a cross-appeal.

At this point, a brief summary of the facts may serve to a clearer understanding of the discussion. On April 21, 1921, Joseph Talich and his wife, Christina Talich, executed two notes aggregating $5,191.02,, secured by a real estate mortgage in favor of the plaintiff. The notes contained the following clause: "We each bind our separate estate for the payment of this note." On January 29, 1922, Joseph Talich died. Later, foreclosure action was commenced and on August 9, 1922, a decree of foreclosure in the usual form was entered. On August 17, 1923, the court entered a deficiency judgment against Christina Talich as follows:

"It is therefore considered, ordered, adjudged and decreed that the plaintiffs have and recover from the defendant, Christina Talich, the sum of $5,957.46, the amount of said deficiency, together with interest at the rate of 10 per cent. from this date, to wit, the 17th day of August, 1923, and execution is awarded for the same."

On February 13, 1925, execution was issued on this judgment and returned *nulla bona.* Thereafter garnishment process was duly served upon Archie D. Marvel, John S. Marvel, George F. Washburn, Citizens Bank of Giltner, and the Farmers State Bank of Aurora. The answer of the garnishee, Farmers State Bank, disclosed that it had a credit balance in the name of defendant for $131.50. The answers of the other garnishees were somewhat complicated, but disclosed, among other things, that defendant had obtained a judgment in the district court for Hamilton county against them for $11,889.92, which judgment had been appealed to the supreme court; that whether they were indebted to the defendant depended upon the decision of the supreme court in that case. It may be well to state that the judgment mentioned has been recently affirmed by this court. *Talich v. Marvel,* p. 246, *post.*

The record shows that, at the time of the death of Joseph Talich, he carried two life insurance policies in which the defendant was named as beneficiary. One of these was for $5,000, issued by the Northwestern Mutual Life Insurance Company, on which the beneficiary was paid $4,175. The remainder was retained by the company on account of advances made to Joseph Talich. The $131.50 in the Farmers State Bank was a part of the insurance paid to the beneficiary. The other policy was for $10,000 and was issued by the Omaha life Insurance Company. Subsequent to the death of Joseph Talich, his widow assigned the draft she received on this last policy to the Citizens Bank of Giltner, and later the bank collected on the draft $10,000 and applied the proceeds to its own use. Still later, defendant brought an action in conversion against the Citizens Bank, Archie D. Marvel, John S. Marvel, and George F. Washburn for fraudulently having obtained from her the $10,000 draft and converting the proceeds thereof to their own use. In that action she recovered judgment for $11,889.92 with interest from November 26, 1924. From this judgment all of the defendants appealed. Defendant John S. Marvel

alone superseded the judgment. It is defendant's interest in this judgment which plaintiff now seeks by garnishment proceedings to have applied as a payment on its deficiency judgment.

The defendant assigns generally as error the findings, judgment and orders of the court which subjected her property in the possession of the garnishees to payment on the deficiency judgment. The defendant's position was brought to the attention of the court (1) by a motion to quash the garnishment proceedings for the reasons above indicated; (2) by a petition and application to open and modify the deficiency judgment so as to limit and restrict the liability of the defendant to the separate estate held by her on April 21, 1921; (3) by an application for an injunction restraining the plaintiff from subjecting the property in the hands of the garnishees to the payment of the deficiency judgment; (4) by an application to amend and correct the decree by a *nunc pro tunc* order so that the execution issued on the judgment should run only against the estate of defendant owned by her April 21, 1921. These several motions were overruled by the court. The rulings thereon form the bases of the errors assigned.

Taking the pleadings as a whole, it seems perfectly clear that the defendant at the time she executed the notes was a married woman. As such, her right to enter into binding contracts is only such as the statute has enlarged her common-law limitations. It will serve no useful purpose to review the common-law liability of a married woman upon her contracts, and the enlargement of her powers and liabilities as affected by statutes. The discussion of these questions can readily be found in the reported decisions of this court. In *Kocher v. Cornell,* 59 Neb. 315, the question now before us is discussed and the general rule announced that "The contract of a married woman can only be enforced against the separate estate which she possessed at the date of the contract." To the same general effect see *Grand Island Banking Co. v. Wright,* 53 Neb. 574; and

Marsh v. Marsh, 92 Neb. 189. As against this view, the plaintiff has cited a number of our own decisions, among them *Tyler v. Winder,* 89 Neb. 409, in which it was held that a married woman who has no separate estate may make a valid contract to compensate an attorney to prosecute or defend an action of divorce for her. In *Still College and Infirmary v. Morris,* 93 Neb. 328, it was held that a married woman may make a valid contract essential to an educational course for herself in Osteopathy though she has no separate estate. In *Peterson Bros. & Co. v. Gunnarson,* 106 Neb. 29, it was held that where a husband deserts his wife and departs from the state with intent to renounce the marital relations, leaving the wife without maintenance or support, the wife may make a contract as a *feme sole,* and where she so acts is liable on her contracts. *Biltwell Tire & Battery Co. v. Book,* 112 Neb. 647, does not militate against the rule in the *Kocher* case, when viewed in the light of the questions discussed in each case. In most of the cases just above cited, the question being considered related to the liability of the married woman on her contract, and in none of them is the question discussed as to what portion of her property, if any, was subject to exemption from seizure to satisfy the judgment which might be rendered. It will be observed that the contract in question was not made by the defendant with reference to her own separate trade, business, or profession, but rather in the nature of a surety for her husband. In some of our decisions, it might appear from a casual reading that a contrary view had been taken from the principle announced in the *Kocher* case, *supra,* but we think the peculiar facts of these cases bring them within an exception to the rule in the *Kocher* case.

It is the contention of the plaintiff that the judgment against defendant being a general judgment is enforceable against any or all property which she possessed, regardless of when it was acquired. It is also urged that, by failing to have the judgment recite that it was enforceable only

out of property possessed at the time of the making of the notes, she thereby waived her right to insist that her after acquired property was not liable for the satisfaction of the judgment. We do not agree with this contention. So far as the writer is advised, it has been the uniform practice in the district courts, in entering a judgment against a married woman upon a contract which bound her separate estate, to enter a general judgment against her, without designating the property out of which the judgment could be satisfied. The general judgment determines but two matters the liability of the judgment debtor and the amount of the liability. The question of what property is subject to levy under execution to satisfy the judgment is a matter arising subsequently and collaterally, and is not affected by the general form of the judgment, but may be determined by matters *aliunde*, regardless of such general form.

It is a matter of frequent occurence that a general judgment against a debtor may not be enforced against certain classes of property; for instance, the homestead is exempt from execution for a certain amount and under certain conditions. A portion of a married man's wages is exempt, likewise the instruments and books of a professional man. So it frequently happens, where certain classes of property of the judgment debtor, which are exempt, have been levied upon by execution, that the courts will interfere and prevent the sale of property not subject to execution.

In the case before us, it seems clear that certain property of the defendant is sought to be subjected to the payment of the deficiency judgment which in law is not liable therefor. The only reasons assigned by the plaintiff to sustain its action in this regard is that the judgment was general in form, and that the defendant did not plead her coverture as a defense in the original action, and did not have her liability thereon restricted to her separate property owned by her at the time of the execution of the notes. It seems to us that it would be too narrow a view to hold that, be-

cause the defendant did not plead her coverture as a defense or did not incorporate in the deficiency judgment the property out of which the judgment could be satisfied, defendant must now submit to have her property, which was not liable for the payment, taken to discharge the judgment.

Taking the record as a whole, it clearly appears that, at the time of the execution of the notes, defendant was a married woman. The law definitely fixed what portion of her property would be liable for the satisfaction of her contract and limited it to property owned by her at the time of the contract. When her property which was not liable to be seized was sought to be taken to discharge the deficiency judgment, it seems to us that it was the proper practice to move for a discharge of the garnishment. She could preserve her rights by injunction, by motion to quash the garnishment, by an application to amend the judgment so that it could be satisfied only out of the property held by her at the time of the execution of the contract, or by other appropriate action.

Plaintiff discusses at considerable length the question whether the defendant is liable for a deficiency judgment under her contract. We do not understand that this question is seriously contested by the defendant. The point urged by defendant, as we understand it, is not whether she was liable for a deficiency judgment, but rather what portion, if any, of her property is exempt from seizure to satisfy the judgment. Upon this question, the plaintiff relies upon *Jones v. Knosp*, 91 Neb. 224. There is some language used in that case which gives credence to the position taken by plaintiff, namely, that, by failing to plead her coverture in the original action, she is now estopped from setting up any defense to the judgment. Under the peculiar facts of that case, the conclusion reached was right; but the rule was perhaps too broadly stated, and so far as the doctrine announced therein runs counter to this opinion it is overruled.

We think the motions of defendant for a *nunc pro tunc* order, is not well taken. The purpose of such an order is to make the record speak what was actually done, and not for the purpose of having the record show what should have been done. In this case the journal entry reflected the action of the trial court.

Upon a review of the entire record, we think the trial court erred in failing to quash the garnishment proceedings, because it clearly appeared that the property sought to be seized was acquired by defendant long after the contract was entered into upon which the judgment was based, and was therefore not subject to seizure in satisfaction of the deficiency judgment. We are also of the opinion that it would have been the proper practice for the court to have sustained the motions to open up and modify the judgment or have granted an injunction so as to give the defendant the relief prayed for by the motions.

In the view that we have taken, that the after acquired property of defendant was not subject to seizure, and it appearing that the property in the hands of the garnishees was after acquired property, we deem it unnecessary to discuss the further question presented by the defendant that the property sought to be reached was exempt as being money paid on an insurance policy under the provision of section 7881, Comp. St. 1922.

Upon the question presented by the cross-appeal of the plaintiff, the court allowed the attorneys' lien for the full amount prayed for by them. We deem it unnecessary to review the testimony on this phase of the case, but in our view it fully sustains the findings and judgment of the trial court on that question.

The judgment of the district court, in so far as it requires the Farmers State Bank of Aurora to pay into court $131.50 to be applied upon plaintiff's deficiency judgment against defendant, and in so far as it requires the other garnishees to pay into court $5,439.75 to apply in satisfaction of such judgment, is reversed and set aside. With respect to the other matters, the judgment of the district court is affirmed.

The cause is remanded to the district court, with directions to enter judgment in accordance with this opinion. In accordance with the stipulations of the parties, the conclusions reached are applicable to both cases.

AFFIRMED IN PART, AND REVERSED IN PART.

CHRISTINA TALICH, APPELLEE, V. ARCHIE D. MARVEL ET AL.: CITIZENS BANK OF GILTNER, APPELLANT.

FILED FEBRUARY 14, 1927. No. 25050.

Judgment: ENFORCEMENT. Where a judgment is obtained in a county wherein the judgment debtor has sufficient real estate out of which the judgment could be satisfied if execution had been issued and levied, the judgment creditor has the right to file a transcript of the judgment in another county or counties and proceed to collect the same by process of execution or garnishment, without first having issued execution upon the original judgment.

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

Hainer, Craft, Edgerton & Fraizer and *C. M. Skiles*, for appellant.

Fred C. Foster, Thomas, Vail & Stoner, O. K. Perrin and *S. M. Kier, contra.*

Heard before DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

DAY, J.

This is an appeal from a judgment of the district court for Douglas county, Nebraska, ordering the Omaha National Bank, garnishee, to pay into court $10,294.86 held by that bank to the credit of the Citizens Bank of Giltner, Nebraska, to be applied in payment of a judgment in favor of Christina Talich against the Citizens Bank et al.

The record shows that on August 17, 1923, the Giltner State Bank of Giltner, Nebraska, obtained a judgment in

the district court for Hamilton county against Christina Talich for $5,957.46 with interest from that date at 10 per cent. per annum. The record also shows that on February 6, 1925, Christina Talich obtained a judgment in the district court for Hamilton county, Nebraska, against Archie D. Marvel, John S. Marvel, George F. Washburn, and the Citizens Bank of Giltner, Nebraska, for $11,889.92. From this latter judgment each of the defendants appealed to this court. A supersedeas bond was filed only by John S. Marvel.

The Giltner State Bank issued an execution upon its judgment against Christina Talich, which was returned *nulla bona*. Thereafter garnishment proceedings were instituted by the Giltner State Bank, upon the judgment, and served upon the Citizens Bank of Giltner. Upon the answer of the garnishee in that action, the trial court ordered the garnishee to pay into court $5,439.75 to be applied upon the judgment in favor of the Giltner State Bank against Christina Talich. Christina Talich superseded the judgment, appealed to this court, and obtained a reversal of the judgment of the district court. For a more detailed statement of the facts and the decision of this court in that case reference is made to *Giltner State Bank v. Talich, ante*, p. 236.

Christina Talich did not issue execution upon her judgment against the Citizens Bank, but filed a transcript thereof on March 24, 1925, in the district court for Douglas county, and on the same day issued an execution upon the transcripted judgment, which was returned *nulla bona*. Thereupon garnishment proceedings were instituted and process served upon the Omaha National Bank. The garnishee answered that it had on deposit to the credit of the Citizens Bank of Giltner the sum of $10,294.86.

The Citizens Bank filed a petition of intervention alleging in substance that Christina Talich had obtained a judgment against the interveners for $11,889.92 which had been appealed to the supreme court; that it had been garnished

in the district court for Hamilton county, in a certain action wherein the Giltner State Bank had recovered judgment against Christina Talich, and had been ordered in that action to pay into court $5,439.75 to be applied on the judgment in favor of the Giltner State Bank against Christina Talich; that Christina Talich had superseded the order of the district and appealed to the supreme court. The Citizens Bank also alleged that no execution was issued upon the judgment obtained by Christina Talich against the Citizens Bank, although it had real estate in said county of the value of $30,000 upon which execution could have been levied and satisfied. Christina Talich transcripted the judgment from the district court for Hamilton county and filed the same in Douglas county and, after issuing execution and having the same returned *nulla bona,* instituted the garnishment proceedings herein.

Upon the trial of the issues presented to the district court for Douglas county, the court ordered the Omaha National Bank, garnishee, to pay into court $10,294.86, for the benefit of Christina Talich. The garnishee complied with this order. From this judgment the Citizens Bank has appealed.

The appellant urges two main questions as grounds for a reversal of the judgment. It is urged that our statutes do not authorize garnishment proceedings upon a transcripted judgment where the debt could be collected in the county where judgment was obtained by the issue and levy of execution. Our statute authorizes a transcript rendered in one county to be filed in another county, and when so filed it becomes a lien upon the real estate of the judgment debtor the same as though the judgment had been originally obtained in that county. The statute also authorizes the judgment creditor, after issuing execution upon the transcripted judgment, to institute garnishment proceedings to enforce the collection of the judgment. The law is founded upon the theory that the judgment creditor may have his judgment satisfied out of any property of the judgment

debtor he chooses. We know of no law in the state which requires a judgment creditor to attempt to satisfy his judgment out of property of the judgment debtor in the county where the original judgment was rendered, before the right obtains to pursue other property. Of course, there could be but one satisfaction of the debt. Under the facts of this record, we think the plaintiff was clearly within her rights in transcripting the judgment to Douglas county and instituting garnishment proceedings to collect her judgment.

It is next urged that the plaintiff by this garnishment proceeding, and by a similar proceeding brought in another county, has impounded a much larger sum of the Citizens Bank's property than was necessary to satisfy the judgment, especially in view of the fact that the Citizens Bank as garnishee has paid into court $5,439.75 under the order of the court in the case of Giltner State Bank v. Talich.

The record shows that the Omaha National Bank, garnishee, has paid into court $10,294.86, and in another garnishment process in Adams county the Bank of Commerce has paid into court $991.63. The aggregate of these amounts is $11,286.49 and is not sufficient to satisfy the plaintiff's judgment against the Citizens Bank of $11,889.-92.

We do not consider that the item of $5,439.75 paid into court by the Citizens Bank to be applied on the judgment in favor of the Giltner State Bank v. Christina Talich can properly be regarded as a payment in discharge of the debt from the Citizens Bank to Mrs. Talich. She had superseded the order of the court directing the Citizens Bank to pay this amount into court, and on appeal it was held that the entire amount in the possession of the Citizens Bank was exempt from seizure to pay the judgment of the Giltner State Bank against her. *Giltner State Bank v. Talich, ante,* p. 236.

Considering the entire record, we are satisfied that the order and judgment of the district court for Douglas county, directing the garnishee to pay into court, for the

benefit of Christina Talich, $10,294.86, was correct, and the judgment is

AFFIRMED.

CHRISTINA TALICH, APPELLEE, V. ARCHIE D. MARVEL ET AL.: CITIZENS BANK OF GILTNER, APPELLANT.

FILED FEBRUARY 14, 1927. No. 25105.

Case Followed. The issues involved in this case are identical with those presented in No. 25050, *Talich v. Marvel, ante,* p. 246, determined at the present sitting of court. Upon the authority in that case, the judgment in the present action is affirmed.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

Hainer, Craft, Edgerton & Fraizer and *C. M. Skiles,* for appellant.

Fred C. Foster and *Thomas, Vail & Stoner, contra.*

Heard before DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

DAY, J.

The legal question presented in this appeal is the same as was involved in *Talich v. Marvel, ante,* p. 246. In this case Christina Talich filed in Adams county a transcript of the judgment which she obtained against the Citizens Bank in Hamilton county and, after execution thereon in Adams county being returned *nulla bona,* proceedings were instituted and served on the Bank of Commerce of Hastings, Nebraska. The garnishee answered that it had in its possession to the credit of the Citizens Bank of Giltner $991.63.

The issues presented before the trial court were identical with those involved in *Talich v. Marvel, ante,* p. 246. The trial court ordered the garnishee to pay into court $991.63 to be applied upon the judgment held by Mrs. Talich against the Citizens Bank. The garnishee complied with

this order. From this judgment the Citizens Bank has appealed.

Upon the authority of *Talich v. Marvel, ante,* p. 246, the judgment of the district court is

AFFIRMED.

NANNIE I. DAVIS, APPELLEE, V. OTTO H. MEYER, APPELLANT.

FILED FEBRUARY 14, 1927. No. 24605.

1. **Pleading:** DEMURRER: WAIVER. "Where a party demurs to a petition because several causes of action are improperly joined, but answers over after an adverse ruling thereon, and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in such ruling." *Genho v. Jackson,* 99 Neb. 1.
2. **Libel and Slander:** WORDS NOT ACTIONABLE PER SE. Words, spoken and published of another, are not, ordinarily, slanderous and actionable *per se,* unless they impute to the person of whom spoken the commission of a crime, or subject him to public ridicule, ignominy or disgrace.
3. ———: ———. An alleged utterance that plaintiff is a half-breed Mexican is not such a charge as subjects the person, of whom it is spoken, to public ridicule, ignominy or disgrace, and is not, therefore, actionable *per se.*
4. ———: EVIDENCE. ADMISSIBILITY. In an action for slander, it is error to permit the plaintiff to testify, over objection, that there are rumors in the neighborhood, similar to the utterances charged to have been made by the defendant, when there is no evidence that the defendant uttered the words, or that such rumors are attributable to him.

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

Claude S. Wilson, Albert S. Johnston and *John J. Ledwith,* for appellant.

George E. Hager, contra.

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

GOOD, J.

This is an action for damages. Plaintiff in her petition declared upon four separate causes of action; the first and second being for assault, the third for malicious prosecution, and the fourth for slander. To this petition a demurrer for misjoinder of causes of action was interposed and overruled. Defendant then filed an answer in the nature of a general denial. A trial of the issues to the court and jury resulted in a verdict for $700 in favor of plaintiff on the fourth cause of action, and finding for defendant on the other causes of action. Defendant appeals.

The propositions relied on for reversal are: (1) Error in overruling defendant's demurrer to the petition; (2) that the pleadings and evidence will not support a judgment for plaintiff on the fourth cause of action; (3) error in the admission of evidence and (4) that the verdict is excessive.

The error, if any, in overruling defendant's demurrer to the petition is not now availing as a ground for reversal. Defendant did not stand upon his demurrer, but answered over. It is held in *Genho v. Jackson*, 99 Neb. 1: "Where a party demurs to a petition because several causes of action are improperly joined, but answers over after an adverse ruling thereon, and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in such ruling." This has long been the rule in this state.

The second assignment of error relates to the sufficiency of the pleadings and the evidence to support a judgment for plaintiff on the fourth cause of action. In this cause of action, being for slander, the gist of the charge is that defendant maliciously spoke and published of and concerning the plaintiff the following false and defamatory matter: That she was a half-breed Mexican and had shot and killed a man in Oklahoma, meaning that the plaintiff was guilty of the crime of murder. Defendant contends that calling the plaintiff a half-breed Mexican, even if false, is not slanderous *per se*, and, since no innuendo is charged in that respect, the words are not actionable.

It is a familiar rule in this state, and we think in most jurisdictions, that words, spoken and published of another, which are not obviously defamatory, will not support an action for damages, unless, by innuendo or otherwise, special damages are pleaded and proved. It is not every false charge against an individual which is sufficient to sustain an action for damages. Unless facts are pleaded and proved which show that plaintiff has sustained actual damages, there can be no recovery if the language used is not actionable *per se,* and, in order to be actionable *per se,* it must impute to the person the commission of a crime or subject him to public ridicule, ignominy or disgrace. *World Publishing Co. v. Mullen,* 43 Neb. 126; *Callfas v. World Publishing Co.,* 93 Neb. 108; *Geisler v. Brown,* 6 Neb. 254; 17 R. C. L. 263, sec. 3.

The charge that plaintiff is a half-breed Mexican amounts to no more than charging that she is a Mexican of half-blood. We are not aware that any court or authority can be found which holds that charging another with being a Mexican of either whole or half-blood is slanderous *per se.* It is true that in some of the southern states it has been held actionable to charge a white person with being a negro or having negro blood in his veins. It must be remembered, however, that these decisions were rendered at a time when most of the negroes in the south were slaves, and to charge a white person with being a negro or having negro blood was, in effect, to charge him with not being a free man, but one either in bondage or born of parents who were in bondage. It is true that in many of the southern states, even at this time, the negro is subject to marked social and legal discrimination. Separate schools and separate compartments on trains are provided for him, and he is not permitted to intermarry with the white race. In this state marriage between a white person and one possessing one-eighth or more negro blood is prohibited. Comp. St. 1922, sec. 1491. No such restriction applies to the citizens of Mexico. The Mexicans are not of the black

or yellow race. According to the International Encyclopedia, about 19 per cent. of the population of Mexico are pure white, 38 per cent. Indians, and 43 per cent. of mixed blood. Within the boundaries of Mexico are represented nearly if not all of the really cultured races of the western hemisphere. It is not perceived that calling one a Mexican can, in any manner, subject him to public ridicule, ignominy or disgrace, any more than it would to call him a half-breed German, Swede, or Canadian. We hold that the words are not actionable *per se.*

The second part of the charge, namely, that the defendant had said of the plaintiff that she had shot and killed a man in Oklahoma, meaning thereby that she had committed murder, imputes to the plaintiff the commission of a crime, which, if sustained by competent evidence, would justify a recovery. The only evidence to which our attention has been called, which relates even remotely to this charge, is that of one witness who testified that in a conversation defendant said of the plaintiff: "Well, he said he understood that shooting was tolerated in the south, but he did not see how they could get by with it here." There is evidence in the record tending to show that plaintiff had shot at defendant a short time prior to this conversation, and it is plain that the conversation related to this circumstance. But this is far from supporting the charge in the petition. Evidence was introduced, over objection, that there were rumors in the neighborhood that plaintiff had shot and killed a man in Oklahoma prior to her coming to Nebraska, but there is nothing in the record to show that such language was spoken by defendant about the plaintiff, or that the rumor was due to anything said by defendant. There is no competent evidence in the record that defendant ever uttered words which would impute to the plaintiff the commission of a crime.

It follows that the first part of the charge in the fourth cause of action is insufficient to justify a recovery, and that the second part is not sustained by the evidence.

Over defendant's objection, plaintiff was permitted to testify that there were rumors in the neighborhood that she had shot and killed a man in Oklahoma. Since the record fails to show that defendant ever uttered the words, or that the rumor was attributable to him, it is too plain to admit of argument that such evidence was improperly admitted.

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

REVERSED.

Note—See Libel and Slander 17 R. C. L. 414; 36 C. J. 1150 n. 74, 1152 n. 1, 1165 n. 35, 40, 1203 n. 46; 37 C. J. 36 n. 26, 69 n. 46, 73 n. 22, 74 n. 44.

CHRISTINA TALICH, APPELLEE, V. ARCHIE D. MARVEL ET AL., APPELLANTS.

FILED FEBRUARY 14, 1927. No. 24639.

1. **Conspiracy:** PROOF. A charge of conspiracy, as in this case, may be sustained by proof of surrounding facts and circumstances.

2. **Conversion.** "Any distinct act of dominion wrongfully exerted over one's property in denial of his right is a conversion." *Starr v. Bankers Union of the World*, 81 Neb. 377.

3. ———: PRINCIPALS. In wrongful conversion, each and all knowingly participating therein, or who, with knowledge, benefit by its proceeds in whole or in part, are principals.

4. **Principal and Agent:** DUTY OF AGENT: PRESUMPTION. It is the duty of an agent to disclose to his principal each material fact gained by him pertaining to the subject of his agency, and, unless the contrary is shown, he will be presumed to have complied with such duty.

5. **Notice.** "Where one is put upon inquiry, he is to be charged with notice of all such facts as he would have learned by reasonable inquiry." *Cooper v. Newman*, 45 N. H. 339.

6. **Evidence:** FAILURE TO TESTIFY: PRESUMPTION. In the trial

of a civil action, after the plaintiff has introduced evidence tending to prove his case, if the defendant fails to testify to matters peculiarly within his knowledge necessary to his defense, a presumption exists that his testimony, if produced, would militate against his interest, which presumption may be considered by the court or jury trying the case in determining the facts proved.

APPEAL from the district court for Hamilton county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

Hainer, Craft, Edgerton & Fraizer and *C. M. Skiles,* for appellants.

Fred C. Foster and *Thomas, Vail & Stoner, contra.*

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

THOMPSON, J.

This action was brought in the district court for Hamilton county by appellee, hereinafter called plaintiff, against appellants, hereinafter called defendants (unless for reasons separately named), to recover $10,000 with interest for the wrongful conversion by them of a draft for $10,000 issued by the Omaha Life Insurance Company to plaintiff in payment of a policy written by it on the life of her husband, Joseph Talich, wherein she was named as beneficiary. After the issues were duly joined, the case was tried to a jury, and a verdict returned in favor of the plaintiff for $11,889.92, and against all of the defendants, on which judgment was entered. Seeking reversal thereof, defendants have appealed, John S. Marvel alone superseding the judgment.

As above indicated, the action is one seeking judgment for wrongful conversion. However, the defendants insist that it is one for rescission. Neither the pleadings nor the evidence sustain such a contention.

As to the challenge that the judgment is not sustained by the evidence: The substance of the claim of plaintiff

fairly stated, and so far as is necessary for our consideration, is: That the defendants wrongfully conspired to and did, by duress, coercion, and wrongful influences by them designedly exercised, procure plaintiff to indorse her name on the back of such draft, and to permit such draft in such condition to remain in their possession, and that afterwards, without plaintiff's knowledge or consent, such defendants, in furtherance of such wrongful design and purpose, converted the same to their own use, to her damage in the sum of $10,000 and interest; and further that, in pursuance of such design, such defendants procured to be delivered to plaintiff certain notes, none of which she had signed, which computed with interest equalled the face of such draft, which notes were tendered back to defendants and by them refused, and for the purpose of such tender plaintiff brings such notes into court.

The substance of the claim of the defendants, save and except John S. Marvel, is: That such draft was obtained by them under and by virtue of an agreement voluntarily entered into by and between them and the plaintiff, by the terms of which she was to and did indorse and deliver to them the draft, and in consideration thereof they delivered to her the indorsed notes in question; that each defendant acted for himself without a common design or purpose other than that each desired to collect the respective debts owing them; and further that John S. Marvel was not personally present.

As to the claim of John S. Marvel, he interposes a general denial to each and every allegation contained in plaintiff's petition.

There is an acute and striking conflict in the evidence as to just how the indorsement of such draft was procured to be made, and as to how and for what purpose the draft was left in the possession of the defendants. The record is voluminous. To attempt an analysis thereof, or to fairly quote therefrom, would be to extend this opinion beyond proper limits, and would serve no useful purpose. A careful con-

sideration of such record convinces us that the evidence amply sustains the contentions of the plaintiff and each thereof as hereinbefore stated, and fully supports the findings of the jury as covered by its verdict.

In arriving at this conclusion, we have not been unmindful of the separate challenge urged by John S. Marvel, and neither have we been unmindful of the law applicable to the facts disclosed by the record as to each and all of the defendants; but, we have recognized that, in order for such acts to constitute conversion, they must be positive and must be tortious, as held by us in *Colley v. Chicago & N. W. R. Co.*, 107 Neb. 864. "Any distinct act of dominion wrongfully exerted over one's property in denial of his right is a conversion." *Starr v. Bankers Union of the World*, 81 Neb. 377-380, "All are principals in conversion, and every person who knowingly aids and abets another in the conversion of the property of a third person is liable to such third person for the value of the property so converted." *Osborne Co. v. Piano Mfg. Co.*, 51 Neb. 502. "Any wrongful influence designedly exerted by an interested party and producing a condition of mind that deprives the other party of the exercise of his free will may amount to duress and invalidate a contract signed while the influence prevails." *Farmers State Bank v. Dowler*, 112 Neb. 262.

Also, in our determination, we have considered the defendant John S. Marvel's claim, in substance, that the record is without evidence connecting him with such conspiracy, and that he not being present is not holden for damages. He was the president of the defendant bank, as well as of the Bank of Commerce at Hastings, the cashiers of which banks were the active participants in the carrying out of the plan, and as such as well as individually were personally interested in seeing that the notes were taken up, as was John S. Marvel; that on receipt of the draft John S. Marvel was given full credit on his own individual account in the Giltner bank for the full amount of his note, $834.30, and interest, making a total of $953.30;

and defendant Washburn was given credit for the note and interest held by him for the use of himself and one Feagan, amounting to the sum of $618.70; that these and the other notes going to make up the total of those hereinbefore referred to were indorsed without recourse, and, without any authority from the plaintiff, placed in the hands of her son (save and except the note of John S. Marvel which was sent to her by mail from Hastings two days later), and such draft turned over to the Bank of Commerce, without plaintiff's knowledge or consent, as a credit to the bank of Giltner, on account of certain transactions existing between such banks, all of which facts were then spread upon the records of the banks, respectively, as their interests appeared. As stated, Marvel was the president of each of such banks, and the banks were present and active in the transaction by and through their respective cashiers. These cashiers were also the authorized agents of such Marvel in the collection of his note, if not in the entire transaction. Hence, by reason thereof and the reflected facts hereinbefore stated, he is chargeable with notice, at least of facts sufficient to put him upon inquiry. Then, he retains such proceeds and rests his defense solely on a denial of the allegations of plaintiff's petition, he makes no offer to return the money even after the petition had warned him of how and when the money was received, and he does not even testify in support of his own answer, nor does he explain or offer to explain his receipt and retention of the money. Having knowingly benefited by the proceeds realized from such conversion, he becomes and is a principal.

As to his operating through his agents, and his receipt and retention of the money, we find the following authorities instructive: 38 Cyc. 2054, 2055; *Pearlman v. Snitzer*, 112 Neb. 135; *Cooper v. Newman*, 45 N. H. 339; *Evans v. State Nat. Bank*, 24 Fed. 325; *Jones v. Minnesota & Manitoba R. Co.*, 97 Minn. 232; *Canifax v. Chapman*, 7 Mo. 175; *Banks v. Windham*, 7 Ala. App. 616; *Western Union Telegraph Co. v. Franklin Construction Co.*, 70 N. H. 37.

As to the failure of John S. Marvel to testify: In the trial of a civil action, after the plaintiff has introduced evidence tending to prove his case, if the defendant fails to testify to matters peculiarly within his knowledge necessary to his defense, a presumption exists that his testimony, if produced, would militate against his interest, which presumption may be considered by the court or jury trying the case, in determining the facts proved. *Copperthite v. Loudoun Nat. Bank*, 111 Va. 70; *Bonelli v. Burton*, 61 Or. 429; *Carson v. Mott Iron Works*, 117 Va. 21; *Summers v. Keller*, 152 Mo. App. 626; *Jenner v. Shope*, 205 N. Y. 66; *Meyer v. Minsky*, 112 N. Y. Supp. 860.

The necessity for, as well as the application of, the foregoing rule is apparent when considering a case like this, as the proof of an agreement to enter into a conspiracy rests in the first instance solely in the minds of the would-be conspirators; hence, one not a party thereto must rest his case largely on the proveable surrounding facts and circumstances.

Defendants have called our attention to other assignments of alleged error which we have not discussed herein, but which, upon examination, we conclude are without merit. The defendants have had a fair trial. The judgment of the district court is without reversible error, and is therefore in all things,

AFFIRMED.

THEODORE KNAAK, APPELLEE, V. LESLIE B. BROWN ET AL.: HERMAN STATE BANK, INTERVENER, APPELLANT.

FILED FEBRUARY 14, 1927. No. 24363.

1. **Dismissal.** A "dismissal" after final submission of a case to a jury or to a court, where trial is by the court, to be effective, must be by leave of court and upon its order, which order is required to be entered on its journal.

2. **Judgment: SATISFACTION: AVOIDANCE.** A "satisfaction of judgment" is but a receipt, and like a receipt, in the absence

of intervening equities, may be explained or avoided by satisfactory evidence that payment was not, in fact, made, or, though made, satisfaction has become inoperative by reason of reversal of judgment, the vacating of sale, or any other cause rendering it inequitable for the defendant to avail himself of the entry of satisfaction.

3. ———: LIEN. A judgment lien on real estate attaches only to the actual interest of the judgment debtor therein, and is subject to all the then existing equities thereto, whether of record or not.

4. ———: SATISFACTION: REINSTATEMENT. Evidence examined, and *held* that, the intervener, Herman State Bank, not having changed its position in reliance upon the entry of satisfaction set forth in this opinion, plaintiff is entitled to have such entry vacated and his decree of foreclosure reinstated as of date of its original rendition.

5. Action of the district court in setting aside a certain sheriff's sale, the confirmation thereof, and sheriff's deed issued pursuant thereto, approved.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed, and remanded, with directions.*

J. A. Singhaus, for appellant.

P. F. O'Gara, contra.

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

EBERLY, J.

This was originally the usual action to foreclose a purchase money mortgage upon a certain business property situated at Coleridge, Cedar county, Nebraska, brought by Knaak, as plaintiff, against Leslie B. Brown *et ux.* and Floyd Van Valin *et ux.* as sole defendants. The Herman State Bank sought to intervene after decree of foreclosure was entered, statutory stay thereof taken, and after a claimed dismissal had been entered by plaintiff, followed by his motion to vacate the same and reinstate decree of foreclosure. The allegations of the bank's amended petition in intervention were placed in issue by appropriate pleadings,

and upon hearing thereof by the district court for Cedar county, June 16, 1924, relief was denied and the petition of intervention dismissed. This order was journalized June 18, 1924. This last named order only the intervener superseded and from it an appeal is prosecuted. In its assignment of error contained in its brief, intervener adds a further assignment covering the denial by the trial court of its motion to set aside an order made in said cause, December 14, 1923, setting aside the dismissal of said action and reinstating said decree of foreclosure. No motion for new trial was filed, and the cause is here for trial *de novo.*

A brief recital of certain facts of the transaction may assist in properly presenting the question requiring our attention: Brown and wife executed the mortgage foreclosed. At the time of the entry of the decree of foreclosure, Van Valin had become the owner of the property by purchase from Brown, and under the terms of his conveyance had assumed, as part of the consideration, the payment of the mortgage debt, and was in possession of the property. About the time of the expiration of the statutory stay, Van Valin made an application to the Occidental Building & Loan Association of Omaha for a loan on the mortgaged premises which, to the extent of $2,500, was, at least, conditionally accepted by that company. Notes and mortgage evidencing that amount were forwarded to Van Valin and wife, executed by them, and this mortgage recorded by the loan company.

Contemporaneous with these negotiations an agreement for settlement of the foreclosure decree had been arrived at. In accordance therewith, Van Valin prepared a check for the sum of $500 payable to Knaak, a note of $660.75 secured by a chattel mortgage, likewise payable to Knaak, and had placed these instruments in possession of Mr. Gray, a banker, trusted by both parties. Under the arrangement between Van Valin and plaintiff Knaak, upon the expected receipt of the proceeds of the $2,500 loan, Mr. Gray was to deliver the same, together with the $500 check, the note

of $660.75, and chattel mortgage securing the same, to Knaak, who was thereupon to execute a proper satisfaction of his decree of foreclosure. The foregoing constituted the substantial terms of the settlement agreed upon.

It was discovered, however, that the requirements of the loan company were such that it was necessary for Knaak to release the decree of foreclosure of record before the proceeds of the $2,500 loan would be paid over by the loan company. To accomplish this purpose the following entry was made by Knaak's attorney upon the appearance docket of the district court for Cedar county, page 44: "Settled and dismissed April 3, 1923, by order of P. F. O'Gara, attorney for plaintiff. P. F. O'Gara. D. F. Crouch, Clerk. April 4, 1923, received of P. F. O'Gara, $19.30 bal. costs in this case. D. F. Crouch, Clerk."

The Occidental Building & Loan Association reconsidered and concluded to decline to make the loan, and refused to pay over the money represented by the mortgage of $2,500 and the note of that amount it had received. These papers were returned to the makers with a release of its $2,500 mortgage recorded by it on April 25, 1923. Owing to the impossibility thus created, the settlement agreement between plaintiff and defendant was never carried out, and no delivery thereunder was ever made by Gray to Knaak of the property herein referred to.

It appears that on April 21, 1923, in a cause that had been pending in the district court for Washington county, Nebraska, wherein the Herman State Bank was plaintiff, and Floyd Van Valin was defendant, a judgment for a deficiency was entered against Van Valin and in favor of the bank for $2,753.60. A transcript of this judgment was filed in the district court for Cedar county on April 24, 1923. At the time of the filing of the transcript the record disclosed the unreleased $2,500 mortgage in favor of the loan association as a first lien on the premises. The result of the recording of the release by the loan association was to make the judgment of the Herman State Bank, so far as

the records were concerned, an apparent first lien on the premises in suit. On August 20, 1923, and during the March, 1923, term of the district court for Cedar county, Nebraska, Knaak filed a motion in his foreclosure case, having for its declared object and purpose that the "dismissal" hereinbefore set out "be vacated of record, and that said cause be fully and completely reinstated, and that the decree of foreclosure be declared to be of full force and effect." Neither Van Valin nor any of the defendants oppose this motion. On September 4, 1923, the Herman State Bank, by petition of intervention, sought to interpose objection to this motion. The allegations of this petition of intervention were controverted by pleadings of the plaintiff Knaak.

On December 14, 1923, "it being a day of the regular December, A. D. 1923, term of the district court, in and for Cedar county, Nebraska," the district court heard the motion of Knaak to set aside, cancel and hold for naught the entry on the appearance docket hereinbefore quoted, and, by its order of that date, canceled and annulled the entry and reinstated the decree of foreclosure in full force and effect.

On January 5, 1924, the Herman State Bank filed a motion to set aside this order made on December 14, 1923, "for the reason that said entry was secured by plaintiff of said order on December 14, 1923, without notice to intervener of the time when said motion would be taken up for hearing by said court, and with full knowledge on the part of plaintiff that said intervener was depending upon said plaintiff securing an order fixing a time for hearing thereon, and advising said intervener when to be present." This motion of the bank to set aside the order of December 14, 1923, was heard and denied by the district court on March 3, 1924. It may be said in passing that the evidence before the court upon the hearing of the motion of Knaak to reinstate the decree which was sustained by the order of December 14, 1923, as well as evidence received on the hear-

ing of the motion of intervener bank to set aside the decree of December 14, 1923, which was denied March 3, 1924, is not preserved in the record.

On June 16, 1924, a further hearing was had in the case of Knaak v. Van Valin et al. on issues formed by the amended petition of intervention filed in behalf of the Herman State Bank, the answer and cross-petition of plaintiff Knaak thereto, and reply of bank. The district court's decision following, which has already been set out, furnishes the basis of intervener's appeal. The crux of appellant's complaint is the cancelation by the district court of the entry of April 3, 1923, a copy of which has been set out.

The parties and district court alike, in the record, refer to the entry of April 3, 1923, as "dismissal," "settlement and dismissal," etc. It is obvious, however, that the true nature and legal effect of the entry in question must be determined by its substance and is not at all affected by what the parties may call it. In substance, it fails to conform to the requirements of a "dismissal." Indeed, in the absence of statute conferring statutory powers to dismiss upon parties, the general rule undoubtedly is that discontinuance must be by leave of court, express or implied, and upon its order, and that a dismissal cannot be accomplished by the mere act of plaintiff alone, and particularly after trial and verdict, it being considered that the granting or refusal of leave to dismiss, discontinue, or take nonsuit, is a matter of practice to be exercised at the discretion of court with reference to the rights of both parties.

Our Civil Code provisions, so far as applicable to a proceeding after final judgment or decree, are in strict conformity with the rule above. Comp. St. 1922, secs. 8598, 8599.

Under the express provisions of our statutes, an order of dismissal must be made by the court and must be entered upon the journal of the court. Comp. St. 1922, sec. 8952. No such entry appears in this record.

In a case involving the principle controlling here, the

supreme court of California said that the filing of the written statement of abandonment, and the clerk's entry in the register of actions, does not, under the Code of Civil Procedure of California, sec. 581, operate as a dismissal of the action if no judgment of dismissal was ever made or entered by any order of the court made in relation to the matter of abandonment. *Barnes v. Barnes*, 95 Cal. 171, 16 L. R. A. 660; *Rochat v. Gee*, 91 Cal. 355. The reason upon which the California decisions are based is that under their code "the filing of the paper referred to was, in effect, an order for a dismissal of the action, and would have been sufficient authority for the clerk to have entered a judgment of dismissal; but until the entry of such judgment the court retains jurisdiction of the case." Upon this particular branch of the case, it may be said in conclusion, giving the words of the entry on the appearance docket at page 44 all reasonable force and effect, the entry amounts to no more than competent evidence upon which an order to dismiss might have been entered by the court, but which, in fact, it appears, never was made.

It is plain, however, from the substance of the entry, that its object was to secure a discharge and satisfaction of record of the decree of foreclosure. As our Civil Code defines a judgment as the final determination of the rights of parties in an action, the entry may be properly termed a "satisfaction of judgment."

In this connection it may be noted that section 9508, Comp. St. 1922, in terms, requires the clerk of the district court to keep at least eight books, of which the "judgment record" and "journal" are each, one; that section 9509, Comp. St. 1922, provides in part; "And whenever any judgment is paid off and discharged, the clerk shall enter such fact upon the judgment record in a column provided for that purpose."

The record being silent on the question of any entries being made by the clerk of the district court, except as shown in the record, the presumption obtains that none

were made. There being no statutory authority for the entry of a satisfaction of judgment in the appearance docket, and there being an absence of any other order or entry satisfying said judgment, do we have before us a satisfaction of judgment (or decree) such as contemplated by law? *Manker v. Sine,* 47 Neb. 736.

Waiving this point and assuming the "satisfaction of decree" is properly entered, still, "Relief may be had, in a variety of forms, when a judgment appears from the record to be satisfied, but the entry of satisfaction was induced by fraud, mistake, inadvertence, or any other cause not producing an actual satisfaction nor precluding the plaintiff from pursuing appropriate remedies to reinstate his judgment. * * * But the remedy usually resorted to is by motion in the original action for an order canceling the entry or return of satisfaction and directing execution to issue for so much of the judgment as remains unpaid." 2 Freeman, Judgments (5th ed.) sec. 1166. *Williams v. Miller,* 249 Fed. 495; *Galway v. City of Chicago,* 207 Ill. App. 304; *Chicago, S. B. & N. I. R. Co. v. Dunnahoo,* 63 Ind. App. 237; *Farmer & Sons v. Sasseen,* 63 Ia. 110; *McNeal v. Hunt,* 6 Kan. App. 670; *Magwire v. Marks,* 28 Mo. 193; *Boynton v. Boynton,* 186 Mo. App. 713; *Sneary v. Nichols & Shepard Co.* 70 Okla. 133; *Leonard v. Ross,* 56 Okla. 118; *Sims v. Campbell,* 1 McCord Eq. (S. Car.) * 53; Freeman, Executions (3d ed.) sec. 53. See *Hinkins v. United States Fuel Co.,* 58 Utah, 327.

The time for the motion is not governed by the statute requiring motions for relief from a judgment or other proceeding taken against a party through his mistake, inadvertence, surprise or excusable neglect. *Acme Harvester Co. v. MaGill,* 15 N. Dak. 116.

In fact, an entry of satisfaction is but a receipt, and like a receipt may be explained or avoided by satisfactory evidence that payment was not, in fact, made, or, though made, satisfaction has become inoperative by reason of reversal of judgment, the vacating of sale, or any other cause, ren-

dering it inequitable for the defendant to avail himself of the entry of satisfaction. *Stewart v. Armel,* 62 Ind. 593; *Dane v. Holmes,* 41 Mich. 661; *Boynton v. Boynton,* 186 Mo. App. 713; *Marx v. Valley Stone Co.,* 147 N. Y. Supp. 519; *Reynolds v. Magness,* 24 N. Car. 26; *Farmer & Sons v. Sasseen, supra; Wallace v. Berdell,* 105 N. Y. 7.

Thus, in case of absence or failure of consideration, the entry may be vacated, as where the consideration for the satisfaction was a deed believed to be good, but, in fact, worthless. *Reed v. Fisher,* 90 Neb. 697; *Boynton v. Boynton, supra; Winter v. Kansas City Cable R. Co.,* 73 Mo. App. 173.

True, a court is not bound to set aside on motion a satisfaction voluntarily entered, though without consideration, and will not do so to the injury of an innocent third person who has acted on the strength of the record, as in the case of a *bona fide* purchaser of property who became such when the judgment appeared by record to be satisfied.

But, in the instant case, the district court, on consideration of the evidence which is not before us, on December 14, 1923, set aside and annulled this entry. At a later time, and at a hearing which resulted in a judgment from which the appellant bank now complains, there was an attempt to have reinstated the entry thus canceled and annulled. However, the intervener bank wholly failed to show that it, in any manner, changed its position in reliance upon the record, or that it occupied the position of an innocent third party who had acted on the strength of the record.

Indeed, this bank, by the filing of its transcript, obtained a lien. But its lien attached only to the actual interests of the judgment debtor, Van Valin, in the mortgaged premises, and was subject to all existing equities, whether of record or not. Judgment lien merely conferred the right to levy upon the property in litigation here to the exclusion of all other adverse interests subject to the judgment. *Metz v. State Bank of Brownville,* 7 Neb. 165; *Doe v. Startzer,* 62 Neb. 718; *First Nat. Bank of Falls City v. Edgar,* 65 Neb. 340; *Harral v. Gray,* 10 Neb. 186; *Pearson v. Davis,* 41 Neb.

608; *Roberts v. Robinson*, 49 Neb. 717; *Chicago, B. & Q. R. Co. v. First Nat. Bank of Omaha*, 58 Neb. 548.

"A judgment lien is, in equity, but a charge on the title held by the defendant when the lien attaches, or which is subsequently acquired. It can only hold the legal estate subject to the equity. 'It is well settled that a judgment lien on the land of the debtor is subject to every equity which existed against the debtor at the rendition of the judgment; and courts of equity will always limit the lien to the actual interest of the judgment debtor.' * * * Thus, if through an innocent mistake the holder of a trust deed has released it as to more of the land than was intended, the lien of an intervening judgment is subject to the equitable right to have the release reformed, notwithstanding a recital in it of full payment." 2 Freeman, Judgments (5th ed.) sec. 950, and cases cited. Knaak's judgment was never paid. Satisfaction was due to a mistake, and no consideration for making it was received or given.

It follows, therefore, that Knaak, as against defendants and intervener, is entitled to a cancelation or vacation of the entry of April 3, 1923, and a complete reinstatement of his decree of foreclosure as of date of its original rendition, as a first and paramount lien on the premises.

The Herman State Bank is, subject to the rights of the plaintiff therein, entitled to a second lien on the premises in litigation.

