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REPORTS OF CASES

IN THE

Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS, 1928,
AND JANUARY TERM, 1929.

VOLUME CXVII

HENRY P. STODDART,
OFFICIAL REPORTER

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By Henry P. Stoddart, Reporter of the Supreme Court,
For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1928.

RUSSELL C. WILLIS, APPELLANT, V. WINFIELD SPONSLER ET AL., APPELLEES.

FILED MAY 15, 1928. No. 25593.

1. **Bills and Notes:** RENEWALS. The making and the accepting of a promissory note for an existing one is not a payment of the maker's original indebtedness, unless there is a specific agreement to that effect.
2. ———: ACCOMMODATION MAKER. "An accommodation maker of a promissory note is not liable to the party accommodated." *Empson v. Richter*, 113 Neb. 706.
3. **Escrow.** An escrow should be made by all parties to the instrument deposited.
4. **Parol Evidence:** NOTES: ACCOMMODATION MAKERS. In a payee's action on a promissory note, parol evidence, as a general rule, may be admitted to prove that defendants were accommodation makers, where that defense is an issue of fact.
5. **Homestead:** MORTGAGE: FORECLOSURE: DEFENSES. A suit to foreclose a mortgage on a homestead may be defended on the ground that the note and the mortgage purporting to secure it were signed by mortgagors as an accommodation to mortgagee and were never unconditionally delivered.
6. ———: ———: ACCOMMODATION MAKERS: DELIVERY. Evidence outlined in opinion *held* sufficient to prove that a real estate mortgage on a homestead was signed as an accommodation to mortgagee and that it was never unconditionally delivered, though recorded.

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

C. P. Anderbery, for appellant.

Charles A. Chappell and *Harvey M. Wilson, contra.*

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

ROSE, J.

This is a suit in equity to foreclose a mortgage for $1,925.33 on a hotel and two lots of ground in Wilcox, Kearney county. The mortgage and the note that it purported to secure were dated March 16, 1922, and were payable September 15, 1922. Russell C. Willis, payee and mortgagee, is plaintiff. Winfield Sponsler and Mattie Sponsler, husband and wife, makers and mortgagors, are defendants.

In an answer to the petition defendants admitted the signing of the note and the mortgage, but alleged that the real estate in controversy was their homestead, that the mortgage was never delivered, and that it and the note were given without consideration as an accommodation to plaintiff.

Upon a trial of the issues raised by the pleadings the district court canceled the mortgage and dismissed the action. Plaintiff appealed.

It is argued by plaintiff that an unpaid debt evidenced by two prior notes aggregating with interest the amount of the note in suit was a valid consideration for the latter. The prior notes were executed by defendants in favor of plaintiff under the following circumstances: Winfield Sponsler purchased from plaintiff March 30, 1920, a half section of land in Wichita county, Kansas, for $6,720. Later, to secure part of the unpaid purchase price, defendants executed a mortgage for $3,200 on the Kansas land. In addition they gave a secured interest coupon note for $192 and also an unsecured note for $1,600 on the purchase price, both dated March 1, 1921, and payable March 1, 1922. For an amount equal to the sum of these notes and interest, or $1,925.33, defendants, March 16, 1922, signed a third note and also a mortgage on the hotel property in

Wilcox, Nebraska. This third note and the mortgage purporting to secure it, while unrecorded, were left in the First National Bank of Wilcox, Nebraska, in care of William Halstead, cashier, where they remained more than three years. Plaintiff eventually procured possession of them, had the mortgage recorded June 6, 1925, and brought this suit June 12, 1925, to foreclose the mortgage.

On the issue of consideration for the third note plaintiff testified in substance that none of the notes were paid; that the note in suit was given for the 192-dollar note and the 1,600-dollar note plus interest; that the latter note was given for Kansas land, was merged in the note for $1,925.33, and was given to take up the other notes, including principal and interest. Plaintiff still held the original notes at the time of the trial and introduced them in evidence as a part of his case in chief. The debt evidenced by one of the original notes retained by him was a lien on the Kansas land. While holding onto the prior notes and the lien on the Kansas land he brought suit in Nebraska on the new note. He did not testify that the new or third note was a renewal or that it was given to extend the time for payment of the old or original notes or that it and the mortgage on the Nebraska real estate were given as additional or collateral security. There was no evidence of an agreement that the new note discharged the original indebtedness. The following is a well established rule of law:

The making and the accepting of a new promissory note for an existing one is not a payment of the maker's original indebtedness, unless there is a specific agreement to that effect. *Spear v. Olson,* 104 Neb. 139; *Auld v. Walker,* 107 Neb. 676; *Berwyn State Bank v. Swanson,* 111 Neb. 141; *Nebraska State Bank v. Walker,* 111 Neb. 203; *Farmers State Bank v. Dowler,* 112 Neb. 262; *Exchange Nat. Bank v. Schultz,* 113 Neb. 346; *City Nat. Bank v. Denslow,* 114 Neb. 600.

There is no direct proof that defendants as makers of

the old notes are not now liable thereon to plaintiff. The only parties to this litigation are the makers and the payee. No innocent purchaser is interested in the controversy.

With plaintiff's case as thus outlined it was defended in part under the following theory of the law:

"An accommodation maker of a promissory note is not liable to the party accommodated." *Empson v. Richter,* 113 Neb. 706; *Farmers Nat. Bank v. Ohman,* 112 Neb. 491; *Spangenberg v. Losey,* 116 Neb. 112.

In the present instance defendants testified they signed the new note and the mortgage at plaintiff's request to bolster up his credit in Kansas until September 15, 1922, the date fixed by the parties for the surrender of both instruments. Other testimony on behalf of defendants tended to prove the following facts: When the note and the mortgage in controversy were signed, defendants did not have the title to the hotel property. Papers relating to the purchase thereof by defendants had also been left at the First National Bank of Wilcox, Nebraska, in charge of William Halstead, cashier. That property had been traded to defendants for a quarter section of land in Frontier county, Nebraska, and the title to the latter tract was involved in an action pending in the supreme court on appeal. Under an agreement obligating plaintiff to surrender the new note and the mortgage as accommodation paper by September 15, 1922, defendants signed them. The appeal was not determined until May 1, 1925. *Sponsler v. Max,* 113 Neb. 477. There is evidence of the facts thus outlined.