In so far as the order of June 16, 1924, sets aside and annuls the execution sale had on intervener's judgment, the confirmation thereof, and sheriff's deed issued pursuant thereto, it is likewise approved. The sufficiency of the pleadings on which this hearing was had is unquestioned by either party. The findings are sustained by the evidence and are imperative if due recognition is to be accorded the maxim, "*Actus curiæ neminem gravabit.*" The district court, in the proper exercise of the constitutional grant of chancery power, is bound to interfere if it perceives that

its own process or jurisdiction is about to be used for purposes which are not consistent with justice.

We find, however, that the district court did not expressly determine the amount unpaid upon plaintiff's decree of foreclosure. It is necessary that this be done. In view of the present condition of the record, and the fact that during the pendency of this case the rent accruing on the premises has been collected by a receiver appointed by the court, in justice to all parties, the case should be affirmed and remanded solely for the purpose of taking an account and determining the amount actually unpaid on plaintiff's decree of foreclosure.

Accordingly, the order entered in this cause on December 14, 1923, annulling and setting aside the satisfaction of decree which appears on appearance docket at page 44, as well as the decree made and entered in said cause on June 16, 1924, appealed from, are in all respects affirmed, and the cause is remanded to take an accounting, and for the purpose of determining the amount still unpaid upon plaintiff's decree of foreclosure, and for such other proceedings as may be necessary to be had in conformity with this opinion.

AFFIRMED, AND REMANDED, WITH DIRECTIONS.

TIP INMANN ARMSTRONG, APPELLANT, V. CITY NATIONAL BANK OF LINCOLN, APPELLEE.

FILED MARCH 1, 1927. No. 24693.

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

Frank M. Tyrrell, Wilmer B. Comstock and *Craven & Bickford,* for appellant.

Stewart, Perry, Stewart & Van Pelt, contra.

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

PER CURIAM.

The court has carefully considered the assignments of error and the evidence in the record. Under the evidence no conclusions could be arrived at with reason other than that there is no liability on the part of the defendant bank. The jury were fully warranted in arriving at the verdict and the errors assigned could not have been prejudicially erroneous.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. CITIZENS STATE BANK OF CHADRON: FAY C. HILL, RECEIVER, APPELLEE: JOHN PRITZUSE ET AL., CLAIMANTS, APPELLANTS.

FILED MARCH 1, 1927. No. 25378.

Appeal: MOTION FOR NEW TRIAL. In actions at law, as well as suits in equity, in order that "error of law occurring at the trial" may be considered by this court, it is necessary that the district court's attention must have been called to the same by way of a motion for a new trial.

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

G. T. H. Babcock, Samuel L. O'Brien, and *Allen G. Fisher,* for appellants.

C. M. Skiles and *E. D. Crites, contra.*

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

PER CURIAM.

In this case the appellants Pritzuse filed a claim with the receiver of the Citizens State Bank of Chadron, appellee, for the sum of $3,800.17, composed of the following items: Taxes paid by them which they claimed should have been

paid by such bank by reason of a certain lease, amounting to, with interest, $3,235.17, and rent on building, $565, and asked that the entire amount be allowed as a preferred claim and ordered paid out of the guaranty fund. The receiver refused such allowance, and issues were duly joined in the district court for Dawes county. Trial was had, and judgment rendered allowing the claim as follows: To the extent of $250, the same being in full for rentals and ordered paid out of the guaranty fund, and the remainder, $3,179.10, allowed as a general claim to be paid out of the assets on final distribution, *pro rata* with other general claims, and no more.

At the close of the evidence claimants asked leave to amend their claim so as to include the present worth of the lease covering the above rentals, which lease did not expire, as claimants alleged, until the 1st day of September, 1932, which request was refused, and exceptions taken. To reverse such judgment and ruling of the court, claimants prosecute this appeal.

As to the over-ruling of claimants' request to amend their claim: In order that "error of law occurring at the trial" may be considered by this court, it is necessary, under our uniform holding, that the district court's attention must have been called to the same by way of a motion for a new trial. *Carmack v. Erdenberger*, 77 Neb. 592; *Farmers Loan & Trust Co. v. Joseph*, 86 Neb. 256. This record does not disclose the filing of such motion. Further, such amendments are addressed to the sound discretion of the trial court, and it is only in case of an abuse thereof that error may be predicated thereon. Such an abuse is not shown.

It is also insisted that the judgment is not sustained by the evidence. A careful consideration thereof, in connection with the issues raised by the pleadings, discloses that the amount of rentals collectible, as determined by the trial court, as well as that of taxes paid by claimants covered by the lease, are each fairly supported by the evidence, and

sustained by the pleadings. Further, the evidence is quite conflicting, and in such a case the findings of the trial court are entitled to consideration, such court being advised as to the situation of the parties with respect to the property in question, and having had the opportunity to observe the demeanor of the witnesses at the trial.

The contention of claimants that the obligation on the part of the bank to pay these taxes was assumed by the guaranty fund commission and the receiver, respectively, under the proved facts reflected by the record is without merit, as are also the other alleged errors presented.

The judgment of the trial court is, in all things,

AFFIRMED.

SCOTTS BLUFF COUNTY ET AL., APPELLEES, V. FIRST NATIONAL BANK OF GERING ET AL., APPELLANTS.

FILED MARCH 1, 1927. No. 24979.

1. **Banks and Banking**: COUNTY DEPOSITS: ACTION AGAINST SURETY. Where a county treasurer deposits public funds in a national bank in excess of 50 per cent. of the paid-up capital stock of said bank, contrary to section 6193, Comp. St. 1922, and the bank furnishes surety bonds in an amount equal to the total of such deposits, the entire deposits are within the protection of such surety bonds; and where all save one of said sureties discharge their full obligations, leaving deposits unpaid equal in amount to the face of the bond furnished by that one, an action may be enforced against that surety for the face of its bond, with interest from the date of its default.

2. ———: DEPOSITOR. When a bank gives to one of its depositors credit in his pass-book for a check drawn by another of its depositors, having on its books ample funds to pay the check, such credit is equivalent to a payment of the check so deposited; and the depositor of the check is entitled to be considered a depositor of the cash represented by the check even though, without knowledge or connivance on his part, it was not entered on the books of the bank and the money was not further actually transferred.

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

Montgomery, Hall, Young & Johnsen, for appellants.

Mothersead & York, contra.

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

GOSS, C. J.

This is an action by the county of Scotts Bluff and its county treasurer, Schmidt, to recover from the First National Bank of Gering and from Globe Indemnity Company, hereinafter called the company, the sum of $5,000 and accrued interest on a certain bond for that sum executed by those defendants to secure deposits of county funds. Trial to the court resulted in a judgment against defendants for the full amount and they appealed.

The bank had a paid-up capital of $25,000. To secure deposits it had given surety bonds, including that of the company, for a total sum of $57,500. On December 31, 1923, during all of which day the bank was apparently open for business, the bank received from the treasurer for deposit a check of one Barton, drawn on the bank and with funds to Barton's credit sufficient to pay it, for $1,274.48. This deposit was entered on the treasurer's pass-book but, without any knowledge or connivance on his part, the deposit was not actually credited to his account on the books of the bank; the check was placed in an envelope, marked "County Treasurer," where later, when appointed, the receiver found it. The bank was taken charge of by the authorities and failed to open on January 2, 1924, the next business day. The county deposits of record on the books of the bank were $55,892.66, without including the Barton check of $1,274.48. The total of these two items is $57,167.14; but contractual interest at 3 per cent. on the daily balances increased the total deposits to $57,500 or more, if the Barton check be considered as a deposit. The other surety com-

panies paid the face of their bonds, or $52,500, and suit was brought against the company for the full amount of $5,000 on the theory that the county deposits totaled $57,500 or more when the bank closed.

The company argues, inasmuch as section 6193, Comp. St. 1922, prohibited the treasurer having on deposit with the bank a sum exceeding 50 per cent. of the $25,000 paid-up capital of the bank, that the company is liable with all the other bonding companies for only its *pro rata* share of $12,500. Questions akin to this have been before this court and a contrary principle has been followed. For examples: Notwithstanding section 6193, when a county treasurer deposits public funds in a state bank in excess of 50 per cent. of the paid-up capital stock of the bank it was held, in *State v. Peoples State Bank,* 111 Neb. 136, that the entire deposit was within the protection of the depositors' guaranty fund. Where a contract by a state bank to borrow money in excess of the debt limit authorized by its charter has been performed by the lending of money to such state bank, it will not be allowed to avoid the payment of its notes. *State v. Farmers State Bank,* 112 Neb. 597. And while the law prohibits a state bank from making loans in excess of a certain percentage of its paid-up capital stock and surplus, yet such loans are frequently made and their payment has always been enforced by this court when suit has been brought upon the notes. *State v. Peoples State Bank,* 111 Neb. 136. We adopt the same principle here. The bank could not defend a suit by the county to enforce its claim to deposits on the ground that they exceeded the statutory percentage of the bank's capital. It necessarily follows that the surety could not assert such a defense, for the engagement of the surety was to pay deposits of the county in the bank, if its principal failed to do so.

Was the Barton check a deposit? The evidence concerning it, in addition to what is heretofore stated, shows that, since the receiver took possession of the bank and found the check there, a claim for the full amount of the county de-

posits including the check has been filed, and that Barton treated the check as paid and filed a claim for the balance of his account on deposit when the bank closed. The receiver testified that it was his intention to issue to Barton a receiver's certificate for his balance less that check, thus treating the check as paid.

The receiver was right. He took over the bank with its rights and liabilities as they stood at the close of business. His legal position is that of the bank. While the bank was open and doing business, it received this check and credited it in the depositor's pass-book in the usual way. No duty rested upon the treasurer to see that the bank credited the deposit on its books, nor to see that the check was charged to Barton's account on its books. The transaction was the same as if the bank had cashed Barton's check and then had entered the cash deposit in the pass-book to the credit of the treasurer. The relation between the bank and the depositor thereupon became that of debtor and creditor. *Bryan v. First Nat. Bank,* 205 Pa. St. 7; *Oddie v. National City Bank,* 45 N. Y. 735; *Second Nat. Bank v. Gibboney,* 43 Ind. App. 492; *Wasson v. Lamb,* 120 Ind. 514; *Cohen v. First Nat. Bank,* 22 Ariz. 394; *American Exchange Nat. Bank v. Gregg,* 138 Ill. 596; *National Bank v. Burkhardt,* 100 U. S. 686; *American Nat. Bank v. Miller,* 229 U. S. 517.

We hold, therefore, that the Barton check was deposited and credited in legal significance, and that thus the balance on deposit to the credit of the treasurer was equal to or greater than the sum of the surety bonds; that a balance of $5,000 or more remained unpaid after the other companies paid; and that the company is legally bound to pay the face of its contract with interest from the date of its default.

On consideration of the application of appellees for a further allowance of attorney's fees in this court, we are of the opinion that the allowance in the trial court was sufficiently liberal to cover services in both courts, and so we

make no allowance here, but content ourselves with an affirmance of the case in all respects.

AFFIRMED.

Note—See (2) 3 R. C. L. 526; 1 R. C. L. Supp. 843; 4 R. C. L. Supp. 193.

FRED WILLIAMS V. STATE OF NEBRASKA.

FILED MARCH 1, 1927. NO. 25379.

1. **Criminal Law**: MENTAL CAPACITY: PROOF. In a criminal prosecution, where the mental capacity of defendant to commit the crime charged is raised by opinion evidence, in response to a hypothetical question and given by a physician called as a witness by the defendant, such evidence may be rebutted by the evidence of nonexpert witnesses, who testify about facts and circumstances surrounding the commission of the crime, and to defendant's appearance, actions, conduct and language at and about the time of the commission of the alleged crime. And such evidence may be sufficient to justify the jury in finding, beyond a reasonable doubt, that defendant was legally responsible for his act in committing the crime charged.

2. **Homicide**: MENTAL CAPACITY: SUFFICIENCY OF EVIDENCE. Evidence examined and *held* sufficient to warrant the jury in finding, beyond a reasonable doubt, that at the time of committing the offense charged defendant knew what he was doing and could distinguish between right and wrong with respect to his acts constituting the crime charged in the information.

3. **Criminal Law**: CONVICTION: CONFLICT OF EVIDENCE: REVIEW. This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

4. ———: INSTRUCTIONS: REVIEW. Whether instructions given by the court to the jury correctly state the law must be determined from an examination of the entire charge, and not by a single sentence or paragraph thereof.

5. ———: ———: MENTAL CAPACITY. An instruction in a criminal action, relating to the defendant's mental status, and which

informed the jury that defendant must know what he was doing and must know right from wrong with respect to the particular act at the time of the commission of the offense charged, *held* to be a correct statement of the law, as applied to the facts set forth in the opinion.

6. ———: NEW TRIAL: DISCRETION OF COURT. Whether defendant should be awarded a new trial for alleged misconduct of the jury is a question addressed to the sound judicial discretion of the trial court, and will not be disturbed unless an abuse of such discretion is shown.

7. ———: MISCONDUCT OF JURY: Misconduct of the jury, or of the bailiff having them in charge, unless prejudicial to the rights of the defendant, constitutes no ground for reversal.

ERROR to the district court for Douglas county: CHARLES A. GOSS, JUDGE. *Affirmed.*

Jamieson, O'Sullivan & Southard, for plaintiff in error.

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

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ., and SHEPHERD, District Judge.

GOOD, J.

For shooting and killing his wife on the morning of November 30, 1925, Fred Williams, hereinafter called defendant, was convicted of murder in the second degree and sentenced to imprisonment in the penitentiary for a term of 20 years. To review the record of his conviction, he prosecutes error to this court.

The first assignment of error is that the verdict is contrary to law and not sustained by sufficient evidence.

That defendant shot and killed his wife is admitted; but it is contended that at the time of the homicide the defendant was not in such a mental condition as to be legally responsible for his actions. It is also urged that, where evidence has been adduced, tending to show that a person charged with crime is not in such mental condition at the time of the commission of the offense as to be legally ac-

countable for his act, then the burden is upon the state to prove, beyond a reasonable doubt, every element necessary to constitute the commission of the crime, and also that defendant's mental condition was such that he would be legally accountable for his act. The rule of law contended for is undoubtedly sound, but the question presented is: Are the facts proved sufficient to sustain a finding, beyond a reasonable doubt, that defendant, at the time of the commission of the offense, was legally responsible for his act?

Defendant called as a witness a physician, who, in response to a hypothetical question reciting, in substance, the facts detailed by the defendant and some other of defendant's witnesses, testified that in his opinion defendant, at the time of the homicide, did not know right from wrong with respect to the particular act. No other direct evidence of defendant's mental condition was offered, and the only evidence bearing upon defendant's impaired mental condition, if such existed, was such as might be inferred from the testimony as to his actions, language and conduct at the time of and immediately before and after the shooting of his wife. Counsel for defendant seem to take the view that some direct evidence by the state was essential to meet the evidence adduced by defendant. The opinion of the physician was based upon the assumption that all the facts set forth in the hypothetical question were true. Some of the matters in the hypothetical question were not proved. and, as to many others, the evidence was in conflict. Under such circumstances, it was for the jury to determine what weight should be given to the opinion of the physician. The state did not call expert witnesses as to the defendant's mental condition, but the facts and circumstances surrounding the commission of the crime and defendant's actions, language and conduct were fully set forth in detail, and from these the jury were required to determine the question.

Are the facts proved sufficient to warrant the jury in finding that defendant knew right from wrong with respect to

the act that he was committing when he shot and killed his wife? The evidence is very voluminous and we shall not attempt to summarize all of it, but will outline some of its salient features.

It appears that defendant is, by occupation, a printer and linotype operator; that he and his wife had been married for about five years; that they lived in one side of a duplex house at 817 Park avenue, in the city of Omaha; that defendant was engaged most of the time at his occupation, and that the wife, for the purpose of helping to maintain the home and provide for household expenses, furnished room and board to a number of persons; that the defendant and his wife frequently had disagreements and some quarrels, but none of a serious nature until about six weeks prior to the tragedy. According to his testimony, defendant took exceptions to the conduct of one of the boarders. He testified that his wife showed a preference for this man, conducted the home and provided articles of food in deference to his, rather than to defendant's, wishes; that six weeks prior to the tragedy he and his wife had a quarrel concerning the matter, he at that time insisting that the boarder must leave the home, or defendant would do so; that his wife refused to accede to defendant's wishes; that thereupon defendant left his home and went to another place in the city of Omaha, staying about a week, and then moved to Sioux City, where he was employed at his occupation. While he was in Sioux City his wife brought an action against him for divorce. Two weeks before the fatal shooting, defendant visited his wife in a fruitless effort to effect a reconciliation. He then returned to Sioux City.

On Friday, the 28th of November, 1925, defendant was served with notice of an application for alimony in the divorce action, theretofore begun by his wife. On the next day he purchased a revolver, a box of cartridges and a knife. He testified that he purchased the revolver with the idea of committing suicide, but there is no evidence that he made any attempt upon his own life. According to his

testimony, at about 3 o'clock on Sunday, the day following the purchase of the knife and revolver, he drove to Omaha, for the purpose of making one final effort to effect a reconciliation with his wife. He testified that he reached Omaha at about 11 o'clock in the evening, and between 11 and 12 o'clock went to his home, or the home of his wife, crawled through a window into the basement of the home, intending to stay there until the next morning, and, after the boarders had gone, to see his wife. There is nothing in the evidence to indicate that there was a bed or fit place in the basement for him to sleep. He further testified that after he had been in the basement some time, perhaps 30 minutes, he heard footsteps on the floor above, going to his wife's room, which excited a suspicion of misconduct on her part; that he ascended the stairs from the basement into the kitchen, thence into the dining-room and into the living-room, which was also used as a sleeping-room by his wife; that as he went in he switched on the electric lights in the dining-room and living-room and discovered his wife and the boarder in a compromising situation; that he fired one shot and thereafter did not remember anything until he found himself telephoning to the police. He claims not to remember nor to have any knowledge of what transpired for a period of 30 or 40 minutes, and to have an imperfect knowledge and recollection of what occurred until some time the next morning.

From other evidence, it appears without question that defendant not only shot the boarder through the shoulder, but that he brutally beat his wife on the head and face with his revolver, inflicted a wound upon her with a knife, and, while he was struggling with her, another roomer on the second floor, hearing the noise, came part way down the stairs and saw defendant and his wife struggling near the foot of the stairs; that defendant pointed the revolver at this roomer and told him to go back to his room. The roomer needed no second admonition to obey the direction. At about this time Mrs. Williams escaped from defendant

and fled from the house, and collapsed upon the sidewalk in front of a public garage a few yards from the Williams home. Other witnesses, who saw her as she was leaving, testified that she was staggering and was going rather slowly until she collapsed. One of the employees of the garage, assisted by a stranger, lifted and carried her into the office and placed her in a chair. At that time she was covered with blood, and stated that her husband had beaten her, and asked to be taken to a hospital. A call was telephoned to the police station. Fifteen or twenty minutes later defendant entered the garage office, where his wife was, and when she saw him she said, "My God! there he is; he is going to kill me," or words of like import. One of the bystanders placed a hand on defendant's arm, and he responded, "I know what I am doing," and almost immediately fired four shots into his wife's body, killing her instantly. He then remarked, "Well, I guess I finished it, boys," or words to that effect. Immediately thereafter defendant left the garage, returned to his home, and attempted to telephone to the police. The police officers arrived at about this juncture, and to one of them, who made inquiry as to what the trouble was, he replied, "I will show you." He took the officer into the living-room, pointed to various articles of men's apparel and to the bed, which was apparently disarranged as though it had been occupied. Within a few moments he made statements to the officers and newspaper reporters, in which he gave in detail an account of his conduct and actions in shooting the boarder, beating his wife, and following her to the garage where he shot her to death, and stating, in effect, that any one else would have done the same thing under like circumstances.

The evidence further shows that the next morning he was taken to the hospital to see the wounded boarder. While there he went up to the bed and addressed him in friendly terms, shook hands with him and said that he did not know who it was or he would not have done it. Defendant further testified that he did not know of any misconduct on the part

of his wife or suspect her of infidelity until a few moments before the shooting; that he had only felt aggrieved because she was paying more attention to the boarder's wishes about the home and food than to his wishes. The boarder, called as a witness, testified that he came home that evening at about midnight and had a message to leave with Mrs. Williams for another of the boarders, but did not find her in the living-room and went up to his own room on the second floor. He testified that shortly thereafter he came downstairs, went into the living-room and was sitting, talking to Mrs. Williams when defendant suddenly burst into the room and shot him in the shoulder, and began to beat his wife with the revolver. The boarder escaped and went to his own room and was later taken to the hospital. He testified that he had never enjoyed any privileges other than those accorded the other roomers in the house; that all the roomers treated the place as a home and came into the living-room to read the daily papers and to visit with the members of the family and with each other. All of these roomers were called as witnesses, and they testified to a like state, and all of them testified that they had never observed any misconduct on the part of Mrs. Williams, and that all were accorded like privileges. It may be observed further that, aside from the testimony of defendant, there is not a word in the record that would indicate that Mrs. Williams was other than a virtuous lady.

A great deal of evidence was given by police officers, detectives, reporters, and others, describing defendant's appearance, his actions, language and conduct immediately after the shooting. To a number of these persons he detailed the facts and circumstances in a clear and connected manner and gave a fairly accurate statement of the occurrences. This evidence directly contradicted defendant's testimony that he had no recollection of what occurred after discovering his wife and a boarder in the living-room. The fact that shortly after the shooting, when asked what the trouble was, he said, "I will show you," and took the officers

into the living-room and pointed out articles of men's wearing apparel and the condition of the bed, tends to prove that he knew, remembered and realized fully what he had done, and was attempting to justify his actions.

Whether defendant knew that it was wrong to shoot his wife was a question of fact that may be established by the facts and circumstances surrounding the commission of the crime, together with his appearance, actions, conduct, and language, at the time of the shooting. The finding of the jury was based upon conflicting evidence. Unless we can say, as a matter of law, that the evidence on the question is so lacking in probative force that the jury should not be permitted to declare that they are convinced, beyond a reasonable doubt, of the truth of the charge, this court should not interfere with the verdict upon that ground. *Shannon v. State,* 111 Neb. 457; *Hamblin v. State,* 81 Neb. 148.

From a consideration of all the evidence, we think there was sufficient to amply justify the jury in finding, beyond a reasonable doubt, that at the time of the shooting defendant knew what he was doing and knew right from wrong with respect to the particular act.

Complaint is made of a number of the court's instructions to the jury. One of such instructions informed the jury of the essential and material averments of the information which it was necessary to establish, beyond a reasonable doubt, before the defendant could be convicted of the crime charged. In this instruction no direct reference was made to the mental condition of the defendant. One of the essential elements was stated: "That the defendant shot said Hazel Williams purposely and with deliberate and premeditated malice and with the intent to kill her." In another paragraph of the instructions, relating to the mental condition of the defendant, the jury were informed that the defendant relied upon the defense of temporary insanity or loss of his normal mental faculties to such an extent that he did not know what he was doing at the time he com-

mitted the act charged; and another paragraph informed the jury that, before they could find the defendant guilty, they must be satisfied from the evidence, beyond a reasonable doubt, that he knew what he was doing at the time, and that he was capable of discriminating or distinguishing between right and wrong with respect to the particular act charged.

It has long been the rule in this state that, where the instructions, as a whole, correctly advise the jury as to the law on the points in issue, a single instruction which, by itself, might be misleading will not be permitted to work a reversal of the judgment. *Aller v. State*, 114 Neb. 59. The instruction, stating the essential elements of the crime, was a correct instruction. It did not pretend to inform the jury that they might convict the defendant, regardless of his mental condition, and on that subject they were specifically instructed.

Complaint is made of the instructions relating to the defendant's mental status, in that two standards are given: One that defendant must know what he was doing, and the other that he must know right from wrong, with respect to the particular act, at the time.

We think the instruction given was peculiarly applicable to the evidence given by the defendant. Defendant testified that he did not know anything about, or have any recollection of, what occurred from the time that he discovered his wife and one of the boarders in the living-room of the home, until some time after the shooting. The instruction, in fact, does not set up a double standard, either of which would convict defendant, but, on the other hand, it told the jury that, if defendant did not know what he was doing at the time, or if he was not able to distinguish right from wrong with respect to the particular act, then he could not be legally convicted. The instruction was most favorable to the defendant. A careful examination of the court's charge to the jury satisfies us that it was free from any error.

Complaint is made because the court permitted, over objection, testimony of quarrels between defendant and his wife from time to time prior to the commission of the offense charged. The defendant, himself, upon the witness-stand testified to frequent quarrels, but the evidence does not disclose, either on the part of the state or of the defendant, that there were any serious quarrels prior to the time of the tragedy in question. After a careful scrutiny of the record, we do not find that the court committed any error in that respect.

It is charged that there was misconduct of the jury for which the defendant should be awarded a new trial; that one of the jurors had made statements during the progress of the trial that were derogatory of counsel for defendant, that he was satisfied the defendant was guilty, and that such remarks were made during the progress of the trial and before the taking of evidence was concluded. Each of the jurors was called and examined under oath with respect to any such statements, and the trial court, after hearing all the evidence, held that there was no misconduct in that respect, and we are satisfied that the great weight of the evidence sustains the court's ruling.

Further complaint is made of misconduct of the jury, in that, while they were deliberating on the verdict, the jury called the bailiff and asked him whether they could fix the penalty at the minimum in a conviction for second-degree murder, and that the bailiff replied that he had never known such a thing to be done. This was no doubt an irregularity. The jury should not have inquired of the bailiff; nor should the bailiff have given any answer. However, the incident does not disclose that the rights of the defendant were in anywise prejudiced by the inquiry. The bailiff neither advised nor attempted to advise the jury as to what they could or should do. No misstatement of the law or of fact was made. No prejudice to defendant's rights is shown.

It is urgently insisted that the sentence imposed is excessive and not in proportion to the gravity of the offense or

the moral turpitude involved. This contention does not meet with our approval. The evidence is sufficient to warrant a finding that defendant deliberately planned to murder his wife, and came to Omaha, armed, with the intention of carrying out his murderous design. The jury were merciful and lenient in finding defendant guilty of second-degree murder. Defendant is fortunate indeed to escape a conviction for murder in the first degree. The story told by him was inconsistent in many respects and was so unreasonable that it did not impress all of the jurors, at least, with having much, if any, merit or truth in it. The sentence does not seem excessive. The trial lasted for a period of two weeks; there is a voluminous record, and in the whole thereof we fail to find any prejudicial error.

The judgment of the district court is therefore

AFFIRMED.

Note—See (2) 39 L. R. A. 737, 44 L. R. A. N. S. 125; 13 R. C. L. 713; 3 R. C. L. Supp. 76—(6) 20 R. C. L. 252.

MILTON HIDDLESON ET AL., APPELLEES, V. CITY OF GRAND ISLAND ET AL., APPELLEES: E. H. BAKER ET AL., INTERVENERS, APPELLANTS.

FILED MARCH 1, 1927. No. 25682.

1. **Municipal Corporations:** OBJECTIONS TO PAVING: ACTION OF COUNCIL JUDICIAL. The council of a city of the first class exercises judicial functions when, in conformity with the provisions of section 4084, Comp. St. 1922, it passes upon and determines the sufficiency of objections to paving filed by abutting owners of property in the paving district; and such decision by the council becomes final, if no proceeding is had for its review by the district court.
2. ———: ———: TIME FOR FILING. Objections to paving filed by abutting property owners of a paving district in cities of the first class, to be effective to prevent the paving, must be filed within the time limited by section 4084, Comp. St. 1922.
3. ———: ———. Under the provisions of section 4084, Comp. St. 1922, where a city council has passed an ordinance creating a paving district and given notice to the property owners, as therein required, and, within the time prescribed by statute,

"the owners of the record title representing a majority of the abutting property owners" in the district file objections to the paving, the right of the council to thereafter proceed with the paving is extinguished, and it then becomes the duty of the council to repeal the ordinance creating the district. However, under such circumstances, when it is determined that the objections are sufficient to prevent the paving, the paving district, for all practical purposes, ceases to legally exist, regardless of the fact that the ordinance, attempting to create the district, is not formally repealed.

4. ———: STATUTE RELATING TO PAVING: "FORTHWITH" CONSTRUED. The word "forthwith," in section 4084, Comp. St. 1922, is used in an elastic sense, and means as expeditiously as, under all the circumstances, is reasonably prudent and convenient.

5. ———: CREATION OF PAVING DISTRICT: EFFECT OF DELAY. Where the city council of a city of the first class has, in accordance with the provisions of section 4084, Comp. St. 1922, created a paving district by the passage of a proper ordinance and given notice therein prescribed, and no sufficient objection to the paving has been filed, mere failure of the council to proceed with the paving of the district for a period of years will operate neither to repeal the ordinance creating the district, nor to destroy the right of the council to subsequently proceed with the paving.

6. **Statutes**: AMENDMENTS. "Where, by amendment and repeal, the words of a former statute or section of a statute are changed in some respects, but it is intended that the statute shall continue to operate, it is not strictly a repeal, but a continuation of the former law as amended." *Morgan v. City of Falls City*, 103 Neb. 795.

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

Prince & Prince, for appellants.

Benjamin J. Cunningham, Paul C. Holmberg and *Albert S. Johnston, contra.*

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

GOOD, J.

Plaintiffs, who are resident taxpayers of the city of Grand Island, brought this action, to enjoin that city and

its officials from carrying out an alleged contract for the paving of the streets in paving district No. 59 within the city, and to enjoin the city and its officials from ever paving said district.

The grounds alleged for the injunction were that district No. 59 was never lawfully created; that by reason of the city council's failure to forthwith proceed with the paving, as provided by section 4084, Comp. St. 1922, the ordinance creating the district became null and void and the district ceased to have a legal existence; and that the contract for the paving was not legally let because it was not concurred in by a majority of the members of the city council. The city answered, setting forth reasons why the paving had not been proceeded with promptly after the passage of the ordinance creating the district, and denied the other allegations of the petition. Certain owners of real estate within the district sought and obtained leave to intervene, and they also resisted the application for the injunction upon substantially the same grounds as did the city, but further asked for a mandatory injunction requiring the council to proceed and pave the streets within the district.

The trial court found that the district was legally created, but that it had ceased to have a legal existence because of the failure of the council to promptly proceed with the paving after the creation of the district, and perpetually enjoined the city and its officials from ever paving the streets within the district. Interveners alone appeal.

In this court interveners concede that the contract attempted to be let by the council for paving the district was invalid, because it was not concurred in by the vote of a majority of the council. The city of Grand Island is a city of the first class, having a population of more than 5,000 and less than 25,000. It has a council, consisting of eight members and a mayor. The vote of the council for letting the contract in question was four for and four against, and the mayor assumed and exercised the right to cast the deciding vote. It is conceded by both parties that the concurrence of a majority of the members of the council is

required, and that where the council is evenly divided the mayor is not empowered to cast a deciding vote.

Interveners contend, however, that the court erred in holding that the district no longer has a legal existence, and that the injunction is too broad, in that it forever enjoins the paving of the streets within the district. We will first determine the question as to the legal creation and present existence of the district.

In September, 1923, the council of Grand Island passed an ordinance creating paving district No. 59. Section 4084, Comp. St. 1922, then in force and applicable, provided, *inter alia:* "The mayor and council shall first, by ordinance, create a paving district or districts. The mayor and clerk shall, after the passage, approval and publication of such ordinance, publish notice of the creation of any district or districts * * * for not less than twenty days in a daily or weekly newspaper. * * * If the owners of the record title representing a majority of the abutting property owners in a district shall file with the city clerk within twenty days from the first publication of said notice written objections to the paving, * * * said work shall not be done in said district under said ordinance, but said ordinance shall be repealed. If said objections be not filed against any district in the time and manner aforesaid, the mayor and council shall forthwith proceed to construct such paving."

The mayor and clerk, within the time prescribed, published notice of the creation of the district, and within 20 days objections were filed by property owners. The council, after referring the matter to an appropriate committee, caused an investigation to be made, and ascertained and determined that the objections were not signed by "the owners of the record title representing a majority of the abutting property owners" in the district. This required the council to exercise a judicial function in determining a question of fact, and from which error might have been prosecuted, as provided by section 9127, Comp. St. 1922. No attempt was made to review the decision of the council. Its decision, as to the sufficiency of the objections, therefore, be-

came final. Later, and after the expiration of the 20 days, other objections, signed by, possibly, a majority of the abutting property owners, were filed, but not within the time allowed by law, and were, therefore, ineffectual to affect the right of the council to proceed with the paving, or to require the repeal of the ordinance creating the district.

Plaintiffs urge, however, that the district was not legally created, because it embraced within its limits former paving district No. 53, which had been created by an ordinance of the city council. The council had previously undertaken to create paving district No. 53 by the passage of an ordinance for that purpose. Upon notice being given, as provided by statute, objections were filed which the city council found were sufficient to comply with the statute. Thereupon the right of the council to proceed with paving in district No. 53 was extinguished. The council should have formally repealed the ordinance creating district No. 53. This, however, was not done. We do not deem the failure of the council to formally repeal the ordinance as having any effect. The fact that the council, upon investigation, found and determined that the objections were sufficient would effectually prevent the paving of the district, and it was then the duty of the council to repeal the ordinance. Under the statute, the council had no other duty in the matter than to pass a repealing ordinance. Under such circumstances, district No. 53, for all practical purposes, ceased to legally exist, regardless of the fact that the ordinance creating district No. 53 was not formally repealed. It was within the power of the council to create a new district, which included the territory described in the ordinance attempting to create No. 53.

It is most strenuously urged that because of its failure to forthwith proceed to construct the paving the council has lost the power so to do, and that the district has, in fact, ceased to legally exist. District No. 59 was created in 1923, and no attempt was made by the council to pave the streets therein for more than two years, notwithstanding that the

statute says that the council "shall forthwith proceed to construct such paving." What is the meaning of the clause, "shall forthwith proceed," etc., and what is the effect of the failure of the council to so proceed?

The term "forthwith" has been construed in a multitude of cases and various meanings have been assigned, according to the circumstances and subject-matter to which it referred. A collection of authorities, defining the term under varying conditions and circumstances in which it was used, may be found in 26 C. J. 997 *et seq.* The term is a relative one and an elastic expression. In some connections it may mean "immediately" or "without delay;" in others it means "as soon as reasonable under all the circumstances," or "as soon as is reasonably convenient." To determine the meaning that should be applied to the term, as used in the statute, regard must be had for the nature of the thing to be done, and whether it is practicable to be done without any delay.

It is apparent that, before paving could be done, after the council had determined that the objections to the paving were insufficient, it was necessary to advertise for bids and also to give to the property owners a period of 10 days within which they might designate the kind of paving materials to be used. This would take considerable time, and the season when severely cold weather might be reasonably expected was approaching. It is a matter of common knowledge that street paving is usually laid upon a concrete base, and that the pouring of concrete in severely cold weather is undesirable, because it may freeze and be rendered worthless. It is likewise a matter of common knowledge, of which this court will take judicial notice, that freezing and sub-zero weather frequently occurs in the winter season in this latitude. Had the council proceeded immediately with the paving it would have been midwinter before the concrete base could have been laid. It would have been a hazardous undertaking and might have proved a costly experiment for the city. No prudent person, acting for himself, would proceed with such an undertaking under the

circumstances. We must conclude that the legislature did not intend that the council should act in an unreasonable and imprudent manner. It seems apparent, therefore, that the legislature intended the term "forthwith" to be used in an elastic sense and that it meant that the council should proceed as expeditiously as under all the circumstances it was reasonably prudent and convenient so to do. If this be the correct interpretation of the term, then we must further inquire and determine whether the council has unduly delayed performing the duty enjoined upon it by statute, and, if so, what effect has such failure upon the existence of the district, or upon the right of the council to hereafter proceed with the paving.

It appears that when the spring of 1924 arrived a large number of the property owners within the district petitioned the council to postpone paving the district until 1925. Apparently, the council acceded to the request of the petitioners. When the spring of 1925 arrived, another petition was presented, asking that the paving be deferred until 1926, because of the then financial conditions prevailing in Grand Island and vicinity, which, the petitioners claimed, made it inadvisable to then proceed with the paving. This petition seems likewise to have been heeded by the council, and the matter went over until 1926, when a third petition was filed by the property owners, including the plaintiffs, requesting the council to refrain from paving the district at any time.

It is possible that there may have been an unreasonable delay on the part of the council, but it does not lie in the mouths of the plaintiffs to complain thereof, when they have expressly petitioned for it. It may be that the council was justified in so deferring the paving. We are not prepared to say that the council was not justified in refusing or neglecting to pave, when a majority of the owners of the property in the district, who would be benefited by the paving and who would have to bear the principal cost thereof, were requesting that the paving be delayed for a time.

The failure to pave during this period, in our judgment,

could not operate to invalidate the ordinance creating the district. The district is still in existence and it is still within the power of the council to pave at a future date, and, if there is no good reason for further delay, the council should proceed to advertise for bids and to pave the district as directed by the statute, unless the council, in its wisdom, should see fit to repeal the ordinance creating the district. Without deciding the question, we assume that it is within the discretion of the council to repeal the ordinance which created the district, but, unless the council has the right to and does repeal the ordinance, then it should proceed, as expeditiously as circumstances and prudence will permit, to advertise for bids and construct the paving, as provided by statute.

Counsel for plaintiffs urge that district No. 59 no longer has a legal existence, because section 4084, Comp. St. 1922, under which it was organized, has been repealed. In 1925 the legislature amended the section and repealed the section as originally existing. The section, as amended, however, reenacted all the provisions which are called in question in this case. It is a well recognized rule that, "Where, by amendment and repeal, the words of a former statute or section of a statute are changed in some respects, but it is intended that the statute shall continue to operate, it is not strictly a repeal, but a continuation of the former law as amended." *Morgan v. City of Falls City*, 103 Neb. 795. Plaintiffs' contention in that respect is without merit.

This brings us to the last contention of the interveners: That they are entitled to a mandatory injunction to require the city council to forthwith proceed with the paving. It appears that the council was so proceeding, because it had advertised for bids and attempted to let a contract. It does not appear that the four members of the city council who voted against letting the contract were doing so to evade their duty. For aught that appears, they may have been actuated by proper motives and pursuant to the last clause of section 4084, Comp. St. 1922, which is: "*Provided*, the mayor and council may, in any event, at its option

reject all bids and readvertise if, in its judgment, the public interest require." The four members who voted against letting the contract may have deemed that the contract was not for the public interest.

Under the circumstances shown by the record, we think that the interveners are not entitled to a mandatory injunction. This decision, however, is without prejudice to the right of interveners to hereafter institute appropriate legal proceedings to enforce action by the council should it fail to perform the duties imposed by the statute.

From what has been said, it follows that the judgment of the district court is erroneous in that it perpetually enjoins paving in the district. The judgment is hereby modified so as to enjoin only the paving under the present contract; the city and its officials to be free to again advertise for bids and proceed with paving in accordance with this opinion.

AFFIRMED AS MODIFIED.

Note—See Municipal Corporations, 28 Cyc. 990 n. 61; 1010 n. 3; 1011 n. 4, 9.

LUCILE BOOMER, APPELLANT, V. LANCASTER COUNTY, APPELLEE.

FILED MARCH 1, 1927. No. 24646.

Negligence: DIRECTION OF VERDICT. In the trial of a personal injury case to a jury, where negligence forms the basis of the recovery sought, and the defense interposed is a denial and contributory negligence on the part of the plaintiff, and where from the facts and circumstances proved reasonable minds might draw different conclusions concerning the negligence or lack of negligence of the respective parties, it is error to sustain a motion for an instructed verdict.

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

C. J. Campbell and *Harry R. Ankeny,* for appellant.

Charles E. Matson, Max G. Towle and *Farley Young, contra.*

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

THOMPSON, J.

Plaintiff sues to recover damages occasioned by the alleged negligence of defendant county to keep one of its highways in reasonably safe condition for public travel. Defendant admitted its duty to maintain the highway in such condition, denied negligence, and pleaded contributory negligence on part of plaintiff, which latter was denied by her. At the conclusion of plaintiff's evidence, defendant interposed a motion for a directed verdict, which was sustained and case dismissed. From this judgment plaintiff appeals, and for reversal presents as error the sustaining of such motion.

As to the law applicable to such a motion: In *Wheeler v. Abbott*, 89 Neb. 455, we held: "Where upon a jury trial, at the close of plaintiff's evidence, the defendant moved the court for a directed verdict in his favor, the motion must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted and all proper inferences to be drawn therefrom." This holding was approved by us in *Schmelzel v. Leecy*, 104 Neb. 672, and in *Hall v. Union P. R Co.*, 113 Neb. 9.

The facts as reflected by the record are: That plaintiff is a minor; that the highway in question extends south on Fourteenth street of the city of Lincoln to the south line of Lancaster county and beyond; that at about five miles south of the corporate limits of such city there has been at the times mentioned herein a concrete bridge or culvert which crosses such highway at right angles; that Fourteenth street is paved and the highway for three-fourths of a mile beyond the city limits, and from there on is a graded road; that this highway is a main traveled way leading to and from Lincoln; that some 30 days or more prior to the date of the injury the county undertook to improve the

highway by repairing such bridge or culvert, and in furtherance thereof erected at about the center of the highway, and at the immediate end of the paving, a sign on a post, on which was printed, in plain letters on the north side thereof, "Road closed," and at either side of such post running therefrom to the outer line of the street a barricade of boards was erected by the county to such an extent as to prevent travel over or around the same; that about six miles south of the end of the paving a similar sign was erected; that while thus barricaded Mr. Robb, the driver of the automobile at the time here in question, drove to the end of the paving from the north, and, finding the highway closed, retraced his course on Fourteenth street; that in the meantime the county had removed a part of the culvert, leaving the concrete guard and post at the extreme west end thereof intact, and had filled in with loose dirt where the culvert had been removed to a width sufficient to accommodate an automobile, so as to permit public travel over and upon the same, and had piled loose dirt to a height of about six feet in about the center of the highway at that place; that in passing over the opening thus made for travel, in going in and out of the same with an automobile or team, one had to make, as some of the witnesses said, "a hairpin curve," and others, "a staple curve;" that the bed of this curve was rough, and on the night in question within this curve "there was a raise in the road, a bump, about the size of a bushel basket;" that, to warn travelers of the dangerous condition of the curve, a light had been placed on the loose dirt piled as aforestated in the middle of the original highway, but in such a way, as some testified, as not to leave such light visible to those approaching from the north, and by others as being visible from the north when viewed from a certain point, but then not plainly so, owing to the position the light occupied; that at the time in question, the evening of August 13, 1924, Walter Larson and Donald Robb decided on an automobile ride, each having had considerable experience in driving automobiles, including the car in question, which Larson took, and with Robb, proceed-

ed to gather up the party; that plaintiff was invited by Larson as his guest; that the evening was cloudy; that the party started south down Fourteenth street, Larson driving and plaintiff occupying the front seat with him, the other members of the party all in the rear seat; that they arrived at the end of the paving and found that the barricades on each side of the post had been removed, but the post with the sign thereon remained standing, and on either side thereof were well-traveled tracks obviously made by recent automobile travel, an automobile traveling south just preceding them; that Larson called attention to the sign, and Robb said, in substance, that about a month before when he was there barricades extended across the entire road, and from the foregoing facts he concluded that the road was then open to public travel, and the county had failed to remove the sign; thus, they decided to proceed, and did so for a distance, when Larson and plaintiff took the rear seat and Robb and a Miss Mitchell took the front seat, Robb driving the car about a mile and a half at a reasonable rate of speed (the road being in good condition up to the place of the accident), until within 30 feet of the culvert, when he and others dimly observed the pile of loose dirt, but did not see the light; that he applied the brakes and reduced the speed to about 15 miles, turned into the curve, and a wheel struck the pile of dirt in the road, which caused the automobile to swerve and strike the concrete post on the west with such force as to throw the plaintiff out of the automobile, causing the injury complained of. The evidence further shows that the "Road closed" sign which had been placed some miles south of the culvert by the county had also been displaced and was lying flat on the ground, and that public travel both from north and south was proceeding unmolested and without warning other than as herein indicated, on that day and before.

From the record as thus disclosed, it will be seen that plaintiff was not engaged in a joint enterprise, but was simply an invited guest, and was without control over the driver. *Jessup v. Davis, ante,* p. 1; *Reudelhuber v. Doug-*

las County, 100 Neb. 687; *Loso v. Lancaster County*, 77 Neb. 466.

Further, it is plain that reasonable minds might draw different conclusions as to whether or not either or both of these contesting parties were guilty of negligence. Therefore, such question was one of fact and should have been submitted to the jury under proper instructions, and not determined by the trial court as a matter of law. *McLean v. Omaha & Council Bluffs Railway & Bridge Co.*, 72 Neb. 450; *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 426.

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

REVERSED.

ROSE, J., dissenting.

In the view which I take of the evidence, the action was properly dismissed.

MARTIN MCELHANEY, APPELLANT, V. WILLIAM T. FENTON, APPELLEE.

FILED MARCH 1, 1927. No. 25710.

1. **Habeas Corpus:** ERRORS NOT JURISDICTIONAL. "On an application for a writ of habeas corpus, errors or irregularities in the criminal trial, not jurisdictional, will not be considered." *In re Fanton*, 55 Neb. 703.

2. ———: EXCESSIVE SENTENCE. "Habeas corpus will not lie on behalf of a convicted prisoner on the ground that the sentence to imprisonment is in excess of the statutory period, since such a sentence is erroneous merely, and not void." *In re Fanton*, 55 Neb. 703.

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

Harlan A. Bryant, W. W. Towle and *Francis V. Robinson*, for appellant.

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

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

THOMPSON, J.

An information was filed in the district court for Hall county on August 1, 1922, in which it was charged that Martin McElhaney, the relator herein, late of such county, did on or about July 28, 1922, in the county aforesaid, "into a certain dwelling house of Hans Wiese, situated in the county of Hall, in the state of Nebraska, unlawfully, * * * and feloniously, break and enter, with the intent then and there and thereby the goods and chattels, to wit, a suit of clothes of the value of twenty-five dollars the property of Hans Wiese, then and there being, unlawfully, * * * to steal, take and carry away," etc. To which information the accused pleaded guilty, and was so found and sentence entered, "That he be taken to the penitentiary of the state of Nebraska and there confined at hard labor, Sundays and legal holidays excepted, for not more than twenty years or less than three years, as the same may hereafter be determined by the state prison board." From this judgment error proceedings were not prosecuted. Afterwards, on July 26, 1926, in the district court for Lancaster county, this proceeding was instituted seeking his discharge from such imprisonment upon a writ of habeas corpus. On the issues being duly joined and trial had, the writ was denied and relator remanded. To reverse this judgment relator appeals.

It is clear from a reading of the information and comparing the allegations therein contained with section 9623, Comp. St. 1922, that the crime charged comes within the provisions of such section, and not within those of section 9624. The former section applies solely to the unlawful entering of a building with intent to commit some distinct act therein specifically designated; the latter section to the unlawful entering of the building and the committing or attempting to commit one of the acts in the section enumerated, after so being therein. *Smith v. State*, 68 Neb. 204.

Relator insists that the trial and conviction were had under section 9623, *supra,* but that the punishment applied was that provided for in section 9624. In this latter the state disagrees, and, as we are impelled to conclude, rightly so. From the record the trial was had under the statute covered by the information, and the judgment rendered with such statute in mind. This inference is of such potency as to place it beyond question. While section 9623 provides that the punishment for a breach thereof shall be imprisonment in the penitentiary not more than ten years nor less than one year, etc., and the judgment in question sentenced the relator to not more than twenty years nor less than three years, the placing of the minimum at three years, instead of at one year, was clearly within the discretionary power vested in the trial court by section 10248, Comp. St. 1922, as we held in *Pointer v. State,* 114 Neb. 13.

The fixing of the sentence at not more than twenty years was erroneous, but did not render the judgment void. It stands as valid and enforceable for the term that the statute authorized the court to impose sentence, to wit, for not more than ten years. However, while error was thus committed in entering the judgment, if the proper proceedings had been had looking to the correction thereof, the judgment would have been modified to conform with the provision of the statute. As we have seen, such proceedings were not had, hence, while the error remains, "Habeas corpus will not lie on behalf of a convicted prisoner on the ground that the sentence to imprisonment is in excess of the statutory period, since such a sentence is erroneous merely, and not void." *In re Fanton,* 55 Neb. 703.

The court was vested with jurisdiction, and the judgment is valid for the term authorized by the statute, to wit, not more than ten years, and after that becomes, and will be, inoperative. Error was not committed by the trial court in disallowing the writ and remanding the relator.

AFFIRMED.

Note—See Habeas Corpus, 29 C. J. 27 n. 6, 51 n. 25, 52 n. 27, 58 n. 2, 45 L. R. A. 136.

PAUL PETERSON V. STATE OF NEBRASKA.

FILED MARCH 1, 1927. No. 25348.

1. **Criminal Law:** ROBBERY OF CORPORATION: PROOF. In a prosecution for robbery where defendant is charged with holding up a messenger and taking money belonging to a corporation from him, it is only necessary in proving corporate character to show that the concern is a *de facto* corporation; and this may be done by proving that it was doing business as such.
2. ———: ———: ———. In a robbery case, the whole transaction may be shown, together with anything tending to connect the accused with the crime or to establish his identity.
3. ———: INSTRUCTIONS: CONSTRUCTION. Whether an instruction is reversibly erroneous is not to be determined from its language alone, but from an examination and consideration of the whole charge. In other words, the instructions in a case should be considered together, not section by section or paragraph by paragraph.
4. ———: REDUCTION OF SENTENCE. The supreme court will not often reduce the sentence imposed by the trial court, particularly where, as in the case at bar, the moral turpitude involved was great and the crime was a crime of violence.

ERROR to the district court for Douglas county: CHARLES A. GOSS, JUDGE. *Affirmed.*

Jamieson, O'Sullivan & Southard, for plaintiff in error.

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

Heard before DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ., BLACKLEDGE and SHEPHERD, District Judges.

SHEPHERD, District Judge.

The plaintiff in error, convicted of robbery and sentenced to fifteen years in the penitentiary, comes up on four assignments of error, viz.: There was no proof that the owner of the money taken was a corporation, as alleged in the information. The court improperly received in evidence certain exhibits. The court erred in its definition of the term "shortly after." The sentence was excessive.

While no one testified that the Alamito Dairy Company was a corporation, and no articles or records were offered

to establish the fact, the corporate entity of the concern was sufficiently shown by incidental testimony. The employee from whom the money and checks were taken testified that he was working for the Alamito Dairy Company; speaks of being at the Alamito Dairy plant; says that he had the Alamito Dairy deposit in his possession. The testimony recites that the defendant was at one time brought to said dairy company. Defendant himself testified that he was not in the vicinity of the Alamito Dairy on the day before the robbery, and declared that he had nothing to do with the Alamito robbery. The cashier of the company swore that she had been employed by the Alamito Dairy Company for eight years, had been cashier for six years, and had made up the deposit which was taken. This was enough to show that the concern was going and functioning as a corporation. There was enough in the record to justify the jury in finding that the concern was at least a *de facto* corporation. Even the authority cited by the plaintiff in error sustains this conclusion.

"In a prosecution for knowingly receiving goods which had been stolen from the freight cars of a railroad corporation while being transported, strict proof as to the existence of the corporation is unnecessary. It is sufficient to show that the company named in the information was, at the time charged, operating the railroad, and that the goods sold were stolen from freight cars upon its tracks. This establishes its *de facto* existence, which is sufficient." *Bloom v. State*, 95 Neb. 710.

In a prosecution for embezzlement from a corporation, it is plain that the character of the concern may become of peculiar importance. In this case the accused neither claims the property nor asserts any duty or privilege in regard to the same. His defense does not raise any question as to the character or capacity of the owner. Ordinarily, the purpose of setting forth the ownership of property taken in robbery is to negative any ownership on the part of the taker. The money was taken from Gondring, the

bank messenger employed by the Alamito Company. According to a Missouri holding, mere possession or custody in an employee is enough to make such employee the owner as against the thug that robs him. *State v. Montgomery,* 181 Mo. 19. See, also, *People v. Oldham,* 111 Cal. 648, and 34 Cyc. 1806-1810.

A careful examination of briefs and record convinces us that the trial court did not err in receiving in evidence exhibits 1, 2, 4 and 5—the grip frame, the buckle, the buttons, etc., and the canvas sack. All of these articles were found in the defendant's house three or four days after the robbery, together with silver and currency which was said to be the money taken. All were identified by the messenger and the cashier with much circumstance and detail. One of the police officers testified that the defendant told him that he would find the money at his house. The places where it was found indicated that it was ill-gotten. The leather had been burned from the grip frame which was dug from the ash heap; the buckle and buttons were shaken out of the furnace; the sack of silver was found buried in the earth in the basement. Guilty fear was obvious. Altogether, the foundation laid for the introduction of the exhibits in question seems unusually complete. In a prosecution for robbery, the entire transaction may be shown, together with anything tending to connect the accused with the crime or to establish his identity. *Keating v. State,* 67 Neb. 565; 34 Cyc. 1806, 1807. The court is of opinion that the ruling of the district court in this connection was without error.

When it is considered that the robbery was on the 12th, and the finding of the money on the 16th or thereabouts, the instruction of the court to the effect that the word "shortly" in "shortly after the theft of it" means "on or after the 12th day of November" could hardly have been prejudicially erroneous. Granted that the definition is not the approved one, it was not prejudicial when the two instructions, No. 7 and No. 11, are considered together. The

first paragraph of instruction No. 7 told the jury that the inference to be drawn from the mere possession of stolen property was for the jury alone; and the third paragraph of said instruction is in these words: "It is for the jury alone to say, in the light of all the facts and circumstances shown in the evidence, whether any such inference shall be drawn," i. e., inference of guilt from the unexplained possession of the property.

Whether an instruction be reversibly erroneous is not to be determined from its language alone, but from an examination and consideration of the whole charge. In other words, the instructions should be considered together, and not sentence by sentence or paragraph by paragraph.

A judgment should not be set aside on the ground of misdirection of the jury, if the court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred. Comp. St. 1922, sec. 10186.

There is no contention in the case at bar that the evidence was insufficient to sustain a conviction of the defendant, except in the particular that no formal proof of the character of the Alamito Dairy Company was adduced on the part of the state. Nevertheless, the whole of the evidence has been carefully examined with a view to passing upon the request of the defendant for a reduction of the sentence imposed by the district court. The section of the statute last above quoted gives the supreme court the power to reduce the punishment. In this case, however, the crime was heinous. The company's messenger, in his Ford, was pursued by the defendant in a heavier car and crowded against a telephone pole to make him stop. He was menaced with a gun in the hands of the defendant and about $3,600 was taken from him. It was highway robbery of the worst type. Fifteen years in the penitentiary is a stiff sentence, but in view of the danger to society and the moral turpitude involved it cannot be said to be excessive. The trial court was within the statute in fixing the term. It heard the

testimony and observed the defendant and this court is not inclined to interfere with its judgment.

No error being found in the record, the judgment of the district court ought to be, and is,

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLANT, V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLEE.

FILED MARCH 1, 1927. No. 25622.

1. **Mandamus:** RAILROADS: TRAIN CREWS. While mandamus will lie to compel a railroad company to comply with the law as to the size of its train crews, it cannot be invoked to compel such railroad company to provide a larger crew than the law plainly prescribes.
2. **Railroads:** TRAIN CREWS. The law of Nebraska does not provide, except in the case of main line freight trains carrying both passengers and freight, that mixed trains shall have and use two brakemen.
3. **Affirmance.** The record examined and the judgment of the district court *held* without error and affirmed.

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

O. S. Spillman, Attorney General, and *Hugh LaMaster,* for appellant.

Wymer Dressler and *Robert D. Neely, contra.*

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

SHEPHERD, District Judge.

In this case the appellant complains because the district judge refused to issue an order in mandamus requiring the appellee, a railway company, to have and to use two brakemen on its mixed trains. Appellant insists that the law of Nebraska provides that each mixed train shall carry two brakemen, and assigns as the single error relied upon the

failure of the trial court so to hold. The said court refused to hold that the full crew statute applies to mixed trains, that is, trains carrying both freight cars and passenger cars.

It is probable, though we do not decide, that the state may under the police power regulate the size of the train crews on all railroad trains, and that enactments of the legislature in that behalf are not violative of the federal Constitution. It may be admitted, too, that the transportation act of 1920 does not concern train crews. We are also inclined to agree with counsel that sections 5331 and 5337, Comp. St. 1922, and indeed all of the provisions of the law, should be considered together for the purpose of arriving at the intention of the legislature.

But we are of opinion that the district court made no mistake in deciding that the legislature did not undertake to prescribe the size of the crew of the mixed train. It is true that the title of the legislative act evinces an intent to protect the lives and property of the traveling public, and railway employees generally, but, except in the case of freight trains on main lines carrying passengers, we find no language in the title or act directly imposing on the roads any duty in the matter of the crews of mixed trains.

The argument of the appellant is that the legislature surely did not intend that a railroad might attach a passenger car to a string of 100 boxes and flats, and by that simple expedient avoid the necessity of carrying a second brakeman; that its intention was clearly to divide all trains into two classes, freight trains and passenger trains, with trains made up of both freight and passenger cars rated as in the freight train class. Appellant therefore calls attention to section 5337, which concludes with the words "provided, main line local freight trains running one hundred miles or more and carrying passengers * * * shall be provided with * * * three brakemen," and declares that if, as is proper, this be construed in *pari materia* with section 5331 of the statutes, which reads in its concluding lines, "provided, mixed freight and passenger trains shall not be considered passenger trains," the conclusion is unescapable that

the mixed train falls into the category of the freight train and must be governed accordingly. And the law is clear that the freight train must carry two brakemen.

This is persuasive, yet not sound, in our opinion. The last quoted words, "provided, mixed freight and passenger trains shall not be considered passenger trains," though from an act considered and passed at the same session as the full crew act, is from an act relating to gasoline motor cars, and is probably of special and limited application in connection with the particular conditions therein described. It is not sufficient to support appellant's contention.

In the second place, even if the words under consideration were of general application, they can mean no more than they say. To say that mixed trains are not passenger trains is not to say that they are freight trains. Such a conclusion could only follow if there were a hard and fast provision in the law that all trains are either passenger trains or freight trains. No such provision exists.

So, a custom has grown up of calling a train made up of both freight and passenger cars and carrying both passengers and freight a "mixed train." *"Mixed train"* has come to have definition accordingly. Legislators and everybody else recognize the term and its meaning. Because of its function, the way it naturally operates, the legislature has not seen fit to prescribe the size and character of its crew. Until it does the road cannot be required to furnish its mixed trains with another brakeman. While mandamus will lie to compel a railroad company to comply with the law as to the size of its train crew, it cannot be invoked to compel the road to provide a larger crew than the law plainly prescribes.

We are confirmed in our conclusion by the fact that the penalty section of the act provides no punishment in connection with mixed trains. The penalty section is usually particular and specific, and the omission to mention mixed trains in such section argues that the legislature did not mean to include such trains in the regulation of the act.

It follows that the judgment of the district court is

AFFIRMED.

GEORGE H. GUTRU, APPELLEE, V. GEORGE R. JOHNSON ET AL., APPELLANTS.

FILED MARCH 1, 1927. No. 25719.

1. **Judgment:** INSUFFICIENCY OF EVIDENCE. Evidence examined, and *held* insufficient to sustain the trial court in holding that the judgment in question was obtained by perjured testimony on the part of the plaintiff.
2. ———: SETTING ASIDE: NEWLY DISCOVERED EVIDENCE. Newly discovered evidence which is merely cumulative in character will not entitle a party to a new trial, nor will such evidence justify a court of equity in setting aside a judgment obtained in a law action.
3. ———: ———: DILIGENCE. If by the exercise of reasonable diligence a defendant may produce evidence disproving the testimony of a plaintiff and proving the latter a perjurer because of giving the same, but fails to do so and suffers a judgment in consequence, he may not rid himself of said judgment by producing such evidence in a suit in equity brought for that purpose.

APPEAL from the district court for Madison county: DE WITT C. CHASE, JUDGE. *Reversed and dismissed.*

William McDonnell and *Sullivan, Wright & Thummel,* for appellants.

C. C. Flansburg and *H. Halderson, contra.*

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ., and SHEPHERD, District Judge.

SHEPHERD, District Judge.

This is the third appearance of this controversy in this court. It was first here on appeal from a judgment in damages obtained by Johnson against Gutru for fraud in the sale of land; and the judgment was affirmed. Next it came to the supreme court on appeal from an order of the district court denying an amended application for a new trial on the ground that there had been irregularity in obtaining the judgment and misconduct on the part of the jury, which appeal likewise resulted in an affirmance. Then

Gutru brought suit in equity alleging that the described judgment had been procured by perjury, and again urging in a second cause of action that the jury had been guilty of misconduct. Issue having been joined, trial was had and the district court entered a decree finding for Gutru on the charge of perjury by him preferred against Johnson and enjoining the collection of the judgment. Johnson appealed and now the matter is here again, this time on the correctness of the decree of the trial court in said equity case.

A cross-appeal was taken by Gutru upon a ruling of the trial court dismissing his second cause of action. Three things lead us to conclude that this ruling was correct. In the second appeal he contended that the proceeding was substantially under section 9160, Comp. St. 1922, and that the precise matter was therein presented upon its merits. If it was, and there is nothing in the record to show to the contrary, the question stands adjudicated. In the second place and in any event, having a remedy at law under the section named, he abandoned it and cannot now be permitted to ask relief in equity. We have examined the cases cited in the briefs and are constrained to believe that the great weight of authority is against such procedure. "It is an elementary principle that courts of equity will not take jurisdiction of causes where the plaintiff has a complete remedy at law, even though the party complaining may not have availed himself of that remedy, and by laches deprived himself of it." *Proctor & Hunter v. Pettitt,* 25 Neb. 96; *Krause v. Long,* 109 Neb. 846. And, finally, while the quoted remarks of the two jurors may show that they were prejudiced against the appellee, they do not prove that their prejudice prevented them from deciding upon the law and the evidence, and it does not appear that they communicated their prejudice to each other or to any of the other members of the jury.

The complaint as to the ruling on the first cause of action, i. e., the complaint of Johnson that the evidence was insufficient to sustain the holding that the judgment was procured by perjury on his part, presents far greater difficulty.

First of all, appellant contends with much force that the trial court should have found that by exercise of reasonable diligence Gutru might have produced all of the evidence adduced in the equity case on the original law trial, and therefore that it should have refused to consider the question of perjury at all, for the reason just recognized that one who has a law remedy and loses it through laches will not be aided by equity.

There is much to sustain that contention. There is little or no evidence in this case tending to show that the testimony of Johnson in the jury case was false or perjured that could not have been produced in that case, had the appellee exercised due diligence. We have examined, not only the evidence pointed out in the briefs, but the whole of the evidence, and are convinced that, with the fair warning that the petition in the original case gave, Gutru was bound to know that his adversary was going to swear upon the stand that he had had a conversation with him about the land in question, and had been told that the soil was all black, deep and rich, etc. From the same source it must have been equally obvious to the appellee that Johnson would testify to a conversation with Gutru about Blair and his agency, and to a conversation with Blair about Gutru and his statements in regard to the land, and also about the refusal of Blair to permit Johnson to examine the farm, etc. Appellee did not have Blair's evidence in the damage case, though thus apprized that Blair and his acts and representations would be under fire before the jury. He stated that he could not locate him. Blair had lived at Royal where Gutru's brother-in-law and agent, Staab, lived and conducted a bank for Gutru. A somewhat damaging letter written by Johnson to Blair was produced in evidence, indicating the probability of contact and understanding between the latter and the appellee. The evidence discloses that half an hour's inquiry at Royal would have elicited information that Blair was at Fremont. It is patent that the slightest diligence in preparation for trial would have enabled Gutru to meet the testimony of Johnson, as anticipated false testimony, with

all the opposing evidence produced by him upon final trial to the judge, that is to say, upon the trial of the equity case.

Appellee insists that certainly in one particular he could not have done so; that the immutable evidence of the Spencer hotel register containing his signature under date of July 30, 1919, came to him only after a period of something more than three years, long after he might have used it in a proceeding under the statute, section 9160, Comp. St. 1922. He declares that his notice was drawn to the fact that he was at Spencer on the 30th of July only because one of his witnesses happened to find a check which reminded him of the circumstance, and led him to speak about it. Surely, he says, this evidence was not obtainable at the time of the jury trial. It was brought to him only by a chance, an unforseen circumstance, a happening of years after.

This might be unanswerable but for the fact that the petition apprized him that the date of the conversation was July 31, a consideration which entirely changes the situation because it must have suggested to him as a matter of first importance that his whereabouts on the 31st should be definitely established, to the end that he might refute the expected perjury. Then the matter of his whereabouts could have been ascertained with comparative ease. If a litigant may neglect such obviously important inquiry—inquiry which would have so certainly resulted in complete information—with his lawsuit approaching, and then, after the suit has gone against him, repair the damage which his neglect has occasioned by a resort to equity, there can be no end to litigation. If by the exercise of reasonable diligence a defendant may produce certain evidence disproving the testimony of the plaintiff as to defendant's conduct and representations and tending to prove perjury on the part of the plaintiff, and through inertia or carelessness fails to do so, he cannot thereafter have the judgment in said suit set aside by the production of said evidence in an equity action for that purpose. *Secord v. Powers*, 61 Neb. 615; *Barr v. Post*, 59 Neb. 361; *Scudder v. Evans*, 105 Neb. 292.

The case of *Krause v. Long, supra,* is substantially different from the case at bar. In that case the defendant had no reason to disbelieve the testimony of the plaintiff to the effect that he was not aware of potash deposits on the land, and none to anticipate perjury in that connection. In this case Gutru had every reason to disbelieve the testimony which Johnson gave in the jury case, for it was promised and even heralded in the petition. He knew in advance that Johnson was going to testify to the conversation in question, and believed, if we credit him with sincerity, that such testimony on Johnson's part would be perjured testimony. As a matter of fact, he testified that he had no such conversation in regard to the land as Johnson detailed; and what he presented in the equity case as newly discovered evidence on the point was no more than cumulative.

But the court finds itself in agreement with the contention of the appellant on the merits. The evidence referred to—and it was greatly stressed both in the brief and upon the argument of the appellee—is not immutable or sure proof that the latter was not in Newman Grove in the forenoon of July 31, or that the appellant perjured himself in testifying that he had a conversation with him at that time and place. Granted that it is sure proof that appellee was in Spencer on the 30th, it is entirely possible that he might have been in Newman Grove on the morning of the 31st. A fast automobile would have covered the distance in four hours during the afternoon of the 30th, four hours during the night of the 30th and 31st, or four hours in the early morning of the 31st. In other words, the testimony of the appellee that he did not leave Spencer till the morning of the 31st, and that he came home by a route described by him, arriving during the afternoon, is necessary in order to make the appellant out a perjurer.

It is highly improbable that young Johnson, a good deal of a lamb in discernment as well as in years, should hand over his twenty-thousand-dollar inheritance to his banker, a large speculator in lands, in the purchase of a farm belonging to the latter, though held in the name of another,

without a word of inducement direct from the great man to the dupe. It is almost unbelievable that even such a simple one as Johnson would have invested his patrimony in such a purchase without other persuasion to buy than that shown in the record, if the talk of Gutru is excluded. The transaction bears all the trappings of fraud. The story is the old, old story, and one is constrained to believe that Johnson's recital of his relations with Gutru and of the latter's representations to him respecting the land is substantially correct. It is not strange that one so easy to befool should make a poor witness and should appear before a judge with halting tongue and hang-dog look when his mistakes and inaccuracies were being pointed out and made much of by skillful opposing counsel. The record does not bear out the finding of the district court that he procured his judgment by perjury.

It is true the record shows that the appellant swore that he was not at the farm and did not examine it for two years after the trip upon which he made his purchase. Much evidence tending to prove to the contrary was adduced during the jury trial. A number of witnesses testified that he had stated to them that he had been offered a profit of about three thousand dollars on his deal. One or two others testified that he had been on the land during said two years. Some additional witnesses swore in the equity case, notably one Samuelson, who testified he had accompanied him to the land during the period. But this was merely cumulative, and a new trial will not be granted on account of newly discovered evidence merely cumulative in character. *Campbell v. Holland,* 22 Neb. 587. Moreover, complaint on this score lacks force because the action was in damages affirming the contract of sale, and not in recission praying the return of his money paid. Hence, the fact that he had been on the land and discovered its quality and the falsity of the representation made to him respecting the same did not affect his right to recover damages, though it would have prevented a recovery in recission.

While equity holds jealously to its inherent power to set

aside a judgment at law where it is proved that such judgment was procured by perjury on the part of the judgment creditor, it will do so only when the proof is clear and convincing. *Koop v. Acken,* 90 Neb. 77; *In re Estate of Kelly,* 103 Neb. 524; *Scudder v. Evans,* 105 Neb. 292; *Krause v. Long,* 109 Neb. 846.

In *Scudder v. Evans,* 105 Neb. 292, Judge Letton said: "An extended experience of the general inaccuracy of observation and of the frailty of human nature as exhibited on the witness-stand convinces the writer that, if judgments may be opened up and set aside on the sole ground that testimony given at the hearing was false or even perjured, then comparatively few judgments would be conclusive. It is in the highest degree essential to the welfare of the community, and to the respect which should be given to and the confidence which ought to exist in the judgments of a court, that they should not be set aside unless upon the strongest and most convincing grounds." And he said further in said opinion: "It is seldom, indeed, that a judgment may be opened on account of perjured testimony. It is only when an interested party may have participated in, or conspired to commit, a fraud upon the court."

We hold to this doctrine, and, finding, as we do, that the district court erred in decreeing that the appellant's judgment in damages was obtained by perjury on his part, it follows that its decree must be reversed.

Reversed and remanded, with directions to the district court to enter a dismissal of the first cause of action, and of the case, at the costs of the appellee.

REVERSED AND DISMISSED.

GORDON C. SHAW, APPELLANT, V. JOHN A. STEWART, APPELLEE.

FILED MARCH 7, 1927. No. 25688.

1. **Elections:** ELECTION OFFICERS: DUTIES. The duties of election officers, in the matter of counting ballots, are purely ministerial.

2. ———: ———. Election officers are not clothed with judicial power.
3. ———: STATUTES: CONSTRUCTION. In the exercise of the right of suffrage, the statutes are to be construed liberally in favor of the voter.
4. ———: ———: ———. Technical rules of construction in an election contest will not be permitted to disfranchise the voter.
5. ———: ———: COUNT OF BALLOTS. Upon examination of the record, we find that the election officers exceeded their authority in rejecting ballots in which the name of a candidate was written in and properly marked with an "X" by the voter.
6. ———: ———: ———: INTENT OF VOTER. The intent of the voter as disclosed by his ballot shall govern, in the absence of fraud, if such intent can be determined from the ballot which he has cast.

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

Waring & Waring, for appellant.

J. E. Ray, contra.

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

DEAN, J.

At a regular city election held in Edgar, April 6, 1926, John A. Stewart was a candidate for councilman from the first ward on a "citizens" ticket and Gordon C. Shaw was an opposing candidate in the same ward "by petition." The official ballot, so far as it is involved here, was printed in the following form:

For Councilman.

Vote for One

☐ J. A. STEWART.....Citizens

☐ GORDON C. SHAW.....By Petition

☐ .....

When the ballots were counted, it appeared that 120 electors had placed an "X" before the printed name of J. A.

Stewart, and 19 electors had placed an "X" before the printed name of Gordon C. Shaw, and 107 electors had written the name of Gordon C. Shaw in the third space on their respective ballots and had placed an "X" before the name so written. Stewart received 120 votes and Shaw received 126 votes, provided all the votes are to be counted, where Shaw's name was both printed and written. Claiming a majority of six votes, Shaw contested the election. But Stewart prevailed both in the county court and the district court. Shaw has appealed.

There is nothing in the record to show that the vote was irregular or that the writing in of the name of Shaw on the ballots, or the marking of the ballots, was not authorized by law and by our former decisions. No fraud has been charged and, of course, none was proved. In view of the facts and of our decisions in public election cases, whether for candidates for public office or for a civic proposition submitted to the voters, we have uniformly held that technical rules of construction shall not be permitted to disfranchise the voter. *State v. Grimm, ante,* p. 230, and cases there cited.

Gauvreau v. Van Patten, 83 Neb. 64, is a case involving an election contest for councilman in the city of Hastings. In that case an interesting citation from a recognized authority is here reproduced: "Wherever our statutes do not expressly declare that particular informalities avoid the ballot, it would seem best to consider their requirements as directory only. The whole purpose of the ballot as an institution is to obtain a correct expression of intention; and if in a given case the intention is clear, it is an entire misconception of the purpose of the requirements to treat them as essentials, that is, as objects in themselves, and not merely as means." 2 Wigmore, Australian Ballot System, 193 (appendix). See, also, *White v. Slama,* 89 Neb. 65.

One of the cardinal rules in cases of this class clearly appears to be that, in the absence of fraud, the intent of the voter as disclosed by his ballot will govern, and the provi-

sions of statutes generally, relating to the form of the ballot and the statutory manner of indicating the elector's choice of candidates, should be construed as directory, unless the statute itself makes the ballot void for failure to strictly comply with its every provision. See generally *Bingham v. Broadwell,* 73 Neb. 605; *Griffith v. Bonawitz,* 73 Neb. 622. For an election officer to disfranchise a voter whose intent plainly appears on his ballot is a grievous wrong against the voter and for this court to do so on appeal would be an unthinkable perversion of judicial power.

Some of the rules that govern in the matter of statutory elections are pointed out in the following citations: Election officers are without judicial power. *Hagge v. State,* 10 Neb. 51; *State v. Dinsmore,* 5 Neb. 145. It is elementary that the duties of election officers in the counting of ballots are purely ministerial. *Long v. State,* 17 Neb. 60. In the exercise of the right of suffrage the statutes are to be construed liberally in favor of the voter. 9 R. C. L. 1093, sec. 102. The provisions of a statute which affect the mode and manner of conducting the mere details of an election are directory and the will of the majority is to be respected even when irregularly expressed. The electors are not to suffer on account of the default of their agents. McCrary, Elections (4th ed.) sec. 228; *State v. Grimm, ante,* p. 230; *Howard v. Harrington,* 114 Me. 443, L. R. A. 1917A, 211; *Clark v. Board of Commissioners,* 33 Kan. 202; *Coughlin v. McElroy,* 72 Conn. 99.

Defendant finally cites section 1945 and subdivision 4 of section 1951, Comp. St. 1922. The above sections follow:

"In each division, and beneath all candidates placed there by nomination or petition, a blank space shall be provided, into which electors may write the name of any person for whom they wish to vote and whose name is not printed upon the ballot." Comp. St. 1922, sec. 1945.

"If you wish to vote for any person whose name is not printed on the ballot, write his name in full in the blank space on the ballot under the proper office you wish him to

hold, and make a cross in the square opposite the written name." Comp. St. 1922, sec. 1951, subd. 4.

Defendant contends that these statutes prohibit an elector from writing in the name of a candidate whose name has been printed on the ballot and that if he does so such vote shall not be counted. We do not agree with counsel. Section 1945 and subdivision 4, of section 1951, Comp. St. 1922, do not declare invalid a ballot where the elector has written in the name of the candidate whose name is also printed upon the ballot. We think that the provisions of the last two above cited sections of the statute, under the facts disclosed by the record, and herein pointed out, may be regarded as merely directory, and not mandatory. In the absence of evidence showing an unlawful or fraudulent purpose in so marking the ballot, as above pointed out, it should be counted. But it is significant to note that, where the statute itself makes the ballot invalid unless certain provisions specifically named in the statute be complied with, the provisions so named are mandatory and, unless complied with by the voter, his ballot is for this reason invalid and cannot lawfully be counted. Cases are also cited by counsel which very properly hold to the rule that a ballot is invalid and shall not be counted where it has the name of but one election official indorsed thereon where the statute requires the names of two or more indorsements. But such citations are not applicable to the facts before us. It is elementary that such defect renders the ballot illegal and it cannot, of course, lawfully be counted by the election board.

We conclude that, in view of the facts and of the authorities applicable thereto, the judgment of the district court must be reversed. It is therefore ordered that a writ of ouster be issued, forthwith, against defendant, and that plaintiff be declared the duly elected councilman for the first ward of Edgar.

REVERSED.

Note—See (6) 9 R. C. L. 1142; 2 R. C. L. Supp. 930.

FRANK CARTER V. STATE OF NEBRASKA

FILED MARCH 9, 1927. No. 25442.

1. **Criminal Law**: TEST OF INSANITY. "The test of insanity, urged as a defense to a charge of crime, is the capacity of the accused to understand the nature of the act committed and his ability to distinguish between right and wrong." *Kraus v. State*, 108 Neb. 331.
2. ———: ADDRESS OF COUNSEL: OBJECTIONS: REVIEW. Ordinarily, when error is predicated upon the claim that counsel in addressing the jury abused his privilege, to be available on appeal, the objectionable remarks must have been excepted to at the time and a ruling had thereon.
3. **Evidence** examined, and *held* sufficient to sustain the verdict and judgment.

ERROR to the district court for Douglas county: CHARLES A. GOSS, JUDGE. *Affirmed.*

John N. Baldwin and *James H. Walker*, for plaintiff in error.

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

Heard before DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ., BLACKLEDGE and SHEPHERD, District Judges.

DAY, J.

Frank Carter, hereinafter called defendant, was convicted in the district court for Douglas county of murder in the first degree for the killing of Austin D. Searles, on February 17, 1926, and in response to the verdict was sentenced to suffer death.

Alleging there was prejudicial error upon the trial, the defendant, as plaintiff in error, has brought the record of his conviction to this court for review. The information was in the usual form and in substance charged the defendant with shooting and killing Austin D. Searles in Douglas county, Nebraska, while defendant was engaged in an attempt to rob said Austin D. Searles. Counsel for defense in their brief state: "In the case at bar, it is undisputed that plaintiff in error killed Austin D. Searles on the date

alleged, but according to the theory of the defense the purpose was not robbery, the defense being that defendant was insane and did not know the difference between right and wrong as to the particular act for which he is on trial." The principal argument advanced by defendant's counsel is that the verdict is contrary to the evidence and cannot stand because the testimony so overwhelmingly discloses that defendant was insane at the time of the homicide.

Dr. Harrison Wigton was called as a witness on behalf of defendant and, after qualifying as an expert in nervous and mental diseases, testified that he had had defendant under observation for about a week for the purpose of determining his mental condition. He said: "I found that he is mentally deficient, not on the intellectual side, but on the moral side; that he is what we call a moral imbecile, having the intellectuality of an adult and even greater than ordinary intellectuality as far as memory is concerned, but with the moral ideals of a child ranging from three to seven years." He also testified that he found "evidence of profound urges" and paranoia, both of which he describes as mental deficiencies. As the result of his examination, he testified that in his opinion the defendant did not know right from wrong with respect to the act of killing Dr. Searles. He was asked a long hypothetical question based on the evidence which detailed a history of the defendant, and in response thereto stated that in his opinion the defendant was insane and did not know the difference between right and wrong with respect to the act charged.

Dr. G. E. Neuhaus was also called as a witness by defendant and, after qualifying as a specialist in nervous and mental diseases, testified that he had had defendant under observation and examination for ten days; that, as a result of his examination, he determined that defendant was suffering from a mental disorder and, at the time of the killing of Dr. Searles, defendant did not know the difference between right and wrong with respect to that act. His diagnosis was practically the same as that of Dr. Wigton. The witness also testified, in response to the same hypothet-

ical question asked of Dr. Wigton, that defendant did not know the difference between right and wrong with respect to the act of which he was charged.

The state called Dr. Alexander G. Young, who for a number of years has been the physician on the board of insanity for Douglas county. He qualified as a specialist in nervous and mental diseases and detailed a wide experience with such diseases. He examined defendant, and among other things stated: "I found that the man was of the approximate age of 46; that physically he seemed in good condition; that he presented no signs of organic nervous disease; that in his behavior, in talking to him, he responded readily to all questions; that he talked rationally in answer to my questions; that he gave the history of his life, of his experiences, of his ideas, which indicated to me that he belonged to a type of mind which is of a varied character, which is generally classed, for lack of a better name, as being a psychopathic personality; that he presented, as far as his statements given me were concerned, an appearance of lacking moral ethical sensibilities. He seemed to be self-centered; he showed in his history emotional reactions of both normal and of a deviating type, which we find in this group of individuals; he showed no delusions; he had no hallucinations, which are some of the principal signs of insanity; he appeared to be able to plan; he stated that he knew the difference between right and wrong; that he realized the consequences of his acts as he was planning the acts of robbery which he committed. I gained the impression while I was talking to him that he was not giving me all of the facts that would have a bearing upon his life. I think that is all." Based upon his observation of the defendant and also upon the hypothetical question, the witness was of the opinion that defendant knew right from wrong with respect to the act of killing Dr. Searles.

On the trial, defendant was called as a witness in his own behalf, probably for demonstration purposes or for laying the foundation for a hypothetical question. He gave a remarkable account of his life, detailing events commencing

when he was six years old. He stated that at one time he had a dispute with his employer over a small amount of money which he claimed was due him for wages, and after a lapse of several years he visited the locality of his former employer and in a spirit of revenge shot and killed two dumb animals belonging to him. For this act, he was sent to the penitentiary. After being released from there, he wandered over the country, working at odd jobs and farm labor. In February, 1926, he returned to Omaha where he had previously lived. He had secured a 22-caliber Reising gun with a silencer attached and engaged in holding up and robbing people in Omaha. He described how, a short time before the killing of Dr. Searles, he tried to hold up a Mr. McDevitt; that the latter, instead of complying with the request to hold up his hands, turned to run away and thereupon he shot and killed him. A few days later, he shot through a window of a drug store, his object being to lead the police to believe that the man who was doing the shooting lived in that neighborhood.

With respect to the killing of Dr. Searles, he stated that he had previously been in Dr. Searles' office and knew the surroundings; that he went over there to rob him. On the night in question, he called at the office and told the doctor that he wanted to show him something. The doctor invited him into his private office and locked the door. As he was doing this defendant took out his gun and commanded the doctor to hold up his hands, and, when the doctor attempted to escape, shot and killed him. He then picked up the doctor's watch, which had fallen from his pocket, and after locking the door made his escape. He stated that he did not engage in the hold-up business for the purpose of obtaining large sums, that all he wanted was enough money to supply his needs, which were few. In trying to escape, he went to Council Bluffs and into the railroad yards, where he was accosted by a railroad detective and shot him. He was arrested in the vicinity of Bartlett, Iowa, and had in his possession his silencer gun and Dr. Searles' watch. He

detailed many other circumstances unnecessary to relate as bearing upon the particular question before us.

Whatever may be the rule in other jurisdictions, as to the degree of insanity as a defense for crime, it is well established in this state that the test is the capacity of the accused to understand the nature of the act committed and his ability to distinguish between right and wrong with respect to it. *Kraus v. State,* 108 Neb. 331; *Schwartz v. State,* 65 Neb. 196; *Philbrick v. State,* 105 Neb. 120 The court correctly instructed the jury on the question of insanity.

In the brief, some criticism is made of remarks of the county attorney in his address to the jury. No exception was taken to the remarks at the time; the court's attention being called thereto for the first time in the motion for a new trial. It has been repeatedly held that abuse of privilege by counsel in addressing the jury, to be available on appeal, must be excepted to at the time. *McLain v. State,* 18 Neb. 154; *Hill v. State,* 42 Neb. 503; *Hanks v. State,* 88 Neb. 464; *Goldsberry v. State,* 92 Neb. 211.

A strong appeal has been made to us to reduce the penalty from death to life imprisonment, as we may do under section 10186, Comp. St. 1922. If reliance is to be placed upon the verdict of the jury as to the insanity of the defendant, his crime was deliberately planned and executed in cold blood. If the extreme penalty is justified at all, it would seem that the facts before us are amply sufficient to call for the exercise of such penalty. We see no reason for interfering with the judgment of the district court, and it is therefore affirmed. Friday, June 24, 1927, between the hours of 6 a. m. and 6 p. m., is fixed as the date for carrying out the judgment of the court.

AFFIRMED.

Note—See Criminal Law, 16 C. J. 100 n. 12; 17 C. J. 62 n. 94—13 R. C. L. 710—10 L. R. A. N. S. 999.

DAVID O. BROWN V. STATE OF NEBRASKA.

FILED MARCH 9, 1927. No. 25602.

Forgery: PROOF. Where one is informed against for forging the name of another to an instrument, it is incumbent upon the state at the trial to prove by direct or circumstantial evidence that he signed the name of such other person without authority.

ERROR to the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

Edward F. Hannon and *Prince & Prince,* for plaintiff in error.

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

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

THOMPSON, J.

This is an action brought in the district court for Custer county wherein David O. Brown, plaintiff in error, hereinafter called defendant, was informed against for that he did in such county falsely make, forge, and counterfeit a certain receipt for goods with intent to defraud. To this information he entered a plea of not guilty. Trial was had and judgment entered by which he was sentenced to serve a term in the penitentiary. To reverse this judgment the defendant prosecutes error.

It is urged as ground for such reversal that the verdict and judgment are without evidence to support them, and are contrary to law.

The record reflects the following facts as proved: That Will Mullen caused to be sent by express from Omaha, Nebraska, two packages of merchandise consigned to P. J. Martin at Anselmo, Nebraska; that, as is the custom in such cases, a duplicate receipt was executed by the express company, one copy thereof retained by it and forwarded with the packages and the other delivered to the consignor,

and at the bottom of each thereof was a blank space for the signature of the consignee, to be by him placed thereon at the destination office on receiving the consignment; that on the morning of the day in question the defendant appeared at the express office in Anselmo and presented the consignor's duplicate receipt, demanded the goods covered thereby, signed the name of P. J. Martin, the consignee, to the duplicate receipt transmitted with the packages, paid the charges, and received the goods in question; the local agent at the time being unacquainted with the defendant, and believing him to be P. J. Martin, the consignee. It was further proved that the defendant was not known in that community by any other or different name than that of David O. Brown. The evidence does not show P. J. Martin, the person named as consignee, to be known by either party, or in the community of Anselmo.

In furtherance of his plea of not guilty, the defendant interposed proof tending to establish an alibi, and, testifying in his own behalf, denied having any knowledge of the transaction in question, or that he was present at the time.

It will be seen that the forgery charged in this case is that arising from the defendant signing the name "P. J. Martin" to the receipt in question, and receiving the property by reason thereof. Where one is informed against for forging the name of another to an instrument, it is incumbent upon the state at the trial to prove by direct or circumstantial evidence that he signed the name of such other person without authority. *Taylor v. State*, 114 Neb. 257. In the instant case, the state failed to meet this burden either by direct or circumstantial evidence, and it was error not to so instruct the jury.

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

REVERSED.

UNITED BANK & TRUST COMPANY, APPELLANT, V. SAM MCCULLOUGH, APPELLEE.

FILED MARCH 9, 1927. No. 24670.

1. **Bills and Notes:** LAW GOVERNING. "Where a promissory note is made in one state, to be performed in another state, it is, ordinarily, to be regulated and governed by the law of the place of performance, without regard to the place at which it was written, dated, or signed, unless it clearly appears that the parties intended that the contract should be governed by the law of the place where made." *Farm Mortgage & Loan Co. v. Beale*, 113 Neb. 293.
2. **Trial:** INTERPRETATION OF LAWS: QUESTION OF FACT. Questions as to the terms and interpretation of the laws of a sister state are questions of fact to be determined as such.
3. **Evidence** in the record examined, and *held* to support the judgment of the district court.

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

Elmer E. Ross, and *Hall, Cline & Williams*, for appellant.

Brown & Dibble, contra.

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

EBERLY, J.

This is a suit by the Merchants National Bank (succeeded by the United Bank & Trust Company) of San Francisco to recover on a note executed by Sam McCullough, payable to the order of F. J. Linz Motor Company. The instrument in suit is in the following form:

"San Francisco, Cal., 8-8-1921.

"$1,500. Four months after date, for value received, the undersigned promises to pay to the order of F. J. Linz Motor Co. at San Francisco, fifteen hundred dollars, with interest from date at eight per cent. per annum, payable at maturity. This note is one of a series of notes bearing even date herewith. In case of default in payment of any instalment of interest or principal at the time that the same

shall be due and payable upon any of said notes, or in case of failure to observe any of the conditions thereof, then all said notes immediately shall become due and payable on demand of the holder thereof. Said notes represent the purchase price of one National automobile, No.——, motor——, which the undersigned hereby agrees to purchase, and in consideration of the acceptance of said notes by the payee and of delivery to the undersigned of said automobile, the undersigned agrees as follows: The title to said property shall be and remain in the payee until all of said notes or any renewals thereof shall be paid in cash. The payee may in order to protect his interest in said car, or in the event of failure of the undersigned to perform any of the terms or conditions of this agreement, at its option enter the premises of the undersigned, or any premises where said property or any part thereof may be found, and move the same therefrom without let or hindrance or without making demand of any kind therefor, and may retain the same and all moneys paid on account of said note, or of the purchase price, for the use, wear, and tear of said car up to the time of said retaking; and may treat all obligations on its part to sell said car to the undersigned as terminated, or payee may, upon any repossession of said car, at its election, treat this agreement as in full force and effect, retaining possession of said car as security for the performance of the terms of this agreement and all costs which it may incur in retaking or holding the same. No new note, additional security, suit or judgment obtained upon any of said notes shall constitute payment thereof so as to operate as a waiver of the payee's title to said car. The undersigned shall not transfer said car or remove the same from the state of California, or permit any lien to attach thereto, or assign any of his rights therein, without the consent of the payee. The undersigned agrees to keep said car in good order and condition and to insure same free of charge to the payee against loss by fire, theft and transportation for an amount equal to the aggregate of the deferred payments so long as any of said payments shall remain unpaid; the insurance to be

payable to the payee or his assigns as their interest may appear, and the policy to be delivered to the payee and held by him or his assigns until said contract is fully discharged. Should the undersigned fail to deliver to the payee a policy of insurance upon the signing and delivering of this contract, the payee or his assigns is authorized to insure said property for one year for two-thirds of the purchase price hereinbefore mentioned, the cost of said insurance together with interest thereon at the rate of eight per cent. per annum to be paid by the undersigned on demand. In case the payee or his assigns shall employ an attorney to recover either the property or collect any unpaid balance due under this agreement, the undersigned promises to pay the additional sum of $50 as and for attorney's fees. The undersigned further promises to pay to the payee or his assigns any expense that the payee or his assigns may incur in recovering the possession of the said property, or collecting any balance due under this contract, in the event that the undersigned fails to perform any of the promises and covenants to be performed by the undersigned. Time is of the essence hereof, and the undersigned further agrees that in the event the payee shall in good faith assign and transfer this contract, and the moneys payable thereunder, to a third party, then the undersigned shall be precluded from in any manner attacking the validity of this contract on the ground of fraud, duress, mistake, want of consideration, or failure of consideration, or upon any other ground, and all moneys payable under this contract by the undersigned shall be paid to such assignees or holder without recoupment, set-off or counter-claim of any sort whatsoever.

"Sam McCullough, Visalia, California."

The following indorsements appear on the back of the instrument:

"F. J. Linz Motor Co. F. J. Linz. For value received I hereby guarantee payment of the within obligation and any renewal thereof, and hereby waive presentation, demand, protest and notice of nonpayment, and consent to any extension of payment acceptable to the holder. F. J. Linz

Motor Co. F. J. Linz. For value received, we do hereby sell, assign and transfer to Merchants National Bank of San Francisco, all of our right, title and interest in and to the within agreement, the property therein described and all moneys to become due thereunder.

"F. J. Linz Motor Co., by F. J. Linz. Dated 8-8-21."

Plaintiff claims to be a "holder in due course." The defendant in his answer admits execution of the instrument, alleges that it was procured by the fraudulent concealment of the Linz Motor Company, and that the automobile of which it formed the purchase price was, in truth and in fact, never delivered by that organization. To defendant's pleadings a reply was filed. Trial resulted in a judgment and verdict in favor of the defendant, from which plaintiff appeals.

Uncontradicted evidence in the record discloses that the instrument in suit was made in the state of Nebraska and was to be wholly performed in California. This court is committed to the doctrine: "Where a promissory note is made in one state, to be performed in another state, it is, ordinarily, to be regulated and governed by the law of the place of performance, without regard to the place at which it was written, dated, or signed, unless it clearly appears that the parties intended that the contract should be governed by the law of the place where made." *Farm Mortgage & Loan Co. v. Beale,* 113 Neb. 293.

The laws of California are not pleaded by either party. But certain statutes of California, portions of the negotiable instruments law of that state, were introduced in evidence, and as both parties expressly stipulate that any of the provisions of the Code of California (on this subject) might be made a part of the bill of exceptions by either party, we must assume that both parties in the district court proceeded on the theory that the laws of California are controlling in this case. If we are correct in this deduction it follows that this court is bound by this principle. Plaintiff, in the court below, and at the present time, insists that the instrument in suit is a negotiable promissory note; that

it occupies the position of a holder in due course thereof; and that the action of the district court in permitting the introduction of this evidence to establish the defense pleaded by the defendant denied the plaintiff its right as such. That, as permitting the introduction of this evidence was in effect to hold that the instrument in suit was nonnegotiable, it constituted reversible error.

It is thus obvious that the California law is exclusive and is controlling. The statutory provisions of California are before us, and their correct interpretation, in accordance with the doctrine announced by the supreme court of that jurisdiction, will be the test by which the action of the district court is to be judged.

We find the provisions of the California negotiable instruments act, in point in the present case, were construed by the supreme court of that state in the case of *Central Savings Bank v. Coulter*, 72 Cal. App. 78. In this case the facts before that court embraced a promissory note in usual form, but containing the statement: "This note is secured by a deed of trust dated the 17th day of November, A. D. 1919." This trust deed contained certain provisions which it was contended rendered the note nonnegotiable. The supreme court of California sustained this contention in the following language:

"Sections 3082 *et seq.* of the Civil Code define what instruments must contain in order to be negotiable. Among other things, there must be an unconditional promise or order to pay a sum certain in money, with interest at a definite time or by instalments; may have a provision accelerating the due date with exchange, costs, and attorney's fees; the instrument must be payable on demand at a fixed or determinable future time; the time of payment may be on or before a certain specified event which is certain to happen. It is also provided that an instrument payable on a contingency is not negotiable. That the deed of trust set forth in the record violates many of the terms of the uniform negotiable instruments act of this state plainly appears by an analysis of its provisions. This analysis is set

forth so succinctly in the respondent's brief that we take the liberty of quoting it in full: '(a) It provides for the payment of further advances and all sums now or hereafter owing by the makers. (b) It provides for the payment of "all taxes and assessments." (c) Of all other charges and incumbrances now or hereafter appearing as a lien upon the property. (d) Of all expenses and attorney's fees expended by the creditor in any action affecting the property or the title thereto. (e) Of all sums expended by the creditor in settling or compromising of any adverse claim; or, (f) Of all sums expended by the creditor on account of taxes, assessments, etc. The deed of trust provides that the entire sum secured by the deed of trust may be declared due, "if default be made.....in the payment of any of the other moneys herein agreed to be paid," or "if breach be made in the performance of any obligation for which this deed of trust is a security." This means that the entire sum secured becomes due, not alone in one year, nor upon the happening of an event "which is certain to happen," but (a) if the maker fails to pay any taxes; or (b) if he fails to pay any assessments; or (c) if he fails to pay any charge or incumbrance; or (d) if he fails to repay any expenses or attorney's fee expended by the creditor in any action involving the property or the title; or (e) if he fails to repay any sum paid in settlement or compromise of any adverse claim; or (f) if he fails to repay any sum expended by the creditor on account of taxes or assessments.' We conclude that the note under consideration is a nonnegotiable instrument and that the appellant's objection to testimony based upon the alleged negotiability of the note in question is not well founded." *Central Savings Bank v. Coulter*, 72 Cal. App. 78.

Comparing the provisions thus held by the supreme court of California to be in violation of "many of the terms of the California uniform negotiable instruments act" in *Central Savings Bank v. Coulter, supra,* it is obvious that certain of the provisions of the instrument in suit are likewise in conflict with the terms and conditions of that act.

It is also quite evident that the supreme court of California in the foregoing excerpt, and its conclusions as to the effect of collateral agreements relating to the security on the subject of negotiability stated in the foregoing excerpt, is wholly at variance with the doctrine of this court on that subject, announced in *Garnett v. Meyers*, 65 Neb. 280.