The rejoinder of plaintiff, as presented in an able argument, was that all evidence tending to prove the defense of accommodation paper was incompetent, leaving nothing to support the judgment below; his view of the defense being based on the contention that the testimony assailed as incompetent orally contradicted the terms of a written contract creating the following escrow:

"We are this day depositing in escrow with the First National Bank, Wilcox, one mortgage and note to be turned

over to R. C. Willis when title to lots 25 and 26, block 7, is turned to Winfield Sponsler; the understanding being that, if title is not turned to Winfield Sponsler and the other papers now in escrow with said bank are turned back to the original depositors, then this mortgage and note are to be turned back to Winfield Sponsler.

"R. C. Willis, Leoti, Kansas.
"Winfield Sponsler."

There seems to be a fatal defect in this instrument as an escrow. It does not bear the name of or bind Mattie Sponsler, a party to the note and the mortgage. She pleaded and testified that the hotel property was the homestead of defendants. She testified also that she never saw or authorized the escrow. The husband testified that his wife was not present when the escrow was signed, that he never read it, that he signed his own name to it supposing it conformed to the accommodation agreement, and that he told Halstead not to deliver the note and mortgage to plaintiff. In addition, the mortgage in the hands of Halstead showed on its face that Mattie Sponsler was a party to it. An escrow should be made by all parties to the instrument deposited. 21 C. J. 870, sec. 12. Oral evidence that the note and the mortgage were accommodation instruments was properly admitted. An unconditional delivery was essential to a foreclosure. Though plaintiff denied the making of the accommodation agreement, there was a clear preponderance of the evidence in favor of defendants on the issues that they were accommodation makers and that there never was an unconditional delivery of the note and the mortgage. It follows that error does not appear in the proceedings and judgment of the district court.

AFFIRMED.

AMERICAN SURETY COMPANY OF NEW YORK, APPELLEE, V. SCHOOL DISTRICT NO. 64, DOUGLAS COUNTY, APPELLANT.

FILED MAY 15, 1928. No. 25876.

1. **Schools and School Districts:** SCHOOL DISTRICTS: POWERS. A school district is a creature of statute possessing no powers whatever beyond those given by the legislature, and is unable to contract, *ad libitum*, as individuals may do, but only respecting objects, and to the extent, the laws permit.

2. ———: ———: ACTION ON CONTRACT: PETITION. To state a cause of action against a school district founded wholly on contract, it must affirmatively appear from the pleading that the contract in suit is one which the school district is empowered to make.

3. **Pleading:** EXHIBITS. A written instrument incorporated as an exhibit and expressly made a part of a pleading, and a part of a cause of action or a defense therein stated, controls the allegations thereof which it contradicts or which are inconsistent therewith.

4. **Schools and School Districts:** CONTRACT FOR BUILDING: BOND OF CONTRACTOR. If a contract with a school district is entered into for the construction of a school building under lawful terms and conditions specified therein, and the contractor gives a bond, in substance, conditioned for the faithful performance of such contract, and as required by section 3224, Comp. St. 1922, the covenants and conditions of such bond as a secondary contract are not to be read into or construed as a part of the primary contract, or as effective to alter, narrow or limit or otherwise vary the legal obligations thereof.

5. **Parol Evidence:** WRITTEN INSTRUMENTS. The rule excluding parol evidence to vary or contradict a written instrument applies only between the parties to such instrument and those claiming under them. It has no application to controversies between a party to the instrument on the one hand and a stranger to it on the other.

6. **Subrogation:** RIGHTS OF SUBROGEE. Subrogation is the substitution of another person in place of a creditor so that the person in whose favor it is exercised succeeds to the rights of a creditor in relation to the defendant. But such subrogee can acquire no greater rights than the creditor had to whose rights he succeeds at the time of such payment made by him.

7. **Contracts:** WRITTEN MATTER CONTROLS PRINTED MATTER. When an instrument consists partly of written (or typewritten) and partly of printed form, the former controls the latter where the two are inconsistent.

8. ———: STATUTES. Statutes, with reference to which contracts are made and entered into, become a part of such contracts.

9. **Bonds:** UNAUTHORIZED CONDITIONS. Where the conditions of a statutory bond are separable and part are authorized by statute and part are not authorized or even prohibited, and the statute does not expressly, or by necessary implication, declare it void as a whole, the conditions not authorized or prohibited may be rejected as surplusage, and the residue sustained as a good statutory bond *pro tanto*, the rule being the same as that applied to common-law bonds partly good and partly bad.

10. **Contracts:** REPUGNANT CLAUSES. Where two clauses of a written instrument are so repugnant that they cannot stand together, the first will be retained and the second rejected, unless the inconsistency is so great as to avoid the instrument for uncertainty, and this rule is the more readily applied where the instrument is apparently carelessly drawn, or where the conflicting clause is on the back of the contract.

11. **Schools and School Districts:** INDEMNITY BONDS. So far as the members of the board of a school district act, under section 3224, Comp. St. 1922, in exacting a bond for the benefit of laborers, mechanics and materialmen, they exercise statutory powers exclusively conferred upon them as trustees for the beneficiaries to be protected thereby, and do not act for, or in behalf of, the school district of which they are officers in accepting, taking and keeping this statutory bond.

12. ———: ———: ACTION AGAINST SCHOOL DISTRICT. The obligee of the bond, in view of the subject of the action in suit, appearing therein solely as a trustee and not as representative of the school district, defendant, and the terms of the bond sued upon imposing liability, if at all, on the obligee only, such bond affords no basis for a cause of action against the school district in its corporate capacity.

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

DeLamatre & DeLamatre and *J. C. Travis*, for appellant.

Montgomery, Hall, Young & Johnsen, contra.

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

EBERLY, J.

Action in the district court for Douglas county, Nebraska, by the American Surety Company of New York (hereinafter referred to as surety company) against School District No. 64, Douglas county (hereinafter designated school district) on an alleged covenant in writing contained in a builder's bond executed by the surety company only, which, by delivery to, alleged acceptance of, and retention by, the school district, became the obligation of the latter. This alleged covenant provides in express terms that "the obligee (school board of School District No. 64, Douglas county, Nebraska) shall retain * * * not less, however, in any event, than ten *per centum* of (the value of all work performed or materials furnished in the prosecution of such contract)." There was judgment for the surety company for the amount of its claim, and from this judgment the school district appeals.