It seems, under the California doctrine, covenants and agreements pertaining to the security for the purpose of the rule are deemed identical in legal effect with agreements pertaining solely to the indebtedness secured thereby. Indeed, it would seem that the instrument here in suit violates the restrictions of the uniform negotiable instruments act in a greater degree than the instrument before the supreme court of California in the *Coulter* case. The instrument here presented, among other provisions, contains the following: "The payee may in order to protect his interest in said car, * * * at its option (retake the property) * * * and may retain the same and all moneys paid on account of said note, or of the purchase price, for the use, wear and tear of said car up to the time of said retaking; and may treat all obligations on its part to sell said car to the undersigned as terminated."

It is to be noted that this exercise of retained power is not in any manner dependent upon a prior default on the part of the maker of the instrument. Assuming the provision in question to be valid, it must be conceded, even in the absence of default on the part of maker, and before the maturity date stated therein, the holder in due course is vested with the right by the instrument itself to treat that writing as a conditional sale contract wholly terminable at his option and discretion. The effect of such termination which the terms of the instrument necessarily contemplate is that all rights vested in the maker of the instrument to the property involved by such determination vanish. Of course, it would follow that no right to recover from the maker the amount unpaid then remaining survives. *Liver v. Mills*, 155 Cal. 459; *Muncy v. Brain*, 158 Cal. 300.

The obligations of the contract would be at an end, their

force and effect forever terminated. The instrument, by its terms, placing the matter of determining the "certainty of the amount due," and the "certainty of the date of maturity," and the "continuance of the contract itself," exclusively within the breast of the payee or his assignee without respect to any default on the part of the maker of the instrument, or maturity of the obligations, wholly fails to conform to the requirements of the California negotiable instruments law on these subjects. California has adopted the rule that "Whenever the note (or some collateral agreement known to the indorsee) makes the note payable whenever the payee deems himself insecure, the due date is usually held to be uncertain and the note nonnegotiable." *People's Bank v. Porter,* 58 Cal. App. 41. The provisions before us are more than mere permission to the payee to take the car in the event of failure of payment on the due date, "as something to be done in lieu of the payment of money." The rights reserved are more than the mere conferring upon the payee a choice of remedies when the note becomes due, either to reclaim the chattel or sue for money. It affects and destroys the absolute "promise to pay," both as to "certainty of amount" and "certainty of date of maturity." These essential requirements of negotiable paper, in view of the rule above quoted, cannot be satisfied by the terms of an instrument making these elements without respect to maturity date, or any default of maker, dependent wholly on the fact that any particular holder may at any particular time deem himself unsafe and insecure.

In view of all the provisions of the instrument in suit, construed as a California contract, and governed by California laws, we do not find that the district court, in the record before us, committed reversible error.

It follows, therefore, that the judgment and proceedings of the district court are correct, and the judgment is

AFFIRMED.

IN RE APPLICATION OF KATE RESLER, ALSO KNOWN AS KATE DAVIS, FOR A WRIT OF HABEAS CORPUS.

FILED MARCH 9, 1927. No. 25779.

1. **Habeas Corpus:** VOID JUDGMENT. The writ of habeas corpus is a proper remedy where one is deprived of his liberty by reason of a void judgment.
2. **Criminal Law:** ACQUITTAL. In the present case, the defense interposed of a previous trial and judgment of not guilty entered thereon by a court of competent jurisdiction for the crime charged should have been sustained.
3. ———: ABETTOR: INFORMATION. The law as announced in *Scharman v. State, ante*, p. 109, holding that the same rule as to the information, conduct of the case, and punishment, heretofore applicable to a principal, should thereafter govern his aider, abettor, or procurer, and that no additional facts need be alleged in an information against such accessory before the fact than are required against his principal, followed and approved.
4. **Indictment and Information:** HOMICIDE. Information upon which petitioner was tried and acquitted construed, and *held* to properly charge petitioner as principal with the crime of murder by poisoning; that the words actually employed therein are the legal equivalent of the statutory language, embracing only as additional and explanatory thereof that the crime was, in fact, committed by another, through the procurement of the defendant.
5. **Criminal Law:** COMPLAINT. Complaint upon which the relator is now being detained and imprisoned construed, and *held* to charge the relator with poisoning with intent to take life under section 9563, Comp. St. 1922, and being, in substance and effect, a charge of an attempt to commit the crime set forth and charged in the information upon which the accused was acquitted.
6. ———: VERDICT. Upon an indictment for an offense, the jury may find the defendant not guilty of the offense, but guilty of an attempt to commit the same, where such an attempt is an offense.
7. ———: FINAL JUDGMENT. It thus appearing that the charge now set forth in the complaint upon which the relator is now being held was, by express provision of statute, made and included within the charge set forth in the information upon which the petitioner was tried and acquitted, the verdict "not guilty" was therefore in all respects a complete determination thereof in her favor.

ORIGINAL application for writ of habeas corpus. *Writ allowed.*

Bernard McNeny, John F. Fults and *Edward J. Lambe,* for petitioner.

O. S. Spillman, Attorney General, John Stevens and *Wade Stevens, contra.*

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

EBERLY, J.

An application to this court was made at a former day for a writ of habeas corpus on the allegation that the plaintiff was then unlawfully imprisoned and detained in the county jail of Furnas county, Nebraska, under the findings and order of the county judge of that county.

On consideration of the application the court was of the opinion that the facts herein recited fairly raised the question whether the county judge, in making the findings and entering the order as an examining magistrate, in a cause then pending before him on December 14, 1926, had not exceeded his power. It therefore directed the writ to issue. To this writ return has been made. The cause has been heard by the court upon the application for the writ (including a transcript of the evidence received, and all proceedings had at the preliminary examination referred to and duly settled and allowed by the county judge and made a part of the proceedings by his order), the respondent's return thereto, and a stipulation of all parties in interest "waiving the presence of the petitioner before" this court.

Disclaiming any assertion of a general power of review over the proceedings of examining magistrates in matters of determining by them "that an offense has been committed, and there is probable cause to believe that the person charged has committed the offense," we proceed to ascertain from an examination of the entire record before us whether, in view of the facts contained therein, the county

court of Furnas county, or the judge thereof, had power to make the findings and enter the order of commitment thereon in this case.

It appears that on March 19, 1926, an information in proper form was filed in the district court for Furnas county, Nebraska, which, omitting formal parts, and appropriate technical terms as to premeditation, malice, and intent, charged the petitioner, Kate Davis, with a violation of section 9544, Comp. St. 1922, by setting forth that on or about the 30th day of August, 1925, "the said Bert M. Davis * * * did * * * give and administer to the said Blanche A. Davis a large quantity of a certain deadly poison called strychnine, sometimes also called strychnia alkaloid," and that "the said Blanche A. Davis * * * did then and there take said poison and swallow the same, * * * by reason and by means of which, * * * on said 30th day of August, 1925, * * * did die; and before said poisoning and murder were committed by the said Bert M. Davis some time during the year 1925, the exact date or dates being unknown to complainant, and in the county of Furnas, and state of Nebraska, one Kate Resler, who is now also known as Kate Davis, did unlawfully, feloniously, wilfully, purposely, and of her own deliberate and premeditated malice, procure, incite, counsel, advise, aid and abet the said Bert M. Davis in the perpetration and commission of said poisoning."

Thereafter, in a district court of competent jurisdiction, to a properly impaneled jury, a trial was regularly had on this information, and at its close, after instructions by the court, and after consideration of the evidence adduced, the jury, on June 27, 1926, in open court, returned a verdict of "not guilty," which verdict was duly accepted and received by the court and entered on the records thereof, and an order thereupon made and entered discharging said jury from further consideration of said cause, and further providing that petitioner "be and is hereby released and discharged."

On November 8, 1926, the county attorney of Furnas county filed a complaint in due form in the county court of

Furnas county which, omitting formal allegations, charged: "That at some time during the year 1925, and prior to the 31st day of August of said year, the exact date being to complainant unknown, in the county of Furnas, and state of Nebraska, one Kate Resler, who is now also known as Kate Davis, and one Bert M. Davis, then and there being, did then and there unlawfully and feloniously confederate and conspire together to commit a felony, to wit, to administer poison to one Blanche A. Davis with the intent to destroy or take the life of the said Blanche A. Davis; and in pursuance of said conspiracy and to effect the object thereof, the said Kate Resler and Bert M. Davis did, in the said county of Furnas, and state of Nebraska, on various dates within the time aforesaid, the exact dates being to complainant unknown, give and administer to the said Blanche A. Davis certain poisons, the exact nature of which are to complainant unknown, with intent to destroy or take the life of the said Blanche A. Davis, and did mix certain of such poisons, the exact nature and name of which are to complainant unknown, in water, food, drink and medicine with the aforesaid intent, and did offer and give the same to the said Blanche A. Davis and induce her to take and swallow the same with the intent of them, the said Kate Resler and Bert M.Davis, to destroy or take the life of the said Blanche A. Davis."

Upon this complaint the preliminary examination now before us was held and resulted in the findings and order of commitment complained of.

That, in this case, the petitioner may properly present the question involved by habeas corpus, we have no doubt. It is firmly established that if a court or a judge thereof which renders a judgment, or who enters an order, has not jurisdiction to perform the act done, either because the proceeding or the law under which it is taken is unconstitutional, or for any other reason the judgment is void, it may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged. *In re*

Havlik, 45 Neb. 747; *In re Application of McMonies*, 75 Neb. 702; *In re Vogland*, 48 Neb. 37.

In the present case it is true that the ground for habeas corpus was not the invalidity of an act of the legislature under which the petitioner was informed against, but because it was claimed to be a second prosecution for the same offense contrary to the express provisions of our Constitution. In other words, the contention is that the constitutional rights of the defendant were violated by her second arrest and detention for the same offense contrary to the express terms of the Constitution that no person shall be twice put in jeopardy for the same offense. It is difficult to see why a conviction and punishment under an unconstitutional law is more a violation of a person's constitutional rights than an unconstitutional conviction under a valid law. In the first case it is true the court has no authority to take cognizance of the case, but in the second it has no authority to render judgment against the defendant. *Michaelson v. Beemer*, 72 Neb. 761.

In view of the fact that our constitutional provisions were, in fact, intended to secure an absolute immunity and unqualified privilege to a defendant legally acquitted on a criminal charge of never again being subject to further arrest, detention, molestation, or inconvenience based upon that which has been once solemnly determined in his favor, these provisions are certainly limitations on the power of the court to, in any manner, violate or infringe the right thus plainly granted and conferred by the fundamental charter of the state.

In the present case, therefore, the finding that a crime has been committed, if the same be one of which the accused had theretofore been legally acquitted, and the further finding that there was probable cause for believing the petitioner guilty of the same, followed by a mittimus restricting her liberties, was certainly beyond the power of the court and beyond its jurisdiction to enter because it was against the express provisions of the Constitution which bounds and limits all jurisdiction involved. *Hans*

Nielsen, Petitioner, 131 U. S. 176; *Ex parte Bornee*, 76 W. Va. 360; *Ex parte Lange*, 18 Wall. 163; *Ex parte Siebold*, 100 U. S. 371; *In re Snow*, 120 U. S. 274.

It follows, therefore, that habeas corpus is the proper remedy in the instant case, and properly presents the question of the validity of the proceedings against the petitioner and the legality of her present imprisonment.

The record before us discloses that at the preliminary examination, excepting certain evidence of a strictly cumulative character, all of the proof presented to the examining magistrate had been heard, considered and passed upon by the jury in the trial of petitioner on the charge of murder by poisoning. It also appears without question that the time, place, party, and transactions involved in the information herein set out, and in the complaint above set forth, are in all respects identical. There is no question before us involving disputed facts or conflicting evidence. It is wholly a matter of law.

It is claimed by the respondent, however, that even though the time, place, parties, and the transactions involved be identical, yet in view of legislative action there is involved three distinct crimes: (a) Criminal conspiracy, section 9543, Comp. St. 1922; (b) administering poison with intent to take life, section 9563, Comp. St. 1922; (c) murder by administration of poison or causing the same to be done, section 9544, Comp. St. 1922. That it was competent for the legislature to punish distinct parts of the transaction as separate crimes, and that by reason of the action of the legislature, the three crimes before us being separate and distinct, an acquittal of one could not be the subject or basis of a plea in bar to a criminal charge based upon either of the other two.

Does the above complaint which is the foundation of the proceeding, the validity of which is now challenged, charge, as a separate, distinct, unconnected crime, a conspiracy alone, or, is the offense, described therein, embraced in the charge of murder on which there was an acquittal in the district court?

Conspiracy, as originally known to the English law, was defined as follows: "Conspiracy is a consultation and agreement between two or more, to appeal, or indict an innocent falsely and maliciously of felony, whom accordingly they cause to be indicted or appealed; and afterward the party is lawfully acquitted by the verdict of twelve men; the party grieved may be relieved, and the offender punished two ways. * * * Secondly, by indictment at the suit of the king, the judgment whereof is criminal." Coke's Institutes, part III, 142.

At the time of the adoption of our Criminal Code in 1873 the above was, in substance, incorporated in it, and now appears in section 9736, Comp. St. 1922.

In 1909 a statute relating to blackmail was adopted, which now appears as sections 9579-9583, Comp. St. 1922. The last section, in terms, purports to punish conspiracies concerning blackmail by a maximum penalty of three years in the penitentiary. In 1919 (Laws 1919, ch. 195) under the title "An act relating to conspiracy and to provide a penalty, and to declare an emergency," it was enacted: "If two or more persons conspire to commit any felony or to defraud the state of Nebraska in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties in such conspiracy shall be fined not more than ten thousand ($10,000) dollars or imprisoned in the penitentiary not more than two years, or both." The act last quoted contains no repealing clause and makes no reference to preceding legislation on the subject of conspiracy.

Chapter 89, Laws 1923, provides: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." The unquestioned purpose of the last act was to eliminate the common-law distinction between principals and accessories before the fact, and to provide for the punishment and trial of accessories before the fact as principals.

Construing this section last referred to in *Scharman v. State. ante,* p. 109, this court held: "Section 9541, Comp.

St. 1922, as amended by chapter 89, Laws 1923, which provides that an aider, abettor, or procurer, whether present or not, shall be subject to the same prosecution and punishment as his principal, construed to mean: That the same rule as to the information, conduct of the case, and punishment, heretofore applicable to a principal, should thereafter govern his aider, abettor, or procurer, and that no additional facts need be alleged in an information against such accessory before the fact than are required against his principal."

Construing the information upon which petitioner was tried and acquitted, in the light of the principles announced in *Scharman v. State, supra,* we hold it properly charges petitioner as principal with the crime of murder by poisoning. It is true that the charge might have properly been made in the general terms of the statute. But the words actually employed are the legal equivalent of the statutory language, embracing only as additional and explanatory thereof that the crime was, in fact, committed by another "through the procurement," etc., of the defendant. *Scharman v. State, supra; State v. Gleim,* 17 Mont. 17, 31 L. R. A. 294; *People v. Rozelle,* 78 Cal. 84; *State v. Littell,* 45 La. Ann. 655; *Territory v. Guthrie,* 2 Idaho, 432; *People v. Schwartz,* 32 Cal. 160.

The murder charged in the information upon which the petitioner was acquitted was a complete and indivisible offense. By statute, the scope of the accusation evidenced by the information had been extended to include every possible criminal relation to the fact of death that existed at the time of its occurrence. The scope of the charge, indeed, must be measured by the transactions which might be shown to support it. Immunity of acquittal must be commensurate with peril of conviction. For what a verdict of "guilty" might punish, a verdict of "not guilty" must protect.

It must be conceded that the petitioner, by her acquittal, was wholly relieved from any further attempt to fix penalties upon her because of her relation to the fact of killing

being that of an accessory before the fact. An accessory before the fact, it may be said, is one who, by word or act, gives encouragement to the actual perpetrator in the commission of the act, or who procures, instigates, incites, advises, or counsels him to commit it, or joins with him in a conspiracy to that end, or by aiding him in any of the foregoing ways in some other unlawful act that would naturally result in a homicide if the homicide action results therefrom. 29 C. J. 1067, sec. 40.

But the petitioner is now sought to be held as a conspirator for a completed conspiracy having for its object the death of Blanche A. Davis.

It may be conceded that as to a completed felony, all accessories before the fact, at common law, might or might not be conspirators; but it cannot be denied that in such case all "conspirators before the fact," by the consummation of their conspiracy, became "accessories before the fact."

Our Nebraska statutes, as determined by *Scharman v. State, supra,* now inflict punishment as principal alike on both classes of these offenders. Under our former decision, one could not be convicted as principal if the evidence disclosed he was accessory before the fact; neither could he be convicted as accessory before the fact if the evidence disclosed he was present and a principal. *Casey v. State,* 49 Neb. 403. But since the amendments referred to have been adopted, the scope of possible conviction under the charge contained in the information upon which petitioner was tried has been extended to include as principal all criminal relations to the criminal act charged, whether before denominated as principal or as accessories before the fact.

It follows that, in view of the provisions of the legislation above referred to, that whether present or absent at the time the poison was administered, assuming the crime to have been committed, the charge of conspiracy was within the terms of the information upon which the case was tried, and the evidence establishing the conspiracy would have

been relevant and material for consideration of the jury, and, if believed by them, would have resulted in the conviction of the petitioner of the crime of murder. Therefore, construing the complaint upon which the petitioner is now detained, as respondent would have it construed, the language of the supreme court of Colorado would appear to be applicable:

"It is evident, therefore, that the facts necessary to show his guilt as accessory before the fact are essential to show him guilty of the conspiracy charged in this indictment. In other words, the criminal conduct that would constitute him an accessory before the fact, where the object of the conspiracy has been consummated, is the same that would prove him a conspirator where the contemplated crime is not completed. It is laid down by Wharton, as a general rule, that 'where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, * * * the plea *(autrefois acquit)* is generally good.'" *Davis v. People*, 22 Colo. 1.

We are, however, convinced that, applying to this complaint in the county court the principles announced in *Scharman v. State, supra,* (which was decided after the complaint in question had been filed), we are forced to accept the construction that the offense charged in the instant complaint is not conspiracy under section 9543, Comp. St. 1922, but poisoning with intent to take life under section 9563, Comp. St. 1922.

It is to be noted in this connection that, while the maximum penalty provided for "conspiracy" is "not more than $10,000 (fine) or imprisonment in the penitentiary not more than two years, or both," the minimum penalty might be one dollar fine and costs. The penalty for poisoning (section 9563, Comp. St. 1922) is imprisonment in the penitentiary not less than two years, nor more than fifteen years. The latter, therefore, is deemed the more serious offense.

In view of the statutory provisions of 1923, we feel it must be conceded that, where a conspiracy is executed or consummated, all conspirators, who at common law were

either principals or accessories before the fact, are now to be deemed principals. The charge that "the said Kate Resler and Bert M. Davis did, in the said county of Furnas, and state of Nebraska, on various dates within the time aforesaid, the exact dates being to the complainant unknown, give and administer to the said Blanche A. Davis certain poisons, the exact nature of which are to complainant unknown, with intent to destroy or take the life of the said Blanche A. Davis, and mix certain of such poisons, the exact nature and name of which are to complainant unknown, in water, food, drink and medicine with the aforesaid intent, and did offer and give the same to the said Blanche A. Davis and induce her to take and swallow the same with the intent of them, the said Kate Resler and Bert M. Davis, to destroy or take the life of the said Blanche A. Davis," would embrace all acts and relations criminally connected with the offense at or prior to its commission, whether such connection be evidenced by actual or constructive presence at the time of the commission of the crime or by absence and participation as by an accessory before the fact or as a conspirator. *Scharman v. State, supra.*

Therefore, the additional allegation contained in the complaint including the words "Kate Davis and one Bert M. Davis, then and there being, did then and there unlawfully and feloniously confederate and conspire together to commit a felony, to wit, to administer poison to one Blanche A. Davis with the intent to destroy or take the life of the said Blanche A. Davis; and in pursuance of said conspiracy and to effect the object thereof," did commit said crime, must be deemed as explanatory, and that, in truth and in fact, but one offense is actually charged, and that of administering poison with intent to kill. *Scharman v. State, supra.*

There can be no question but where one crime is included and forms a necessary part of another, and is but a different degree of the same offense, and where on a prosecution for the higher crime a conviction may be had for

the lower, then a conviction or acquittal of the higher will bar a prosecution for the lower, or for any crime of which the lower is an essential ingredient. 16 C. J. 271, sec. 449; *Warren v. State,* 79 Neb. 526.

A careful comparison of the information set forth herein and the terms of the complaint later filed, in the light of the statutory provisions upon which they are based, plainly establishes one conclusion, viz, that the information charges the consummated and completed crime which is denounced by the provisions of section 9544, Comp. St. 1922, viz, "administering poison or causing the same to be done" to "kill another;" and that section 9563, Comp. St. 1922, and the complaint drawn thereunder have for their object and purpose the punishment of those who "shall administer poison to another with the intent to destroy or take the life of the person or persons to whom the same shall be administered." Section 9544, Comp. St. 1922, in short, provides for the punishment of the completed and consummated act; section 9563, Comp. St. 1922, provides for the attempt to commit the offense punished by the first.

Section 10153, Comp. St. 1922, provides: "Upon an indictment for an offense * * * the jury may find the defendant not guilty of the offense but guilty of an attempt to commit the same, where such an attempt is an offense."

Thus, the charge now set forth in the complaint was, by express provision of statute, made an included offense of the charge set forth in the information upon which petitioner was tried. Of it she might, without amendment, have been convicted and sentenced as an included offense at the time of her former trial thereunder, and the verdict of "not guilty" was therefore in all respects a complete determination thereof in her favor. *Mulloy v. State,* 58 Neb. 204; *Russell v. State,* 66 Neb. 497.

"There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely, *Interest reipublicæ ut sit finis litium,*

and *Nemo debet bis vexari pro una et eadam causa.*" *United States v. Throckmorton,* 98 U. S. 61.

It appearing that, as to the charge contained in the complaint, jeopardy attached by virtue of the former trial, and it appearing from the admitted facts of the record that the charge contained in the complaint on which the petitioner is now being detained and imprisoned by respondent, is one upon which jeopardy attached by virtue of the former trial on the information set forth in this opinion, and that petitioner is now and has been unlawfully imprisoned and detained by respondent and is entitled to be forthwith released and discharged: Ordered, that respondent be and he is hereby directed to forthwith discharge and release said Kate Resler, also known as Kate Davis, petitioner.

PETITIONER DISCHARGED.

Note—See Criminal Law, 16 C. J. 264 n. 42, 265 n. 48, 271 n. 5, 6—Habeas Corpus, 12 R. C. L. 1192, 6 R. C. L. Supp. 742; 29 C. J. 46 n. 66, 53 n. 28—Homicide 29 C. J. 1068 n. 6, 7, 8, 9, 10, 1069 n. 11, 12, 1073 n. 59.

EMIL GALL, APPELLEE, V. JOHN R. BECKETT, ET AL., APPELLANTS.

FILED MARCH 25, 1927. No. 24338.

1. **Municipal Corporations:** STREET IMPROVEMENTS: PETITION. Under the charter of South Omaha in 1909, a petition for both the creating of an improvement district and the paving of a street therein was sufficient to confer on the city authority to proceed with and complete the paving, without any petition therefor after the creating of the improvement district.
2. ———: ———: ASSESSMENTS. Under the charter of South Omaha in 1909, the city had authority to create a paving district more extensive than the boundary of the lots on the street to be paved, to order the paving on a petition representing a majority of the foot-frontage on such street, and to make assessments for benefits against all lots in the improvement district, if benefited.
3. **Dicta** contrary to the above rules in *McCaffrey v. City of Omaha,* 91 Neb. 184, disapproved.

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

John F. Moriarty and *S. L. Winters*, for appellants.

A. H. Murdock, contra.

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

PER CURIAM.

This is a suit in equity to set aside as void two city ordinances passed by South Omaha for the purposes of creating an improvement district and of paving A street from the west line of Twenty-third street to the east line of Twenty-sixth street, to cancel benefit assessments levied on lots 1 and 2, block 11, abutting on A street in the improvement district, and to annul lot-sale certificates issued by the county treasurer of Douglas county for nonpayment of the assessments. The municipal proceedings assailed were commenced in 1909 and were effective for the purposes of completing the paving and of benefiting the lots. Lot 1 was assessed for benefits of $209.18 and lot 2 for benefits of $96.08. Plaintiff claims to be the owner of the lots and prays for equitable relief, removing the cloud which South Omaha, not then, but now, a part of Omaha, cast on his title. John R. Beckett, defendant, bought the lots at the county treasurer's sale and sold the certificate of sale to defendant Joseph F. Murphy.

The suit was defended on the theory that the proceedings of South Omaha conformed to powers conferred by its charter.

Upon a trial of issues raised by the pleadings the district court entered a decree wiping out the proceedings of South Omaha in so far as they affected plaintiff's lots, set aside the sale by the treasurer, canceled the certificates of sale and quieted in plaintiff his clouded title. Defendants appealed.

The controlling questions presented depend on the mean-

ing of the South Omaha charter, properly construed, and the grants of power to the city, with special reference to the provisions relating to paving as they existed at the time in question. Laws 1909, ch. 17, sec. 128.

It is contended by plaintiff that the city did not comply with the charter and acted without jurisdiction. If he is understood, his propositions are that the ordinances and the proceedings under them were void because there was no petition for the improvement subsequent to the creation of the paving district, and that the petition on which the city acted did not represent the requisite ownership of lot frontage essential to jurisdiction. The challenge extends to an assertion that the street frontage in that part of the paving district not abutting on A street is entitled to representation on any valid petition, whereas the petitioners for the paving were owners of lots abutting on A street only.

Upon a consideration of the South Omaha charter from every standpoint, the supreme court is unanimous in the opinion that one petition for both the creating of the improvement district and the paving of A street, though preceding the ordinance creating the improvement district itself, is a sufficient compliance with the law in those respects, and that the South Omaha charter contains a valid exercise of legislative power, conferring upon that city authority to create a paving district more extensive than the boundary of the lots on A street and to order the paving on a petition representing a majority of the foot frontage on the A street lots. In this view of the charter, the proceedings assailed by plaintiff were regular and valid.

Dicta to the contrary in the consideration of similar provisions of the Omaha charter in *McCaffrey v. City of Omaha,* 91 Neb. 184, are disapproved. The judgment of the district court and the former order of the supreme court affirming it are therefore vacated and the action dismissed at the costs of plaintiff in both courts.

REVERSED AND DISMISSED.

CLARK HANKINS V. STATE OF NEBRASKA.

FILED MARCH 25, 1927. No. 25209.

1. **Criminal Law**: EMBEZZLEMENT: EVIDENCE: BOOK ACCOUNTS. In a prosecution for embezzlement where the books, records, papers and entries are voluminous and of such a character as to render it difficult for a jury to arrive at a correct conclusion as to amounts, an expert accountant may be allowed to examine them and to testify as to the result of his examination, when such books, records, papers and entries are in the courtroom, subject to inspection by the accused.
2. ———: ———: ———. In the prosecution of a bookkeeper for embezzlement, records for the inspection and keeping of which he is responsible, and which were inspected and went through his hands in the course of his duties, are admissible against him, though not actually made by him. In the circumstances shown by the evidence in this case, this includes the records made on the detail ribbons of the cash register.
3. ———: JURORS: DUTIES. While a juror in a case under consideration may not state to other jurors a fact in relation to the case, known to him, but not in evidence, yet jurors are not mere automatons. They do not shed their experiences of life when deliberating in the jury room and may, when not violating the above principle, use them by way of illustration and argument, applicable to the case, merely to aid their fellow jurors in arriving at a correct verdict. Record examined in the instance complained of and *held* to show no misconduct of the juror.

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

Pratt, Hamer & Beynon, for plaintiff in error.

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

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

GOSS, C. J.

The plaintiff in error, convicted of embezzlement and duly sentenced to the penitentiary, comes up on 21 assignments of error. These are so grouped in his argument that they

may be classified and treated inclusively under (1) hearsay testimony of a witness who audited the books and papers, (2) misconduct of the jury and of the county attorney, and (3) error in an instruction to the jury.

The trial lasted eight days and the record is voluminous, consisting of more than 1,000 pages of testimony, including more than 1,100 exhibits. A brief outline of the evidence will help to understand the case. Hankins was charged with the embezzlement, on or about January 28, 1925, of $1,000, the personal property of Paul Niemack, his employer, who operated a garage and automobile business in Ravenna, having the agency for one of the most widely known cars and handling all of the things usually incident to such a concern. The business was conducted in two places, located about half a block apart. The sales and service end, that is, the garage, salesroom, repair shop, gasoline and oil station, was located on the west side of the main street. It was here that the business with customers was transacted, sales were made, money taken in and the cash register kept. On the east side of the street an office was maintained where the books and records were kept. Here the defendant worked as chief bookkeeper, and as manager in the owner's absence, from June 14, 1923, to April 2, 1925. With him was employed an assistant who also worked on the books, three different persons assisting him at different periods during his service. At the garage on the west side of the street 10 to 15 men were employed all the time, 23 or 24 different men being so engaged during defendant's employment. Some of these were salesmen and used the cash register which was the initial step in the system of bookkeeping. The records from the register furnished much of the evidence complained of. The register had various keys for the registering of money and for other purposes. It also had levers which could be set in different places for the purpose of showing the nature of the transaction. While the machine was complicated, it was efficient, and the only mistake it ever made was when a cogwheel broke and the register jumped $100. A record is made by the cash reg-

ister upon a long ribbon, or tape of paper, referred to in the evidence as the "detail ribbon." Each day the register also makes a record of the business of the day upon such dial or dials as are used to record the transactions of the day. The bookkeeping system began with the cash register as follows: About 6:00 o'clock each evening the bookkeeper, or his assistant, would go across the street to the cash register, inspect the dials and the ribbon and count the cash. Then the transactions of the day thus discovered would be entered on a printed sheet called a "daily register take-off sheet," from which entries would be made in the books and accounts. One of these sheets to which we are referred (and there are many others in the record) shows items of cash sales, charge sales, total sales for the day, received on account, merchandise returned, gas sales, storage, accessories, parts, tires, and the like. The defendant testified that the cash was counted the following morning and that, if the cash was different from the amount shown by the register, the take-off sheet would be changed to show the amount actually found. A large number of detail ribbons were identified as having been made by the cash register during the course of defendant's employment and the employer testified that they were a part of his system of bookkeeping. They were not offered in evidence, but were in the courtroom subject to inspection; and a witness, who is an expert bookkeeper and accountant, and who made an audit of the books and accounts, testified that he used the conventional books (naming them) and the cash register ribbons, take-off sheets, and all other records in connection with the business. Over objection by the defendant, the auditor was taken through a long examination from day to day covering the whole period of defendant's charge of the books after July 1, 1923, except a period of about 25 days, the records for which could not be located, and his testimony was received showing in detail the shortages in cash. Likewise the auditor testified to his conclusion from his audit of the books and papers that there was a total shortage of cash unaccounted for amounting to $2,261.03. The defendant was charged with

embezzling $1,000. The jury found him guilty of embezzling $200.

Defendant does not take the position that it is never proper to permit an accountant or expert bookkeeper to testify to the result of his examination of a set of books or accounts. He concedes it is well settled that within certain limits, or under certain conditions, he may do so. It is the rule that, in a prosecution for embezzlement where the books, records, papers and entries are voluminous, and of such a character as to render it difficult for a jury to arrive at a correct conclusion as to amounts, an expert accountant may be allowed to examine them, and to testify as to the result of his examination, when such books, records, papers and entries are in the courtroom, subject to inspection by the accused. *Bauer v. State,* 99 Neb. 747; *Mendel v. Boyd,* 71 Neb. 657; *Bode v. State,* 80 Neb. 74; *Bartley v. State,* 53 Neb. 310. But he claims that the general rule was departed from in the admission of expert testimony as to what is shown by the detail ribbons, because, he asserts, they were not made by the defendant.

Defendant does not quarrel with the general rule, but his brief strenuously urges that the evidence of the auditor was erroneously received on the ground that detail ribbons are hearsay. He asserts they are hearsay, because no single witness, testifying to a single item, says of it that it correctly records a single transaction, or, testifying of a single ribbon, says that he operated the cash register which made the figures on that ribbon. That argument might have efficacy if it applied to a stranger to the ribbons. But the defendant is not such. The cash register was under his dominion. It was a part of the paraphernalia of his office as bookkeeper. Every salesman who pushed a button to record a sale was acting under his direction as fully as if he were standing at defendant's desk and making the memorandum with pen or pencil. And when, at the end of the day, the defendant took account of the business of the day, it was the work of but a moment to check over the cash items on the register ribbon and compare them with the

cash on hand. If he then discovered a discrepancy, it could be reconciled, or the attention of his employer and fellow workers called to it. By his system and his conduct, he adopted the detail ribbon as a verity and bound himself by it as fully as if he had pushed the register button himself, or himself had entered on paper with a pen the items there recorded. It is significant that, when the register cogwheel broke and jumped $100, the fact was readily discovered and promptly reported by him to his employer, though, with this exception, which was patent, he is not known to have reported any of the large number of discrepancies between the cash register ribbon and the actual cash he claims to have found in the cash register, although he testifies these discrepancies were frequent. Moreover, the reason why hearsay testimony is not admissible is that one has no opportunity to cross-examine the adverse witness from whom the testimony is sought to be elicited. But these records spoke to defendant day by day as he checked the cash. They made a fixed record of what they said to him. Being properly identified, they were as competent basis for the testimony of the auditor as any other record used by the defendant in his position as bookkeeper. Of course, they were subject to any explanation he might make to the jury concerning them and their verity, and his explanation, like the evidence sought to be deduced by the state from the register record, was for the jury to weigh in connection with the other evidence in the case.

We hold that, in the prosecution of a bookkeeper for embezzlement, records for the inspection and keeping of which he was responsible, and which went through his hands in the course of his duties, are admissible against him, though not actually made by him. The evidence on this phase of the case was properly submitted to the jury on the authority of the cases heretofore cited, supplemented more definitely, on the point just discussed, by the following: *People v. Elder,* 100 Mich. 515; *State v. Clements,* 82 Minn. 434; *Secor v. State,* 118 Wis. 621; *Ruth v. State,* 140 Wis. 373.

In the trial, the prosecution went further, perhaps, than required. It had the expert accountant go through the accounts item by item and prove the alleged shortages from day to day and then at the conclusion give the total discrepancies claimed to exist in the accounts, resulting in the sum total above stated. For example, as a type of the evidence complained of, the defendant selects and sets forth in his brief an instance where the witness was allowed to answer that, on September 25, 1923, he found "a discrepancy of $10 in the amount of cash received on Helen Hicks' account, the amount entered being $517.45 and the correct amount as shown by the cash register being $527.45." This was objected to on the ground that no foundation had been laid for it, but there was no objection that it called for a conclusion and no motion to strike out that part of the answer of the witness that there was "a discrepancy of $10." The rest of the answer was competent and its foundation was properly laid in the cash register details and in the accounts.

Defendant complains of the county attorney in his cross-examination of witnesses who testified on direct examination, to the good reputation of the defendant and to hearing talks and discussions in a store and barber shop relating to the character of the defendant. Thereupon the county attorney asked them whether in these talks and discussions anything was said about a shortage of the defendant when working in another garage. No objection was made to the question. No error, therefore, can be predicated upon it. Moreover, such cross-examinations of character witnesses are not controlled by statute and cases interpretive thereof, cited by defendant, such as apply where a defendant is questioned as to a previous conviction of a felony. The cases of that character briefed by defendant would not be applicable here, even if the alleged error had been preserved.

The motion for new trial was supported by affidavits of several jurors willing, as occasionally happens, to impeach their own solemn verdict. These were overruled by the

trial court. Error is argued in respect to one of these, that of a juror who swore that during the deliberations of the jury one of his cojurors assured him that, from his experiences in the use and operation of cash registers, mistakes could not be made upon the cash register. Jurors are not mere automatons. Some latitude must be left them to present to their fellow jurors their arguments and their reasons for their beliefs based on the evidence. They do not shed their personalities and their experiences of life when they begin their deliberations. The ideal jury in a technical or scientific case would be one whose members are experienced in the particular branch of technique, or science, necessary to be understood in arriving at an ultimate correct conclusion as to the facts presented in that particular trial. It seems the juror complained of would have been correct if he had spoken in such terms of this particular register, for the machine, itself, never made a mistake, so far as the record shows, unless the broken cogwheel incident would be classified as such. The juror in question was not stating a fact known by him in the case on trial, but was, in effect, expressing an opinion based on experiences of his own merely as argument to aid in arriving at a correct verdict. There is no merit in this assignment of error and the trial court was right in overruling it.

Error is attempted to be predicated on a single clause of the court's instruction to the jury on the evidence produced as to the previous honesty and good character of the defendant. The effect of the whole instruction was to leave this evidence to be considered by the jury in connection with all other evidence in the case, with the admonition that if, after consideration of all the evidence in the case, including that bearing on the good reputation of the defendant, the jury entertained a reasonable doubt of the defendant's guilt, it was their duty to acquit him. We do not find that the instruction prejudiced the defendant in the judgment of the jury, nor that it had any tendency to do so.

For a long, complicated and technical case, this one was tried with evident fairness and with unusual freedom from just criticism. It does not contain reversible error and ought to be, and is,

AFFIRMED.

Note—See Criminal Law, 16 C. J. 615 n. 66, 743 n. 73, 1082 n. 30.

OSCAR STRAND, ADMINISTRATOR, APPELLANT, V. BANKERS LIFE INSURANCE COMPANY, APPELLEE.

FILED MARCH 25, 1927. No. 24636.

1. Insurance: EXACTION OF PREMIUM IN ADVANCE: DUTY OF INSURER. A life insurance company that exacts in advance a premium from an applicant without assuming any obligation for insurance prior to the issuance and delivery of a policy is his trustee for the return of the premium if the application is rejected and for its unconditional acceptance if the application is approved and the policy delivered.
2. ———: ———: ACTION ON APPLICATION. It is the duty of a life insurance company that exacts in advance a premium from an applicant without assuming any obligation for insurance prior to the issuance and delivery of a policy to act on the application within a reasonable time.
3. ———. The business of a life insurance company operating under a charter from the state is affected with a public interest.
4. ———: ACTION ON APPLICATION: LIABILITY FOR DELAY. A life insurance company that exacts a premium in advance from an applicant without assuming any obligation for insurance prior to the issuance and delivery of a policy is liable in tort for failure to perform the duty to act on the application within a reasonable time, where the negligence is the proximate cause of damages.
5. ———: ———: EXCUSABLE DELAY. A life insurance company that did not act on an application for two weeks, while in good faith seeking from the medical examiner an omitted answer to a material question in his medical report, *held* not chargeable with actionable negligence for the delay, where the applicant in his application represented the medical report "to be full, complete and true."

6. ———: ———: DELAY NOT CHARGEABLE TO INSURER. A delay of two weeks by a medical examiner in reporting to a life insurance company a material answer omitted from his report of the medical examination, where there was no delay on his part in transmitting the report itself when prepared, *held* not chargeable to the insurance company under the facts stated in the opinion.

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

Elmer E. Ross, for appellant.

Peterson & Devoe, contra.

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

ROSE, J.

This is an action against a life insurance company to recover $1,000 in damages for negligence in preparing, examining and approving an application for life insurance in the sum of $1,000, after receiving an annual premium, and in failing to issue and deliver a policy. Melvin A. Strand of Shelby, Nebraska, was the applicant. He died without procuring the insurance. As administrator of his estate, his father, Oscar Strand, is plaintiff. The Bankers Life Insurance Company is defendant. Its home office is in Lincoln, Nebraska. In an answer, defendant demurred to the petition, pleaded a return of the premium and denied the negligence charged by plaintiff. A trial of the issues resulted in a peremptory instruction in favor of defendant. Upon the jury's verdict thus directed the action was dismissed. Plaintiff has appealed.

Did the trial court err in directing a verdict against plaintiff? In a blank form furnished by defendant, Melvin A. Strand applied for a 20-payment life insurance policy for $1,000, naming his father, Oscar Strand, as beneficiary. The application was procured by W. L. Mosgrove, soliciting agent, and was written by A. I. Scott, agent at Shelby. The medical examination of applicant, after a delay on his part,

was conducted by Dr. L. Myers, examining physician at that place. It was the duty of Myers to ask questions as they appeared in a printed form drafted by defendant and to insert therein the answers of the applicant. An answer to one of the questions, however, was never inserted in the medical report. That question was: "Have you ever had inflammatory rheumatism?" The applicant signed both the application for insurance and the report of the medical examination, and they were forwarded to and received at the home office of defendant without delay. The first annual premium was $29.02 and it was promptly paid to and accepted conditionally by Mosgrove, who issued and delivered a receipt of which the following is a copy:

"Conditional Receipt.

"Received at Shelby, State of Nebr., this 23d day of Nov. 1923, of Melvin A. Strand the sum of twenty-nine and 2/100 dollars, in payment of premium upon $1,000 policy which he has this day applied for to the Old Line Bankers Life Insurance Company, of Lincoln, Nebraska.

"The applicant agrees to submit to such medical examination as the company may require by an examiner approved by the company. Upon such examination, if application is approved, policy shall issue. If disapproved, said payment is to be returned to the applicant. It is expressly agreed that a refusal by the applicant to submit to a medical examination shall forfeit the payment herein to the company. Policy to date at issue unless the insurance age has changed, in which event it shall date back within the age limit for which premium is paid. It is understood and agreed that all the premiums are due in advance and payable in cash; therefore, when notes are taken by the agent as an accommodation to the party insured, any refusal afterwards to accept the policy, or any tender of said policy back to the company or to an agent, will not in any wise release the party insured from liability on said notes.

"Melvin A. Strand, Applicant. W. L. Mosgrove, Agent."

The question unanswered in the report of the medical ex-

amination resulted in further inquiry by defendant and in consequent delay. In the meantime the applicant went to a hospital, submitted to an operation for appendicitis, and died. The negotiating parties did not enter into a contract of insurance and the policy was never delivered, though the applicant was insurable when examined. The premium was returned to Oscar Strand, father of the applicant. From the undisputed facts there is a logical inference that the policy would have been issued and delivered except for the omission and delay mentioned. The record presents this difficult question: Was there actionable negligence in the failure of defendant to perform a duty owing to applicant?

For the sake of brevity the chronology of events in 1923 is indicated thus: November 23, application drawn and signed, premium paid and the conditional receipt issued; November 24, application received at home office of defendant; November 29, Mosgrove instructed by defendant to urge prompt examination of applicant; November 30, applicant reminded that a report of his medical examination had not been received; December 6, medical examination; December 7, report of medical examination received at home office; December 10, Myers directed by letter from defendant to procure the answer omitted from the report of the medical examination; December 17, additional demand by defendant on Myers for the omitted answer; December 21, Scott inquired about the fate of the application; December 22, illness of applicant; December 23, applicant taken to hospital and operation for appendicitis performed; December 24, Scott advised by mail that the application was held up at the home office "pending the completion of the medical report," and he was directed to see Myers and urge him to complete it; December 28, Myers, without further questioning of applicant, wrote in a separate document the answer "none" to the question, "Have you ever had inflammatory rheumatism?" December 26, applicant died; December 27, application approved; December 28, undelivered policy prepared.

Plaintiff did not attempt to plead a cause of action for in-

surance, but confined his remedy to damages for negligence. An action based on negligent failure of a life insurance company to act promptly on an application for insurance after a conditional payment of the premium is comparatively new in the law of insurance. There is a diversity of opinion on the subject. In *National Union Fire Ins. Co. v. School District,* 122 Ark. 179, L. R. A. 1916D, 238, the opinion contains the following:

"The better reason and the decided weight of authority supports the doctrine that mere delay in passing upon an application for insurance cannot be construed as accepting such application and consenting to be bound for the insurance sought by it, nor can a cause of action for negligence be grounded upon such delay."

Interstate Business Men's Ass'n v. Nichols, 143 Ark. 369, seems to be a case of like import. Judge Cornish took the same view in *Meyer v. Central States Life Ins. Co.,* 103 Neb. 640, 644.

On the contrary, a right of action for negligence in failing to act promptly on an application for insurance has been recognized by some of the courts of last resort. *Wilken v. Capital Fire Ins. Co.,* 99 Neb. 828; *Duffie v. Bankers Life Ass'n,* 160 Ia. 19; *Johnson v. Farmers Ins. Co.,* 184 Ia. 630; *Boyer v. State Farmers Mutual Hail Ins. Co,* 86 Kan. 442. Cases on both sides of the question are discussed by the supreme court of Illinois in an opinion reported and annotated in 15 A. L. R. 1021, under the title of *Bradley v. Federal Life Ins. Co.* The case is reported also in 295 Ill. 381.

The view that there is a remedy based on negligence seems to be founded on reason and justice. The receipt in the present case shows on its face that the insurance company, without assuming any insurance risk, accepted conditionally the first annual premium. The transaction makes the insurance company applicant's trustee for the return of the premium if the application is rejected and for the unconditional acceptance of the premium if the application is approved and the policy delivered. In connection with

the application the receipt implies time for a proper investigation of the risk under consideration. Good faith and fairness of both parties are required in negotiations for insurance. The retaining of the money of the applicant beyond a reasonable time would deprive him of its possession and use during the delay. The use of money or interest thereon is a valuable right. Negligent or inexcusable delay on the part of a trustee is a wrong, if it deprives the beneficiary of the use of a trust fund which has served its purpose as such. The receipt, the application and the report of the examining physician imply a duty on the part of the insurance company to act on the proposed risk within a reasonable time under the circumstances surrounding the negotiations. In addition, an unreasonable delay and the retention of an unearned premium might deprive an insurable applicant of an opportunity to apply elsewhere for and to procure life insurance. Furthermore, an insurance company transacts business under a charter from the state. It is now recognized that insurance is affected with a public interest. It is regulated by the government for the protection of the insuring public. The privilege of an insurable person to apply to a licensed insurer for insurance is a vital feature of domestic life as well as of the industrial world. The possession of a premium held by an insurance company as a trust fund, without any obligation for insurance prior to the issuance and delivery of a policy, imposes the duty of acting on the application within a reasonable time. The conclusion therefore is that there is a remedy in the form of an action in tort for an unnecessary and negligent delay in performing such a duty, if it prevents an insurable applicant from procuring a policy which he would otherwise have received, thus causing a loss.

Is the evidence on the issue of actionable negligence sufficient to sustain a verdict in favor of plaintiff? The applicant bound himself by an agreement that there should be no contract of insurance except upon issuance and delivery of a policy to him while in good health. Under the terms of the receipt, defendant was required to return the pre-

mium upon the disapproval of the application, but, if approved, the policy was to date at issue. Referring to 1923, the application was dated November 23 and the applicant was not in good health after December 22. If therefore there was an unreasonable delay, it occurred between those dates. The applicant did not present himself for the medical examination until December 6. Prior thereto he alone was responsible for delay. Alleged negligence was consequently limited to the time between the date of the examination, December 6, and December 22, when the applicant lost his good health and with it his insurability. In the ordinary course of defendant's business the policy might have been issued within three days from the date of the examination, December 6, or on December 9, had the report of the medical examination been full, complete and true. Did evidence of mere delay for the length of time between December 9 and December 22, nearly two weeks, prove actionable negligence?

Defendant at its home office approves or rejects applications. Neither the soliciting agent nor the medical examiner had authority to contract for insurance. When the applicant died defendant did not have the information essential to the approval of the application. The omitted answer to the inquiry about rheumatism had not been received at the home office. It was material to the risk. The parties to the lawsuit so stipulated. There is no evidence of fraud or deceit on the part of any one connected with the negotiations or transactions. The circumstances indicate the good faith of the applicant, the defendant, the agents and the physician. Defendant twice demanded of Myers an answer to the question relating to rheumatism. No one else was authorized to reduce answers of the applicant to writing. The examiner's report signed by both applicant and physician declared on its face in plain type: "The medical examiner will invariably give the answers in his own handwriting." Requests for the omitted answer were properly directed to him. In the application applicant represented the medical report "to be full, complete and true."