The plaintiff, as part of its petition in the trial court, set forth copies of certain specifications in writing for the construction of the proposed school building; the written proposal or bid of one Gustafson based thereon, wherein it was stated that the "amount of the bid on the specified work" is an amount named and certain (without any further or other specifications as to times and conditions of payment); the acceptance of such bid in writing on May 31, 1924, by "school board of School district No. 64, Douglas county, Nebraska," and also a copy of the builder's bond (identified as exhibit D and expressly made a part of plaintiff's petition) executed in behalf of Gustafson by the surety company only. In this bond the "school board of School District No. 64, Douglas county, Nebraska," is the sole obligee named. The penalty of the bond is $10,300. It is dated June 2, 1924. It identifies the primary contract to which it is collateral and sets forth the terms and conditions thereof in the following language:

"Whereas, the principal has entered into a written contract dated *May 31st, 1924,* with the obligee, for *erection of new school building according to the plans and specifications attached,* a copy of which is hereto annexed: *Now, therefore, the condition of this obligation is such that, if the principal shall indemnify the obligee against any loss or damage directly arising by reason of the failure of the principal to faithfully perform said contract, and if the principal shall pay off and settle in full with the person or persons entitled thereto all accounts and claims that may become due by reason of laborers' or mechanics' wages, or for materials furnished or services rendered to the principal in executing or performing the obligations of said contract, so that each of such persons may receive his just dues in that behalf, then this obligation shall be void; otherwise to remain in full force and effect.*

"Provided, however, and upon the express conditions, the performance of each of which shall be a condition precedent to any right to recovery hereon:

"First: That in the event of any default on the part of the principal, a written statement of the particular facts showing such default and the date thereof shall be delivered to the surety, by registered mail, at its office in the city of *Omaha, Nebraska,* promptly and in any event within ten (10) days after the obligee or his representative, or the architect, if any, shall learn of such default; that the surety shall have the right within thirty (30) days after the receipt of such statement to proceed, or procure others to proceed, with the performance of such contract; shall also be subrogated to all of the rights of the principal; and any and all moneys or property that may at the time of such default be due, or that thereafter may become due to the principal under said contract, shall be credited upon any claim which the obligee may then or thereafter have against the surety, and the surplus, if any, applied as the surety may direct.

"Second: That no claim, suit or action by reason of any default shall be brought against the principal or surety

after the *twenty-fifth* day of *February, 1925,* nor shall recovery be had for damages accruing after that date; that service of writ or process commencing any such suit or action shall be made on or before such date; that the principal shall be made a party to any such suit or action, and be served with process commencing the same if the principal can with reasonable diligence be found; that no judgment shall be rendered against the surety in excess of the penalty of this instrument.

"Third: That the surety shall not be liable for any damages resulting from strikes or labor difficulties, or from mobs, riots, fire, the elements, or acts of God, or for the repair or reconstruction of any work or materials damaged or destroyed by any such causes; nor for damages from injury to person, or for the death of any one; nor under or by virtue of any statutory provision for damages or compensation for injury to or for the death of any employee; nor for the nonperformance of any guaranties of the efficiency or wearing qualities of any work done or materials furnished or the maintenance thereof or repairs thereto; nor for the furnishing of any bond or obligation other than this instrument; nor for damages caused by delay in finishing such contract in excess of ten *per centum* of the penalty of this instrument.

"Fourth: That the obligee shall faithfully perform all the terms, covenants and conditions of such contract on the part of the obligee to be performed; and shall also retain that proportion, if any, which such contract specifies the obligee shall or may retain of the value of all work performed or materials furnished in the prosecution of such contract (not less, however, in any event, than ten *per centum* of such value), until the complete performance by the principal of all the terms, covenants and conditions of said contract on the principal's part to be performed; that the plans and specifications mentioned in said contract are not in any respect defective, and are and at all times will be kept adequate for the complete performance of such contract, and that no change shall be made in such plans and

specifications which shall increase the amount to be paid the principal more than ten *per centum* of the penalty of this instrument, without the written consent of the surety.

"Fifth: That no right of action shall accrue upon or by reason hereof, to or for the use or benefit of any one other than the obligee herein named; and that the obligation of the surety is, and shall be construed strictly as, one of suretyship only, shall be executed by the principal before delivery, and shall not, nor shall any interest therein or right of action thereon, be assigned without the prior consent, in writing, of the surety." (Italics designate typewritten as distinguished from printed form.)

The plaintiff also alleged in substance, as the sole default of Gustafson, his failure to pay certain laborers and mechanics for labor that was performed, certain materialmen for materials actually used in erecting the school building covered by said contract, and his builder's bond, which claims for such labor and materials this plaintiff paid, and that such default constitutes the sole and ultimate basis for its claim under the terms of the alleged covenant specifically set forth in its petition.

The answer of the defendant embraced in substance (1) a general denial; (2) that the defendant and said Gustafson on or about May 31, 1924, in addition to the writing set forth in plaintiff's petition, entered into a further oral agreement whereby it was orally agreed that the "amount of the bid," as accepted by the school district, was to be paid in certain definite instalments by the school district to Gustafson at certain definite times, and that the "full balance" due on this contract was to be paid to said Gustafson when the schoolhouse to be constructed was completed by him and had been inspected and accepted by the school district; that the plaintiff was duly informed and advised of all the terms of this oral agreement prior to the execution and delivery of the bond (exhibit D), and that in due course of time the building was completed and inspected and accepted by the defendant, and the amount of the accepted bid paid and received by Gustafson, all in strict

compliance with the terms thus orally agreed upon. To the allegations of this answer the plaintiff filed a general denial by way of reply.

The record discloses that, on the trial, all evidence as to the oral agreement pleaded by defendant relating to the times of payment and amount of instalments constituting the "amount of the bid" was, on objection of the plaintiff, excluded. It was thought by the trial court to involve a violation of the parol evidence rule. But it also appears without substantial contradiction that the first paragraph of the conditions of the bond (exhibit D) was written in that instrument by the surety company at the request of the obligees for the purpose of making the bond in this matter comply with section 3224, Comp. St. 1922; also that the entire contract price for the school building constructed was, in good faith and in strict compliance with the terms of its primary contract, paid out by the school district to persons entitled thereto. The surety company had actual knowledge of the terms of payment contained in the primary contract, and such payments were completed before these claims of laborers and mechanics and materialmen, set forth in plaintiff's petition, were paid off and taken over by the surety company.

The record also discloses that the sufficiency of pleadings of the plaintiff was challenged by proper objections seasonably lodged to the introduction of evidence and by appropriate motions at the conclusion of the evidence.

The real questions presented by this controversy, in the form in which they come before us and in the light of the record as an entirety, when reduced to constituent elements, may be said to be narrow, technical, though simple. The authenticity of all the written instruments pertaining to the transaction, as set forth in the pleadings of the parties, are, in effect, admitted. The terms of the alleged oral contract appear in the form of offer of proof. On this basis the controversy is to be determined by a proper application of the rules of evidence and a proper construction of the provisions of the several instruments in writing which ap-

pear in the record as exhibits to the several pleadings in the light of the law relating to the subject of the action.

As preliminary to the consideration of the questions suggested, we may say that, as a rule of pleading, this court for almost half a century has been committed to the doctrine that—"School districts—mere creatures of statute—possessing no powers whatever beyond those given by the legislature, they are unable to contract, *ad libitum,* as individuals may do, but only respecting objects, and to the extent, the laws permit." *School District No. 16 v. School District No. 9,* 12 Neb. 241. Therefore, a more definite statement is required than as against natural persons. Enough should be stated to show that the alleged indebtedness was one which the school district could incur. Thus: "To state a cause of action against a school district for money 'paid, laid out and expended,' for its use, and at its request, facts must be averred which show that the supposed indebtedness was such as the district could lawfully incur." *School District No. 16 v. School District No. 9, supra.* These principles remain unmodified so far as actions founded wholly on contract against school districts are concerned.

Nebraska Telephone Co. v. City of Red Cloud, 94 Neb. 6, reaffirms the above. It announces a modification, it is true, which was approved by a divided court, and extends only to actions "for the recovery of the reasonable market value of property received and retained."

The question as to the power of the school district to make the obligation sued upon is properly presented by general demurrer or objections to the introduction of evidence. *School District No. 16 v. School District No. 9, supra; Nebraska Telephone Co. v. City of Red Cloud, supra.*

It may also be said that exhibits attached to plaintiff's petition and "expressly made a part thereof" are subject to consideration by the court without reference to the legal effect thereof as alleged by the pleadings.

Therefore, it follows in the instant case that the allega-

tions of the pleader are controlled by the statement of the written instrument on which the pleading is founded. *Carson v. City of Hastings,* 81 Neb. 681; *Carey v. Zabel,* 112 Neb. 16.

It would seem that the following statutory provisions are applicable to the subject of the action here presented: "Every duly organized school district shall be a body corporate and possess all the usual powers of a corporation for public purposes by the name and style of 'School District Number ..... of ..... county,' and in that name may sue and be sued, purchase, hold and sell such personal and real estate as the law allows." Comp. St. 1922, sec. 6239.

"It shall be the duty of the * * * contracting board of officers of all * * * school districts * * * now or hereafter empowered by law to enter into a contract for the erecting * * * of any public building * * * or other public structure or improvement; and any officer or officers so empowered by law to enter into such contract, to which the general provisions of the mechanics' lien laws do not apply, and where the mechanics and laborers have no lien to secure the payment of their wages and materialmen who furnish material for said work have no lien to secure payment for material furnished in said work, to take from the person, persons, firm or corporation to whom the contract is awarded a bond in a sum not less than the contract price with at least two good and sufficient sureties, or in lieu thereof by one surety company, conditioned for the payment of all laborers and mechanics for labor that shall be performed and for the payment for material which is actually used in the erecting, furnishing, or repairing of the building or in performing the contract. Such bond shall be to the board awarding the contract, and no contract shall be entered into by such board until the bond herein provided for has been filed with and approved by said board. Such bond shall be safely kept by the board making the contract, and may be sued on by any person entitled to the benefit of this chapter. The action shall be in the name of the

party claiming the benefit of this chapter." Comp. St. 1922, sec. 3224.

The nature of the transaction here presented obviously requires the application of the following rule of construction: "Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described." *Nash v. Towne,* 5 Wall. (U. S.) 689. See, also, *Nebraska Hardware Co. v. Humphrey Hardware Co.,* 81 Neb. 693.

Logically, in the application of the principle of construction just announced, the first question suggested is: What effect did the secondary contract (exhibit D) have on the primary contract between the school district and Gustafson? Did its execution and delivery, as a secondary obligation, subscribed by the surety company only, and its acceptance and retention by the school district or by the school district board operate, by necessary implication, to incorporate in the primary contract between the school district and Gustafson of prior date the covenants and obligations of exhibit D as the controlling provisions thereof?

In principle, a similar question was determined in *Milske v. Steiner Mantel Co.,* 103 Md. 235, 115 Am. St. Rep. 354. The primary contract in this case cited was an unconditional builder's contract for the erection and completion of a building for a price definite and to be paid as therein set forth. It also contained a stipulation that the contractor awarding the contract should, with some responsible bonding company, execute a bond to the employer "conditioned for the faithful performance of his duties in the erection of the building." This stipulation was complied with by the contractor as principal, together with the American

Surety Company of New York as surety, each signing and executing a bond which, after its third condition, provided "that the principal (the contractor) shall not, nor shall the surety be liable for any damage resulting from an act of God." This bond was accepted and retained by the obligee. In an action founded on this quoted provision brought by the contractor against his employer who was the obligee of the bond, it was contended that this condition must be read into and considered as a part of the primary contract for the construction of the building; that it was, in fact, a binding covenant imposed upon the obligee who had accepted and retained the bond in which it appeared and of which it formed a part; and that, therefore, the obligee was bound as for a covenant that he had duly entered into. The trial court, however, denied recovery. The supreme court of Maryland sustained this determination. In its opinion, after setting forth the terms of the primary contract for the construction of the building as entered into between the employer and contractor, that court proceeds:

"These are the main and substantial provisions of the contract. It is an absolute and unconditional contract on the part of the plaintiff. There are no conditions or contingencies incorporated or provided for therein by which he might be excused from performance, or might be relieved from loss or damage, or whereby the loss occasioned by the storm mentioned in the declaration might be imposed upon the defendant. The bond was given, not to vary or change in any particular the obligations of the plaintiff under the contract, but to secure the faithful performance by him of all the duties assumed by him thereunder. Its object was to protect the defendant from loss or damage which might result from nonperformance by the plaintiff, and cannot be construed to add to or change any of the terms of the contract, or to be taken as a part thereof. When the purpose of the contract, its subject-matter, and the surrounding circumstances at the time are considered, it would seem to be perfectly clear that the

bond is an entirely independent and collateral contract given to protect the defendant against any default or miscarriage of the plaintiff under the contract. The original obligation to construct the building had been undertaken by the plaintiff, and the bond must be treated as a contract of guaranty or suretyship for the faithful discharge of his duties under his agreement with the defendant. That the original and distinct obligation of the plaintiff existed, and that the bond was a mere collateral agreement founded upon it, appears clear from the language employed and from a consideration of the surrounding circumstances. The bond may, therefore, be dismissed from the case and should not have been introduced into the declaration."

It follows that, as applied to the present case, the foregoing decision is authority for the conclusion that the terms of exhibit D, the secondary agreement by the surety company, cannot be read into the primary contract of the school district with the contractor or, in any manner or to any degree, affect the same. The full obligations of the latter, imposed by its terms on the respective parties thereto, remain and continue in full force and effect.

We are thus restricted to the terms of the secondary contract (exhibit D) as the exclusive basis of plaintiff's recovery in this case. Under the rule of construction as heretofore announced, we will look to the language employed in that instrument, the subject-matter to which it relates (especially so far as involved in this action) and the surrounding circumstances. In other words, this court will endeavor to place itself in the same situation as the parties who made this contract, so as to view the circumstances as they viewed them, and so judge the meaning of the words and the correct application of the language employed. For this purpose the terms of the primary contract between the school district and Gustafson, including both the written part thereof, as the same appears in the exhibits heretofore referred to, and the oral part thereof as shown by offers of proof which were excluded by the

trial court on the theory that the transaction then presented properly necessitated the application of the parol evidence rule, are important, and they constitute a part, at least, of "surrounding circumstances." These excluded offers of proof disclose an attempt to establish the terms of an executed and consummated contract after full performance in strict accord with all of its terms both parol and written, but also fairly disclose that, at the time of originally entering into the same, the parties thereto, contemporaneous with the making and subscribing thereof and in addition to the written terms, orally agreed on certain parol stipulations, additional to, but wholly consistent with, the written language employed, and which served only to supply obvious omission in the written language of their agreement. *Spiegal & Son v. Alpirn,* 107 Neb. 233; *Weddle v. Specht,* 97 Neb. 693; *Huffman v. Ellis,* 52 Neb. 688.

If we assume (but do not decide) that the circumstances detailed in these offers of proof properly invoke the consideration by the district court of the so-called parol evidence rule, still we cannot approve the action of that court in excluding the evidence offered. The objecting party was not a party to this primary contract. His action was not based upon it. The primary contract sought to be proved was but collaterally involved in the pending litigation then being tried.

This court is thoroughly committed to the doctrine that the rule excluding parol evidence to vary a written instrument has no application in a controversy between a party to such instrument on the one hand and a stranger to it on the other. 22 C. J. 1292; *Stanton Nat. Bank v. Swallow,* 113 Neb. 336; *De Laval Separator Co. v. Jelinek,* 77 Neb. 192; *Fairbanks, Morse & Co. v. Burgert,* 81 Neb. 465; *Fletcher v. Brewer,* 88 Neb. 196; *Rankin v. Northern Assurance Co.,* 98 Neb. 172; *Hauth v. Sambo,* 100 Neb. 160; *Durland Trust Co. v. Payne,* 106 Neb. 135; 10 R. C. L. 1019, sec. 212; *Bjornson v. Rostad,* 30 S. Dak. 40; *Vogt v. Schienebeck,* 122 Wis. 491.

It follows that in sustaining the objection to this evidence

the district court committed reversible error.

In view of the conclusion that the plaintiff is limited, as the basis of its recovery, to the builder's bond (exhibit D) we find it unnecessary to discuss at length the proposition of the surety company that, upon payments of the materialman for materials used in the construction of the building, it acquired an equitable right of subrogation against the school district even in the absence of statutory subrogation.

Subrogation is the substitution of another person in the place of a creditor so that the person in whose favor it is exercised succeeds to the rights of a creditor in relation to the defendant, but such subrogee can acquire no greater right than the creditor had to whose right he succeeds at the time of such payment by him.

The undisputed facts are that, prior to the payment by the surety company of any claim for materials furnished in this case by the materialmen in strict compliance with the actual terms of the primary contract, the contractor had been paid in full by the school district. The materialmen involved sustained no contractual relations with the school district whatever. It is not even claimed that the school district failed to perform any statutory duties it owed them. The contractor's right to compensation having wholly ceased and determined, he possessed no rights which, under any circumstances, might inure to the benefit of his creditors. Where the creditors themselves have no rights, there is nothing to which the subrogee can be subrogated; hence, the plaintiff herein can, under the facts in this case, acquire nothing through the application of that equitable principle.

The original builder's bond was executed by the surety company and accepted by the school district with the avowed intent and purpose and effort on part of both that the same should be in full accord and complete compliance with section 3224, Comp. St. 1922. In its preparation we note that a blank form was used, evidently not intended for the purpose for which it was employed, and the first paragraph of the conditions is in typewriting, complete within

itself, and substantially complies with the provisions of the statute referred to, and the language in which it is framed carried a sense of exclusion or completeness. The remaining terms and conditions, as shown by the copy appearing in this opinion, are wholly contained in fine print of the form employed. The subject-matter to which this construction is to be applied in the controversy before us is solely and exclusively wages of laborers and mechanics and for materials furnished by materialmen in the construction of the building.

The conclusion is inevitable that the instrument before us is a statutory bond and must be construed as such with reference to subject-matter completely embraced in the statute providing for its existence.