The physician represented both applicant and defendant for purposes of the data essential to underwriting. There was no delay in transmitting the medical examiner's report itself. By mere error or oversight one material answer in a long list of questions was not inserted. Negotiating parties in the ordinary affairs of life do not measure each other according to the standard of infallibility—an attribute of Omnipotence. In an action against a physician for negligence in the performance of professional duties, though involving human life, he is not answerable for a higher degree of skill than that ordinarily possessed by members of his profession generally. In his capacity as medical examiner of an applicant for insurance his responsibility is no greater. By exacting in advance an agreement that there should be no contract of insurance prior to the issuance and delivery of a policy, defendant guarded against the creation of a pecuniary liability before expiration of the reasonable time required for ascertainment of material facts in the usual course of its insurance business. While diligently seeking in good faith for two weeks the necessary information through the regular channels in the usual manner, defendant was not liable for negligence. *Evans v. International Life Ins. Co.*, 112 Kan. 264.

In *Duffie v. Bankers Life Ass'n*, 160 Ia. 19, and in *Wilken v. Capital Fire Ins. Co.*, 99 Neb. 828, cited by plaintiff, the information essential to the assuming of the risk was fully disclosed by the application or other documents when executed. There was no error requiring further time for examination and correction as in the present case. Such a difference was noted in *Page v. National Automobile Ins. Co.*, 109 Neb. 127.

An earnest argument was directed to the propositions that the examining physician was negligent in omitting an answer to the question relating to rheumatism and in failing to report the answer later when requested by letter to do so, and that this negligence was attributable to defendant and prevented the delivery of a policy while applicant was in good health. The physician was employed by defendant

in a limited capacity. There was no evidence of negligence in his employment. He was engaged in the general practice of medicine. The examination of an applicant for insurance was an incident of his professional duties. His practice took him away from his office. He was busy during the time in question. He did not keep clerical help. When asked for a reason for his failure to answer promptly the first letter inquiring for the omitted information, he testified: "There is no reason that I can recollect at this time except that I was busy." He said that the letter might have been misplaced and that he thought he had answered it. The physician was employed for the mutual convenience of applicant and insurer. He acted for both in conducting the examination. He did not devote all his time to defendant's business. The negotiations between applicant and defendant were conducted in view of the surrounding circumstances. Necessary information was contemplated by both as a condition of incurring an insurable risk. Time for checking and correcting errors was implied by the receipt for the premium, the application and the physician's report —documents signed by the applicant himself. In absence of fraud or deceit, mere failure to insert in the report of the medical examination an answer to a material question and delay of nearly two weeks in answering the letter of inquiry did not necessarily create in tort a liability equivalent to a contract of insurance. The applicant, over his own signature, represented the report of the examining physician "to be full, complete and true." He signed the report and had an opportunity to see that his own answers were properly reduced to writing. The report was not accepted as originally prepared. The error was discovered but never ratified. Defendant, while seeking in good faith without unnecessary delay the omitted information, was not chargeable with the alleged negligence imputed by plaintiff to the examining physician. *Evans v. International Life Ins. Co.*, 122 Kan. 264. It follows that actionable negligence was

not shown and that the district court did not err in directing a verdict in favor of defendant.

AFFIRMED.

Note—See Insurance, 32 C. J. 981 n. 90, 1106 n. 42, 45 new; 36 L. R. A. (N. S.) 1211, 51 L. R. A. (N. S.) 873; 4 R. C. L. Supp. 928, 5 id. 785, 6 id. 838.

DAVID O. BROWN V. STATE OF NEBRASKA.

FILED MARCH 25, 1927. No. 25603.

1. **Criminal Law**: COMPLAINT: SEPARATE COUNTS: POWER OF JUSTICE OF PEACE. Section 18, art. V of the Constitution, provides: "No justice of the peace shall have jurisdiction in any civil case where the amount in controversy shall exceed two hundred dollars; nor in a criminal case where the punishment may exceed three months imprisonment, and a fine of over one hundred dollars, or both." Examined in connection with section 3278, Comp. St. 1922, which provides, among other things, in substance, that separate offenses may be set out in separate counts of the complaint and that judgment may be rendered upon each count; and examined, also, in connection with section 1, ch. 57, Laws 1925, which provides, in substance, that magistrates shall have concurrent jurisdiction with the district court and coextensive with their respective counties, in criminal cases, where the punishment does not exceed three months imprisonment and a fine of $100, *held*, that a number of separate violations of the liquor laws may be set out in distinct counts of a complaint, and where the defendant is found guilty upon separate counts of the complaint, it is within the jurisdiction of the justice of the peace to impose a penalty within the limit of his jurisdiction upon each count of the complaint upon which the defendant is found guilty.
2. ———: POWER OF JUSTICE OF THE PEACE. The term, "in a criminal case," in section 18, art. V, of the Constitution, in connection with the jurisdiction of a justice of the peace, is used in the sense and refers to a single violation of the law.

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

Edward F. Hannon and *Prince & Prince*, for plaintiff in error.

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

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

DAY, J.

This case is before us on a petition in error brought by David O. Brown, defendant, to review a judgment of the district court for Custer county, affirming a judgment of a justice of the peace, wherein the defendant was convicted upon several counts of the complaint and sentenced to serve a term in jail and pay a fine for violating the liquor laws of the state.

Complaint was filed before the justice of the peace, charging the defendant in eight separate counts with having violated the liquor laws of the state. Each count charged a separate offense. In the same complaint a count was filed against a Ford automobile which was specifically described. On the trial before the justice, defendant was found guilty upon counts 1, 3, 4, 6, 7, and 8 of the complaint, and not guilty upon the second and fifth counts. The justice also found that the Ford automobile was a common nuisance, and ordered the same confiscated and sold at public auction to the highest cash bidder, and the proceeds of the sale placed to the credit of the school fund of Custer county.

Upon count 1, defendant was sentenced to jail for a period of 90 days. Upon counts 3, 4, 6, and 7, defendant was fined $100 on each count and sentenced to serve a term in jail of 90 days on each count. On count 8, defendant was sentenced to 60 days in jail. The justice also adjudged that the sentence on the counts upon which defendant was found guilty should run consecutively. The result of the judgment imposed by the justice in the aggregate would require the defendant to serve 510 days in the county jail, pay a fine of $400, and suffer confiscation of the automobile. For reasons unexplained, defendant was not represented at the trial before the justice of the peace.

From the judgment entered by the justice of the peace,

defendant attempted to appeal to the district court; but, owing to some defect in the procedure, he voluntarily dismissed the appeal and brought the case to the district court on error. He filed a transcript of the proceedings before the justice, but had no bill of exceptions. Defendant contends that the justice of the peace had no jurisdiction to impose a jail sentence in excess of 90 days, nor to impose a fine in excess of $100. He also argues that on the face of the record the alleged offenses arose out of the same transaction, that but one offense was charged, and that but one penalty should have been exacted.

As to the objection that the several counts arose out of the same transaction, there is nothing in the record to sustain this contention. It is true that the counts set forth in the complaint charge that the offenses were committed "on or about the 5th of February." But, under an allegation of this character, an offense which has been committed at any time prior to the date alleged and within the statute of limitations might be the subject of that particular count. We have examined the different counts of the complaint and each charges a separate offense under the liquor laws of the state. Whether any of these constitute the same transaction can only be determined by the facts which, as before stated, are not before us.

Before the enactment of section 3278, Comp. St. 1922, it had been long the settled practice in this state that, in misdemeanor cases, separate offenses of the same nature might be joined in an information and the defendant tried on all of them at the same time. In *Burrell v. State,* 25 Neb. 581, defendant was charged in 17 counts with violation of the liquor laws of the state, each of the counts charging a separate misdemeanor. He was convicted on 16 of the counts and adjudged to pay a fine of $1,525 and costs. In that case it was held: "In the case of misdemeanor several distinct offenses of the same kind may be joined in the same indictment." It was also held that separate sentence should be passed on each count of the indictment upon which defendant is found guilty. The same principle was announced in

Little v. State, 60 Neb. 749, *McArthur v. State*, 60 Neb. 390, and *Haarmann v. State*, 111 Neb. 790.

The rule is well established that, where a defendant has been convicted at the same term of court of several distinct offenses, each punishable by imprisonment in the penitentiary, whether charged in separate informations or in separate counts of the same information, the court may impose a separate sentence for each offense of which the accused has been found guilty.

"In such case, the judgment should not fix the day on which each successive term of imprisonment should begin, but should simply direct that each successive term should commence at the expiration of the one imposed by the previous sentence." *In re Walsh*, 37 Neb. 454.

In *Nichols v. State*, 49 Neb. 777, it was held: "Where an information contains different counts, each charging the defendant with the sale of intoxicating liquors in violation of section 11, ch. 50, Comp. St. 1895, and he is found guilty under several counts, the punishment is not to be aggregated so as to make a single or entire punishment for all of the offenses, but a separate sentence is to be imposed for each conviction, the same as though all such offenses were charged in separate informations and at different times."

As bearing on the same general question, see *Hans v. State*, 50 Neb. 150, *White v. State*, 88 Neb. 177, and *State v. Denhardt*, 129 Ia. 135.

In *Haarmann v. State*, 111 Neb. 790: "Defendant was charged in one count of an information with unlawful possession of intoxicating liquor, and in another count with unlawful transportation of intoxicating liquor. He was convicted and fined on both counts. The evidence showed that after the act of transportation had ceased defendant was in possession of the liquor. Two separate crimes were committed and there was no error in joining the counts or in trying defendant on both counts at the same trial."

The cases heretofore cited have come from judgments in courts of general jurisdiction, and the question arises whether the rules of practice applicable in the district court

should be applied in the justice courts within their jurisdiction. Section 3278, Comp. St. 1922, in so far as applicable to the question now being considered, reads as follows: "In any indictment, information, complaint or affidavit, against any one or more individuals charging the violation of any of the provisions of this act, separate offenses may be set out in separate counts, and any and all offenses hereunder may be joined in the same indictment, information, complaint or affidavit, and the accused may be prosecuted and convicted upon all or any of said counts so joined the same as upon separate indictments, information, complaint or affidavits, and judgment may be rendered on each count upon which there is a conviction."

That this section of the statute refers to proceedings in all courts having jurisdiction of the subject matter seems to be free from doubt, and that it includes within its operation justices of the peace is equally clear. Section 18, art. V of the Constitution, provides: "No justice of the peace shall have jurisdiction in any civil case where the amount in controversy shall exceed two hundred dollars; nor in a criminal case where the punishment may exceed three months imprisonment, and fine of over one hundred dollars, or both." Section 1, ch. 57, Laws 1925, provides: "Magistrates shall have jurisdiction concurrent with the district court and coextensive with their respective counties, in all criminal cases where the punishment cannot exceed three months imprisonment, and a fine of one hundred dollars, or both, except as otherwise provided by law." The term "in a criminal case" in section 18, art. V of the Constitution, in connection with the jurisdiction of a justice of the peace, is used in the sense and refers to a single violation of the law. While the decisions are not uniform, there is abundant authority supporting the rule that, "Where there are separate causes of action upon distinct contracts, each for a sum within the justice's jurisdiction, they may be joined in one action although the aggregate amount exceeds the jurisdiction." 35 C. J. 522, sec. 90. The rule is otherwise, however, where several demands arise out of the same trans-

action and constitute but a single cause of action. In such cases the aggregate fixes the justice's jurisdiction. 35 C. J. 522, sec. 90, and cases cited. By analogy, it would seem that the same rule would apply in criminal cases.

There can be no doubt that, if separate complaints had been filed against defendant, charging the offenses set out in the several counts of the complaint, the defendant could have been tried on each complaint, and, if found guilty, punishment could have been imposed upon each of the offenses to the limit fixed by law. Does it militate against this rule that the several offenses were set out in different counts of the same complaint? We think not. The purpose of the statute in permitting several offenses of the same general character to be set out in different counts of the same complaint was to facilitate prosecution and avoid the necessity of filing a number of complaints, and to save time and expense of numerous trials. Each count being a separate offense, it was within the power of the justice to impose a penalty upon each offense upon which defendant was found guilty, provided, of course, that the punishment imposed on each offense did not exceed the jurisdiction of the court. The mere fact that the aggregate of the punishment inflicted is in excess of what the court could impose for a single violation does not violate the provision of the Constitution and render the judgment void. The judgment, confiscating the car, is in harmony with our decision in *Walker v. State,* 113 Neb. 19.

From what has been said, it follows that the district court committed no error in affirming the judgment of the justice of the peace.

AFFIRMED.

Note—See Criminal Law, 16 C. J. 157 n. 50—Justices of the Peace, 35 C. J. 522 n. 24, 26.

WILLIAM M. FRASIER, APPELLANT, V. DUNDY COUNTY, APPELLEE.

FILED MARCH 25, 1927. No. 24840.

Officers: COMPENSATION. A public officer, holding office created by statute, must perform every service required of him by law, and he must look to the statute for his compensation. If it provides none, then the services are gratuitous.

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

Lehman & Swanson and *Victor Westermark,* for appellant.

R. D. Druliner and *Scott & Scott, contra.*

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

GOOD, J.

In this action plaintiff seeks to recover the sum of $812.50, alleged to be due him for salary as acting county judge of Dundy county, for a period of six and one-half months. Defendant answered, admitting that plaintiff had been duly appointed and qualified as acting county judge, and had performed the duties of the office for the period alleged; and for a defense alleged that the full amount of the salary of the county judge for the first six months of the period had been paid to Judge Hamilton, the regularly elected and qualified county judge of the county, and further alleged that there was no provision of the statutes of Nebraska for the payment of salary to an acting county judge, who performs the duties of said office during the disability of the regularly elected and qualified county judge, and that because thereof there is no authority for allowing any salary to plaintiff in this case. A trial to the court resulted in a finding and judgment for plaintiff in the sum of $62.50 only. Plaintiff appeals.

The following pertinent facts appear from the record.

One Hamilton was the duly elected and qualified county judge of Dundy county. He became ill and it was necessary to appoint some person as an acting county judge, to perform the duties of the office. Plaintiff was appointed, qualified and performed the duties of the office for a period of six and one-half months. At the end of six months Judge Hamilton died, and plaintiff performed the duties of the office for one-half month thereafter. The salary of the office was paid to Judge Hamilton up to the time of his death. The trial court allowed plaintiff to recover the salary for a period of one-half month that he served after the death of Judge Hamilton. From this allowance the county has not appealed, and the question of whether or not that amount should have been allowed is not before us for decision.

The only error assigned and relied upon in this court is that the judgment is contrary to law. Section 1158, Comp. St. 1922, authorizes the county board to appoint a competent, disinterested person to act in the place of a county judge, if for any reason he is temporarily disqualified from acting in any cause, or is prevented, by sickness or absence, from performing the duties of his office, and further provides that the board in its discretion may make a single order, appointing such person to act in the place of the county judge during all of such absences and disqualifications during his term of office. Said section further provides that the person so appointed shall give bond in the same manner, possess the same powers, and be subject to the same duties, restrictions and liabilities that are prescribed by law respecting county judges, but nowhere provides for any compensation or salary for the person filling the position of acting county judge. It is conceded that the regular salary of the county judge of Dundy county is $1,500 per annum, payable monthly.

Plaintiff argues that, because the statute confers upon an acting county judge the same powers and imposes the same duties and obligations as are imposed upon the regularly elected county judge, the former is entitled to draw the

salary as judge, and that the county board should not have paid the salary to Judge Hamilton during the time that he was not performing the duties of the office and while the plaintiff was filling the position of acting county judge, and that such salary should have been paid to plaintiff.

Whether the regularly elected county judge was entitled to collect the salary during the time of his disability, caused by sickness, we think it unnecessary to decide. If plaintiff is entitled to collect the salary of the county judge, it would be no defense that the county had paid it to some other person. It may be observed that there is abundant authority which holds that the right to a salary attaches to and follows the legal title to the office, regardless of who actually performs the duties, and the fact that the regularly elected officer has not performed the duties of the office does not deprive him of the right to the legal compensation therefor. See *McGillic v. Corby*, 37 Mont. 249; *People v. Bradford*, 267 Ill. 486; *Ward v. Marshall*, 96 Cal. 155; *Bates v. City of St. Louis*, 153 Mo. 18; 29 Cyc. 1422. The authorities also generally hold that the performance of the duties by a *de facto* incumbent gives him no claim to the official compensation. *McGillic v. Corby, supra;* 22 R. C. L. 531, sec. 226; 29 Cyc. 1392, 1422. The rule is firmly established that a public officer, holding office created by statute, must perform every service required of him by law, and he must look to the statute for his compensation. If it provides none, then the services are gratuitous. *Nuckolls County v. Peebler*, 65 Neb. 356; *State v. Meserve*, 58 Neb. 451; *Bayha v. Webster County*, 18 Neb. 131; *State v. Silver*, 9 Neb. 85.

Applying this rule to the facts as disclosed by the record makes it too plain to admit of argument that plaintiff is not entitled to recover any compensation. It is possible that the legislature, in providing for the office of acting county judge, did not anticipate such an extended service as was performed by the plaintiff in this case. It may be that it had in mind a very short period of temporary disability, or where the county judge was disqualified from acting in a particular case. It may also be that it was an

oversight that the legislature failed to provide any compensation for an acting county judge. Be that as it may, in the absence of any statute authorizing it, the court is powerless to award compensation or salary to one performing the duties of an acting county judge.

The judgment of the district court in disallowing the plaintiff any salary for the six months' period, during which Judge Hamilton lived, is in accordance with law, and is therefore

AFFIRMED.

Note—See Officers, 29 Cyc. 1393 n. 73, 1422 n. 30, 1423 n. 31; 22 R. C. L. 531, 6 R. C. L. Supp. 1332.

AARON S. CRISLER, APPELLANT, V. JOSEPH M. CRUM ET AL., APPELLEES.

FILED MARCH 25, 1927. No. 25706.

1. **Associations:** LABOR UNIONS: RULES AND TRIBUNALS. A labor union, organized as a voluntary, unincorporated association, may lawfully adopt rules for the government of its members and provide tribunals within the association to determine controversies between the members or local divisions or lodges of the association, provided such rules are reasonable and uniform and do not contravene the laws of the land or offend public policy.
2. ———: ———: INTERNAL CONTROVERSIES: REMEDY. Members of a labor union, organized as a voluntary, unincorporated association, are bound by and required to observe a law of the association which requires that a member shall exhaust his remedies within the association before appealing to the civil courts in any case of controversy arising within the association and for which the laws of the association provide means for adjudication and settlement.
3. ———: ———: ———: ———. It is a general rule of equity that, when a member of a voluntary, unincorporated association is aggrieved or feels injured by any action taken by the officers or committees of the association, within the scope of their authority and pertaining to its affairs, and where the laws and rules of the association provide a means of redress, he should first exhaust the remedies provided by the laws and rules of the association before applying to the civil courts.

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

C. C. Flansburg, for appellant.

Wright & Thummell and *H. E. Kuppinger, contra.*

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

GOOD, J.

Plaintiff is a locomotive engineer in the employ of the Chicago, Burlington & Quincy Railroad Company and is a member of the Brotherhood of Locomotive Engineers. He brought this action to enjoin the defendants, as officers of said brotherhood, from interfering with his seniority rights as an engineer and other vested rights of employment; to compel defendants to revoke and rescind orders by them made, which he claims had the effect of reducing his rank and pay as an engineer; to compel defendants to restore him to his former place and seniority as an engineer, and to remove defendant Crum from working as an engineer in the Wymore division of said railway company.

Defendants answered, admitting the making of the rules and orders complained of, but alleged that they were made with full authority and in accordance with the constitution, rules and regulations of the said brotherhood. A trial resulted in a decree for defendants. Plaintiff appeals.

There is practically no dispute as to the facts. From the record it appears that the Chicago, Burlington & Quincy Railroad Company, hereinafter called the Burlington railroad, bargains and contracts with the Brotherhood of Locomotive Engineers, hereinafter called the brotherhood, for engineers to man the trains of its railway system. Contracts are made between the officers of the brotherhood and the railway system which fix the rates of pay and conditions of employment, which are valid for one year, and continue in force until another contract is entered into, or until one party to the contract gives 30 days' notice of intention to

terminate it. Pursuant to one of these contracts, plaintiff was employed as an engineer on the Burlington railroad.

The brotherhood is a voluntary, unincorporated association. Its general purpose is to combine the interests of locomotive engineers, promote their welfare and working conditions, and for other purposes, not necessary to enumerate. The brotherhood has a very elaborate system of laws, composed of a constitution, statute, and rules, regulating its affairs in almost every particular. Under its plan of organization, the supreme governing body is known as the Grand International Division of the Brotherhood of Locomotive Engineers, and will be hereinafter referred to as the grand division. This body is composed of officers of the grand division and delegates selected by and representing local divisions. It meets triennially in the city of Cleveland, Ohio. It is the supreme law-making body of the brotherhood. Its principal officer is the grand chief engineer, and his decisions have the force and effect of law and are binding unless and until reversed by an appeal to the grand division. The brotherhood is subdivided into lodges, called divisions. Each division corresponds very closely to a division of the railway system with which it contracts. The local lodge or division is empowered to select a committee of adjustment, which has power to pass upon and adjust differences between the members of the local lodge or division. The scheme of government further provides for general committees of adjustment, there being one of such committees for each railway system contracting with the brotherhood. The general committees of adjustment are given powers to contract with the railway system for employment of engineers, fixing the rights, rates of pay, conditions of employment, and other matters. These committees also have power to make rules, not inconsistent with the laws or rules of the grand division, for the government of certain affairs of the brotherhood, pertaining to the engineers of the particular railway system. These committees are given power to settle all questions in dispute as to seniority and rights to runs, or jurisdiction of territory,

between the members and divisions of the particular system of railways. If any one is aggrieved over the decision upon any controversy submitted to these committees, there is a provision for an appeal from the decision to the members of the brotherhood of the particular railway sytem. In the interim between meetings of the committee the chairman thereof has the same powers as the committee. The grand division has jurisdiction over all subjects pertaining to the brotherhood, and its enactments and decisions are the supreme law of the brotherhood.

The engineers of a local division of the brotherhood operate and man the trains of a corresponding division of the railway system, by which they are employed. The engineers of each local division are classified. The first class has what are known as assigned runs. Assigned runs are those held by an assemblage of engineers assigned to leave a terminal at a regular, specified time, to arrive back to the terminal at a regular time, with regular days of leaving and arriving. The second class is known as the pool, which is an assemblage of engineers assigned to irregular freight service, whose duties require them, under the rule, to run "first in and first out." The third class is called the extra board, which is an assemblage of engineers at a division point, to fill vacancies caused by engineers laying off for sickness or anything that would require an engineer, either in the pool or on an assigned run, to leave his run for any purpose, so that an extra engineer would be necessary to fill the temporary vacancy. The members of the extra board might be properly termed substitutes. Each engineer whether on an assigned run, a member of the pool, or of the extra board, has the right to select his runs according to seniority. By seniority is meant a right vested in engineers by a period of service in the division of which the engineer is a member. The engineer longest in the service at that division has first place, and the one next longest the second place, and so on. This right of seniority is recognized by the brotherhood and the railway companies and is a valuable right of the engineer.

The Burlington railroad has one division known as the St. Joseph division which operates trains out of the city of St. Joseph, Missouri. These trains run over tracks from St. Joseph, north through Napier, Missouri, to Council Bluffs and Omaha. It has another division known as the Wymore division, located at Wymore, Nebraska, and from this point trains are operated between Wymore and St. Joseph, and also between Lincoln, Nebraska, and St. Joseph, both by way of Napier. Both of these trains run over the track between Napier and St. Joseph, which is a part of the St. Joseph division. There is a local lodge or division of the brotherhood located at St. Joseph, known as No. 107, and another lodge or division, known as No. 621, located at Wymore. The Burlington tracks between Wymore and Napier and between Lincoln and Napier are within the Wymore division. The engineers of the St. Joseph division of the brotherhood operate and man the trains running over the St. Joseph division, while those at Wymore operate and run the trains in the Wymore division. It appears that sometimes, where a track is used by two or more divisions, it is what is known as a joint track and constitutes a part of each of the divisions operating over it. But where there is not a joint track, and the trains of one division run over a part of the track of another division, the brotherhood of the latter division is given the right to supply a proportionate part of the engineers to man the trains which run, in part, over the two divisions, the proportion being based on the number of miles of the runs within each division.

This condition gave rise to a controversy between the Wymore division and St. Joseph division of the brotherhood. The matter was taken to the general committee of the brotherhood for the Burlington system, and appealed to the grand chief engineer, and finally to the grand division, where, in 1912, the decision of the grand chief engineer, ruling that the Wymore division was entitled to man exclusively the trains running between Lincoln and St. Joseph and between Wymore and St. Joseph, was sustained. Several years later the general committee of the brother-

hood for the Burlington railroad adopted a rule which provided that in such a situation each of the divisions should be entitled to furnish engineers to man such trains in the proportion of the mileage that such trains ran in each division, but no attempt was made to put this rule into force, as between the Wymore and St. Joseph divisions, until the grand division had acted and again referred the question back to the general committee for adjustment. This was done in 1921. When the matter was called to the attention of the grand chief engineer, he at first declined to consider the question, on the theory that it had been previously settled, in 1912. An appeal was taken from the grand chief to the grand division in triennial session, which at first sustained the ruling of the grand chief, but later rescinded and referred the entire matter back to the general committee of the brotherhood for the Burlington system. Pursuant to the rule previously adopted by the general committee, it assigned to the St. Joseph division of the brotherhood a proportion of the engineers operating trains which ran over the two divisions. This resulted in displacing some of the engineers of the Wymore division, and each engineer in the latter division was affected, because it reduced the number of runs which the Wymore division could man or operate, and by reason thereof some of the engineers on assigned runs in the Wymore division were forced back into the pool, and some of the pool engineers were forced back to the extra board, and their wages greatly diminished.

Plaintiff contends that his seniority is a property right and has been invaded and wrongfully destroyed by the actions of defendants; that the action of the grand division, in 1921, in referring back to the general committee for adjustment the controversy between the St. Joseph and Wymore divisions of the brotherhood was irregular and void; that the action of the general committee was without authority and void; that such action has deprived plaintiff of his seniority right as an engineer and reduced his rank and greatly diminished his wage as an engineer.

For the purposes of this case it may be conceded, with-

out deciding, that plaintiff's right of seniority as an engineer is a property right, and that it may not be wrongfully divested or interfered with by another. We think it is unnecessary, for a determination of this case, to decide whether the action of the grand division, in referring the controversy back to the general committee, was valid. The action of which plaintiff complains was not the action of the grand division, but resulted from the action of the general committee, and it is pertinent to determine whether the action of the committee was within its power, and whether the action of such committee operated to destroy or affect plaintiff's right to seniority.

Does the record show that plaintiff's seniority right has been interfered with or destroyed? Plaintiff's seniority pertains to the Wymore division of the brotherhood only. A roster of the engineers of that division is maintained. The oldest engineer in point of service in that division is entitled to the first place on the roster; the next oldest in service, to second place, and so on; and the engineers on the roster, other things being equal, are entitled in their order to select runs, or, in other words, entitled to choice of runs, in accordance with their rank on the roster. Plaintiff still maintains his position on the Wymore roster of engineers as he did before; his relative position thereon has not been changed, so that, strictly speaking, his right of seniority has been neither interfered with nor destroyed. But it is true that by the action of the general committee some of the runs, which prior to its action were manned by the Wymore division, are now manned by the St. Joseph division. This results in displacing a number of the engineers on the Wymore division and giving their places to the St. Joseph division. This necessarily leaves fewer positions as engineers, open to the Wymore division, from which to select. Since the older members in point of service are entitled to selection, it follows that the younger or junior members of the roster will be forced down the line in the runs that are available to them. It results in retiring some of the engineers from the assigned runs to the pool and will, perhaps,

force some of the members of the pool back to the extra board.

The next question for determination is: Was the general committee authorized to act in the premises and to award to the St. Joseph division the right to furnish a part of the engineers to man the runs on trains between St. Joseph and Lincoln and between St. Joseph and Wymore, which operated by way of Napier? By reference to the laws of the brotherhood, as disclosed by the record, it appears that the general committee is vested with power to adjudicate and determine, as between divisions of the brotherhood, the rights of each division to man or operate the runs known as interdivisional runs, and it further appears from the evidence that the runs between St. Joseph and Lincoln and between St. Joseph and Wymore by way of Napier are interdivisional runs. It follows therefore that the general committee had power to pass upon and adjudicate the question.

It further appears that there is what is called a joint track, being a railroad track used by two divisions jointly, and over which each division runs trains; that, the track being a part of each division, neither division has any right to furnish engineers except to man the trains of its own division. Plaintiff contends that the track from Napier to St. Joseph is, in fact, a joint track and is therefore within both the Wymore and St. Joseph divisions. It is possible that this may have been the case when the grand chief and the grand division in 1912 made the ruling that the Wymore division was entitled to man all the runs and furnish all the engineers for the runs between St. Joseph and Lincoln and between St. Joseph and Wymore, which run over the track between Napier and St. Joseph; but in this case it appears from the record that the parties have stipulated that the track from St. Joseph to Napier is within and a part of the St. Joseph division. In his brief plaintiff so admits. This being true, it is apparent that his position, that the track between St. Joseph and Napier is a joint track, is not well founded.

The record discloses that the general committees are

authorized to adopt rules to regulate and control the matters of the brotherhood which are, by general laws of the brotherhood, committed to the general committees, provided that the rules so adopted do not violate or transgress the laws of the grand division. It is also disclosed that the general committee of the brotherhood for the Burlington system, pursuant to authority in it vested, did, in 1919, adopt a rule which would be applicable to the brotherhood employed by the Burlington system, of which the following is a copy: "When crews run on or over two or more seniority divisions, the assignments shall be made on basis of percentage of miles run on each division." It was pursuant to this rule, duly adopted, that the general committee decided that the St. Joseph division was entitled to furnish a proportion of the engineers for the runs between St. Joseph and Wymore and between St. Joseph and Lincoln. For aught that appears, it seems that the decision of the general committee was in accordance with the rule, and also in accordance with the general rules and laws of the supreme governing body of the brotherhood; but whether any error was made in the ruling it is unnecessary to decide. The laws of the brotherhood provide for an appeal, in matters of this character, from the general committee. If either party to a decision is aggrieved, he may first appeal to the membership of the brotherhood, which operates on the Burlington system, and there is a further provision that an appeal may be taken on questions of law to the grand chief engineer, and from his decision an appeal lies to the grand division. Plaintiff in this case did not seek to avail himself of the rights conferred by the laws of the brotherhood. He appealed neither to the members of the brotherhood, as provided, nor to the grand chief for an interpretation of the law or a decision of the controversy.

Plaintiff, however, argues that the appeal to the membership affords no remedy, in fact, because there is no means or method provided by the laws or rules of the brotherhood for taking a vote upon the question. In this contention plaintiff is clearly mistaken. The laws do pro-

vide the manner and the time in which a vote of the members may be taken upon such a question. While the method may be somewhat cumbersome, still we are unable to say that it does not provide an adequate method of determining the question by appeal. In any event, it is in accordance with the supreme law of the brotherhood, of which plaintiff is a member. When he became a member of the brotherhood, he became bound by all of its laws, rules, and regulations, and is required to observe them. These rules further require that, before he could take any question to the civil courts for determination, he should first exhaust his rights by an appeal to the tribunals provided by the laws of the brotherhood. If plaintiff was dissatisfied, his proper course was to pursue the remedy provided in the laws and regulations of the brotherhood.

A labor union, organized as a voluntary, unincorporated association, may lawfully adopt rules for the government of its members and provide tribunals within the association to determine controversies between members or local divisions or lodges of the association, provided such rules are reasonable and uniform and do not contravene the law of the land or offend public policy.

The laws of the brotherhood provide that a member, before appealing to the civil courts in any case of controversy arising within the organization, should previously exhaust all his remedies within the brotherhood. Members of a labor union, organized as a voluntary, unincorporated association, are bound by and required to observe a law of the association which requires that a member shall exhaust his remedies within the association before appealing to the civil courts in any case of controversy arising within the association and for which the laws of the association provide means for adjudication and settlement.

It is a general rule of equity that, when a member of a voluntary, unincorporated association is aggrieved or feels injured at any action taken by the officers or committees of the association, within the scope of their authority and pertaining to its affairs, and where the laws and rules of the

association provide a means of redress, he should first exhaust the remedies provided by the laws and rules of the association before applying to the civil courts.

While our attention has not been called to any case or authority precisely in point, the following authorities, in a general way, support the principles herein announced: *Pixley v. Cleaver,* 105 Neb. 485; *Ihnen v. South Omaha Live Stock Exchange,* 101 Neb. 195; *Jackson v. South Omaha Live Stock Exchange,* 49 Neb. 687; *Stivers v. Blethen,* 124 Wash. 473; *Loeffler v. Modern Woodmen of America,* 100 Wis. 79.

In the instant case, plaintiff complains of the action of the officers of the brotherhood who have acted on a matter within their jurisdiction. He was entitled to appeal for relief to a higher tribunal within the association. He elected not to pursue that course. He is therefore not entitled at this time to appeal to a court of equity for redress.

It follows that the judgment of the district court should be, and is,

AFFIRMED.

Note—See Associations, 5 C. J. 1365 n. 46; 6 A. L. R. 965; 16 R. C. L. 422, 3 R. C. L. Supp. 568.

UNION CENTRAL LIFE INSURANCE COMPANY V. ENO SAATHOFF, APPELLANT: JULIUS H. PIEPER ET AL., APPELLEES.

FILED MARCH 25, 1927. No. 24766.

1. **Appeal:** TIME. The three months provided in section 9138, Comp. St. 1922, within which to perfect an appeal from a judgment or decree rendered in the district court, does not commence to run until the judgment or decree is entered on the journal of such court.
2. **Mortgages:** FORECLOSURE: DECREE. In a suit to foreclose a mortgage on real estate, the execution of the contract, the breach thereof, the identity of the real estate described therein, and the amount remaining due thereon are material and necessary issues to be determined by the decree.

3. ———: ———: REVIEW. In such a suit, the findings of fact contained in the decree on issues properly pleaded are not subject to review on objections to a deficiency judgment.
4. ———: ———: APPLICATION FOR DEFICIENCY JUDGMENT: ISSUES. A decree of foreclosure of a real estate mortgage showing personal liability of defendant for any deficiency that may remain after sale of the mortgaged premises precludes such defendant on an application for a deficiency judgment from presenting any defense which he could or should have interposed prior to the announcement of the decree.
5. Appeal: "ENTRY OF RECORD." The words "entered of record" and "spread upon the journal," as appearing in the decisions of this court construing section 9138, Comp. St. 1922, mean one and the same thing, to wit, "entered on the journal."

APPEAL from the district court for Boone county: FREDERICK W. BUTTON, JUDGE. *Affirmed in part, and reversed in part.*

G. F. Rose and *Wright & Thummell,* for appellant.

Vail & Flory, contra.

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

THOMPSON, J.

This is an appeal taken by defendant Eno Saathoff from the refusal of the district court for Boone county to allow a deficiency judgment. The record reflects the following: Both the plaintiff and defendant, cross-petitioner Eno Saathoff, were seeking to foreclose their respective mortgages on the lands in question, and praying for a deficiency judgment; Eno Saathoff against the defendants Pieper, appellees herein. After due service of summons on all parties, the Piepers failed to plead and default was entered against them. The issues being duly joined, trial was had, and the court found generally in favor of the above mortgagees; that the Piepers had each signed the respective notes set forth in the cross-petition of Saathoff, and the mortgage securing the same, and after due execution thereof, for a valuable consideration, had delivered the same to such Saat-

hoff; found the amount past due and unpaid on such notes and mortgage from the Piepers to Saathoff; and, further, that plaintiff was entitled to a decree of foreclosure and sale of the property, as also was defendant Saathoff. After the lands were sold and proceeds applied, the decree in favor of Saathoff was left entirely unsatisfied. Saathoff then, in harmony with the prayer of his cross-petition and such decree, filed a motion, and again asked that deficiency judgment be entered in his favor and against Julius H. Pieper and Katie H. Pieper, his wife, for the amount found due and owing him from them, to wit, $11,003.45, with interest thereon from the date of decree to date of entering of deficiency judgment. To this application the Piepers jointly interposed the following objection: "Comes now the defendants, Julius H. Pieper and Katie H. Pieper and object to the allowance of a deficiency judgment against them or either of them in the above entitled cause, for the reason that the above-mentioned defendants are not personally liable upon the instruments of indebtedness set forth in the pleadings herein." Trial was had, and findings and judgment announced by the court in favor of the Piepers, denying deficiency judgment and taxing costs to Saathoff. A proposed journal entry was prepared at the time, to wit, March 24, 1924, by the attorney for the Piepers, and signed by the then presiding judge covering the announced judgment denying a deficiency, and filed by the clerk, but was not entered on the judgment record, commonly known as the "journal," until February 14, 1925. This appeal was filed and docketed on May 13, 1925, and within less than 90 days from the entering of such announced judgment on the journal. The record brought to this court further shows that, within three days from the announcement of the judgment denying deficiency, Saathoff filed a motion for a new trial, in substance as follows: That the judgment is not supported by the evidence, and is against the weight thereof, and is contrary to law. This motion was overruled on the 20th day of October, 1924, or was so announced by the court. Owing to the indefiniteness of the proceedings as

presented, we cannot determine when this announced judgment was spread on the journal by the clerk, but it is not material, as will be made plain in the further consideration hereof.

Appellees Pieper challenge our right to consider this appeal on its merits, for the reason that the same was not lodged in this court within 90 days from the announcement of the court denying Saathoff a deficiency judgment, and the filing of such announcement with the clerk. As to this contention, it is sufficient to say that such appeal was perfected within 90 days from the entry of the judgment on the journal by the clerk, which we have uniformly held sufficient as to time.

In the case of *In re Estate of Getchell,* 98 Neb. 788, in the opinion as well as in the syllabus, we held: "The time for taking an appeal from the district court to the supreme court begins to run when the final judgment is entered of record."

In *Dahlsten v. Libby,* 104 Neb. 84, in interpreting the above quoted syllabus, in the course of the opinion, we said: "The record, so far as it relates to this assignment, may be summarized as follows: The sale was confirmed June 3, 1918; the order of confirmation was filed with the clerk of the district court, June 12, 1918, but the clerk did not spread it on the journal until December 31, 1918. The appeal was docketed in this court January 29, 1919, less than 90 days from the time the order was spread upon the journal."

This interpretation was in harmony with our holding in *Ward v. Urmson,* 40 Neb. 695, as follows: "This court will not review on appeal or error a decree rendered by the district court, prior to the formal entry of such decree upon the journal of the trial court."

The last above holding was again affirmed by us in *Hornick v. Maguire,* 47 Neb. 826, wherein we held, in paragraph 1 of the syllabus: "This court will not review a judgment rendered by the district court prior to the formal entry of such judgment upon the journal of the trial court." In

paragraph 2 of the syllabus in the *Hornick* case, we held: "A memorandum of a judgment made by a judge of the district court upon his trial docket will not authorize a review thereof in this court before the extension of such judgment upon the journal of the district court, in apt language and in due form."

In so holding we are clearly within the spirit, as well as the letter, of section 8952, Comp. St. 1922, which provides: "All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action"—construed in connection with section 9138, Comp. St. 1922, which provides in substance that an appeal from the district court to this court shall be filed herein "within three months from the rendition of such judgment or decree or the making of such final order or within three months from the overruling of a motion for a new trial in said cause."

While it is the duty of the clerk to enter the judgment on the journal, if he fails in this regard, either party desiring compliance therewith may demand performance. Hence, we need not look further than to the decisions of our own court in determining what is meant by the words "entered of record," or "spread upon the journal," as we have interpreted the two expressions to mean one and the same thing, to wit, "entered on the journal." To such holding we should continue to be bound until the legislature has otherwise provided.

Thus, it will be seen that the filing of a motion for a new trial in no manner militated against the right of Saathoff to appeal, as the appeal is from the judgment as entered on the journal, and not from the overruling of the motion. The running of the 90 days is from the entering of the judgment on the journal, whether the suit be one in equity or an action at law.

This brings us to the question of whether or not the appellant Saathoff is entitled, under this record, to a deficiency judgment against the Piepers, or either thereof.

As to the right of the appellee Julius H. Pieper to inter-

pose the objection lodged in this case, under the record as herein disclosed, we held in *Carstens v. Eller*, 5 Neb. (Unof.) 149: "Only such defenses as accrue after judgment on the notes in such foreclosure proceeding can be interposed against a deficiency judgment entered after the coming in of the report of the sale of the mortgaged premises."

In *Kloke v. Gardels*, 52 Neb. 117, we held: "In such foreclosure proceeding the execution of the contract, the identity of the real estate described therein, the breach of the same, and the amount remaining due thereon, are material issues determined by the decree."

In *Smith v. Allen*, 72 Neb. 170, we held: "Where a cross-petition for the foreclosure of a mortgage alleges that one of the defendants assumed and agreed to pay the mortgage debt, and no answer is filed by the defendant, who appeared in the action, a finding by the court that the allegations of the cross-petition are true concludes the defendant upon that point, and he will not be allowed to relitigate the question of his assumption of the debt, upon a motion being made for a deficiency judgment."

In *Parratt v. Hartsuff*, 75 Neb. 706, we held: "While the decree finding personal liabilities first rendered in a foreclosure proceeding is to a certain extent interlocutory, yet, as to findings of fact made in such decree on issues properly pleaded, it is not subject to review on objections to a deficiency judgment."

In *Anderson v. Walsh*, 109 Neb. 759, we held: "Findings of fact in a decree of foreclosure, showing defendants personally liable for any deficiency that may remain after sale of mortgaged premises, relate only to facts then existing, and do not operate to preclude defendants from setting up, as a defense to an application for deficiency judgment, facts arising after entry of decree."

The only defense sought to be interposed by appellee Julius H. Pieper was one connected with the execution and delivery of the notes and mortgage in question. Hence, under the foregoing holdings, such a defense is not, and was not, available. However, waiving such legal objections, and

considering the case solely on the evidence, the trial court was not warranted in denying the appellant Saathoff a deficiency judgment against Julius H. Pieper for the full amount asked.

As to the appellee Katie H. Pieper, from a careful examination of the evidence we are convinced that the same is insufficient to warrant a judgment against her, as the part taken by her in the transaction leading up to, as well as in, the execution and delivery of the notes and mortgage was simply with the intent and purpose on her part, (and was so understood by all others), of relinquishing her interest in the mortgaged premises, the title to which was held and owned by her husband, and the transaction was in no manner connected with her separate property, trade, or calling. *Grand Island Banking Co. v. Wright*, 53 Neb. 574.

The judgment of the trial court as to Julius H. Pieper is reversed and the cause remanded, with directions to enter deficiency judgment against him for the amount prayed, in harmony with this opinion. As to Katie H. Pieper, the judgment is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

Note—See Mortgages, 27 Cyc. 1609 n. 55, 57, 60, 1752 n. 76, 1756 n. 99 New.

DAN S. HYNES V. STATE OF NEBRASKA.

FILED MARCH 25, 1927. No. 25290.

1. **Criminal Law**: EVIDENCE, PROBATIVE VALUE OF. Where a witness for the state in a criminal prosecution has been impeached, it is for the jury to determine the probative value of his evidence.
2. ———: INSTRUCTIONS. Before error can be predicated upon the failure to charge the jury upon a given point, there must have been a request therefor, unless it is upon a question where there is a statute or positive rule of law which requires the giving of such instruction.
3. **Robbery**: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* sufficient to sustain the verdict of the jury and the judgment and sentence of the district court.

ERROR to the district court for Dakota county: MARK J. RYAN, JUDGE. *Affirmed.*

P. F. Verzani, W. B. Egan and *W. D. McCarthy,* for plaintiff in error.

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

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

EBERLY, J.

Dan S. Hynes, hereinafter designated defendant, was prosecuted in the district court for Dakota county, Nebraska, upon an information which, in proper form (omitting the formal parts and technical language appropriate to the description of unlawful and felonious intent and purpose), charged that "Magnus J. Wibe and Dan S. Hynes," within that county and state, "on the 22d day of May, 1925, did * * * enter a building occupied by the Goodwin State Bank * * * and by violence and by putting in fear * * * the cashier thereof * * * did then and there * * * steal, take and carry away $1,800 in lawful money * * * of the United States * * * the property of the Goodwin State Bank * * * against the will of, and without the consent of the Goodwin State Bank." Upon trial the defendant was found guilty and sentenced to ten years in the penitentiary. Alleging 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 evidence is insufficient to support the judgment of the district court. A careful perusal of the bill of exceptions, however, discloses that the defendant and state unite in the conclusion that on the day in question the bank was actually robbed in the manner charged in the information by two men of whom Magnus J. Wibe was one; that on the day in question two men came to the bank in a Ford automobile, went into the bank building, committed the robbery, and thereafter came out of the bank and drove away together in the same auto-

mobile. The cashier who was "held up," while he does not attempt a minute description of the persons or clothing or appearance of the accused, positively identified Hynes as one of these two men. Within a few hours after the occurrence of the robbery, Hynes and Wibe were arrested together in a Ford automobile returning to Sioux City, Iowa. According to witnesses for the state, both, at the time of their arrest, were armed with revolvers, and on the persons of both were found the proceeds of the robbery.

The evidence in the record also tends to establish that, at the time of his arrest and immediately thereafter, Hynes made statements tantamount to a confession of guilt. And it is without dispute in the record that on the day of his arrest Hynes guided the officers to where certain "travelers cheques" taken from the bank at the time of the robbery had been hidden.

True, at the time of the trial, Hynes denied being present at the scene of the crime or any participation therein, claiming that while the money found in the automobile and on his person, at the time of the arrest, was the money taken by the robbers at the time of the robbery, that so far as he was concerned he was compelled to take it into his possession, later, upon the public highway at the point of a revolver in the hands of Wibe.

Taking the evidence as an entirety, the matter for the jury's determination was the question of the credibility of witnesses. This was strictly within the province of the triers of the fact who both saw and heard the witnesses. The evidence, if believed, is ample to support the verdict of guilty, and it cannot be justly said that the finding is unsupported by the evidence.

Complaint is made because of the refusal of the court to give an instruction defining the crime of "accessory after the fact." It may be said that the evidence produced by the state tended to establish the crime charged in the information, and nothing else. The evidence offered in behalf of the defendant tended to establish that he was "not guilty" of the crime charged, and also "not guilty" of being an "ac-

cessory after the fact to the crime charged." Therefore, the instruction requested was wholly inapplicable to the evidence before the jury, and no error was committed by the court in this refusal.

At the time of the oral argument before this court, defendant's counsel stressed the fact that the question of "alibi" was presented by the evidence in the record and the court failed specifically to instruct upon it. It appears, however, that no instruction upon this subject of "alibi" was presented to, or requested of, the district court by the defendant.

No assignment based upon this alleged error or failure to instruct on the proposition of "alibi" appears in the motion for a new trial which the defendant presented to the district court and which by the district court was overruled. Nor is it one of the assignments of error made in the defendant's brief, as required by rule 12 of this court. Neither is it discussed and relied upon therein as a distinct ground of error upon which the case should be reversed. In the condition of the record before us, the language of this court in *Welter v. State*, 112 Neb. 22, seems to be in point:

"Defendant interposed evidence tending to prove an alibi which, if believed by the jury, would have entitled him to an acquittal, but we do not find it necessary to discuss this feature of the case other than to observe that the jury evidently did not accept the version of defendant's witnesses on this point."

We have not overlooked the other errors assigned in the brief. After a careful reading of the evidence in the light of the instructions given by the court, we are of the opinion that the defendant has had a fair trial and that the conviction is justified by the proof.

Finding no error, the judgment of the district court is

AFFIRMED.

WESLEY N. PHILLIPS, APPELLEE, V. CLINTON LEROY HUNT, APPELLANT: JOHN F. CROSBY ET AL., APPELLEES.

FILED APRIL 12, 1927. No. 24781.

Interest. A state statute fixing interest rates chargeable on loans of money does not contravene the provisions of section 8, art. I of the federal Constitution, vesting congress with power to coin money and regulate the value thereof.

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

Willis E. Reed, for appellant.

Mapes, McDuffee & Mapes and *William L. Dowling, contra.*

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

PER CURIAM.