The character of the instrument, and the subject-matter to which it applies, renders the following principles important in its construction: "When an instrument consists partly of written and partly of printed form, the former controls the latter, where the two are inconsistent." Comp. St. 1922, sec. 8850; *Union P. R. Co. v. Graddy*, 25 Neb. 849; *Davis v. Ravenna Creamery Co.*, 48 Neb. 471. Statutes, with reference to which contracts are made and entered into, become part of the contract. *Watkins & Co. v. Kobiela*, 84 Neb. 422; *Sessions v. Irwin*, 8 Neb. 5.

"Where a bond contains the conditions prescribed by statute and also contains conditions in excess of those so required, if the excess can be separated from the authorized portion without destroying the latter, it may be rejected as surplusage, and the rest of the bond held valid, in the absence of a statutory provision expressly or by implication making it void, unless the language of the bond precludes a construction giving it validity." 9 C. J. 25, sec. 40.

Also: "The prevailing doctrine is that where the conditions of a statutory bond are separable and part are authorized by statute and part not authorized or even prohibited, and the statute does not expressly, or by necessary implication, declare it void as a whole, the conditions not authorized or prohibited may be rejected as surplusage, and

the residue sustained as a good statutory bond *pro tanto,* the rule being the same as that applied to common-law bonds partly good and partly bad." 4 R. C. L. 54, sec. 14.

"It has been frequently held that, in the absence of a prescribed statutory form, and of a declaration that bonds not in accordance therewith shall be void, if a bond be taken under a statute, with a condition in part prescribed by statute, and in part not so prescribed, yet, if it be clearly divisible, a recovery may be had upon it for a breach of the part prescribed by statute. The super-added part may be rejected as surplusage." *Board of Education v. Grant,* 107 *Mich.* 151. See, also, *Van Deusen v. Hayward,* 17 Wend. (N. Y.) 67; *Walker v. Chapman,* 22 Ala. 116; *Shunk v. Miller,* 5 Pa. St. 250; *Grant & Finney v. Brotherton's Adm'r,* 7 Mo. 458; *Morse v. Hodsdon,* 5 Mass. *314; *State v. McGuire,* 46 W. Va. 328; *Welch v. Sykes,* 3 Gil. (Ill.) 197, 44 Am. Dec. 689; *People v. Hartley,* 21 Cal. 585, 82 Am. Dec. 758.

The language employed in expressing the first condition of this bond (exhibit D) is wholly typewritten. So far as the subject-matter of our investigation is concerned it clearly appears therein that this instrument is conditioned for the payment of all laborers and mechanics for labor that shall be performed, and for the payment of all materials used in erecting said schoolhouse or in performing the contract for the same. That no other terms or conditions are within the contemplation of the parties plainly appears from the closing words of this typewritten statement, viz.: That upon the full performance of such condition, "then this obligation shall be void; otherwise to remain in full force and effect." This "obligation" in this connection is properly definable as "the binding power of this contract." *Edwards v. Kearzey,* 96 U. S. 595.

Read the bond as an entirety and contrast the typewritten portion with the portion of the same appearing in the fine print of the blank employed and you have an instrument without material consistency or coherence of parts. The typewritten portion cannot stand if the fine print be

given effect. The two parts are, therefore, inconsistent. Under the provisions of the sections of the statutes referred to, the typewritten condition, exclusive in its expression, controls, and by construction eliminates the "fine print" portion as part of the contract. This construction, however, is not only the result of the application of a technical rule, but is the only one consistent with the surrounding circumstances and the situation of the parties at the time of the execution and delivery of the bond. The school district was, by the terms of the primary contract, then obligated to pay its contractor the entire balance due when the school building was completed, inspected and accepted. This contract was valid, complete and enforceable. For the school district to attempt to retain any portion of the sum thus contracted to be paid would be, in effect, a plain violation of its contract and subject it to damages.

The surety company knew the provisions of this contract and the situation that existed, and with this knowledge undertook to supply a bond for the purpose of complying with section 3224, Comp. St. 1922, and which would apply to that situation. For the purpose stated, it executed the bond in suit. In its typewritten provisions, this bond is entirely consistent with the primary obligation of the school district and correctly conforms to the situation of the parties to the primary contract, but its "fine print" form is wholly inconsistent with the typewritten portion thereof, and is a violation of its undertaking to furnish a bond applying to the true situation, and it fails in compliance with the statute referred to.

Can it be possible that, for a compensation in dollars, the surety company, plaintiff herein, has, knowingly, placed the school district in such a position that a good faith performance of its primary contract necessarily entails a breach of the terms of its secondary obligation with resulting damages, and that a good faith performance of the secondary obligation necessarily entails a breach of the primary contract? Such a supposition is unthinkable and wholly inconsistant with good faith and fair dealing. The acts of

all the parties to a transaction are entitled to a construction consistent with fair purpose and honest dealing.

But another incongruity appears. Plaintiff's sole contractual basis for its cause of action, a search discloses, is to be found safely tucked away as an inseparably connected part of the fourth paragraph of the "fine print" form employed. It assumes that the term "obligee," used in connection therewith, designated the school district, and therefore the school district is bound as for a "covenant" entered into. We concede only for the purpose of this discussion that the term "obligee," as thus used, identifies the corporate entity here sued. The ordinary rules of construction would necessitate construing the paragraph in which the words affording plaintiff the basis of its claim are found as an entirety. Individual sentences, individual clauses, and particular words, must be construed in connection with context.

As applied to the subject-matter, the surrounding circumstances which constitute the facts in the present case, this consideration of this "fine print" paragraph brings us to the following results: "Provided, however, and upon the express conditions, the performance of each of which shall be a condition precedent to any right to recovery hereon: * * * Fourth: That the obligee (school board of school district) shall faithfully perform all the terms, covenants and conditions of such contract (the primary contract between the school district and contractor Gustafson) on the part of the obligee to be performed (which necessarily includes payment by the obligee of the contract price as therein provided) ; and shall also retain that proportion, if any, which such contract specifies the obligee shall or may retain of the value of all work performed or materials furnished in the prosecution of such contract (not less, however, in any event, than ten *per centum* of such value), until the complete performance by the principal of all the terms, covenants and conditions of said contract on the principal's part to be performed."

If the obligation on part of the obligee, imposed by the

words of the contract as above set forth, to retain "ten *per centum* of the value," is to be deemed a covenant, then the obligation imposed by the same paragraph upon the same obligee to faithfully perform all the terms and covenants of such primary contract must also be deemed a covenant. The latter is first in point of time. Applied to the facts in the instant case, the first covenant necessarily and imperatively directs the payment of the balance due, as provided by the terms of the primary obligation, which, in this case, is upon the completion of the building and its acceptance by the school district board. The second covenant, in effect, requires the breaching of covenant No. 1 to pay, and expressly requires that a portion of the purchase price, equivalent to the ten *per centum* of the value of all work done and the materials furnished, be not paid as such primary contract requires. Obviously, the "obligee" cannot be legally bound by the same contract and by the same clause of the contract at the same time to pay and not to pay. These clauses are therefore inescapably inconsistent and mutually repugnant. They cannot stand together. Covenant No. 1 is strictly in accord with the primary contract. Covenant No. 2 is repugnant to its terms.

The rule applicable is: "Where two clauses are so repugnant that they cannot stand together, the first will be retained and the second rejected, unless the inconsistency is so great as to avoid the instrument for uncertainty, and this rule is the more readily applied where the instrument is apparently carelessly drawn, or where the conflicting clause is on the back of the contract." 13 C. J. 536, sec. 493.

Whether we reject the second covenant or deem the instrument avoided for uncertainty, the same result ensues. The plaintiff's action is without support in either event.

And the same construction obtains for another reason. The obligation is a statutory bond entered into, as such, by the surety company, and is entitled to no other construction than that the parties gave it when it was entered into.

The terms and conditions, as expressed in the typewritten portion, are not only separable from the terms embodied in the fine print of the form employed in drafting the same, but are, in themselves, a substantial and complete compliance with the terms and requirements of section 3224, Comp. St. 1922. The "fine print of the form," embracing the portion of the bond on which plaintiff must rely to sustain his action, is not only wholly unauthorized by our statute, but in many respects repugnant thereto. In view of the rule announced by the authorities heretofore cited, the provisions embraced in the "fine print" of the form must, being in excess of the controlling statute and wholly unauthorized thereby, therefore, be deemed to be surplusage and to be rejected as such.

It, therefore, follows that in legal effect the entire contract of the parties in the present case is evidenced by that portion of the bond which excludes the "fine print" provisions which appear as part of the form, but which constitute no part of the legal obligation which the bond evidences.

Still, another reason exists for denying recovery on the basis of the allegations contained in plaintiff's petition filed herein. It must be conceded that, in the absence of statute, no legal duty was imposed on public or municipal corporations or officers representing the same to exact bonds such as the one here in suit. It also follows that, in the absence of statute, there was no corresponding liability for simple failure so to do. It may be said, however, that the question of the exaction of such bonds, as a matter of public policy, received judicial consideration long prior to the adoption of the statute now in force on that subject, as will be seen from the following decisions: *Sample & Son v. Hale*, 34 Neb. 220; *Lyman v. City of Lincoln*, 38 Neb. 794; *Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb. 649; *Fitzgerald v. McClay*, 47 Neb. 816; *Kaufmann v. Cooper*, 46 Neb. 644; *King & Co. v. Murphy*, 49 Neb. 670; *Rohman v. Gaiser*, 53 Neb. 474.

As a summary of the doctrine of the cases just cited that

obtained prior to the passage of section 3224, Comp. St. 1922, it may be said (1) that the requirement of a bond proceeds on the basis that a "moral" as distinguished from a "legal" obligation existed, and therefore the exaction of a bond for the benefit of the laborers and materialmen could be sustained as not in excess of the power of the officers representing the corporation involved in the matter of constructing a public building; (2) apart from statutory authority, it was within the province of the proper officers of a public or municipal corporation, upon whom it devolved to enter into construction contracts, to exact as a condition precedent thereto the giving of a bond by the contractor employed, conditioned for the payment of all laborers and mechanics for labor that should be performed thereon, and for the payment of all building materials which were actually used in performance of the contract so entered into; (3) that the sureties on such bond were liable in a direct action by the parties for whose benefit it was given; (4) that, notwithstanding the form of the obligation taken, in view of the obligation it contained, it was a contract dual in its nature; that it was two contracts, separate and distinct though embodied in one writing; (5) that the case stood exactly as if the contractor and his bondsmen had entered into one direct obligation with laborers, mechanics and materialmen, and one with the district; (6) that the officers of corporate entities, so far as securing the bond for the payment of laborers and materialmen, acted not in their own behalf, but in the capacity of trustees for the beneficiaries protected by the bond. The fundamental basis on which these decisions rest is the nonexistence of statutory powers to contract with reference to the subject-matter in behalf of, or as binding upon, the public corporate entity involved.

Thus, where the stipulation in the construction contract was that the contractor should receive but 45 per cent. of the estimated cost of the work actually performed by him, and that such work should be performed by a day certain, and the payment of 90 per cent. had been paid, and the time

of the completion of the work had been extended, all without consent of the sureties on the bond, such facts, it was held, constitute no defense to actions prosecuted by laborers and materialmen upon the bond because the stipulation relied on as a defense formed no part of the obligation sued upon. This situation has been followed by the legislative adoption of section 3224, Comp. St. 1922.

"When the legislature declares * * * the public policy of the state to be that that which had theretofore been subject to contract between the parties shall hereafter be by certain prescribed forms and with specific conditions concerning the respective rights and duties of the parties thereto, the statutory provisions step in and control and regulate the mutual rights and obligations rather than the provisions of any contract the parties may attempt to make varying therefrom." *Williams v. Travelers Ins. Co.*, 168 Wis. 456.

The terms of section 3224, Comp. St. 1922, impose the duty of taking a bond upon "the contracting board of officers of all school districts." The terms provide that the instrument itself "shall be to the board awarding the contract," and "shall be safely kept by the board, * * * and may be sued on by any person entitled to its benefit." This statute vests no added power in the corporate entity, the school district as such, and imposes no additional duties upon it, and in no manner adds to its liability; in fact, the school district as such is a stranger to its terms and is not in any manner within the purview of its provisions.

This court is further committed to the doctrine that, so far as the members of the board of a school district act, under this statute, in exacting a bond for the benefit of laborers, mechanics and materialmen, they exercise statutory powers exclusively vested upon them as trustees for beneficiaries to be protected thereby. *Forburger Stone Co. v. Lion Bonding & Surety Co.*, 103 Neb. 202. The school board does not act for, or in behalf of, the school district of which they are officers, in accepting, taking and keeping this statutory bond.