This suit is an ordinary proceeding in equity instituted by appellee, Phillips, herein called plaintiff, to foreclose a mortgage on certain real estate in Madison county. Appellant, Hunt, hereinafter called defendant, interposed an answer challenging the power of the state to enact a statute fixing interest rates chargeable on loans of money, owing to the provisions of section 8, art. I of the federal Constitution, as follows: "The congress shall have power * * * to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures." To this answer the plaintiff interposed a general demurrer, which was sustained. The facts pleaded in the answer are those set forth in the case of *Klattenburg v. Qualsett,* 114 Neb. 18, in which the question here presented was considered by us and decided adversely to the contention of defendant. While the answer in this instant case amplifies somewhat the facts alleged in the answer in the previous case, a careful consideration leads us to conclude that the law as announced in the *Klattenburg* case is controlling.

Our attention has also been called to the preamble of the federal Constitution, sometimes designated as the general welfare clause. This, we have considered in connection with our previous holding, but incline to the opinion that it in no manner modifies or limits the provisions of such section 8, art. I, under consideration.

It follows that error was not committed by the trial court in sustaining the demurrer, and in entering judgment in favor of the plaintiff.

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. MONOWI STATE BANK: WENZL DIEZ, INTERVENING CLAIMANT, APPELLEE: VAN E. PETERSON, RECEIVER, APPELLANT.

FILED APRIL 12, 1927. No. 24789.

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

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

John A. Davies, contra.

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

PER CURIAM.

This action grows out of the failure of the Monowi State Bank. Wenzl Diez presented 13 certificates of deposit, aggregating $54,891.89, and asked that they be allowed as preferred and adjudged payable from the depositors' guaranty fund. Objections were made by the receiver, and on hearing the trial court found for the claimant and allowed all the certificates of deposit, together with interest thereon at the rate of 5 per cent. per annum from their respective dates to March 6, 1925, the date on which judgment was entered. The receiver appeals.

It is contended by the receiver that claimant was not entitled to a preference, because a bonus had been paid, in

addition to the 5 per cent. interest, and because the deposits were made upon a collateral agreement; and, further, that, even if entitled to a preference, the trial court awarded the claimant more interest than he should have received under the rule established by this court.

We have carefully examined the record and upon the main question conclude that this case is ruled by the holdings of this court in the following cases: *State v. American Exchange Bank,* 114 Neb. 626; *State v. Citizens State Bank,* 114 Neb. 867; *State v. Wayne County Bank,* 112 Neb. 792; *State v. Farmers State Bank,* 112 Neb. 474; *State v. American Exchange Bank,* 112 Neb. 834. The trial court followed the rule laid down in the cases cited and properly adjudged that the claims were entitled to preference and were payable from the depositors' guaranty fund.

However, it appears from the record that five of the certificates of deposit had, by their terms, matured before judgment was entered, and the trial court allowed interest at the rate of 5 per cent. per annum, the rate of interest specified in the certificates of deposit, from their date to the date of entry of the judgment.

Under the previous rule announced by this court in *State v. Farmers State Bank,* 113 Neb. 679, interest should have been reckoned on the certificates that had matured only until the date of the maturity, and no interest should have been allowed after their maturity.

We find from an examination of the record that the court erroneously included. and awarded the claimant, excessive interest in the amount of $113.75. The total judgment entered in favor of the claimant was $57,520.90. It should have been $113.75 less, or $57,407.15. In all other respects the judgment of the district court is right.

The judgment of the district court is therefore modified so as to allow claimant a judgment of $57,407.15, as of date March 6, 1925, payable from the depositors' guaranty fund as a preferred claim, and, as modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. MONOWI STATE BANK: A. F. SCHINDLER, INTERVENING CLAIMANT, APPELLEE: VAN E. PETERSON, RECEIVER, APPELLANT.

FILED APRIL 12, 1927. No. 24790.

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

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

John A. Davies, contra.

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

PER CURIAM.

This action grows out of the failure of the Monowi State Bank. A. F. Schindler presented a claim based on two certificates of deposit and a deposit on an open account, aggregating $23,835.86, and asked that it be allowed as preferred and adjudged payable from the depositors' guaranty fund. The receiver filed objections, and a hearing was had to the court, resulting in a finding and judgment for the claimant for the full amount, together with 5 per cent. interest from the date of the several deposits to the entry of judgment on March 6, 1925. The receiver appeals.

The receiver contends that claimant is not entitled to a preference, because excessive interest has been paid on the deposits, and because they were made upon a collateral agreement; and further contends that, if they are entitled to a preference, the trial court allowed more interest than claimant was entitled to under the rules of this court.

The facts in the instant case are very similar to those in *State v. Monowi State Bank, ante,* p. 396. The principal questions in the instant case, as in that, are governed by the rules laid down in the cases therein cited.

It appears from the record that the certificates of deposit, by their terms, matured some time prior to the entry of judgment, and the trial court allowed interest at the rate of 5 per cent. per annum, being the rate specified in the certificates of deposit, from their date to the date of entry of judgment. Under the rule announced in *State v. Farmers State Bank*, 113 Neb. 679, interest should have been reckoned on the certificates that had matured only until the date of their maturity, and no interest should have been allowed thereafter.

From an examination of the record, it appears that claimant was awarded excessive interest in the amount of $126.23. The total judgment entered in favor of the claimant was $25,385.79. It should have been for $126.23 less, or for $25,259.56. In all other respects the judgment of the district court is right.

The judgment of the district court is therefore modified so as to allow claimant a judgment for $25,259.56, as of date March 6, 1925, payable from the depositors' guaranty fund as a preferred claim, and, as modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

PAUL CROMMETT V. STATE OF NEBRASKA.

FILED APRIL 12, 1927. No. 25457.

1. **Criminal Law:** PLEA IN BAR. In a criminal case, upon a plea in bar by reason of former conviction, a proper test to determine the identity of the two offenses is whether the evidence necessary to convict in the second case was admissible under the former charge, related to the same crime, and was sufficient to warrant a conviction upon the former charge.

2. **Plea** in bar sustained.

ERROR to the district court for Cherry county: BAYARD H. PAYNE, JUDGE. *Reversed and dismissed.*

E. D. Clarke, for plaintiff in error.

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

Heard before DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ., BLACKLEDGE and SHEPHERD, District Judges.

PER CURIAM.

Plaintiff in error, Paul Crommett, as defendant, was informed against in the district court for Cherry county upon the charge that, in said county, on December 23, 1925, he did unlawfully have in his possession and carry for the purpose of sale more than one pint, to wit, 15 gallons, of intoxicating liquor. The prosecution was conducted as charging a violation of the provisions of chapter 106, Laws 1925, commonly termed the "Pint law." Before the impaneling of the trial jury, the defendant presented to the trial court a plea in bar, based upon a former conviction of the defendant in the county court of said county, wherein it was charged that the defendant, in said county, on December 23, 1925, was engaged in the unlawful transportation of intoxicating liquor, and upon which a conviction was had and sentence imposed.

A hearing was had on the plea in bar. The journal entry of proceedings recites that an answer was filed therein, but none is included in the record. However, it appears that upon the hearing of the plea a stipulation was made on the part of the state and the defendant, to the effect that the defendant then stood convicted in the county court of the crime of transportation of intoxicating liquor, that sentence therefor had been imposed, and that the information in the present case charges the defendant with having in possession and carrying for the purpose of sale the same identical liquor and the same transportation of liquor as was charged in the case in the county court.

The plea in bar was overruled by the trial court, and the correctness of this ruling presents the fundamental question for determination in this case.

The jury were impaneled and trial had. The defendant raised the same question of former conviction by objections and motions in the course of the trial and relied thereon, offering no testimony in his own behalf.

The contention of the defendant here is: That the former conviction is a bar to this prosecution; that there is no difference in any of the elements constituting the two offenses charged; that the offense charged herein is not another degree of the offense charged in the first prosecution, but is, in fact, the identical offense, and that the essential elements of the charge are the same in both cases. In other words, that the only question before this court is whether a conviction upon a certain state of facts is a bar to a second conviction upon the same state of facts.

The state contends that the two prosecutions were under different sections of the statute, the first being under section 3238, Comp. St. 1922, which, with the penalty provided by section 3288, defined the first offense, and the prosecution in the instant case is had under the provisions of chapter 106, Laws 1925, which amends section 3239, Comp. St. 1922.

The distinctions sought to be made on behalf of the state are: First, that in the case at bar it is necessary to allege and prove that the transportation was for the purpose of sale, which introduces a distinct element in regard to the purpose of transportation not required in or a part of the case in which conviction was had. Second, that the plea was bad because the county court in imposing sentence attempted to impose both fine and imprisonment, whereas the law under which the court proceeded authorizes punishment by either fine or imprisonment only, and that consequently the judgment or sentence of the court was void.

Upon the first of these propositions it appears that while there are many distinctions made as to included and related offenses, and it requires some care in the application of the rule and the facts under consideration, it is, we think, well established, as is held in *Warren v. State,* 79 Neb. 526, that the test to determine the identity of the two offenses is whether the evidence necessary to convict in the second case was admissible under the former charge, related to the same crime, and was sufficient to have warranted a conviction upon the former charge. If such a condition is shown to exist, the former acquittal or conviction is a bar to the sec-

ond prosecution. The only distinction here suggested on behalf of the state is as to the element of purpose of sale. As to this, the statute under which the first conviction was had does not mention such element. In the act of 1925 the element is mentioned, and there is the further provision in its concluding clause that the carrying or transporting of more than one pint of liquor shall be *prima facie* evidence that the same is being carried or transported for the purpose of sale.

An examination of the record in this case discloses that, as a fact, no evidence was introduced or offered aside from the mere possession and carrying of the liquor, which in the remotest degree tended to establish any sale or offer of sale by the defendant of this or any other liquor, or of any specific purpose whatever in connection with the possession or transportation of the same. If, as is stated in the state's brief, it is necessary to allege and to prove that the transportation was for the purpose of sale, the proof utterly fails upon that proposition. It is then left to determine whether the clause above referred to in the act of 1925, providing that the transportation shall be *prima facie* evidence that the purpose thereof is for sale, is sufficient to take the case out of the rule which would otherwise make the former conviction a bar to this prosecution. In the face of the stated condition of the record upon that point, it seems to us that it would be a strained and unwarranted construction of the statute to hold that such a provision therein, purporting only to be a rule of evidence and to extablish *prima facie* the inference proper to be drawn from other facts established, is sufficient of itself to authorize the subjection of a defendant to a second punishment for the same identical act and transaction on account of which he has before been convicted and sentenced. We do not find this situation to be within the rule of *State v. White,* 123 Ia. 425, wherein it was held that a conviction for keeping a gambling place was not a bar to prosecution for playing at a game for money; nor of *State v. Rose,* 89 Ohio St. 383, L. R. A. 1915A, 256, that an acquittal or conviction upon a charge of rape

was not a bar to the prosecution for the offense of contributing to the moral delinquency of a female; nor of the other cases cited that are of the same import. We think the distinction is obvious in this case. If proof of sale or offer or attempt to sell is necessary, it is entirely lacking in the record. If the statute supplies the proof for that element by reason of proof of the other two elements, then the case is within the rule stated by this court in *Warren v. State, supra,* for of necessity the defendant could not have been convicted in the former case without proof of the possession and transportation which are the sole elements of proof in this case. In either event, so far as this ground is concerned, the prosecution must fail.

A similar case was before the supreme court of Michigan, *People v. Cook,* 236 Mich. 333, wherein the defendant was charged with having liquor in his possession and was sentenced to imprisonment thereon, and was afterwards, under the same statute and the same state of facts, charged with unlawfully transporting the same liquor. Upon trial he raised the question that the former conviction was a bar. In reference to this the court say:

"If the respondent had first been charged with transporting and had been convicted, it could not possibly be contended that he could be doubly punished for transporting, by afterwards charging him with possession, which was a necessary incident to transporting. A like result may not then be accomplished by charging possession first and transporting next, as was attempted in the instant case."

The court holds that the rule is general that, where one offense is a necessary element in and constitutes a part of another, and both are in fact one transaction, an acquittal or conviction of one should bar the prosecution of the other.

Upon the proposition that the judgment of the county court in the first case is void, we cannot say with certainty whether that judgment has been enforced in whole or in part, although there is a statement in the defendant's brief that the sentence was duly enforced. Whether this is correct or not, we think the case comes within the rule of

McCormick v. State, 71 Neb. 505, and *Knothe v. State, ante*, p. 119. The conviction still stands. If the court undertook to render a judgment or impose a sentence which it had no authority to do, which sentence has not been executed, and it was merely erroneous, it could be corrected by appellate proceedings. If it was entirely void, "we are not prepared to hold that by its abortive attempt to render a judgment against the plaintiff its power to pronounce a legal judgment was lost. It seems clear that the power of the court could only be lost or exhausted by pronouncing a valid judgment."

For the reasons stated, the plea in bar should have been sustained, and the judgment of the trial court should be, and is, reversed and the prosecution ordered dismissed.

REVERSED AND DISMISSED.

JACOB REICHERT ET AL., APPELLANTS, V. AUGUST W. SAREMBA ET AL., APPELLEES.

FILED APRIL 12, 1927. No. 24747.

1. **Affirmance.** Cause heard *de novo*, and *held* that the decree of the district court was right.
2. **Religious Societies:** RIGHT OF PROPERTY: INTERFERENCE BY COURTS. Ordinarily, in case of a factional division in a church organization, the civil courts will not inquire into the ecclesiastical teachings of a pastor, or of a congregation holding church property, in order to determine which faction is entitled to the possession and use of church property.
3. ———: ———: ———: INJUNCTION. Where its deed to its church real estate, its articles of incorporation and its by-laws show that a church society is an independent, congregational body, save that the by-laws provide, in case of a division of the congregation or a dissolution of the corporation, that the property shall be disposed of in accordance with the instructions of the Evangelical Synod of North America, with which synod the congregation has affiliated, and where no petition or complaint has been presented to or acted upon by such synod, a decree of a district court of the Nebraska synod, acting upon the petition or complaint of a minority faction of the congregation made directly to said court, and not to the Evangelical Synod,

nor referred to the court by that synod, is ineffectual to bind the congregation and to oust the majority faction from possession of the church property. In a suit grounded on such facts, the civil courts will deny the minority an injunction against using the church property and will refuse to oust the majority therefrom.

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

Boehmer & Boehmer, for appellants.

Wilmer B. Comstock and *T. R. P. Stocker, contra.*

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

GOSS, C. J.

This is an appeal from a decree denying plaintiffs an injunction and dismissing their suit in which they sought possession of church property and other incidental relief.

The suit was brought by Jacob Reichert, George Groh, and John Klein, alleging that they are acting as trustees of St. John's Evangelical Church of Lincoln, Nebraska, and in their individual capacity as members of the congregation, against August W. Saremba, Peter Bitter, Henry Burbach, and Alex Bauer, claiming to be, respectively, the pastor and trustees of the church.

Ordinarily there is not much dispute about the law affecting church controversies that find their way into the civil courts. They depend more upon the facts of the particular case and the true interpretation thereof than upon the principles of law which are well settled and easily applied when the ultimate facts are determined. So we shall state at more than usual length the facts as shown by the record.

The church society was organized in 1907. As shown by its articles of incorporation, which were adopted at a meeting of the congregation on April 7, 1907, and later recorded, the corporate name in the German language, but translated for us, is the German Evangelical St. John's Church, but

no point is made in this suit as to the discrepancy between this and the name recited in the pleadings. Soon after the organization, the congregation acquired a lot, took title in the corporate name and erected a church. Here in the church, maintained by the original small congregation and by others joining them in increasing numbers, the congregation worshipped in peace until 1922, when their pastor resigned and the first named defendant was employed by the congregation to take his place. Upon application of the church to the Nebraska district officers of the Evangelical Synod, Rev. August W. Saremba had come and, after preaching a trial sermon, a contract of employment was entered into between him and the church. Soon thereafter dissension came. Two factions arose. Our decision does not require us to discuss the causes nor to fix the blame, but we deem it not improper to say that there is evidence of unyielding intolerance in both factions. Quite a number of members were expelled or dropped from the church membership by a two-thirds vote of the congregation (without allowing them to vote on the question of expulsion), a large proportion of them because, it was testified, they had ceased to pay their dues to the support of the church. Others, dissatisfied with the pastor and the action of the majority, withdrew from participation in the services held in the church.

The minority, represented here by the plaintiffs, and so described in their brief, holding meetings in a settlement house in North Lincoln, appealed to the synodical officers and to the Nebraska district synodical court for relief. A meeting of that court was held, witnesses presenting the views of both parties were examined, and the court, on March 26, 1924, entered its findings and decision and sent an official notice of the result thereof to the congregation, suspending the defendant Saremba, and discharging him from his position as pastor of the church, and warning the congregation that that part of it which does not heed the decision must suffer the consequences. He continued his office as pastor and the majority continued to hold the

church. Later, at the next annual conference of the churches comprising the Nebraska district of the synod, held at Milford in the summer of 1924, when the majority faction, then and now holding possession of the church, sent a delegate as its lay representative and the minority faction sent the plaintiff Reichert as its representative, the conference recognized Reichert as the true representative and informed the other delegate that his faction was not considered a member of the synod. Later, on notice to the majority faction, another session of the Nebraska district synodical court was held in Lincoln, December 30, 1924. The court rendered a decision supplementing its former one of March 26, and directed the majority faction to surrender the church property to the recognized faction. This order was duly served; the trustees refused to give over the possession of the keys and of the church property; and then this suit was brought on behalf of the so-called minority faction appealing to the civil and temporal courts to carry out and enforce the decision of the church court.

A decision of the questions involved requires a statement and analysis of the articles of incorporation and constitution or by-laws of the church and of the statutes and by-laws of the German Evangelical Synod of North America, as well as an inquiry into the history of the dealings between the two bodies.

The articles of incorporation of the church provide:

Article III. "This corporation shall have the right to own, hold and possess such real estate as may be necessary for the furtherance of its objects and purposes as herein stated,"

Article IV. "The object and purpose of this society shall be to hold and conduct divine services and teach the doctrine as taught and propounded by the Evangelical Synod of North America."

Article VI. "This corporation shall begin on the 16th day of April, 1907, and shall continue until it is dissolved according to law or by unanimous vote of all the members of this society. The business affairs of this corporation

shall be conducted by a board of trustees (naming them and fixing their term) until the next annual meeting."

Article IX. "The property of this congregation is and shall always remain the undivided property of the congregation. In the event of a division of the congregation or a dissolution of the corporation, the property shall be disposed of in accordance with the instructions of the Evangelical Synod of North America and the decision of this synod with reference to the disposition of the property shall be considered final. And the property shall be disposed of in accordance with the decision of this synod and in no other manner."

The constitution, or by-laws, of the church provides:

Article IV. "Persons are received as members in the congregation at the next regular meeting of the congregation after their application has been approved by the officers by a two-third vote of the members present at such meeting."

Article V. "If a member does not perform his duties towards this congregation as provided in these by-laws, then the congregation shall determine whether poverty or negligence is the cause, and if the latter be the case, then such member may by a two-third affirmative vote be stricken from the list."

Article IX. "All important questions wherein the congregation is involved shall be decided by a two-third majority vote of the members, and such vote shall be taken by ballot or by roll call. For the election of officers at the annual meeting a simple majority of vote shall be sufficient."

Article XII. "If the choice of the pastor becomes necessary, then the trustees must apply to the president of the Nebraska district so that he can submit the name of a suitable man for the place, for whom a vote will then be taken. When this one has not been selected, some other person may be proposed. The pastor is chosen in a regular meeting by ballot for an indefinite time."

Article XIII. "The real estate is and shall forever remain

the indivisible property of the congregation. In case of a dissolution or division, the verdict of the Evangelical Synod of North America shall be obtained and shall be considered conclusive."

From the printed book in evidence as "Statutes and By-Laws of the German Evangelical Synod of North America," as bearing on the questions under consideration, we quote the following separate excerpts: "The qualified members of the German Evangelical Synod of North America shall be: Pastors, congregations, and teachers. Their rights and duties shall be stipulated in the by-laws." "A synodical congregation may have only such pastors to serve it as are either members of the synod or who are recommended by it. If a congregation continually act contrary to this rule, despite the admonition of its district, it shall be excluded from the synod." "Every affiliated member of the synod who lives within the territory of the district and the officers and boards of the district, as such, because of unlawful official conduct, are amenable to action by this court (the district synodical court). Actions before this court may be brought by any synodical member, by one or a number of persons who, being formerly affiliated with a synodical congregation, wish to bring a complaint charging unjust expulsion." "The penalty to be visited by the court upon a member of the synod against whom charges have been sustained shall be, according to the gravity of the offense, either: Judgment to pay a part or all of the court costs, reproof, suspension of rights as a member of the synod for a period of not more than two years, and expulsion from the synod."

The deed by which the church held title is not in evidence. From allusions to it in the testimony and arguments, it must have been, and we assume it was, a deed without any clauses in it fixing any express or specific trust in favor of the synod and binding the congregation. There could, therefore, be no implied trust in favor of the synod arising out of the deed itself, and, so, we must look elsewhere in the case than to the deed for the jurisdiction and the power of the synod

through its district court or otherwise to enter a decision and judgment as to the possession and control of the church property.

Of the articles of incorporation heretofore quoted, while article IX provides that, upon a division of the congregation or dissolution of the corporation, the property shall be disposed of in accordance with the instructions of the Evangelical Synod of North America and the decision of this synod shall be final, yet the natural, plain interpretation of those words, relating to a division of the congregation, means that, where an amicable division of the congregation occurs, then the matter of a disposition shall be referred to the evangelical synod, as a referee agreed upon in advance, to be determined finally by this general synod, and no other. It cannot be interpreted to mean that by this article the corporation intended to abdicate its right to expel members by a two-thirds vote, and that then, before their expulsion was set aside, these expelled members could claim that there was a division of the congregation and, therefore, ask for a division of the property. Until reinstated as members of the congregation, there would be no jurisdiction of the synod over them to empower it to give them property, or a share of property, belonging to a congregation, or its members. The article cannot be understood to mean that a subordinate branch of the evangelical synod can make a disposition of the church property where, as in this case, application was made by the minority faction directly to the district synod, rather than to the evangelical synod itself, and where there was no delegation or reference of the matter by the general synod to the court to hear and determine the matter and report to it. We do not wish to be understood as saying that the district synodical court did not have jurisdiction to hear and determine the complaint of expelled members as to the validity of their expulsion and other grievances not specifically related to a division of the property. What we are considering is the right to the possession of the church property and the power of a subordinate church court to order the disposition and use of it in the light of the record in this case.

Articles IV of the constitution or by-laws, made pursuant to the articles of incorporation, provides for the reception of members, article V for the expelling of members for cause, and article IX for the determination of all important questions in which the congregation is involved, in each of which instances the articles specifically provide for a two-thirds vote of the congregation.

A careful study of the articles of incorporation and of the constitution or by-laws convinces us that it was the intent of the members of the congregation, and that these instruments may be fairly construed to indicate, that the church was a congregational and independent body chartered by the state to govern itself and to be self-contained, save as it may have surrendered or modified any of its charter rights by its affiliation with the synod.

When we study the statutes and by-laws of the Evangelical Synod of North America, we find that a mere member of a church is not a member of the synod; that the synod has only three classes of members, namely, pastors, congregations, and teachers, and that, therefore, members of a local society are not members of the synod; that a synodical congregation, which is the type of membership held by the German Evangelical St. John's Church of Lincoln, may have only such pastors to serve it as are either members of the synod, or are recommended by it; and that the extreme penalty for the continual infraction of the rules of the synod by a congregation, as a member, is that it shall be excluded from the synod. We find nothing there and counsel have called our attention to nothing there specifically giving the evangelical synod control over the property of its members.

Nowhere in the record do we find anything to indicate that the congregation surrendered any of its rights to control its church property as a separate, independent, congregational body, save as heretofore indicated. When such surrender or reference, or cession, or grant of right to the general synod was acted upon or exercised, it must have

been done by the synod upon a petition or complaint made by the parties capable of making it.

Ordinarily, in case of a factional schism in a church organization, the civil courts will not inquire into the ecclesiastical teachings of a pastor, or of a congregation holding church property, in order to determine which faction is entitled to possession and the use of church property. *Kenesaw Free Baptist Church v. Lattimer*, 103 Neb. 755; 8 A. L. R. (Annotation) 105; *Wehmer v. Fokenga*, 57 Neb. 510.

We do not wish to be understood as saying that in no circumstances will the civil courts inquire into such matters, but, in the instant case, the constitution of the church having granted to the synod no control over the church property except, perhaps, in case of a dissolution or division, and the synod, as such, never having acted on any petition or complaint of the church or of any of its members, we cannot consider ecclesiastical or any other differences and thereby change the present possession of the church property.

On the record presented for review, the plaintiffs were not entitled to a decree ousting the majority from possession of the church property. The decree of the trial court was right and it is

AFFIRMED.

Note—See (2, 3) 8 A. L. R. 105; 23 R. C. L. 452; 3 R. C. L. Supp. 1329; 4 R. C. L. Supp. 1502.

NEBRASKA WHEAT GROWERS ASSOCIATION, APPELLANT, V. JOHN ROACH, APPELLEE.

FILED APRIL 12, 1927. No. 24734.

Specific Performance: SUFFICIENCY OF PETITION. In a suit by the Nebraska Wheat Growers Association to require a member to perform a cooperative marketing contract, the petition does not state a cause of action if it fails to allege that plaintiff gave defendant necessary notice of the acceptance of his application for membership.

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

Corcoran & Sprague and *Bernard McNeny,* for appellant.

Butler & James and *J. F. Ratcliff, contra.*

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

ROSE, J.

This is an action by the Nebraska Wheat Growers Association, plaintiff, to require John Roach, as a member thereof, defendant, to perform a cooperative marketing contract obligating him to sell and deliver to plaintiff the wheat raised by him during the years 1921 to 1925, inclusive, grain for feed and seed excepted. The action was dismissed and plaintiff appealed.

There was no error in the nonsuit. The marketing contract pleaded by plaintiff, to become effective, required notice to defendant that his application for membership in the association had been accepted. The necessary notice was neither pleaded nor proved. It follows that the pleadings and proof do not show that defendant was bound by the contract which plaintiff sought to enforce. *Idaho Grimm Alfalfa Seed Growers Ass'n v. Stroschein,* 42 Idaho, 12.

AFFIRMED.

GEORGE W. BAIRD, EXECUTOR, APPELLANT, V. CHARLES G. LANE, APPELLEE.

FILED APRIL 12, 1927. No. 24736.

1. Trusts: ACCOUNTING BY TRUSTEE. In a court of equity the accountability of a trustee for the safe-keeping and investment of trust money is not measured by his own conceptions of duty, where they conflict with fundamental principles of justice essential to the protection of trust property and of the estate of deceased persons.

2. ———: ———. It is the duty of a trustee accepting money for the purpose of safe-keeping and investment to account for

the investments and income, to report his fiduciary transactions to the beneficiary, and to surrender the trust funds in his hands upon the termination of the trust relation.

3. ———: ———: INTEREST. A trustee who, for safe-keeping and investment, accepts from a widow her entire means of support, she having no earning capacity, may be charged with the principal and interest at 7 per cent., where he lends trust money to himself at 6 per cent., exacts 8 or 10 per cent. from other borrowers, pays the beneficiary 6 per cent. only, makes non-producing investments in the stock of corporations officered in part by himself, and fails to keep an account of investments and income.

4. ———: COMPENSATION OF TRUSTEE. A trustee who, through friendship, accepts money for safe-keeping and investment, without any agreement for compensation, is not necessarily entitled to pay for his services where he fails to perform his duties.

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

W. C. Pettit and *James & Danley,* for appellant.

Dungan & Tibbets, contra.

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

ROSE, J.

This is a suit in equity to require Charles G. Lane, defendant, to account as trustee for $8,000 received by him from Mercy A. Finley. The trust funds, according to defendant's receipts therefor, consisted of three items: April 20, 1900, $6,000; December 27, 1902, $1,000; May 2, 1904, $1,000. The correct date of the latter, however, was May 2, 1900. Each of the receipts contained this provision: "For safe-keeping and investment." Mercy A. Finley, beneficiary of the trust, died in Greenville, Mercer county, Pennsylvania, November 27, 1921, leaving a will, which was duly probated in that county. George W. Baird is the executor and as such is plaintiff in this suit. He filed his

petition in the district court for Adams county, Nebraska, December 26, 1923. The equitable relief sought by him is a judgment for the amount owing by defendant to the estate of Mercy A. Finley, deceased. It is charged in the petition that defendant did not make proper investments of the trust funds, mingled them with his own, neglected to keep accounts of the income therefrom and paid interest to the beneficiary at times and in amounts unknown to plaintiff who acknowledged as executor the receipt of $500 in cash from defendant December 16, 1921. Plaintiff's entire claim consists of the three trust funds described and interest on each at the rate of 7 per cent. per annum, less the 500-dollar payment to the executor and interest, amounts and dates unknown, paid by defendant to the beneficiary.

In an answer to the petition in equity defendant admitted the receipt of the trust funds and his acceptance of the trust. He also interposed the plea that the money received by him from Mercy A. Finley constituted all her estate, was her only means of revenue for maintenance, was the only barrier between her and abject poverty, and that, owing to age and feebleness, she had no earning capacity. Defendant denied the charges of misfeasance and pleaded faithful performance of his duties. In substance the answer contained allegations that the trust funds were properly invested; that from the income defendant sent to the beneficiary from time to time as she needed money what was approximately interest on the trust funds at the rate of 6 per cent. per annum; that his payments of interest during the time he had charge of the trust estate aggregated about $10,136.17, as shown by an itemized statement attached to his answer; that he paid on the principal $750, making a total of $10,886.17; that he tendered to the executor in discharge of his obligations as trustee the following securities in which the remainder of the trust funds had been invested: Note of Ed Tanner for $4,882.50; stock of the Citizen's Hotel Company, 10 shares, $1,000; stock of the Hastings Equity Grain Bin Manufacturing Com-

pany, 10 shares, $1,000; certificate of deposit, $367.50; total, $7,250, all, as alleged, "connected with the money received from Mercy A. Finley." The answer contained also a counterclaim for compensation of $3,000 for the trustee's services.

The reply of plaintiff to the answer of defendant was a general denial.

Upon a trial of the issues the district court found that the Tanner note for $4,882.50 was the property of defendant, but permitted him to discharge his liability for that amount of trust money by deducting therefrom for his services $3,000 upon receipting therefor and by depositing in court to the credit of the executor the difference between $4,882.50 and $3,000 or $1,882.50. In addition, defendant was permitted by the trial court to turn over to the executor, as the remainder of the trust property, the corporate stock mentioned, $2,000, and the certificate of deposit for $367.50, and to recover the costs of suit. Plaintiff appealed.

On the record below the appeal presents the cause for trial *de novo* without regard to the findings and judgment of the district court.

In equity, was defendant entitled to discharge his liability for income on investments by proof that he paid the beneficiary at different times as she needed money interest at the rate of 6 per cent. per annum for approximately 21 years, or $10,136.17? The answer depends on the nature of the trust and on what the trustee did. For a number of years prior to the creation of the trust relation defendant was a friend of the beneficiary's son and the friendship extended to the mother. Through the friendly advice of defendant, the son acquired the trust money, but soon died, and it fell into the hands of his mother. In addition to the ties of friendship defendant had the standing and influence of a banker. He was cashier or president of the Exchange National Bank of Hastings previous to, during, and after the period of his trusteeship. In perfect confidence Mercy A. Finley committed to him her only means of livelihood—$8,000. According to defendant's pleading and testimony

this was the only barrier between her and abject poverty, she being without earning capacity and needing every cent of her income. She did not exact promissory notes or securities or a fidelity bond or impose any restrictions on the discretion of defendant as a fiduciary, but for 21 years was contented with three receipts, alike in form, the first being as follows:

"April 20, 1900.

"Received of Mrs. M. A. Finley six thousand dollars for safe-keeping and investment.

"$6,000. C. G. Lane."

Defendant accepted the money with all the implied obligations imposed by implicit trust and confidence. His accountability in a court of equity is not measured by his own conceptions of duty, where they conflict with fundamental principles of justice essential to the protection of trust property and of the estates of deceased persons. It was the duty of defendant as trustee to keep an accurate account of all investments and of the income therefrom, to report promptly such transactions to the executor of the beneficiary's estate, and to turn over to him in money or proper securities all trust funds remaining in his hands. He has never performed this duty, nor given any reasonable excuse for failing to do so. A banker who is compelled by law and business rectitude to keep accurate accounts of debits and credits in transactions with depositors, regardless of the amounts involved or the book-entries required, ought to have at least some kind of memoranda showing investments of trust money and the income therefrom, when called to account as trustee, or else give a valid excuse for his failure to perform his duty in that respect. Without any authentic account to indicate specific investments or income for a period of 10 years or more, defendant appeared in court to answer the charge that he had failed to account as trustee. For that period he was unable to enumerate as a witness the different investments of trust money or to give the rate of interest on each loan, or the income realized, but was willing to rest his defense in

part on his own testimony and conclusion that the earnings of the trust funds did not exceed interest at the rate of 6 per cent. per annum, and that he had paid on that basis all he had received, or about $10,136.17. In proving what he had thus paid, he was not handicapped by oral testimony or the memory of individual transactions. He exhibited a complete list of the payments of interest to the beneficiary. It showed the date and amount of each payment and was accompanied by an authentic voucher. Had fidelity to trust and the promptings of friendship been as powerful as self-interest, the courts would have written data to aid them in estimating the amount owing by the trustee to the beneficiary's estate. The legal rate of interest in Nebraska is 7 per cent. In determining whether defendant is chargeable with 1 per cent., in addition to the 6 per cent. voluntarily paid by him, an examination of the evidence relating to investments is essential.

A partial account prior to July 13, 1912, shows that at different times defendant lent trust funds in varying amounts at 10 per cent. Some of the borrowers paid 8 per cent. As trustee he lent to himself as an individual August 11, 1900, $3,000 at 6 per cent. According to his own testimony he paid back the money May 1, 1902, but was unable to say what he did with it afterward. Subsequent to July 13, 1912, he did not keep a detailed account of his trust investments. In lending or investing trust money he conducted business in part at least in his own name. He testified in substance that the Tanner note tendered by him as evidence of a trust investment of $4,882.50 was secured by a deed in which he was himself grantee. The land described in the deed was incumbered by a prior mortgage for $5,000. Defendant himself claimed a lien of $2,000 or $3,000 on the same land. For several years no interest on the Tanner note has been paid, though the beneficiary, as pleaded by defendant, needed every cent of her income. The district court found that this note was the property of defendant, and from that finding he did not appeal. He testified he once invested trust funds in

stock of the bank officered in part by himself. The shares of stock tendered by defendant as trust property stood in his own name. He was an officer of both corporations. If he risked trust money in those enterprises the risk was speculative. No one could tell in advance that dividends would ever be paid. For a period of years they have produced no income available to the beneficiary, though income from the trust property was her only means of livelihood. If defendant paid from his own pocket interest on the money invested in the stock, as the beneficiary needed it, there is an inference that he lent $2,000 to himself and invested it in the stock for his own benefit. In any event the stock stood in his own name and he was in a position to claim it for himself, if profitable, and to unload it on the trust estate, if unprofitable. The investments of trust money in the stock, if made, did not indicate the prudence and care required of a trustee under the circumstances of this case. In a court of equity he cannot be permitted to escape accountability for the money entrusted to him by tendering in court property of that kind. The executor properly exercised the option to treat the Tanner note and the stock investments as conversions of trust property or as loans of trust funds by the trustee to himself as an individual.

The claim for compensation is wholly without merit. Defendant accepted the trust through friendship. There was no agreement for compensation. For 21 years defendant did not demand pay for services. He testified he never received any. In this situation the beneficiary left a will bequeathing to defendant $200. She made no provision for the payment of the $3,000, claimed by defendant for services. The terms on which defendant offered to account cannot be approved. He did not exhibit a proper account of his doings or turn over the trust funds in his hands. In these and other respects he failed to perform his duties and brought on litigation which will necessarily consume a considerable portion of the trust prop-

erty. These are circumstances under which a court of equity will not allow compensation.

In addition to 6 per cent. interest voluntarily paid by defendant, he is chargeable with interest at the rate of 1 per cent. per annum on $6,000 from April 20, 1900; on $1,000 from May 2, 1900; on $1,000 from December 27, 1902, each to March 14, 1925, the date of the judgment below. He is also chargeable with the three principal items. On the total amount of principal and interest due he is entitled to credit for $750. The counterclaim for compensation is disallowed and defendant is required to pay the costs in both courts.

The judgment of the district court is reversed. A decree conforming to these conclusions will be entered in the supreme court and the cause will be remanded for the purpose of carrying the decree into effect.

REVERSED, AND DECREE ENTERED FOR PLAINTIFF.

Note—See Trusts, 26 R. C. L. 1315.

NELSON S. MERCER ET AL., APPELLEES, V. PAYNE & SONS COMPANY, APPELLANTS.

FILED APRIL 12, 1927. No. 24475.

1. **Specific Performance.** A court of equity will not enforce a contract, unless it is complete and certain in all its essential elements. The parties themselves must agree upon the material and necessary details of the bargain, and if any of these be omitted, or left obscure or indefinite, so as to leave the intention of the parties uncertain respecting the substantial terms, the case is not one for specific performance. It is not the function of a court of equity to make a contract for the parties, or to supply any of the material stipulations thereof. If any of the essential details are wanting, a chancellor will not supply them in a decree for specific performance. *Zimmerman v. Rhoads*, 226 Pa. St. 174.

2. ———. Specific performance of a contract will not be decreed, unless the contract has actually been concluded; or, if any material part of it still rests in treaty, and remains to be settled by further negotiation, equity will not interfere. *Domestic Telegraph & Telephone Co. v. Metropolitan Telephone & Telegraph Co.*, 39 N. J. Eq. 160.

3. ———. To entitle a party to specific performance, there must be a clear, mutual understanding and a positive assent on the part of each party. *Creecy v. Grief*, 108 Va. 320.

4. ———. Mutuality of obligation is an essential element of the right to enforce specific performance of a contract in a court of equity. *Childs v. Reed*, 34 Idaho, 450.

5. ———. Where a contract is informal and not sufficiently definite in its terms to be susceptible of specific performance, and the contract further provides that a formal lease shall thereafter be drawn, and the parties, after repeated efforts, fail to agree on the terms of the formal lease, specific performance is properly denied. *Raccoon Coal Co. v. Faulkner*, 168 Ky. 235.

6. Contracts. It is elementary that, if the minds of the parties do not meet in the making of a proposed contract, and if they cannot themselves agree upon its terms, the courts are, of course, powerless to make a contract for them.

7. ———: TIME. In the absence of a provision in a contract making time for completion one of its essential terms, such contract is, nevertheless, to be completed within a reasonable time.

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

William Baird & Sons, for appellants.

John P. Breen and *William H. Herdman, contra.*

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ.

DEAN, J.

This is the second appearance of this suit in this court. In the former opinion it is pointed out that the suit had its origin in a written instrument, which is referred to as a "preliminary agreement" for a more formal contract to be thereafter made between the parties. The preliminary agreement, as construed by the parties, contemplated future negotiations for the making of a formal 99-year leasing contract between plaintiffs, as lessors, and defendants as lessees, for three improved building lots in Omaha, lo-

cated at the northwest corner of Farnam and Twenty-seventh streets. The lots are owned by plaintiffs. At the first trial the district court sustained a demurrer to the petition on the ground that the contract is indefinite and uncertain in its terms. Thereupon plaintiffs appealed, the judgment was reversed and the cause was remanded regularly for trial. *Mercer v. Payne & Carnaby Co.*, 110 Neb. 28. Subsequently, new pleadings having been filed by the parties, the case was tried on the merits, and the district court rendered a judgment in favor of plaintiffs, from which the defendants have appealed. The law of the case rule prevails in this state. It follows that, under the rule, the former judgment constitutes the law of the case, so far as it is applicable to the facts and the amended pleadings and the record now before us. *Hayden v. Frederickson*, 59 Neb. 141.

It is proper here to observe that, owing to certain changes in personnel, the defendants now consist solely of the Payne & Sons Company and, except as herein otherwise designated, the company will be referred to as the defendants.

The above mentioned "preliminary agreement" which contemplated the future negotiations between the parties, as above noted, is in words and figures following:

"Omaha, Nebraska, February 11, 1920.

"Received of Payne & Slater Company twenty-five hundred dollars ($2,500) as earnest money on the following proposition:

"Payne & Slater Company agree to enter into a ninety-nine year (99) lease on lots six (6) seven (7) and eight (8) block six (6), Boggs & Hill's First addition and to pay the sum of fifteen thousand dollars ($15,000) cash, of which the above twenty-five hundred dollars ($2,500) is a part, and to pay as rent the sum of six thousand dollars ($6,000) net per year for the first ten years of the lease, the sum of sixty-nine hundred dollars ($6,900) net per year for the second ten years of the lease, and the sum of eight thousand dollars ($8,000) net per year for the

last seventy-nine years of the lease; all payments to be made quarterly in advance.

"Complete abstract to be furnished, showing good title, and the property leased free and clear of all taxes, except the taxes for the year 1920, and subject to the existing lease now on the property. Insurance now on the property to be paid for *pro rata.*

"The lease to contain the usual conditions of a ninety-nine year (99) lease and to contain an option to purchase said property during the year 1930 for the sum of one hundred fifteen thousand dollars ($115,000) in addition to the above on payment of thirty-five thousand dollars ($35,000) or more in cash, thirty-five thousand dollars ($35,000) on or before three years from date of purchase and forty-five thousand dollars ($45,000) on or before five years from date of purchase. The said lease to contain a further option to purchase said property during the second ten years of the lease for the sum of one hundred thirty thousand dollars ($130,000) on payment of one-third cash and one-third on or before three years and one-third on or before five years from date of purchase. All deferred payments on both options to bear interest at the rate of 6 per cent. payable semi-annually. Said lease to contain an agreement that a building costing at least fifty thousand dollars ($50,000) be erected on said property on or before ten years from date of lease.

"Lease to be completed and signed and balance of fifteen thousand dollars ($15,000) paid on or before sixty days from date thereof.

"It is understood that all necessary insurance clauses and provisions for bond when the present buildings are torn down before the new building is constructed, and other necessary provisions for the protection of the owner to be included in the lease.

"Harry A. Tukey.

"Payne & Slater Company hereby agree to enter into the above lease and to fulfil conditions of the above receipt.

"Payne & Slater Company, by E. M. Slater.

"I hereby authorize Harry A. Tukey to sign said lease, the form of the lease to be approved by me.

"N. S. Mercer."

Did the negotiations between the parties bring about a meeting of the minds in respect of the subject-matter here involved so as lawfully to compel the defendants to execute a 99-year lease as lessees of the plaintiffs, as they contend? That there was such a meeting of the minds and that defendants are therefore bound to execute such lease is the contention of the plaintiffs.

On the contrary, the defendants contend that the weight of the evidence, fairly considered, shows that the minds of the parties never met in respect of the material terms of a 99-year leasing contract, and that there is now, and always has been, such a lack of mutuality of agreement between them, in respect of the subject-matter, that a contract never could at any time have been consummated, and never was consummated, between the parties, and that mainly for these, and other reasons hereinafter noted, no obligation ever at any time rested on defendants to execute a 99-year lease as contended by plaintiffs.

The "preliminary agreement" for the execution of a 99-year lease expressly provides that the lease is "to be completed and signed * * * on or before sixty days from date thereof." Incidentally, it may be added that the parties construe the word "thereof" to mean "hereof" as it plainly, and for obvious reasons, can refer only to the preliminary agreement. And it is in accord with the usual custom that the moving party, in point of time, is ordinarily charged with the duty of tendering a duly signed conveyance to the grantee. We do not think the signing of the preliminary agreement excuses plaintiffs from complying with the 60-day period, for signing the lease, which expired on or about April 15, 1920. The fact is that the grantors never signed or tendered a signed lease at any time before or at the trial, nor does the decree so require.

Section 2451, Comp. St. 1922, provides: "No estate or

interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning land, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same."

In *Irish v. Pulliam,* 32 Neb. 24, it was held that a certain agreement, which had to do with a building contract, "was to be reduced to writing and signed by the parties before it took effect." It was there held that until it was signed the contract was not complete. It has been held that such signing is imperative. 24 Cyc. 958; *Mather v. Scoles,* 35 Ind. 1. *Soper v. Gabe,* 55 Kan. 646, holds that the rule applies to contracts for "the sale and conveyance of land." To the same effect is *Counce v. Studley,* 81 Me. 431; *Howe v. Huntington,* 15 Me. 350. Where the execution of a deed is involved, an offer "of readiness at all times to make it will not do." *Klyce v. Broyles,* 37 Miss. 524; *Lanyon v. Chesney,* 186 Mo. 540.

In respect of their contractual duties, the conduct of plaintiffs was so dilatory that it practically amounted to an abandonment of the negotiations "for a contract." That they did not exercise even ordinary diligence is in very large part established by their own evidence. Their first substantial move was not undertaken until about a week after defendants served a written demand on them for, first, a return of the $2,500 earnest money, and, second, a notice that they, the defendants, had "withdrawn from any further negotiations." The lack of diligence by plaintiffs is disclosed, in part, in the following facts: Dr. Mercer left for Europe March 30, 1920, and did not return to Omaha until September 7, 1920. This was almost five months after the prescribed date for the execution of the 99-year lease. Harry A. Tukey, an Omaha real estate dealer of 23 years' experience and, according to his own evidence, an associate party plaintiff, was in California from about the first of August, 1920, and did not return

to Omaha until about five months after the required date for signing, though authorized to sign for Mercer. It also appears that, under plaintiffs' theory of the case, Dr. Mercer's wife was a necessary signatory party, and she was therefore caused by plaintiffs to sign and acknowledge a power of attorney wherein her husband was authorized to sign the proposed 99-year lease in her behalf. This power of attorney was executed, and acknowledged by Mrs. Mercer in Surrey county, England, but not until October 9, 1920, which was almost six months after the required 60-day period and almost eight months after the date of the preliminary agreement for the execution of a formal contract for a 99-year lease. And in June, 1920, while Dr. Mercer was yet in London, Tukey sent a letter to him from Omaha, under date of June 11, 1920. One page of this letter is in evidence and is here reproduced:

"June 11, 1920.

"Dr. N. S. Mercer,
"63 Philbeach Gardens,
"London, S. W.:—

"Have been waiting for two or three weeks for Harry Reed to make a search of the records of the lease concerning 'gold clauses.' Yesterday he reported to me and showed about twenty leases with 'gold clauses' and a little more than that without 'gold clauses.' I had an agreement with Slater that if we could show up the majority of leases as having 'gold clauses' they would sign the 'gold clause.' He seems to want to be very fair about the matter but we have not succeeded in accomplishing what we tried to do. Of course, Slater is not taking the arbitrary stand that he refuses to sign the 'gold clause' but stated to me yesterday that he feels that there is some claim on his side of the question. Frankly, I think the matter better rest until your return in September, as I am afraid it is almost impossible to draw up leases with the parties so far apart. There are so many little details of all kinds to settle. If this is satisfactory to you, I think I can arrange it with Slater. Kindly let me hear from you regarding this."

A letter of this tenor, written so long after the lease was "to be completed and signed," appears fairly to disclose that the minds of the parties were always widely separated in respect of material propositions relating to the project. Clearly the facts warranted Tukey in this observation in the above letter to his coworker Mercer: "I am afraid it is almost impossible to draw up leases with the parties so far apart." The letter, however, speaks for itself, and the state of facts reflected by this letter seems to have prevailed throughout the entire series of negotiations. This state of affairs became so very apparent that, on November 22, 1920, which was then almost ten months after the preliminary agreement was signed, the defendants sent the written demand, above referred to, for a return of the $2,500 earnest money, and therein advised plaintiffs that they had "withdrawn from any further negotiations." The written demand and notice are incorporated in the same instrument in language following:

"Nov. 22, 1920.

"Mr. Harry A. Tukey,
"Omaha, Nebraska.
"Dear Sir: Payne & Carnaby Company (formerly Payne & Slater Company) hereby requests the return by you of the $2,500 placed with you as earnest money as set forth in a receipt signed by you under date of February 11, 1920, said receipt relating to negotiations for a ninety-nine year lease to be entered into by Payne & Slater Company as lessee covering lots 6, 7, and 8, in block 6, in Boggs & Hill's First addition to the City of Omaha, Douglas county, Nebraska.

"This will also serve as notice to you that the undersigned have withdrawn from any further negotiations in reference to the matter above mentioned. Yours respectfully,

(Signed) "Payne & Carnaby Company,
"By H. B. Payne, Pres."

In respect of the foregoing notice Mr. Tukey testified: "Q. Now, did you ever, at any time, receive from the de-

fendant, or any one representing the defendant, any demand for the return of the $2,500 earnest money, other than the demand that is made in that letter? A. Not previous to that time. Q. Were you ever notified by the defendants or any one representing the defendants that they would not go ahead and complete this deal except as you were notified by this letter and prior to the date of this letter? A. Well, in the negotiations it might have been stated at different times that they wouldn't sign the lease the way we had it, or something of that kind, but never that they wouldn't sign any lease."

The statement by Mr. Tukey that defendants never said they would not sign any lease corroborates other of the evidence which goes to show that the defendants acted in entire good faith, but they had reasonable cause to despair of the ability of the parties to agree upon the terms of the proposed leasing contract. Incidentally, it may be noted that, in respect of the earnest money paid over by defendants to plaintiffs, Mr. Tukey testified: "Q. That $2,500 original payment which was made at this time, what was done with that? A. Gave Doctor Mercer $1,250 of it, and I still hold $1,250 of it." This evidence tends to support Tukey's former statement that he is one of the parties plaintiff and also the defendants' observation that Tukey did not return the earnest money because he had only half of it and Mercer had the other half.

The sending of the above letter of the defendants to the plaintiffs, under date of November 22, 1920, was followed five days afterward by a visit of Tukey and Mercer to the office of Mr. Slater, then one of the defendants. This was almost ten months after the date of the preliminary agreement and about eight months after it was agreed that the 99-year lease should be signed. On the occasion of this call at Slater's office, Mercer testified that he informed Slater that he had Mrs. Mercer's "power of attorney" with him, and that the plaintiffs "were prepared to sign up, or something; I don't remember the exact words," and Mercer further testified that he thought Slater then said "he

wouldn't sign at that time; that is the substance I believe, practically, that is about all." In view of the evidence pointed out herein, it will not, of course, be seriously contended that defendants, or any of them, were chargeable for the plaintiffs' lack of reasonable diligence in the premises. Nor is it surprisingly strange that Slater, or any other party defendant, would say that "he wouldn't sign at that time." Slater was then only one of the parties defendant, and, in view of the evidence, who can doubt that he was justified in what he said to plaintiff Mercer. True, the contract does not specifically proclaim that "time is of the essence of the contract." Nevertheless, all contracts are to be construed in the light of a reasonable compliance with such business usage, and promptness in performance, as may reasonably bear relation to the facts in the individual case. Did the plaintiffs reasonably comply with their duty in respect of the exercise of reasonable diligence in the premises? We do not think so.

Plaintiffs attached a copy of a proposed lease to their amended petition, as exhibit A, which consists of 25 pages of legal cap. And at the trial they offered the following additional instruments in evidence, namely, an instrument denominated "an original draft of lease," as exhibit 2, consisting of 22 pages of legal cap, and exhibit 3, which is denominated "second draft of lease," and which consists of 19 pages of legal cap, and also exhibit 6, which is denominated "another form of lease," and which consists of 23 pages of legal cap. All of the above exhibits are in evidence. What means this avalanche of legal documents that fell from plaintiffs' pen? They consist of almost 100 pages of typewritten legal cap. That the multitude of leases only added to the confusion of everybody who had to do with the entanglements of this controversy is perfectly apparent from an inspection of the record. Small wonder that from its midst the defendants, after a fruitless parley that lasted almost a year, finally sought relief by withdrawing "from any further negotiations."

To the suggestion, if it should be made, that if the de-

fendants were dissatisfied with the contracts in evidence they should have submitted a contract that was to their liking, the answer is that they submitted no contract nor could they be compelled to do so. They complied with the provision for "negotiating" under the terms of the preliminary agreement. Are the defendants to be penalized because they refuse to execute one of the several confusing 99-year leases so submitted by the plaintiffs? It is elementary that, if the minds of the parties do not meet in the making of a proposed contract, and if they cannot themselves agree upon its terms, the courts are, of course, powerless to make a contract for them. A form of 99-year lease is incorporated in the final decree, and this decree, to which the name of the presiding judge is affixed, consists of 19 pages, and it is repeatedly referred to by counsel as "the court's lease." But it was doubtless prepared by the clerk, or perhaps by counsel, for it is a custom, well-established and almost universally recognized in this jurisdiction, and of which we take judicial notice, that, in the more important civil cases, counsel ordinarily prepare the court's decrees. But this custom, of course, can have no bearing whatever in the premises. From the judgment the defendants alone have appealed.

The material provisions which are contemplated by the preliminary agreement in suit may, of course, be incorporated in a 99-year lease of real estate, but only as and when such provisions are expressly agreed upon between the parties and where there has been a complete meeting of minds in respect thereto. The former opinion almost in its opening sentence has this to say: "There is nothing presented by the appeal except the sufficiency of the petition to state a cause of action for specific performance." And in plaintiffs' brief it is pointed out that, subsequent to the above ruling, when the suit was remanded they filed an amended petition, to which the defendants filed an answer, and to this plaintiffs filed a reply, and that the suit thereupon regularly proceeded to trial and the rendition of a "final decree," under the amended pleadings.

This final decree, among others, contains this recital: "(4) Finds that plaintiffs are entitled to have said defendants, Payne & Sons Company, specifically perform said contract of February 11, 1920 (the preliminary agreement), by executing, as lessee, in duplicate a lease in words and figures following, to wit." The foregoing recital in the decree is followed by a form of a 99-year leasing contract, and in this form of lease the court prescribes the terms and conditions of a contract which has to do with the leasing of a tract of highly valuable real estate in a thickly settled business location of a rapidly expanding, midwestern, metropolitan city. And near the close of the decree the court continuing "(5) finds that a lease in the form set forth in the preceding (court's) finding contains not only the terms and conditions agreed upon specifically in said contract of date February 11, 1920 (the preliminary agreement), and also contains such covenants as are implied by law and such conditions as are 'the usual conditions of a ninety-nine (99) year lease' as shown by the evidence. * * * It is therefore ordered, adjudged and decreed by the court: (1) That the defendant, Payne & Sons Company, shall, within sixty days after there is tendered to them in duplicate a lease in the form and words and figures set forth in finding No. 4 of this decree and duly signed by the plaintiffs Nelson S. Mercer and Anna M. Mercer and acknowledged by said plaintiffs in such form as to entitle the same to be recorded under the laws of the state of Nebraska, sign, make, execute and deliver, as lessee, said lease so tendered in duplicate and acknowledge the same in such form as to entitle the same to be recorded under the laws of the state of Nebraska, and on the execution of the lease as aforesaid, one of the duplicates thereof shall be delivered to said defendant, Payne & Sons Company, and the other retained by said plaintiff Nelson S. Mercer; and it is further ordered, adjudged and decreed that upon the failure of the said defendant, Payne & Sons Company, to sign, acknowledge, make, execute and deliver said lease as aforesaid,

then and in such case the clerk of this court, as special master, shall sign, acknowledge, make, execute and deliver said lease for and in behalf of said defendant, Payne & Sons Company, and when so executed the said lease shall have like effect as if signed, acknowledged, made, executed and delivered by said defendant, Payne & Sons Company, by its proper and duly authorized officers. * * * To all of which the defendant Payne & Sons Company excepts and is allowed forty (40) days from the rising of the court to prepare and serve its bill of exceptions herein. On motion of defendant supersedeas bond herein is fixed at the sum of ten thousand ($10,000) dollars."

Defendants contend that the court's lease "differed in its conditions and requirements from both the first and second drafts" of the proposed leases submitted by plaintiffs. Following are some of the noticeable differences to which defendants take exception, as pointed out in their brief, their argument being that the court's lease herein eliminates the requirement with reference to payments being made in gold coin and calls for only 7 per cent. interest on defaulted payments instead of 10 per cent., and it eliminates the requirements in regard to furnishing tax receipts and furnishing bond in case of contest on taxes, and changes the requirements in regard to insurance, and eliminates the requirements as to wind and lightning insurance, and it changes the requirements in regard to keeping the premises in repair, and also changes the terms pertaining to restoration of improvements, and eliminates requirements as to boiler, elevator or liability insurance, and changes the conditions pertaining to alteration or remodeling and new buildings, and also changes the requirements in regard to the use of the premises, and in respect of the lessee indemnifying the lessor against liens and charges, and it changes the requirements in regard to the notice being given in case of any default, and it also omits any condition with reference to any defect in the lessor's title. In appellees' brief no objections are noted, under supreme court rule 12 (94 Neb. p. XI), to the above exceptions taken by the appellants.

The vitally decisive point, however, is that the decree herein enforces specific performance of a lease that was not submitted by either party and upon which the minds of the parties did not meet.

While this suit is one of first impression here, we are not without accepted authority from other jurisdictions. *Goldstine v. Tolman,* 157 Wis. 141, involves a suit which was begun by plaintiff for specific performance of an alleged agreement to enter into a 99-year lease for certain property in Milwaukee. Plaintiff prevailed in the trial court, and on appeal the judgment was reversed. The case appears to be in point here. In that case, as here, the parties executed a preliminary agreement. Goldstine was plaintiff and Tolman was defendant. The trial court held that the form of the lease submitted by plaintiff in some respects appeared to fulfil the requirements of the preliminary agreement. But the court was not altogether satisfied and drew up a lease which, in the court's opinion, practically conformed to the terms mentioned in the preliminary agreement and therein granted the relief prayed for by plaintiff. On appeal to the supreme court the judgment of the trial court was reversed on the ground that the minds of the parties had not met and for the additional reason that the lease was written by the court.

The rule appears to be, as deduced from the authorities, that a court of equity will not enforce a contract, unless it is complete and certain in all its essential elements, and the parties themselves must agree upon the material and necessary details of the bargain, and if any of these be omitted, or left obscure or indefinite, so as to leave the intention of the parties uncertain respecting the substantial terms, the case is not one for specific performance. It is not the function of a court of equity to make a contract for the parties, or to supply any of the material stipulations thereof. If any of the essential details are wanting a chancellor will not supply them in a decree for specific performance. *Zimmerman v. Rhoads,* 226 Pa. St. 174.

Specific performance of a contract will not be decreed,

unless the contract has actually been concluded; or, if any material part of it still rests in treaty, and remains to be settled by further negotiation, equity will not interfere. No court has power to make a contract for persons *sui juris,* nor to compel them to agree with each other. *Domestic Telegraph & Telephone Co. v. Metropolitan Telephone & Telegraph Co.,* 39 N. J. Eq. 160. To entitle a party to specific performance, there must be a clear, mutual understanding and a positive assent on the part of each party. *Creecy v. Grief,* 108 Va. 320. Where a contract is informal and not sufficiently definite in its terms to be susceptible of specific performance, and the contract further provides that a formal lease shall thereafter be drawn, and the parties after repeated efforts fail to agree on the terms of the formal lease, specific performance is properly denied. *Raccoon Coal Co. v. Faulkner,* 168 Ky. 235. A court of equity will decree specific performance of a contract only where, in the exercise of sound legal discretion, it finds, from all the circumstances, the specific performance will subserve the ends of justice. It is never decreed as a matter of course, even when a legal contract is shown to exist. *McDonald v. Minnick,* 147 Ill. 651. Mutuality of obligation is an essential element of the right to enforce specific performance of a contract in a court of equity. *Childs v. Reed,* 34 Idaho, 450.

Finally, if brief repetition may be indulged, Tukey's observation may be noted in respect of the good faith of defendants, in that he said they might have stated, at different times that "they wouldn't sign the lease the way we had it, * * * but never that they wouldn't sign any lease." Did a party litigant anywhere ever receive a better certificate of good faith from his adversary?

The judgment against defendants is reversed, and the cause is remanded to the district court, with directions to enter a judgment in favor of defendants, and against the plaintiffs, for $2,500 paid to plaintiffs by defendants, together with interest thereon at 7 per cent. per annum, from November 22, 1920, to the date of the entry of the

judgment in the district court, and to dismiss plaintiffs' cause of action.

REVERSED.

ROSE, J., dissenting.

In my opinion defendant entered into an enforceable contract to lease from plaintiffs three building lots in Omaha for 99 years. Defendant made at the time a cash payment of $2,500. The parties entered into their own contract. It contained in specific written terms the vital elements of a 99-year lease. The lots were described. The period of tenancy was 99 years. The annual net rental for the first period of 10 years was fixed at $6,000; for the second period of 10 years, $6,900; for the third period of 79 years, $8,000. Defendant had an option to purchase the lots. It was agreed that the lease should contain the usual conditions of a 99-year lease. It was distinctly held on the former appeal: "Sufficient evidence of 'usual conditions' of a 99-year lease, to which the parties agreed, will, in that particular, leave nothing open for negotiation." Upon a trial of the merits, after the cause was remanded, the district court, in my view of the record, properly decreed the mutual terms on which the minds of the parties met when they entered into the contract prior to the drop in rental values.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLEE, V. GEORGE HELDT, APPELLANT.

FILED APRIL 12, 1927. No. 25619.

1. **Injunction:** MISDEMEANORS: INADEQUATE REMEDY AT LAW. While a court of equity will not ordinarily interfere by injunction to prevent acts which by statute are punishable by fine, yet when said acts are of such a nature that the public welfare is threatened and the criminal laws do not afford a complete and adequate remedy, courts of equity may, at the instance of properly constituted authorities, afford relief by injunction.

2. **Statutes:** ACT RELATING TO BOVINE TUBERCULOSIS: CONSTITUTIONALITY. The subject-matter of section 9, ch. 7, Laws 1925, examined in connection with the title of the act, and *held* uncon-

stitutional, as violative of that part of section 14, art. III of our Constitution, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."

3. ———: ———: ———. The subject-matter contained in section 9, ch. 7, Laws 1925, although unconstitutional, was not an inducement to the passage of the act, and the remaining sections thereof are *held* constitutional.

4. **Animals.** The proclamation of the secretary of the department of agriculture declaring chapter 7, Laws 1925, in operation in Saunders county, Nebraska, on and after April 20, 1925, being based on the provisions of section 9, ch. 7, Laws 1925, which we hold was unconstitutional, was a nullity, and said chapter never became operative in Saunders county.

5. ———: BOVINE TUBERCULOSIS: POWERS OF LEGISLATURE. It is within the province of the legislature in the exercise of police power to require the examination, inspection and testing of cattle for bovine tuberculosis, and if such disease is found to exist, to make provisions for the summary destruction of the diseased animals.

6. **Constitutional Law:** ACT RELATING TO BOVINE TUBERCULOSIS. In such cases, the mere fact that the legislature has made provision for but a partial indemnity to the owner for the cattle destroyed does not render the act unconstitutional, as being in conflict with the Fourteenth Amendment of the Constitution of the United States and our own Constitution.

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

Arthur F. Mullen and *John H. Barry*, for appellant.

O. S. Spillman, Attorney General, Peterson & Devoe and *E. S. Schiefelbein, contra.*

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

DAY, J.

This action was brought by the state on the relation of O. S. Spillman, attorney general, against George Heldt, de-

fendant, to restrain and enjoin defendant from interfering and preventing the agents of the department of agriculture from entering upon defendant's premises, examining, and testing his cattle for bovine tuberculosis, in Saunders county, and carrying out the law of the state and the rules and regulations of the department of agriculture in reference to bovine tuberculosis eradication.

The main issues tendered by the answer may be epitomized as follows: (1) That an injunction was not an available remedy to plaintiff, because the acts sought to be enjoined were, by the provisions of chapter 7, Laws 1925, made punishable by fine, and therefore a plain and adequate remedy at law was afforded to the plaintiff; (2) that chapter 7, Laws 1925, under which the department of agriculture was assuming to act, was never in legal force in Saunders county; (3) that said chapter is unconstitutional and void, in that it violates section 14, art. III of our Constitution; (4) that said chapter is void because it violates the Constitution of the state and the Fourteenth Amendment of the Constitution of the United States, as the enforcement of the act would unlawfully deprive the defendant of his property without due process of law.

By way of cross-petition, defendant prayed that plaintiff and the officers and employees of the state be enjoined from inspecting and administering tubercular tests to defendant's cattle in Saunders county. Plaintiff's reply to defendant's cross-bill was a general denial. Upon a full hearing, the trial court found in favor of the plaintiff and entered judgment as prayed in plaintiff's petition and also dismissed defendant's cross-petition. From this judgment defendant has appealed.

Voluminous briefs have been filed in support of both sides of the controversy which have greatly assisted us in the conclusions reached, but we cannot in the space which should properly be devoted to an opinion undertake to discuss at length the various questions presented.

It is first urged by defendant that injunction is not an available remedy to the plaintiff because the state has a

plain and adequate remedy at law. It is pointed out that the act of 1925, under which the plaintiff was attempting to act makes it a criminal offense, punishable by fine, for any person to interfere with or prevent the officers of the state from administering the act. It is a general rule that, where acts complained of are in violation of the criminal law, courts of equity will not, on that ground alone, interfere by injunction to prevent their commission, as they will not exercise their power for the purpose of enforcing criminal laws, but there is a well-recognized exception to the general rule, namely, that where the acts complained of constitute a nuisance and endanger the public health and welfare, and where a more complete remedy is afforded by injunction than by criminal prosecution, a court of equity may, at the instance of properly constituted authorities, afford relief by injunction.

The general rule was applied to the facts presented in *State v. Maltby,* 108 Neb. 578, and injunction was denied. In that case, the court took notice of the well-recognized exception to the general rule, but the majority of the court was of the view that the facts in that case called for the application of the general rule, rather than the exception. Authorities are cited in the main as well as in the dissenting opinion recognizing the exception to the general rule.

Under the facts disclosed by the record, we are of the view that a criminal prosecution would not afford the public as complete and adequate relief as injunction, and that the plaintiff was well within its rights in applying to equity for relief. The public health and safety were proper elements to be considered as to whether equity would take cognizance of the case. In 32 C. J. 279, sec. 442, the rule is stated: "Where an injunction is necessary for the protection of public rights, property, or welfare, the criminality of the acts complained of does not bar the remedy by injunction." Cases are cited in support of this view. A similar rule is laid down in 14 R. C. L. 367, sec. 68, and cases cited.

It is next urged by defendant that chapter 7, Laws 1925,

under which the department of agriculture and its employees were assuming to inspect and test defendant's cattle never became operative in Saunders county, and therefore the officers were not authorized by law to do the acts they were attempting to do. A determination of the question presented by this objection involves an examination of certain provisions of the act, as well as the title, in connection with section 14, art. III of our Constitution. Upon the point under consideration, defendant argues that section 9 of the act, under which, it is claimed by the state, the act became operative, is unconstitutional, and that therefore the attempted acts of the officers were unauthorized. The title of the act in question is as follows:

"An act to provide for the inspection, examination, and testing of cattle for tuberculosis and to establish an area plan for such inspection, examination, and testing within this state by the department of agriculture, when a request has been made therefor by sixty per cent. of the owners representing fifty-one per cent. of the breeding cattle; and to provide for indemnity on cattle condemned and destroyed by order of the department of agriculture on account of tuberculosis; and to repeal chapter 11, Laws of Nebraska for 1923; and to declare an emergency."

Section 1 of the act, much abbreviated, provides in substance that, whenever a petition signed by 60 per cent. of the owners representing 51 per cent. of the breeding cattle, as disclosed by the last assessment rolls of the several testing districts, who reside in any county, shall be presented to the department of agriculture, asking that all breeding cattle herds within the county be tested for tuberculosis, the department is authorized to make such tests. This section further provides that upon the filing of such petition the secretary of the department of agriculture shall fix a time for hearing before him, giving notice and an opportunity for objections to be filed, and if upon such hearing the secretary of the department is satisfied that the requirements of the law have been complied with, he shall declare such county an area for inspection, examination

and testing of breeding cattle therein for tuberculosis. The secretary is also required to publish a notice in some newspaper of general circulation in the county fixing the time when such tests will begin. Section 9 of the act provides in substance that, where the area plan of tuberculosis eradication has been adopted in this state prior to the enactment of this act, such work may be continued by the department of agriculture in each of said counties under the provisions of this act without further petition by the owners of breeding cattle, provided that 60 per cent. or more of the herds of breeding cattle of such county have been tested or that the petition submitted be signed by 60 per cent. or more of the owners of breeding cattle. The act was passed with an emergency clause and was approved March 31, 1925. It will be observed, however, that the law did not become operative in the several counties of the state by the mere fact of its passage. Outside of section 9, the act is founded upon the theory that, before the law should become effective, petitions are to be circulated and presented to the department of agriculture, an order issued declaring the county to be under the area plan, and from then the work is to be carried on as outlined in the act. It will be noticed that, by the provisions of section 9, the act becomes effective without a petition, notice, and hearing, when the area plan has been previously adopted in the state, provided 60 per cent. or more of the herds of breeding cattle in the county have been tested, or that a petition be submitted, signed by 60 per cent. or more of the owners of breeding cattle.

Acting under the provisions of section 9, the department of agriculture issued an order April 20, 1925, declaring the act to be in force and effect on and after that date. No claim is made that the provisions of section 1 of the act were complied with.

Is the subject-matter contained in section 9 within the title of the act? Section 14, art III of our Constitution, provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." The

title of the act, among other things, provides for the inspection, examination and testing of cattle for tuberculosis and to establish an area plan for such inspection, examination and testing within the state by the department of agriculture, when a request has been made therefor by 60 per cent. of the owners representing 51 per cent. of the breeding cattle, etc. There is no suggestion in this title that the area plan of inspection is to be in force in any other way than upon the petition of 60 per cent. of the cattle owners representing 51 per cent. of the breeding cattle, whereas under the provisions of section 9, in counties where the area plan has been adopted prior to the passage of the present act, no petition is required, as provided for in section 1, before the act becomes operative. Section 9 provides an entirely different method and different conditions under which the act may be effective. Any one reading the title, especially that portion indicating that the act becomes effective when a request therefor has been made by 60 per cent. of the owners representing 51 per cent. of the breeding cattle, would not be apprised of the fact that the act might be effective in any other manner. Had the title to the act omitted the clause, "when a request has been made therefor by 60 per cent. of the owners of the breeding cattle," it is possible that upon a fair interpretation of the title it would be broad enough to include the subject-matter contained in section 9 of the act; but, with the clause included beginning with the word "when," the effect is to limit the scope of the title, rather than to enlarge it, and to carry the idea that it became effective only in that manner.

A reading of the entire act in connection with the title leads one to believe that the subject-matter of section 9 is an afterthought, and not germane to the title or the leading thought running through the remainder of the act. We are quite convinced that the provisions of section 9 are not included in the title and are contrary to section 14, art. III of our Constitution. We are of the view, however, that section 9 was not an inducement to the passage of the act. Without section 9, the act is complete and enforceable and

within the fair limits of its title. We hold that section 9 is unconstitutional, but that the remainder of the act is legal and enforceable. If we are correct in our conclusion with respect to section 9, it follows that the act of 1925 was never in force in Saunders county, because the proclamation by the secretary of the department of agriculture was based solely upon the provisions of section 9.

It is also urged that the act in question is null and void because it provides for the destruction of cattle found to be infected with tuberculosis without compensation to the owner. It is argued that the act is in conflict, not only with our own Constitution, but with the Fourteenth Amendment of the Constitution of the United States. The act provides that, when any bovine animal is certified to be tuberculous by the department of agriculture, such animal shall be branded, quarantined and slaughtered and the owner reimbursed according to the provisions of a schedule which, in the main, provides for the payment by the state of not more than $15 for any grade animal nor more than $30 for any pure bred animal. Provision is made for the appraisal of the amount, and the payment of one-third of the difference between the appraised value and the value of the net salvage received by the owner from the slaughter of such animal. There are other provisions on the subject which provide that, when the owner does not receive compensation from the federal government for such animals, the owner may receive double the amount of indemnity from the state. It seems to be conceded, however, that these provisions contemplate but partial compensation to the owner for the animals destroyed.

The validity of statutes similar to our own have frequently been considered by the courts and in the main they have been sustained upon the theory that such enactments are a proper exercise of the police power of the state. In a recent case, *Fevold v. Board of Supervisors*, 202 Ia. 1019, a similar question to the one now before us was discussed, and it was held that neither the Fourteenth Amendment of the Constitution of the United States nor any other amend-

ment was designed to interfere with the police power of the state to prescribe regulations to promote health, peace, morals, education, and good order of the people; that in the exercise of a reasonable discretion it was within the power of the legislature to determine what measures should be taken, to the end that cattle be tested for tuberculosis in the interest of public health. In that case the general subject is discussed and numerous authorities cited in support of the general rule. In *Durand v. Dyson,* 271 Ill. 382, it is said: "Prevention of the spreading of dangerous diseases among cattle is now universally recognized in this country as within the domain of the police power, as it is so essential to the public safety and health." In *Lawton v. Steele,* 152 U. S. 133, in discussing the general subject of police power, the court said: "It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order * * * the slaughter of diseased cattle." In *Houston v. State,* 98 Wis. 481, it is said: "It is fairly established, by adjudications too numerous to mention, that a state may, in the proper exercise of its police power, authorize the destruction of such property as has become a public nuisance, or has an unlawful existence, or is noxious to the public health, public morals, or public safety, without compensation, notwithstanding the prohibition in section 1, art. XIV of the amendments of the Constitution of the United States." See, also, *Schulte v. Fitch,* 162 Minn. 184; *Richter v. State,* 16 Wyo. 437; *Barbier v. Connolly,* 113 U. S. 27; *Jacobson v. Massachusetts,* 197 U. S. 11.

Cases supporting the doctrine that cattle suffering from contagious or infectious disease may be destroyed by the state under the police power of the state, without compensation to the owner, may be found in 3 C. J. 54, sec. 151; 1 R. C. L. 1158, sec. 102. That bovine tuberculosis is dangerous to the human family is fully sustained by expert testimony and warrants the legislature in enacting laws to

suppress it under the police power of the state. The scientific testimony pertaining to the tests adopted in determining whether an animal is infected with bovine tuberculosis, while not infallible, is, we think, sufficiently correct to warrant the legislature in adopting such method as a test.

Other questions are presented in the brief of the defendant, which we have considered, but which we do not regard as controlling in the case, and a discussion of them is omitted. Upon a review of the evidence, in the light of the authorities, we are firmly convinced that the act in question, except in the particulars heretofore pointed out, is not in conflict with our Constitution or the Constitution of the United States. It follows from what has been said that this act never became operative in Saunders county, and that the judgment of the district court in granting the injunction to the plaintiff was erroneous. The law never having been properly in force in Saunders county, the defendant was entitled to an injunction on his cross-petition against the state and its officers from entering upon his premises and attempting to test his cattle under the provisions of the act.

The judgment of the district court is reversed and the cause remanded, with directions to enter judgment conforming to this opinion.

REVERSED.

Note—See Animals, 8 A. L. R. 70.

CENTRAL NATIONAL BANK OF LINCOLN, APPELLEE, V. FIRST NATIONAL BANK OF GERING ET AL., APPELLANTS.

FILED APRIL 12, 1927. No. 25214.

1. **Trusts:** TRACING TRUST FUNDS. A trust fund may be followed and recovered in equity by the beneficiary, as against the trustee or his general creditors, either in its original or substituted form, when, and only when, it can be traced to and identified in some specific fund or property.

2. **Banks and Banking:** INSOLVENCY: TRACING TRUST FUNDS. One seeking, in equity, the allowance of a claim for preference

against an insolvent bank in the hands of a receiver has the burden of proving that his trust fund either came into the possession of the receiver, or was invested in some specific fund or property that came into the hands of the receiver.

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

Morrow & Morrow, for appellants.

Field, Ricketts & Ricketts, Honnold & Clarke and *Mothersead & York, contra.*

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

GOOD, J.

The Central National Bank of Lincoln brought suit in equity against the First National Bank of Gering and its receiver and another to establish a preferred claim, payable in full from the general assets of said bank in the hands of its receiver. The defendant bank will hereinafter be called the bank.

While the bank was open and transacting, under the laws of the United States, a general banking business, it received from plaintiff for collection and return four promissory notes, aggregating in face value about $4,800. Plaintiff transmitted these four notes to the bank in November, 1923. They were received by the bank in a fiduciary capacity and on specific instructions to collect and make return. Two of the notes were by the bank collected from the makers by the latter drawing checks upon their accounts in the bank. Another of the notes was renewed, and the bank sold the renewal note and converted or used the proceeds. The bank was closed December 31, 1923. The fourth of the notes was found in the bank after it went into the possession of the receiver. This latter note was ordered returned to the plaintiff and will not be further considered in this case.

Plaintiff's action is based on the assumption that the proceeds of the three notes in controversy were mingled with

the general assets of the bank, and that they augmented the assets which came into the possession of the receiver, to the extent of the amount of the proceeds of such notes, and that, therefore, plaintiff is entitled to have its claim allowed as preferred and payable from the general assets of the bank in the hands of its receiver. The defense of the receiver proceeds on the theory that the proceeds of the three notes have not been traced by the plaintiff into any specific property that came into the receiver's possession.

The foregoing facts are presented by proper pleadings, carefully drawn. The trial court found for plaintiff, preferred its claim to the full amount of $4,467.23, and directed payment from any funds in the hands of the receiver. Defendant bank and its receiver appeal.

Is plaintiff, under the pleadings and facts, entitled to have its claim preferred and paid out of the general assets of the bank in the hands of its receiver? This is the only question for determination.

It appears that plaintiff was not informed of the collection of the notes and did not know that any of them had been collected or renewed until after the failure of the bank. At the time the two notes were collected and at the time the third note was renewed, the bank gave plaintiff credit upon its books for the amount of the proceeds of each of the three notes. This was done without the knowledge or consent of the plaintiff, and plaintiff never received the proceeds of any one of the three notes. It further appears that assets of the bank, consisting of real estate, furniture, fixtures, bills receivable, altogether having a face value in excess of $400,000, came into the possession of the receiver, but that such assets were probably worth not to exceed 40 per cent. of their face value. There was also an item of about $1,300 in cash. It appears that this cash item was practically extinguished or used in the payment of other preferred claims, pursuant to the order of the comptroller of the currency. It appears also that subsequent to the collection of the two notes and the renewal of the third the bank acquired some new bills receivable; but whether they

represented new loans made from cash funds in the bank, or were renewals of preexisting bills receivable owned by the bank, is not disclosed.

For the sake of argument, it may be assumed that the bank received cash for the three notes in question and that plaintiff has traced the proceeds of its notes into the cash fund of the bank. If there had been a cash fund on hand sufficient to pay the plaintiff's claim, there is no doubt but that it should have been allowed and ordered paid as a preferred claim from such fund, because plaintiff had traced its trust fund into the cash fund. However, since the cash fund has been dissipated and plaintiff has not traced its trust fund into any other specific property, the question arises whether or not it may impress a lien or trust upon all the assets of the bank and have its claim paid therefrom, to the exclusion of general creditors of the bank.

It is manifest that, so far as the bank building, furniture and fixtures are concerned, plaintiff's trust fund did not enter into their purchase and is not invested in those items. It is also apparent that plaintiff's trust fund did not enter into the purchase of any of the bills receivable owned by the bank at and prior to the time it collected or converted the proceeds of plaintiff's notes.

The law relating to the right of a *cestui que trust* to follow trust funds that have been misapplied by the trustee has been one on which the authorities have, from the earliest time, differed. The ancient rule was that money had no ear-marks, and when a trust fund was mingled with other funds it could no longer be identified and could not be reached by the beneficiary. The first departure from this rule was made in the English case of *In re Hallett's Estate*, 13 Ch. Div. (Eng.) 696, in which it was held: "If money held by a person in a fiduciary capacity, though not as trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the bankers' hands."

In attempting to follow the rule thus announced, some of the courts went to the extreme of holding that where

trust funds are commingled with the general assets of the trustee the beneficiary has a lien upon all of the assets of the trustee and has a preference over general creditors of the trustee. This rule was announced in *McLeod v. Evans*, 66 Wis. 401, and was followed, to some extent, by the courts of Kansas, Missouri, and Iowa, and, apparently, by this court in the cases of *Anheuser-Busch Brewing Ass'n v. Morris*, 36 Neb. 31, and *State v. State Bank of Wahoo*, 42 Neb. 896. In the last-mentioned cases this court, in effect, held that, where a bank collects money for another, it holds the same as trustee of the owner, and, on the making of an assignment by the bank for the benefit of its creditors, the trust character still adheres to the funds in the hands of the assignee, and the owner is entitled to have his claim allowed and preferred over the claims of general creditors.

Later, the case of *McLeod v. Evans, supra*, and other early decisions by the Wisconsin court were overruled in *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237. In the latter case it was held that one for whom a bank had collected a draft before it failed was not entitled to preference over other creditors if the bank had disposed of the proceeds before the assignee came into possession. The authorities up to that time were quite extensively reviewed in this case. It was there pointed out: "The guiding principle is that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of the trust. But so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust." The opinion further quoted from *Little v. Chadwick*, 151 Mass. 110, wherein it was said: "When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the *cestui que trust* to follow it fails."

This court also has departed from the rule announced in *Anheuser-Busch Brewing Ass'n v. Morris,* and *State v. State Bank of Wahoo, supra,* and has allied itself with the general rule now prevailing in the courts of this country. In the case of *State v. Bank of Commerce,* 54 Neb. 725, it was held:

"When trust funds are wrongfully converted, and not only do not remain in the hands of, and are not found among the assets of, the wrong-doer but are actually traced out of his hands and shown to have been dissipated, then the beneficiary of the trust fund is not entitled to have his claim allowed as a preferred one against the estate of the insolvent wrong-doer.

"If the trust property consisted of money, the claim of the beneficiary of the trust fund may be preferred to the extent of the cash found among the assets of the insolvent trustee at the time of his failure, unless it affirmatively appears that such cash assets are not part of the trust fund."

In that case it was recognized that the beneficiary of a trust fund could follow it so long as he could trace it into any specific fund or property. In that case a county treasurer deposited trust funds in a bank which afterwards failed. The court held that the county was entitled to have its claim decreed a first lien upon any asset of the insolvent bank which it showed was the product of the beneficiary's moneys. More than $15,000 had been so deposited, and the bank was aware of the fact that it was a trust fund. When the bank failed, it had left in its vaults only $140 in cash. It had used the treasurer's deposit in paying off other depositors of the bank. It was not shown that any part of the public money was represented or embraced in any particular assets of the bank which came into the possession of its receiver. The county was held entitled to reclaim the $140, as being part of the trust fund, but was not entitled to have its claim against the insolvent bank decreed a first lien upon the other assets thereof.

Again, in *Morrison v. Lincoln Savings Bank & Safe Deposit Co.,* 57 Neb. 225, this court held: "The owner of trust

property is not, merely by reason of the character of his claim, entitled to a preference over the general creditors of an insolvent trustee." And further held: "A person asserting a claim for preference against an insolvent estate has the burden of showing that such estate has been increased, to some extent, by the misappropriation of trust funds or property belonging to the claimant." In that case a bank, while a going institution, had received trust funds and, prior to insolvency, had misappropriated them. It was sought to have the claim allowed as preferred against the general assets of the bank. It was announced in the body of the opinion that "the doctrine held in some jurisdictions, that the beneficiary of a trust fund is entitled in a case of this kind to a preference over the general creditors of an insolvent without showing that such fund, or part of it, was included in the assets which came into the hands of the receiver," was expressly repudiated in the case of *State v. Bank of Commerce, supra.* It was further stated therein that the right rests "upon the equitable title of the beneficiary, who, seeking to recover specific property or to fix a charge upon a mass, must trace his estate, and show that the specific thing claimed is in equity his property, or that his estate has gone into and remains in the mass he seeks to charge." Later in the case of *City of Lincoln v. Morrison,* 64 Neb. 822, in an able opinion written by that eminent jurist, Judge Pound, the authorities were again reviewed, and it was therein held that, where a trustee has used the trust fund in paying his debts, the *cestui que trust* is not entitled to a preference over general creditors for the amount of his trust fund so misappropriated.

The principles announced in the last three mentioned Nebraska cases are now firmly established in this jurisdiction. They are supported by the great weight of authority, both English and American, and seem to be based upon sound reason. The rule is that a trust fund may be followed and recovered in equity, as against the trustee or his general creditors, either in its original or substituted form, when, and only when, it can be traced to and identified in

some specific fund or property. 39 Cyc. 350, and cases therein cited; 26 R. C. L. 1348, 1354, 1355, secs. 213, 214, 218, 219, and cases therein cited. The reason for the rule is not that the beneficiary is entitled to a preference because of the misapplication by the trustee of trust funds, but upon the theory that the trust fund has been traced into, and is a part of or invested in, some specific fund or property of the trustee.

In the instant case, the plaintiff has done no more than to show, at most, that its trust fund was paid into the bank and became commingled with the bank's cash fund. If there was anything in that fund which came into the hands of the receiver, then plaintiff would be entitled to resort to such fund, because it had traced its property into it. If plaintiff had shown that the cash fund of the bank, which included plaintiff's funds, was invested in some specific property, he could still follow it to that particular property. It is quite apparent that plaintiff's trust funds were not invested in the bank building, furniture and fixtures; nor were they invested in any of the bills receivable which belonged to the bank at the time the trust funds were paid to it; nor is it disclosed that the trust funds of plaintiff were invested in any of the assets of the bank which came into the possession of the receiver. The proof, therefore, fails to establish plaintiff's right to a preference out of the general assets of the bank.

It follows that the judgment of the district court is erroneous. It may be that upon a subsequent trial plaintiff may be able to trace its trust funds into some specific property that came into the possession of the receiver, in which event, of course, plaintiff should be given a preference as to such specific property. The judgment is, therefore, reversed and the cause remanded for further proceedings.

REVERSED.

ROSE, J., dissenting.

I take radical exception to the decision of the majority and to the propositions on which the allowance of plaintiff's preferred claim is set aside.

The First National Bank of Gering, defendant, received from the Central National Bank of Lincoln, plaintiff, and accepted three promissory notes, aggregating with interest $4,467.23, for the sole purpose of collecting and returning the amounts due plaintiff, the owner. To that purpose alone defendant was specifically limited in writing and became a trustee to perform the duty of a fiduciary while openly transacting a banking business. Defendant collected the notes, betrayed its trust, clandestinely credited to plaintiff on its books the proceeds of the notes, hid the trust funds in a wilderness of banking assets exceeding on paper $440,000, where the converted trust property could not be identified, misappropriated the credits, wrecked the bank, went into the hands of a receiver and challenged plaintiff to trace its trust funds into a specific asset of the insolvent bank on penalty of having them taken by the general creditors of defendant.

The proceeds of plaintiff's notes augmented the deposits in the insolvent bank, increased the general assets, replenished the depleted bank reserve and paid banking obligations to general creditors. The mere change in the form of the trust property from notes to proceeds, from proceeds to credits, and from credits to assets, did not change the ownership. Plaintiff, the beneficiary, remained the owner. Defendant never acquired title to the notes nor to the proceeds nor to the credits, but, violating its duties as a fiduciary, converted the trust property to its own use by means of fictitious credits and misappropriations. Between plaintiff and defendant the contractual relation of banker and depositor was never created. The use of the trust funds for banking purposes was never authorized. Plaintiff had no knowledge of the collections or the credits or the misappropriations until after defendant had unlawfully spent the trust money and until after the comptroller had closed the insolvent bank when it had on hands in cash $1,370.42 only—a fund practically exhausted.

Recognized principles of equity adapted to ethical banking under existing conditions and customs require payment

of plaintiff's claim out of the augmented assets to which the proceeds of the notes were illegally and fraudulently diverted. Departing from these principles, the majority have rendered a decision which permits general creditors of defendant to collect their debts in part from plaintiff, an innocent suitor that did not participate in any wrongful, fraudulent or illegal act, or transfer its property to defendant or to the receiver or to the general creditors by any instrument known to the law. Plaintiff did not owe any debt or make any agreement authorizing defendant to use the trust property in the banking business. The proceeds of plaintiff's notes were not seized on execution or attachment. The decree appointing the receiver did not authorize him to apply the trust funds of plaintiff to the payment of defendant's debts. The general creditors have no greater right to plaintiff's converted trust property than defendant. The effect of the decision is to allow the general creditors the benefits of defendant's conversion and to apply the converted trust property to the payment of their contractual claims against the trustee. After reading what courts and text-writers have said on this subject, I am of the opinion there is no reason in morals, law or logic for the failure of a court of equity to restore to plaintiff from the mass of defendant's assets the equivalent of the converted proceeds of the notes. The majority rule, defeating plaintiff's claim for payment out of the mass of assets in the hands of the receiver, as stated in the syllabus, is:

"A trust fund may be followed and recovered in equity by the beneficiary, as against the trustee or his general creditors, either in its original or substituted form, when, and only when, it can be traced to and identified in some specific fund or property."

I solemnly protest against this rule that sets bounds to equity power and thus prevents the court from restoring trust money indistinguishably mingled with assets in the hands of a dishonest trustee, unless "when, and only when," the beneficiary can trace it to, and identify it in, some specific fund or property. Under that rule equity does not af-

ford a remedy, if the lawless trustee converts the trust property and hides it in assets where the beneficiary cannot identify it. Banking, finance and commerce have outgrown the rule stated, if it ever had any foundation in righteousness. Limitation of equitable power to a hidebound rule often defeats justice.

The mission of equity will fail if it is not permitted to develop with honest business and existing conditions. Knavery is progressive and more vigilant than equity at a standstill. Rascaldom invents at night devices to evade and cheat fixed rules of equity announced by courts in the light of day. The means employed by a faithless trustee to change the form of trust property and to hide its equivalent from the beneficial owner in a general mass of assets should not be more powerful for iniquity than the conscience of a chancellor for justice. I have an abiding conviction that a proper disposition of the present case required adherence to the following rule of this court:

"Where a trustee mingles trust moneys with his own funds, *cestui que trust* is entitled to a charge upon the whole; and so long as any portion of the mass into which the trust fund has entered remains in any form, it is subject to such charge, and may be followed and claimed." *City of Lincoln v. Morrison,* 64 Neb. 822.

This rule of equity was stated by an oracle of wisdom and was deliberately adopted by a unanimous court. It does not set bounds to equitable relief, but adopts the principle that a claim for converted trust funds, indistinguishably mingled by a faithless trustee with general assets thus augmented, may be made a charge against the mass. The majority, instead of adhering to this classic in the literature of equity jurisprudence, followed its mere application by Doctor Pound to a mass of assets which did not include the equivalent of converted trust property. The growth of the remedy indicated by the rule last quoted was recognized as early as 1889 in an opinion by Chief Justice Fuller of the supreme court of the United States, who quoted with approval the following language:

"Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor." *Peters v. Bain,* 133 U. S. 670, 693.

The application of the rule stated in *City of Lincoln v. Morrison,* 64 Neb. 822, announced as it was by this court as a guiding principle of equity and justice, would have resulted in a decree allowing plaintiff's claim in preference to the claims of general creditors.

The proposition that the trust fund did not enter into the purchase of the bank building, furniture, fixtures or bills receivable, as a reason for not granting plaintiff the relief sought, will not stand the test of analysis or justify the failure to charge the mass of assets with plaintiff's claim. It destroys itself when reduced to a definite philosophy. The principal mediums of exchange in the business world are credits, commercial paper, checks, drafts and securities. Equity looks through the mere forms in which property is held to substance and reason for the purpose of dealing justly with conditions as they exist. Though the converted trust funds were not originally hid in or mingled with the kinds of property enumerated, the bank indebtedness was nevertheless reduced by the proceeds used for banking purposes. The general indebtedness with which those items of property were burdened was decreased to the extent of the trust fund wrongfully converted and used by the insolvent bank. The outstanding obligations of defendant

would have been greater to the extent of $4,467.23, when the receiver took charge, if they had not been reduced by the proceeds of the notes. The financial disaster of the insolvent bank might have occurred earlier, with still greater liabilities, except for the unlawful use of the converted proceeds in banking transactions. All that seems to me to be "manifest," in considering plaintiff's right to a preference over general creditors, is that it is immaterial whether the converted proceeds were used to purchase the bank building, furniture, fixtures and bills receivable or reduced the insolvent bank's indebtedness by which those items of property were burdened.

The same result is reached by another course of reasoning. Defendant is insolvent. Its assets are in the hands of a court of equity for the purpose of winding up its affairs and of distributing its assets among those entitled to them. Before distribution can be made the assets must be reduced to a common fund. Upon completion of that process all property, real, personal and mixed, must be reduced to money—a single fund in the hands of the receiver. Plaintiff's property, changed in form by fraud, is in that fund. No reason exists for separating the different kinds of property to make proof of plaintiff's right to a preference impossible and for uniting all assets in a common fund for distribution among general creditors.

The classification of plaintiff with general creditors is fundamentally wrong. Plaintiff is in a different class. Without any fault or neglect or suspicion of wrongdoing plaintiff confidingly entrusted its notes to defendant for collection in the due course of honest banking. Plaintiff by specific instructions in writing deliberately attempted to keep its notes and the proceeds thereof out of the defendant bank. It did not part with its title or ownership or become a depositor. The situation of the general creditors is entirely different. Their claims grew out of mutual contracts, legal deposits and other authorized transactions. Their funds, property, deposits and credits were entrusted to the bank under mutual contracts creating the relation of debtor

and creditor or of banker and depositor. In view of this difference, it would be more reasonable, equitable and just to classify plaintiff as a preferred creditor.

The ruling of the majority that plaintiff cannot recover its trust proceeds without proof that they went into a specific fund or into an identified article of property in the hands of the receiver, after being traced into the general assets, does violence also to established rules of evidence. It was the duty of defendant as trustee to disclose to the beneficiary what became of the trust property. That duty was never performed. The insolvent bank was required, under governmental control, to keep an account of its transactions. The law imposed on defendant as trustee the duty of telling where the trust funds went. If they could be followed after being mingled with general assets into which they were traced by plaintiff, the banker was the person to make the proof and the equity court was the tribunal to require defendant to disclose the truth, if provable. The holding that plaintiff was compelled to trace its property beyond the mass into a specific fund amounts to admitting the futility of equitable relief in a controversy like this between honest business and shocking fraud, both shown beyond the possibility of mistake.

Confidence in banks as collecting agencies will be impaired by the rules announced by the majority. Millions in notes and drafts are transmitted daily by banks to other banks for collection. With disturbed banking conditions and frequent bank failures commercial paper intended for collection only may, in a changed form, be diverted in a night to general creditors of insolvent banks and lost, if it must be traced into a specific fund or into an identified article of property as a condition of reclaiming it. The general creditors are not entitled to the forbidden fruit of defendant's conversion.

I am authorized to say that Chief Justice Goss and Judge Day concur in this dissent.

EBERLY, J., concurring in the main opinion.

In this case we find a division of the court. This situa-

tion we find reflected in the two conflicting views here presented. It seemed to the writer that a somewhat more detailed recital of the facts out of which the controversy arose than that set forth in either majority or minority opinion might be of assistance, not for the contradiction of either, but rather as supplementary to both.

All agree that the First National Bank of Gering (hereafter called the Gering bank) received from the Central National Bank (hereafter called the Lincoln bank) for "collection and return" a note of $714 and accrued interest, signed by J. L. Moore, a note of $1,537.50, signed by Henry T. Pfenning, and a note of $1,600, signed by Fred Miller. It is not questioned but what the Gering bank was, and is, an insolvent institution, and is now in charge of a federal receiver. While the extent of its insolvency may not definitely appear from the record before us, for the purpose of this discussion we will assume that its dividends to general creditors will not exceed 40 per cent.

Coming to the specific transaction out of which this litigation arose, it may be said that Moore and Pfenning were depositors of the Gering bank. After that bank had received the notes above described, on December 12, 1923, Pfenning's deposit account therein, then a credit balance amounting to $2,849.13, was charged with his note of $1,537.50 which was then past due. It cannot be gainsaid that for a banker to charge a past-due note of the maker to the deposit account of the maker is proper banking practice, and that thereafter notes thus charged are the property of the maker.

On December 20, 1923, Moore's deposit, then a credit balance of $1,214.73, was charged with $716.18, the amount of his note above referred to. Likewise, the note thus charged became the property of Moore. Corresponding credits were given by the Gering bank in the account of the Lincoln bank as the same appears in the books of that institution. When we examine the effects of the transaction, above outlined, upon the assets of the bank we find it to be nil. In other words, if it be conceived that immediate-

ly prior to each of these transactions, each piece of money, including pennies, nickels, dimes, quarters, halves, dollars, gold, paper, all cash items, in the bank till, personal property of every kind and description, and all real estate of the Gering bank had been branded and given an identifying number when these transactions were concluded, not a single number would be missing, nor would any be added. The physical properties thus constituting the actual assets of the bank, in possession of that institution, would be neither different or other at the conclusion of the transactions referred to than they were at their commencement.

It is to be remembered that the receipt of the notes above mentioned by the Gering bank, under the terms of the "Coll. and Ret." slip, imposed the duty to collect in "cash or actual equivalent." It could not then remit because it lacked cash. When the transactions between it and the makers of these obligations had been completed, the evidence affirmatively establishes it had failed to receive any "cash or the legal equivalent" thereon, out of which to satisfy the Lincoln bank. Therefore, its inability to comply with its duty still continued, and this condition remained when the federal receiver took possession of its assets.

True, the Gering bank, with the property of the Lincoln bank, paid and discharged a definite portion of its preexisting indebtedness. In so doing, two notes passed out of its possession to its general creditors who received them in payment of their dues. It cannot be said that the notes in question, thus made use of thereafter, were either in the Gering bank, or form any part of its assets.

Considered as a book transaction, as reflected by the books of the Gering bank, its effect was that as theretofore the Gering bank had been indebted to Moore in the sum of $716.18, and to Pfenning in the sum of $1,537.50, which indebtedness was worth not to exceed forty cents on the dollar, it now owes the Lincoln bank $2,253.68, likewise actually worth forty cents on the dollar. But Moore and Pfenning now have the notes which were originally of the value of $2,253.68.

On the other hand, no one questions the fact that the Gering bank had no right to convert these notes to its own use, and no right to insist upon the Lincoln bank accepting the credit thus given. This credit the Lincoln bank rejects. It now seeks a preference against the assets of the Gering bank based on this transaction.

The third note, that of Fred Miller, for the sum of $1,600 and interest, was not found by the receiver when he went into possession of the Gering bank. It does not appear to have been in this bank at the time of the closing of its doors. The evidence offered by the appellee, the Lincoln bank, disclosed that, probably it had been sold to one Winslow, who was a depositor of the Gering bank. The witness, whose deposition was taken, could not recall how the matter was handled, and could not state whether the Gering bank received any property whatsoever, save and except possibly a check upon itself.

It must be conceded, however, as to the last transaction, there is nothing in the record which discloses affirmatively that the Gering bank received or had in its possession at the time it failed any property resulting from, or traceable to, this Miller transaction.

It has been suggested that *Peters v. Bain*, 133 U. S. 670, furnishes a proper rule for the guidance of this court in the present case. The facts in that case are numerous and involved. However, a careful analysis and condensation produces the following result: Portsmouth, Virginia, is separated from Norfolk, Virginia, by the Elizabeth river. Bains were private bankers who conducted their banking and brokerage business at Portsmouth. As stockholders and officers they also controlled a national bank at Norfolk. Over a period of time, in an unlawful manner, the Bains of Portsmouth, by various devices, secured improper loans from the national bank of Norfolk aggregating $1,443,-462.99. This amount, due to the unlawful manner in which it was obtained, possesses all the qualities of a trust fund and was so treated by all the courts. This money, in the

course of business, the Bains mingled with that which they obtained from other sources.

On April 2, 1885, the comptroller of the currency took possession of the Norfolk bank. The Bain bank at Portsmouth immediately closed its doors because of insolvency. The Bains of Portsmouth, as partners and individuals, then made an assignment to trustees for the benefit of their creditors. The national bank receiver brought suit in equity claiming that a trust in the assigned property resulted from the unlawful loans to the Bains. The trustees named in the assignment, due to notice with which they were chargeable, were held by all the courts to have obtained no greater rights than the Bains possessed, and that the property in their hands was subject to the same rules that it would have been, had no assignment been made.

This case was first tried in the circuit court of appeals, Mr. Chief Justice Waite of the United States supreme court and the circuit judges of that circuit then presiding. The result of the trial was that as to the certain specific property it was adjudged that the receiver was entitled to preference, and as to other items of property this relief was denied.

The reasons for the determination appear in the following excerpts of the decision of the circuit court of the United States: "As to the trust resulting to the (national) bank by reason of the wrongful and unlawful use of its funds by its officers in the purchase of property for the firm or the several members thereof, this branch of the case divides itself into two parts, the first relating to property which was purchased with moneys that can be identified as belonging to the (national) bank; and, second, to that which was bought and paid for by the firm out of the general mass of moneys in their possession, and which may or may not have been made up in part of what had been wrongfully taken from the (national) bank. As to the first of these classes of property we entertain no doubt that the trust exists, and that it may be enforced by the receiver. * * * The property in the second class, however, occupies

a different position. There the purchases were made with moneys that cannot be identified as belonging to the bank. The payments were all, so far as now appears, from the general fund then in the possession and under the control of the firm (Bain Bros.). Some of the money of the (national) bank may have gone into this fund, but it was not distinguishable from the rest." Reported in *Peters v. Bain*, 133 U. S. 670, 678.

In other words, the report of this case discloses that all property of the Bains into which the evidence failed to affirmatively establish that trust funds had entered was placed by the circuit court of the United States in the second class, as to which preferential rights were denied the bank's receiver.

This disposition of the case was, by the supreme court of the United States, on appeal, "in all things, affirmed." The opinion was delivered by Fuller, C. J., and during its course he quoted the language of Mr. Justice Bradley in *Frelinghuysen v. Nugent*, 36 Fed. 229, with reference to the very claim then being made by the national bank receiver that he was entitled to a lien as a preferred claim against the mass of the assets of the Bains, notwithstanding he had been unable to prove that the items of property of which this mass was composed was purchased by the funds obtained from the national bank. In other words, the receiver had failed to trace the funds. In the discussion of the receiver's claim the language appearing in the dissenting opinion was quoted, but the portion quoted in the dissenting opinion in this case is incomplete for the reason that the quotation, as made by Fuller, C. J., extended beyond what appears in our minority opinion. To aid in the full understanding of the quotation complete, we will indicate the portion of Justice Bradley's language omitted in the dissenting opinion by italics, and supply the language made use of by Chief Justice Fuller in capitals: "It was said by Mr. Justice Bradley in *Frelinghuysen v. Nugent*, 36 Fed. 229: 'Formerly the equitable right of following misapplied money or other property into the hands of the parties re-

ceiving it depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. *This is as far as the rule has been carried. The difficulty of sustaining the claim in the present case is that it does not appear that the goods claimed—that is to say, the stock on hand, finished and unfinished—were either in whole or in part the proceeds of any money unlawfully abstracted from the bank.'* THE SAME DIFFICULTY PRESENTS ITSELF HERE, AND WHILE THE RULE LAID DOWN BY MR. JUSTICE BRADLEY HAS BEEN RECOGNIZED AND APPLIED BY THIS COURT, NATIONAL BANK V. INSURANCE COMPANY, 104 U. S. 54, 67, AND CASES CITED, YET, AS STATED BY THE CHIEF JUSTICE, 'PURCHASES MADE AND PAID FOR OUT OF THE GENERAL MASS CANNOT BE CLAIMED BY THE BANK, UNLESS IT IS SHOWN THAT ITS OWN MONEYS THEN IN THE FUND WERE APPROPRIATED FOR THAT PURPOSE.'" *Peters v. Bain,* 133 U. S. 670, 693.

It would seem that this decision as an entirety is in complete accord with the majority opinion in the instant case. Indeed, it appears that the doctrine announced in the majority opinion in this instant case is neither new in pronouncement nor novel in application. In *State v. Bank of Commerce,* 54 Neb. 725 (April 21, 1898); *Morrison v. Lincoln Savings Bank & Safe Deposit Co.,* 57 Neb. 225 (December 22, 1898); *City of Lincoln v. Morrison,* 64 Neb. 822 (May 21, 1902), is involved the tracing of trust funds, and the result attained in each of these proceedings, in view of the facts involved, is entirely inconsistent with the con-

tention of the dissenting opinion, but entirely consistent with the reversal directed in this case.

In each of the three Nebraska cases last named, action was brought by the *cestui que trust* to enforce claims of preference against the assets of an insolvent's trustee because of trust funds which were, or might have been, used or applied by insolvents in payment or discharge of general indebtedness. In at least two the facts involved were the use of trust funds in payment by insolvent banks of the preexisting depositors. Without qualifications, preferential rights based on these claims thus paid were, in every instance, denied by this court, and, as to trust funds thus disposed of, the *cestui que trust* was held to possess only the rights of a general creditor and to be wholly without preference.

In fact, these deductions plainly appear, not only in the body of these decisions, but in the syllabi of the cases referred to. Thus, in *City of Lincoln v. Morrison, supra,* appears the following: "Misappropriation of a trust fund does not entitle *cestui que trust,* merely as such, and for that reason alone, to a preference over general creditors of an insolvent trustee." "But if the whole of such fund, or a greater portion thereof than that representing the trustee's own money is used by an insolvent trustee in paying his debts, *cestui que trust* is not entitled to a preference over general creditors for the amount of his money so lost. * * * *Capital Nat. Bank v. Coldwater Nat. Bank,* 49 Neb. 786, and *State v. Midland State Bank,* 52 Neb. 1, limited. *State v. Bank of Commerce,* 54 Neb. 725, and *Morrison v. Lincoln Savings Bank & Safe Deposit Co.,* 57 Neb. 225, adhered to."

"A person asserting a claim for preference against an insolvent estate has the burden of showing that such estate has been increased, to some extent, by the misappropriation of trust funds or property belonging to the claimant." *Morrison v. Lincoln Savings Bank & Safe Deposit Co.,* 57 Neb. 225.

In view of the substantial accord which prevails among the great majority of jurisdictions on the principles announced and applied by the majority opinion in the instant case, what changed conditions, if any, are now in existence which would justify this court in now abandoning the doctrine deliberately accepted and approved and permanently adopted by a line of decisions made almost three decades ago? The legislative branch of our state government has announced no disapproval. That progress in civilization may necessitate change in judicial concept and pronouncement to enable the judiciary to conform to advancing civilization may be conceded. Even so, in order to justify the overruling of a former decision deliberately made, this supreme court should be convinced, not merely that the case was wrongly decided, but that less injury will result from overruling than from following it. *City of Wahoo v. Nethaway*, 73 Neb. 54. We are convinced that the judgment of reversal is manifestly correct, and that most serious injuries would result from a departure from the doctrine announced.

Because of the established course of business, the principles we are here considering find their usual, but not necessarily their exclusive, application to insolvent banks. In Nebraska, as elsewhere, we have state banks controlled by the state law, and national banks organized under federal statutes. It must be conceded that both of these branches are important factors in the state prosperity and that each is entitled to equality and identity of treatment in the application of our laws to the business situation in which they are interested. Neither should be preferred, both should be treated equally and no condition should be permitted to exist or be brought into being by judicial decision which would result in discrimination against either.

With reference to rights and liabilities arising out of transactions in negotiable paper, there should certainly be no condition permitted which would result in having one law for the national bank and another law for the state bank.

It is to be remembered that in the case before us the insolvent bank is a national bank. A national bank is an instrumentality of the United States subject to its paramount authority, subject to state jurisdiction, regulation, and control only to the extent and in the manner expressly permitted by congress. *M'Culloch v. Maryland,* 4 Wheat. (U. S.) *316; *Osborn v. Bank of United States,* 9 Wheat. (U. S.) 738; *Van Allen v. Assessors,* 3 Wall. (U. S.) 573; *Lionberger v. Rouse,* 9 Wall. (U. S.) 468; *People v. Weaver,* 100 U. S. 539; *Davis v. Elmira Savings Bank,* 161 U. S. 275; *Owensboro Nat. Bank v. Owensboro,* 173 U. S. 664; *First Nat. Bank of Gulfport v. Adams,* 258 U. S. 362; *Bank of California v. Richardson,* 248 U. S. 476; *Des Moines Nat. Bank v. Fairweather,* 263 U. S. 103; *First Nat. Bank of Guthrie Center v. Anderson,* 269 U. S. 341.

By federal statute, on the insolvency of the national bank, one of the executive departments of our federal government, by its agents, takes possession of it and its assets, and by this action its receiver, appointed by this department, and its assets are wholly withdrawn from the jurisdiction of the state courts, except in so far as such jurisdiction is permitted by federal enactment. True, the provisions of the federal statute authorizing a suit in state courts against national banking associations exist. But, even so, they contain the exception: "The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." 24 St. at Large, ch. 373, sec. 4, p. 555.

A receiver of an insolvent bank is an officer of the United States within the meaning of section 563, Rev. St. U. S., which gives the district court jurisdiction of all lawsuits at common law brought by the United States or any officer thereof authorized by law to sue.

So, too, it has been held that a suit against the receiver of a national bank to compel him to pay out of the funds in his hands moneys claimed by the complainant is a suit

arising under the laws of the United States and can be removed into the federal court. *Hot Springs Independent School District v. First Nat. Bank,* 61 Fed. 417; *Jewett v. Whitcomb,* 69 Fed. 417.

It therefore follows that, ordinarily, when cases are commenced against the federal receiver in a state court, the receiver may exercise the option of having the action tried in a federal tribunal if he so desires. We have already seen that the doctrine of the supreme court of the United States on the question now before us, as announced in *Peters v. Bain, supra,* is almost identical with the majority opinion in this case. It appears, too, that the federal courts have not departed from the path traced in the last-named case, but are still in substantial harmony with the present Nebraska doctrine.

This fact appears beyond question in the recent case of *Farmers Nat. Bank v. Pribble,* 15 Fed. (2d) 175, decided September 13, 1926, opinion by Walter H. Sanborn, Circuit Judge. The facts in this case were that the Farmers National Bank held for collection for Pribble a sight draft on an elevator company with bill of lading attached. The elevator company paid this draft by its check of $1,046.89 on a third bank situated in the same town. In accordance with local custom there was a daily clearance between the local banks, and the Farmers National Bank, two days before its failure, exchanged this check of $1,046.89 with the third bank for checks drawn upon itself. The difference in this transaction was $115.13 due the third bank. This was paid. It thus appears that no actual money or property came into the Farmers National Bank, but unquestionably the $1,046.89, by the clearance, was applied by it in discharge of its own indebtedness. Pribble claimed a preference under this state of facts, but it was denied by the federal receiver, which action was sustained by the circuit court of appeals. The important point presented in our instant case was there expressly decided. The court held: "It is indispensable to the maintenance by a *cestui que trust* of a claim to preferential payment (by a receiver) out of the proceeds of the

estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver, and then the claim can be sustained to that fund or property only, and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and value thereof which came to the hands of the receiver." See, also, *Empire State Surety Co. v. Carroll County*, 194 Fed. 593, and cases cited; *Beard v. Independent District of Pella City*, 88 Fed. 375; *In re Seven Corners Bank*, 58 Minn. 5; *American Can Co. v. Williams*, 176 Fed. 816; *Willoughby v. Weinberger*, 15 Okla. 226; *Macy v. Roedenbeck*, 227 Fed. 346, L. R. A. 1916C, 12; *Central Trust Co. v. Chicago, A. & N. R. Co.* 232 Fed. 936; *State Bank of Winfield v. Alva Security Bank*, 232 Fed. 847; *Titlow v. McCormick*, 236 Fed. 209; *Zenor v. McFarlin*, 238 Fed. 721; *Scullin Steel Co. v. North American Co.*, 255 Fed. 945; *Mechanics & Metals Nat. Bank v. Buchanan*, 12 Fed. (2d) 891.

Also, "The doctrine that a *cestui que trust* whose property had helped to swell the general assets of a corporation which was or became insolvent has a prior right to or interest in those general assets, without specific identification and tracing of such claimant's property, was again expressly repudiated and denied by this court in the case last cited. The fact that the claimant's property paid or reduced the indebtedness or liability of the insolvent corporation, so that it will pay a larger percentage of its debts, justifies no lien on its assets by or preference in payment to the *cestui que trust* (1) because such a reduction of indebtedness does not increase the property or the value of the property of the insolvent; and (2) because the property of the claimant so used to pay a part of the insolvent's general indebtedness or liability never goes into, and therefore cannot be traced into, the property or assets of the insolvent which subsequently come into the possession of the receiver."

Farmers Nat. Bank v. Pribble, supra; Titlow v. McCormick, supra; American Can Co. v. Williams, supra; Lucas County v. Jamison, 170 Fed. 338; *Multnomah County v. Oregon Nat. Bank,* 61 Fed. 912; *Beard v. Independent District of Pella City, supra; Hecker-Jones-Jewell Milling Co. v. Cosmopolitan Trust Co.,* 242 Mass. 181, 24 A. L. R. 1148.

In discussing these propositions, Sanborn, Circuit Judge, says: "The argument that the use of a trust fund by an insolvent trustee to diminish its indebtedness is equivalent to the use of it to add specific and traceable property to its assets is fallacious. The indispensable requisite of a trust in cases of this kind is the ability to take out of the property of the insolvent a traceable, identified part of it, which the insolvent, in violation of its duty as a trustee, has put into it. In a simple case the radical difference is plain. If an insolvent has assets worth $5,000 and owes $10,000, and, in violation of its trust, it puts into its assets government bonds of its *cestui que trust* worth $5,000, the *cestui que trust* may recover these bonds or their traceable proceeds, because such a recovery theoretically does not diminish the assets the insolvent rightfully held, nor deprive its general creditors of their recourse to that property. The $5,000 of assets which it had remains, and is still available for the general creditors after the withdrawal of the $5,000 of trust money which was added to the assets. But, if part of such insolvent's indebtedness of $10,000 is its promissory note of $5,000, and if, in violation of its duty, it uses the bonds or money of its *cestui que trust* to pay and does thereby pay that note thereby reducing its indebtedness to $5,000, and the trust money at the suit of the *cestui que trust* is then taken out of the $5,000 of assets, there then remains nothing to pay the general creditors, who by such a proceeding lose the 50 per cent. of their claims which they would have received out of the $5,000 of assets the debtor had before the $5,000 of its indebtedness was paid by the $5,000 of trust money." *Farmers Nat. Bank v. Pribble,* 15 Fed. (2d) 175.

In this connection it may be interesting to quote the words of Judge Sanborn in the discussion of the language of Mr. Justice Bradley, from whose opinion in *Frelinghuysen v. Nugent,* 36 Fed. 229, as previously explained, the minority dissenting in this case, have quoted a portion. Judge Sanborn, with reference to this case, says: "Mr. Justice Bradley, from whose opinion in *Frelinghuysen v. Nugent,* 36 Fed. (C. C.) 229, counsel for the plaintiff quote some general statements relative to trusts, did not in that case decide or adopt the theory that the unlawful use of trust money by a trustee in violation of its trust vested in its *cestui que trust* a like right to its recovery from its receiver that the deposit of it and adding its value to the assets of the insolvent might have created. Justice Bradley held in that case that no trust *ex maleficio* was proved. In *American Can Co. v. Williams,* 178 Fed. 420, cited by plaintiff, the court held that the identification and tracing of the trust funds into the hands of the receiver or other person from whom it was to be taken was essential to the recovery thereof from such receiver. It is not denied that decisions and opinions of courts have been rendered to the effect that a *cestui que trust* may have payment of claims for trust funds from the receivers of assets of insolvents in preference to their general creditors without identification or tracing, and that they may have such payments because trust funds were used to pay some of the debts of the insolvent; but those opinions are not in accord with the established principles, rules, and practice in equity in the courts of the United States, or with the great weight of authority throughout the United States." *Farmers Nat. Bank v. Pribble, supra.*

In the concluding paragraph of this opinion, Judge Sanborn further says: "Our conclusion is that the plaintiff in this case failed to prove two indispensable requisites to his alleged cause of action: First, that his draft for $1,046.89 or its proceeds ever went into a specific identified piece of property or fund or funds which were in the hands of the Farmers' Bank when it closed on May 12, 1924; and, second,

that such draft or its proceeds ever went into a specific identified piece of property or fund in the hands or control of the defendant, the receiver." *Farmers Nat. Bank v. Pribble, supra.*

In view of the authorities quoted, and the reasons upon which they are based, the acceptance of the proposal contained in the dissenting opinion is wholly impossible. Obviously, the modification of the rule, there sought, that previously obtained in this jurisdiction would confer on the claimants a preference right which has heretofore been denied them, not only in the state courts of Nebraska, but in the federal tribunals as well.

It may be conceded that the changes advocated would be exceedingly beneficial to one class of claimants. On the other hand, it would be exceedingly prejudicial to the general depositor and the general creditor.

In the case of state banks, the full force and full effect of this new doctrine, if adopted, would extend not only to the insolvent institutions, but would include the guaranty fund and all in any way interested therein. You cannot remove assets of an insolvent state institution upon the excuse of preferred right thereto without depriving both the state bank and the guaranty fund of their just recourse for advances made for the benefit of a general depositor thereof.

The injustice to the state banks, however, would not end here. They would have no escape from the law as we interpret it, while a federal court or receiver of an insolvent national bank would have. It is quite plain that if an action were commenced against the federal receiver to enforce a claim of preference in a state court, as we have already seen by the authorities cited, proper steps timely taken could secure a removal of such suit to the federal district court where justice would be administered in accordance with the federal rule and in entire disregard of any contrary determination the state courts might make. In other words, if we assume the adoption of the proposition contained in the dissenting opinion, the federal court would be to the

federal receiver the city of refuge, and to them would naturally and inevitably be removed for trial all cases involving preference to assets in his hands. The result of this would be that, in the event of identical claims to preference, one in favor of the state bank and against an insolvent national bank would be denied by the federal tribunal; and the identical claim in favor of a national bank and against an insolvent state institution would be enforced by the state court. So, the adoption of the rule presented in the minority opinion, in view of the situation and of plurality of jurisdiction, would result in a manifest and substantial discrimination against our own state institutions.

Justice can never be promoted by the creation of conditions through judicial action which necessitate one rule for state institutions and another rule for federal corporations. Discrimination and inequality furnish no permanent foundation for confidence, nor do they promote prosperity, nor tend to advance the interest of trade and commerce. The rule adhered to in the majority opinion has the virtue of universality, and is, in effect, the rule now enforced in both federal and state courts. Under it no favored class exists. There is the same rule for the state bank and the national bank, irrespective of the jurisdiction in which the case may be tried.

Conceding to the new proposition advocated by the minority full force and effect of the reasoning with which it is sustained, we are constrained to the belief that it is not in accord with the authorities cited in its support, and we are compelled to accept, in accord with enlightened public policy, precedent, authority, and reason, the opinion of Good, J., which has been adopted by the majority of this court.

The following opinion on motion for rehearing was filed November 10, 1927. *Former judgment of reversal vacated, and judgment of district court affirmed.*

1. **Trusts: NOTES: COLLECTION BY BANK.** A bank that receives

and accepts a promissory note for the sole purpose of collecting the debt and remitting the proceeds is a trustee and as such is accountable to the beneficiary.

2. ———: ———: CONVERSION. A mere change in the form of property confided to and converted by a trustee does not change the ownership, the beneficiary remaining the owner.

3. ———: ———: FOLLOWING PROCEEDS. Where the form of trust property is changed by a fiduciary and the resulting proceeds are wrongfully mingled by him with the mass of assets comprising his insolvent estate, the beneficiary of the trust, in a proper case, may resort to the mass for redress, if augmented by the trust property.

4. ———: ———: ———. The proceeds of commercial paper received by a bank as trustee and wrongfully credited to the owner, if equivalent to money for banking purposes, may, in equity, be treated as money.

5. ———: ———: ———. Where proceeds of a note are converted by a bank as trustee, a credit to the beneficiary therefor on its books may be evidence of a credit equivalent to money.

6. **Banks and Banking**: CONVERSION OF TRUST PROPERTY. The conversion of trust property by a bank and credit to the beneficiary therefor on its books, contrary to instructions, without the knowledge of the beneficiary, do not necessarily create the relation of banker and depositor.

7. ———: ———: INSOLVENCY: PREFERENCE. The proceeds of a note entrusted to a bank for the sole purpose of collecting and returning the amount due thereon may be traced as trust funds into the general assets of the bank after it has been closed on account of insolvency and such funds may be made the basis of a preferred claim against the general assets of the bank, where it is shown that the note was collected, that the proceeds were converted by the bank and wrongfully credited to the beneficiary without the latter's knowledge, and that the fund was mingled with the mass of assets used for general banking purposes, thus augmenting the general assets.

8. ———: ———: ———: ———: BURDEN OF PROOF. Where the beneficiary of a trust, in an action to establish a preferred claim as a charge against the general assets of an insolvent bank in the hands of a receiver, traces the trust fund through conversion of the bank into the mass of its assets, the

burden of proof is on the receiver who has control of the bank records and accounts to prove that the assets were not augmented by the conversion or that the trust fund disappeared from the assets, if the defense is based on those grounds.

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

ROSE, J.

This is a suit in equity to trace proceeds of notes into a national bank subsequently closed on account of insolvency and to establish a preferred claim payable in full from general assets in the hands of the receiver.

The Central National Bank of Lincoln is plaintiff. The First National Bank of Gering, hereinafter called "the bank," and its receiver are defendants. While the bank was transacting a commercial banking business under the laws of the United States, it received from plaintiff four promissory notes for the exclusive purposes of collecting the amount due on each and of returning the proceeds to plaintiff. For these purposes plaintiff transmitted and the bank received the note of Fred Miller for $1,600, interest $80, total $1,680; the note of Henry Pfenning for $1,500, interest $37.50, total $1,537. 50; the note of J. L. Moore for $700, interest $14, total $714; the note of George Schnell for $1,000, interest $25, total $1,025. The Miller note was transmitted November 3, 1923, and the others were transmitted November 30, 1923. Each note matured on or before December 5, 1923. Plaintiff owned all of these notes which, with interest, aggregated $4,956.50. In addition to the facts stated, the petition contains in substance pleas that the bank collected the debts evidenced by these notes, converted the proceeds thereof, mingled plaintiff's funds with the general assets of the bank, used them for banking purposes, never returned or paid any part of them to plaintiff, became insolvent, reduced the cash in the bank to $1,370.42, and went into the hands of a receiver, its doors not being open for commercial banking after Decem-

ber 31, 1923. The equitable relief sought by plaintiff is the establishment of a preferred claim for $4,956.50 payable in full from the general assets of the bank in the hands of the receiver.

The answer, among other things, denies material facts upon which the petition for a preference over general creditors is based and challenges the right of plaintiff to charge the mass of assets in the hands of the receiver with the proceeds of the notes.

From the standpoint of each side the facts were well pleaded and the principal contest at the trial in the district court grew out of a controversy as to the right of plaintiff to a preference over general creditors without tracing the proceeds of the notes into specific funds or property. On this feature of the case the trial court found that the Schnell note fell into the hands of the receiver and that the proceeds of the other notes were appropriated by the bank and were mingled with its assets, thus becoming a charge upon the mass. Consequently the receiver was ordered to return the Schnell note to plaintiff and to pay the latter, out of the general assets, $4,467.23, the amount of principal and interest due on the notes collected by the bank. From the decree of the district court defendants appealed.

The controlling question presented by the appeal has been vigorously argued on three different occasions by counsel for all litigants and at the third hearing a valuable brief was submitted by other counsel acting in the capacity of a friend of the court. With commendable frankness counsel for the receiver and the bank stated in the first instance in his brief the question for determination as follows:

"We are willing to rest this case on the broad general principle that the appellee has not traced its notes into any particular fund or property of the First National Bank and therefore is not entitled to a preferred claim of any kind."

The same proposition was repeated in open court. Oppos-

ing counsel accepted the challenge as a correct statement of the controlling question, conceded that the proceeds of the notes had not been traced into any specific fund or property in the hands of the receiver and argued nevertheless that the trial court properly charged the mass of the bank's assets with plaintiff's claim. In considering the merits of the appeal at a former term the majority of this court delivered an opinion stating correctly the question for solution in the following language:

"Plaintiff's action is based on the assumption that the proceeds of the three notes in controversy were mingled with the general assets of the bank, and that they augmented the assets which came into the possession of the receiver, to the extent of the amount of the proceeds of such notes, and that, therefore, plaintiff is entitled to have its claim allowed as preferred and payable from the general assets of the bank in the hands of its receiver. The defense of the receiver proceeds on the theory that the proceeds of the three notes have not been traced by the plaintiff into any specific property that came into the receiver's possession." *Central Nat. Bank v. First Nat. Bank, ante,* p. 444.

The reduction of the problem to this form is a premise established by all litigants and accepted by the court. It is a recognition of the fact that the proceeds of plaintiff's notes were traced into the general assets of the bank—a conclusion properly drawn from the evidence. That the assets were augmented by proceeds of the notes is also a proper deduction from the evidence.

The members of this court, like courts eleswhere, are divided on the proper solution of the question. The rulings are in hopeless conflict. In the present case the majority in the former opinion held:

"A trust fund may be followed and recovered in equity by the beneficiary, as against the trustee or his general creditors, either in its original or substituted form, when,

and only when, it can be traced to and identified in some specific fund or property.

"One seeking, in equity, the allowance of a claim for preference against an insolvent bank in the hands of a receiver has the burden of proving that his trust fund either came into the possession of the receiver, or was invested in some specific fund or property that came into the hands of the receiver." *Central Nat. Bank v. First Nat. Bank, ante,* p. 444.

These rulings resulted in a reversal of the decree, from which defendants appealed, but there was a dissenting opinion in which three members of the court joined. *Central Nat. Bank v. First Nat. Bank, ante,* p. 451.

Upon a motion by plaintiff for a rehearing, the case was again argued and submitted. In the light of new briefs, rearguments, further research and deliberation, four members of the court entertain the view that the dissenting opinion contains the better solution of the question presented by the appeal, and it is therefore adopted as the opinion of the court. Without repeating the reasons for the dissent, the principles based thereon and now adopted are as follows:

1. A bank that receives and accepts a promissory note for the sole purpose of collecting the debt and remitting the proceeds is a trustee and as such is accountable to the beneficiary.

2. A mere change in the form of property confided to and converted by a trustee does not change the ownership, the beneficiary remaining the owner.

3. Where the form of trust property is changed by a fiduciary and the resulting proceeds are wrongfully mingled by him with the mass of assets comprising his insolvent estate, the beneficiary of the trust, in a proper case, may resort to the mass for redress, if augmented by the trust property.

4. The proceeds of commercial paper received by a bank as trustee and wrongfully credited to the owner, if

equivalent to money for banking purposes, may, in equity, be treated as money.

5. Where proceeds of a note are converted by a bank as trustee, a credit to the beneficiary therefor on its books may be evidence of a credit equivalent to money.

6. The conversion of trust property by a bank and credit to the beneficiary therefor on its books, contrary to instructions, without the knowledge of the beneficiary, do not necessarily create the relation of banker and depositor.

7. The proceeds of a note entrusted to a bank for the sole purpose of collecting and returning the amount due thereon may be traced as trust funds into the general assets of the bank after it has been closed on account of insolvency and such funds may be made the basis of a preferred claim against the general assets of the bank, where it is shown that the note was collected, that the proceeds were converted by the bank and wrongfully credited to the beneficiary without the latter's knowledge, and that the fund was mingled with the mass of assets used for general banking purposes, thus augmenting the general assets.

8. Where the beneficiary of a trust, in an action to establish a preferred claim as a charge against the general assets of an insolvent bank in the hands of a receiver, traces the trust fund through conversion of the bank into the mass of its assets, the burden of proof is on the receiver who has control of the bank records and accounts to prove that the assets were not augmented by the conversion or that the trust fund disappeared from the assets, if the defense is based on those grounds.

The former opinion is overruled, the reversal set aside, and the judgment of the district court is

AFFIRMED.

GOOD, THOMPSON, and EBERLY, JJ., dissenting.

We respectfully dissent from the decision of the present

majority opinion of this court in this case, from the reasoning upon which the decision proceeds, and from the statement of facts set forth therein upon which it purports to be based. We desire to announce our adherence to the views of the law heretofore expressed by Good, J., in *Central Nat. Bank v. First Nat. Bank, ante,* p. 444, as applicable to this controversy, and reiterate the statement as to law and facts set forth in the concurring opinion in this case, *Central Nat. Bank v. First Nat. Bank, ante,* p. 457.

Preliminary to a further discussion of the imperative reasons which compel us to continue our opposition to the rule announced by the majority, it may be said that this is an equitable proceeding tried here *de novo;* that the sole parties to the original transaction which furnishes the foundation of this litigation were a national bank in Lincoln, Nebraska, and a national bank in Gering, Nebraska. The parties litigant now before us are the national bank in Lincoln, Nebraska, and a receiver of the Gering bank properly appointed by the United States comptroller of currency at Washington, D. C. The comptroller of currency, under and pursuant to the provisions of the national bank act, and prior to the commencement of this action, took possession of all of the assets of the Gering bank then wholly an insolvent institution which closed its doors December 31, 1923. At that time the facts, as contained in the record, indicate that, with the exception of one note which is not a matter of dispute here, none of the physical properties embraced in the claim of the Lincoln bank, or any of their actual proceeds, formed any part of the assets of that institution.

The majority opinion admits, as all litigants agree, that the record before us wholly fails to identify any of the property constituting the foundation of plaintiff's suit, or any of the proceeds thereof, as part or whole of any specific assets which reached the possession of the representative of the comptroller when this bank was taken over by that department.

As to three items of property then carried on the books of the Gering bank as "Real estate, $11,940," "Furniture and fixtures, $4,906.25," "Other real estate, $14,000," it is conceded that they became the property of the Gering bank long prior to the transactions before us; that, under the circumstances of the case, it was a physical impossibility for the property in suit, or of any of the proceeds thereof, to have entered into, or to have become incorporated in, any of the properties above named, or in the consideration parted with by the Gering bank for the same.

The majority opinion accords the Lincoln bank a preference against all the assets of the Gering bank, including even the items of real and personal property last set out, and makes the claim of that bank a prior charge and an equitable lien against the same. As bearing on the reasons upon which the majority opinion is based, attention is called to the following excerpt: "The proposition that the trust fund did not enter into the purchase of the bank building, furniture, fixtures or bills receivable, as a reason for not granting plaintiff the relief sought, will not stand the test of analysis or justify the failure to charge the mass of assets with plaintiff's claim. It destroys itself when reduced to a definite philosophy. The principal mediums of exchange in the business world are credits, commercial paper, checks, drafts and securities. Equity looks through the mere forms in which property is held to substance and reason for the purpose of dealing justly with conditions as they exist. Though the converted trust funds were not originally hid in or mingled with the kinds of property enumerated, the bank indebtedness was nevertheless reduced by the proceeds used for banking purposes. The general indebtedness with which those items of property were burdened was decreased to the extent of the trust fund wrongfully converted and used by the insolvent bank. The outstanding obligations of defendant would have been greater to the extent of $4,467.23, when the receiver took

charge, if they had not been reduced by the proceeds of the notes. The financial disaster of the insolvent bank might have occurred earlier, with still greater liabilities, except for the unlawful use of the converted proceeds in banking transactions. All that seems to me to be 'manifest', in considering plaintiff's right to a preference over general creditors, is that it is immaterial whether the converted proceeds were used to purchase the bank building, furniture, fixtures and bills receivable or reduced the insolvent bank's indebtedness by which those items of property were burdened." *Central Nat. Bank v. First Nat. Bank, ante,* p. 451, 455.

True, the language just quoted appears in the former dissenting opinion by Rose, J., but the following also appears in the present majority opinion: "Four members of the court entertain the view that the dissenting opinion contains the better solution of the question presented by the appeal, and it is therefore adopted as the opinion of the court."

In this connection also appears in the majority opinion the further statement: "That the assets were augmented by proceeds of the notes is also a proper deduction from the evidence."

While it is deemed that the conclusion last stated is refuted by the facts as detailed in the opinion by Good, J., and in the concurring opinion by Eberly, J., no good can be served by their further discussion.

However, a careful examination of the majority opinion, especially in view of the language of Rose, J., quoted, inevitably leads to the conclusion that we have before us a recrudescence of the philosophy and principles promulgated in the once leading, but now overruled, and almost universally discredited, case of *McLeod v. Evans,* 66 Wis. 401. The result arrived at, the controlling principles announced, and application made to the facts as assumed to be reflected by the record in the Wisconsin court, are in all respects

identical with the majority opinion in the present case. Cole, C. J., in that opinion says in part: "The conclusion is irresistible, from the facts, that the proceeds of the trust property found its way into Hodges' (the insolvent trustee) hands, and were used by him either to pay off his debts or to increase his assets. In either case, it would go to the benefit of his estate. * * * We do not understand that it is necessary to trace the trust fund into some specific property in order to enforce the trust." Accordingly, that court awarded a lien by preference for the entire amount received by Hodges.

But, as set forth in the former majority opinion by Good, J., in this case, this doctrine was expressly overruled in *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237. Without further discussion we will content ourselves with a reference to note in 3 Pomeroy, Equity Jurisprudence (4th ed.) 2386, sec. 1049, where, after stating the rule as announced in the opinion by Good, J., it continues: "The contrary holding confuses the lien with the trustee's personal liability. Such confusion is harmless in its results when the trustee is solvent; but where his assets are insufficient to pay his debts, the question becomes important as between the beneficiary and the general creditors. To extend the lien in such case to the general mass of the trustee's assets is to pervert the character of the personal liability of the trustee, —a 'simple' equitable debt,—and to render the *cestui que trust* a preferred creditor, irrespective of his inability to establish any right of property in a specific portion of the trustee's estate. Such, however, was the result attained, for a time, by the decisions in a group of western states, nearly all of which have since been repudiated by the courts which rendered them: *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287 (but see *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237; *Burnham v. Barth*, 89 Wis. 362); *Davenport Plow Co. v. Lamp*, 80 Ia. 722, 20 Am. St. Rep. 442 (but see *Bradley v. Chesebrough*, 111 Ia. 126; compare *Whitcomb*

v. Carpenter, 134 Ia. 227, 10 L. R. A. n. s. 928; *McCutchen v. Roush,* 139 Ia. 351); *Myers v. Board of Education,* 51 Kan. 87, 37 Am. St. Rep. 263 (but see *Travelers Ins. Co. v. Caldwell,* 59 Kan. 156; *Kansas State Bank v. First State Bank,* 62 Kan. 788); *Carley v. Graves,* 85 Mich. 483, 24 Am. St. Rep. 99 (but see *Board of Fire & Water Commissioners v. Wilkinson,* 119 Mich. 655, 44 L. R. A. 493); *State v. Bruce,* 17 Idaho, 1, 134 Am. St. Rep. 245, L. R. A. 1916 C, 1 (see *Bellevue State Bank v. Coffin,* 22 Idaho, 210); *Capital Nat. Bank v. Coldwater Nat. Bank,* 49 Neb. 786, 59 Am. St. Rep. 572 (but see *State v. Bank of Commerce,* 54 Neb. 725; *City of Lincoln v. Morrison,* 64 Neb. 822, 57 L. R. A. 885.)"

The note, quoted, correctly indicates that in *State v. Bank of Commerce,* 54 Neb. 725, and in *City of Lincoln v. Morrison,* 64 Neb. 822, this court refused to follow *McLeod v. Evans, supra,* and denied a preference as to trust funds which "might have been" or "were dissipated" in payment of the indebtedness of the trustee. In *City of Lincoln v. Morrison, supra,* this position is reaffirmed, and Pound, C., who delivers the opinion of this court, says, in substance: "We are not able to agree" with the rule stated in *McLeod v. Evans, supra.*

Certainly, these former opinions, last referred to, have been seriously limited, or materially modified, if not wholly overruled, by the latest pronouncement of the present majority.

Conceding that the majority are right in the instant case (which we do not), the profession is entitled to know the full effect of the same as applied to previous decisions. We earnestly protest that the public is entitled to have the law stated from this bench, not only with clearness and certainty as to the disposition of the case now before the court, but also to have its full effect upon prior decisions declared.

Other serious objections to the majority opinion are that it overlooks the fact that the fundamental issue here presented is controlled by the "national bank act," ignores the

policy and interpretation of that act as made by the federal decisions, and fairly denies to the receiver here the right which that statute secures. Then, too, it is in opposition to the trend of legal development which, as evidenced both by statute and decision, is towards greater uniformity.

With reference to the national bank act, the supreme court of the United States said at a very early day: "We consider that act as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed, the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; their obligations as depositaries of public moneys, and as such to furnish security for the deposits, and designating the consequences of their failure to redeem their notes, their liability to be placed in the hands of a receiver, *and the manner, in such event, in which their affairs shall be wound up,* their circulating notes redeemed, *and other debts paid* or *their property applied towards such payment.* Everything essential to the formation of the banks, the issue, security, and redemption of their notes, *the winding up of the institutions, and the distribution of their effects, are fully provided for,* as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates." *Cook County Nat. Bank v. United States,* 107 U. S. 445.

The controlling question before the court in *Cook County Nat. Bank v. United States, supra,* was whether the United States was entitled to a preference against the receiver of the bank under section 3466, Rev. St. U. S., then existing, which provided: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as

well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." This claim of preference on part of the government was denied by the court in the following language: "This section (national bank act) provides for the distribution of the entire assets of the bank, giving no preference to any claim except for moneys to reimburse the United States for advances in redeeming the notes. When this reimbursement is fully provided for, the balance of the assets, as the proceeds are received, is subject to a ratable dividend on all claims proved to the satisfaction of the receiver, or adjudicated by a court of competent jurisdiction. Any sum remaining after the payment of all these claims is to be handed over to the stockholders in proportion to their respective shares. These provisions could not be carried out if the United States were entitled to priority in the payment of a demand not arising from advances to redeem the circulating notes. The balance, after reimbursement of the advances, could not be distributed, as directed, by a ratable dividend to all holders of claims; that is, to all creditors."

It may be said in this connection that this decision is in line with the executive practice as evidenced by an opinion rendered by the attorney general of the United States in 1871. 13 Opinions of Attorneys General, 528.

This federal statute was again before the supreme court of the United States in *Davis v. Elmira Savings Bank,* 161 U. S. 275. New York had enacted a law providing: "All the property of any bank or trust company which shall become insolvent shall, after providing for the payment of its circulating notes, * * * be applied * * * in the first place to the payment in full of any sum or sums of money deposited therewith by any savings bank." The receiver of an insolvent national bank, under authority of the comptroller of currency, declined to accede to a demand for pre-

ferred payment under the terms of the state law, predicating his refusal on the ground that the preference was prohibited by the national bank act. The state law was sustained by the state courts, but on appeal to the supreme court of the United States the courts of New York were reversed, the state law held invalid, and the preference denied.

Mr. Justice White, who reviews the previous decisions of the court, in delivering the opinion of the court, says in part: "National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a state, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the federal government to discharge the duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court." *Davis v. Elmira Savings Bank, supra.*

All must concede that the term "assets" and the requirement that the comptroller of currency must "make a ratable dividend," etc., must be defined and determined in view of all the provisions of the national bank act; that this act being a federal statute and each of the parties litigant being creatures of the same statute, its provisions are binding upon this court and its construction by the supreme court of the United States must be conformed to by us.

The majority opinion seeks to control the comptroller of currency through the receiver of the Gering bank. It is to be remembered in this connection, as stated by Caldwell, Circuit Judge, in *McDonald v. State of Nebraska,* 101 Fed. 171: "A receiver of a national bank appointed by the comptroller of the currency in pursuance of the act of congress is charged by the laws of the United States with the execu-

tion of certain duties in the performance of which he acts as an agent and officer of the United States. His office is created and his duties defined by an act of congress. In contemplation of law every action brought by or against him in his official capacity arises under the laws of the United States. This action is brought against the receiver in his official capacity for an alleged breach of his official duty to the plaintiff imposed on him by the laws of the United States, and the circuit court had undoubted jurisdiction of the case. *Myers v. Hettinger,* 37 C. C. A. 369, 94 Fed. 370; *Price v. Abbott,* 17 Fed. 506; *Platt v. Beach,* 2 Ben. 303, Fed. Cas. No. 11215; *Stanton v. Wilkeson,* 8 Ben. 357, Fed. Cas. No. 13299; *Kennedy v. Gibson,* 8 Wall. 498; *Bank v. Kennedy,* 17 Wall. 19; *United States v. Hartwell,* 6 Wall. 385; *Armstrong v. Ettlesohn,* 36 Fed. 209; *Stephens v. Bernays,* 41 Fed. 401; *Bock v. Perkins,* 139 U. S. 628; *Hot Springs Independent School Dist. v. First Nat. Bank,* 61 Fed. 417."

Furthermore, the policy of this federal statute, and of its administration, as construed by the comptroller of currency, and as judicially interpreted by the federal courts, necessitates the presumption "that promissory notes, bonds, and other property coming to the hands of the receiver were not procured by the use of, and are not, trust property." *Empire State Surety Co. v. Carroll County,* 194 Fed. 593. Hence, the burden of proof is expressly imposed on claimant to identify property. *Schuyler v. Tittlefield,* 232 U. S. 707.

It must be conceded that the national bank act makes no distinction between claims of creditors by contract and claims of creditors based on tort. The comptroller is required to make a "ratable dividend" on both. Both classes of claims thus share equally. The line of demarcation between the respective rights of owners of "trust funds" and assets subject to the claims of creditors is necessarily involved in determining what of the properties of the insolvent bank are statutory "assets," from the proceeds of which the "ratable division is to be made."

As construed by the federal courts, all property coming

to the receiver is presumed to constitute statutory "assets," save and except property affirmatively shown by claimant to be property owned by him, or its proceeds likewise affirmatively traced to, and identified in, specific property in such receiver's possession. The use of trust funds in the payment of trustees' debts in this connection is universally held an insufficient foundation on which to base a claim of preference. This construction of the federal statute is binding upon this court, and to fail to conform to it is to deny the receiver a right which it secures.

Indeed, we are not without cases directly in point. As we have already stated, the majority opinion herein is substantially identical with *McLeod v. Evans, supra.* The latter case affirms the proposition that— "The conclusion is irresistible, from the facts, that the proceeds of the trust property found its way into Hodges' hands (the trustee) and were used by him either to pay off his debts or to increase his assets. In either case, it would go to the benefit of his estate. * * * We do not understand that it is necessary to trace the trust fund into some specific property in order to enforce the trust. If it can be traced into the estate of the defaulting agent or trustee, this is sufficient."

In *Philadelphia Nat. Bank v. Dowd,* 2 L. R. A. 480, 38 Fed. 172, Seymour, J., reviewed *McLeod v. Evans* (not at that time overruled) and other cases, and announced the following conclusion: "The statute forbidding preferences in the distribution of the assets of insolvent national banks is not believed to prevent a beneficiary from following any trust money, held for him by a bank, into any new investment thereof made by the bank. If, however, the doctrine could be carried to the extent claimed in the Wisconsin or even in the Texas case, it would seem to be an unlawful preference under the act of congress."

This case, last referred to, is not cited as a controlling authority, but merely as an interesting judicial appraisement of the principles underlying the present majority opinion and which form its essential foundation.

"The right of congress to determine to what extent a state court shall be permitted to entertain actions against national banks, and how far these institutions shall be subject to state control, is undeniable." 3 R. C. L. 688, sec. 320.

The supreme importance and unqualified necessity of having the powers of the comptroller of currency, a national federal officer, exercised in all states in accordance with one uniform rule construed in one uniform manner, is beyond dispute or cavil.

As our majority now have it, on the question of right to preference, if the comptroller of currency, by his representative, the national bank receiver, is haled before a Nebraska tribunal, one course of action will be required of him; while, if, in the same city, the action can be before a federal court, the direct opposite will be necessarily enjoined.

All this, as part of an orderly (?) course of judicial administration, is now established for the first time in Nebraska, in face of the admitted trend of juridical development (especially in matters pertaining to commerce and commercial law) toward even greater uniformity, as evidenced both by statutes and decisions. Truly, the mere statement of the conditions created is an unstinted condemnation of the cause.

Remembering our duty to enforce federal statutes, as construed by the supreme court of the nation, and that whatever power this court has in the case before us is derived, not from state laws, but from federal enactments, and conferred, at least, upon an implied condition that the rule of uniformity should ever prevail, for the reasons stated, and, in particular, because it is in effect a denial of a right created and vested by a federal statute, we dissent from the disposition of this case made by the majority, the effect of which is to unlawfully require the comptroller of currency, as a sworn officer of the United States, to exercise his official powers in the instant case in contravention of the terms of the federal statute of his creation.