From the allegations of the petition here, it appears that the plaintiff, as foundation of alleged contractual rights, pleads the bond expressly given to comply with section 3224, Comp. St. 1922, with the obligee thereof designated as "School board of School District No. 64, Douglas county, Nebraska," and it presents a literal compliance with the terms of the statute. But the term "School board of School District No. 64, Douglas county, Nebraska," as therein used, designates, not officials acting in behalf of their school district, but trustees acting in behalf of the laborers, mechanics and materialmen who are to be the beneficiaries of the bond taken.

Therefore, if it be conceded that the words we find in the fine print of the bond, "The obligee * * * shall also retain * * * not less, however, in any event, than ten *per centum* of such value (of all work performed or materials furnished in the prosecution of such contract)," until the complete performance of all terms and covenants in the principal part to be performed, is properly a part of the bond and is to be construed as a covenant, even so, it cannot be said that it constitutes the covenant of the school district which is not named in the bond, and is not a party thereto or interested therein, which, so far as plaintiff's cause of action is concerned, has therefore no contractual liabilities. In short, the terms of the bond do not, in view of the basis of plaintiff's claim being laborers', mechanics' and materialmen's demands and the terms of the statute, impose any duty or liability upon the school district as such. If the obligee in the bond named be deemed the promisor, the obligee is not sued in the action we are now considering. What the obligee's rights and liabilities may be, they are therefore not before us for determination.

While the conclusions heretofore announced on some of the questions considered would necessitate a reversal for retrial, we are confident, in view of the entire record, however, that there is no cause of action stated, or can be stated, upon the bond in suit against the corporate entity, School District No. 64, Douglas county.

It follows, therefore, that the evidence wholly fails to support the judgment of the district court. The judgment is reversed and the proceedings dismissed.

REVERSED AND DISMISSED.

FARMERS STATE BANK OF PAWNEE CITY, APPELLANT, V. FRANK BAKER ET AL., APPELLEES.

FILED MAY 15, 1928. No. 25875.

1. **Bills and Notes:** JOINT MAKERS: UNAUTHORIZED DELIVERY. Where one joint maker of a promissory note signs the same on condition that one or more others sign, delivery thereof without such signatures to the payee, with notice of the condition, is invalid.
2. ———: ———: RELEASE. An unconditional release of one of several joint makers of a promissory note, without the consent of the others, is a release of all those not consenting.

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

N. T. Gadd and *Barton & Barton,* for appellant.

H. M. Sullivan and *Squires & Johnson, contra.*

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

REDICK, District Judge.

This action is brought by the plaintiff to recover on three promissory notes dated November 5, 1923, two for the sum of $5,000 each, and one for $3,000, signed by Frank Baker, G. A. Holeman, and B. J. Tierney. Prior to the commencement of the action Tierney died and only Baker and Holeman were made defendants. After the evidence had been taken before a jury, the jury were discharged by consent and the cause submitted to the court, resulting in a judgment for the plaintiff against the defendant Holeman, and against the plaintiff and in favor of the defendant Baker,

as to whom the action was dismissed. Motion for new trial having been overruled, plaintiff brings the cause here for review.

There is no substantial dispute as to the facts, which may be summarized as follows: Prior to 1921 the Farmers State Bank of Ansley had loaned to one Welch the sum of $12,000, and the state bank examiner had objected to this loan and ordered that it be charged off and other securities substituted for it. Thereupon, B. J. Tierney, Frank Baker, Grover A. Holeman, and A. C. Van Horn, who constituted the board of directors of the bank, borrowed the money from one Studley, giving their individual notes therefor, and took up the Welch indebtedness. When the Studley notes came due in July, 1921, the four parties named borrowed the sum of $15,000 from the Farmers State Bank of Pawnee City, plaintiff, giving their joint notes therefor. These notes were twice renewed for the sum of $13,000, $2,000 having been paid in March, 1922.

During the period of these transactions A. C. Van Horn was cashier of the Ansley bank and the holder of $8,200 of its stock, and his father, H. C. Van Horn, was president of the plaintiff bank. Some time prior to November, 1922, the Ansley bank was in a failing condition, and it was arranged between H. C. Van Horn, president of the Pawnee City bank, and Holeman, vice-president of the Ansley bank, that Holeman should purchase the stock of A. C. Van Horn at par, and the latter should sever his connection with the bank, returning to that of his father at Pawnee City; and it was a part of this arrangement that the liability of A. C. Van Horn upon the notes to the Pawnee bank, A. C. Van Horn being no longer a stockholder in the Ansley bank, should cease. This arrangement was carried out, Holeman giving his note to H. C. Van Horn for $8,200. Thereafter, upon the recommendation of H. C. Van Horn, Fred Allen, who had been an employee of the Pawnee bank, was employed by the Ansley bank as cashier, Holeman transferring to him ten shares of the stock purchased from A. C. Van Horn.

When the three notes held by the Pawnee bank came due, they were forwarded to the Ansley bank for collection or renewal, and Allen presented three renewal notes to defendant Baker for signature November 20, 1922. Baker signed them with the understanding and condition that Allen was to procure the signatures of the other makers, which he agreed to do. This transaction took place at Baker's farm about eight miles out of Ansley. The renewed notes were not presented and there is no doubt that Baker understood that the three other parties were to sign the renewals. These notes were again renewed in April, 1923, and finally November 5, 1923, under substantially the same circumstances and conditions. The last three renewals, however, were signed only by Baker, Holeman, and Tierney, the name of A. C. Van Horn being omitted in accordance with the agreement between H. C. Van Horn and Holeman above mentioned. Baker, though president of the Ansley bank, took no active part in its management, had no knowledge of the agreement just mentioned, and did not know that A. C. Van Horn had not signed the renewal notes last mentioned, but had been released from liability on said debt, until some time after the renewals of November 5, 1923, had been executed. The renewed notes were kept in a pouch in the Ansley bank, but it does not appear that Baker ever saw them.

Defendant Baker presents two defenses: (1) That he signed the notes in question upon condition that the other three parties should sign the same with him, and that the delivery of the notes without the signature of A. C. Van Horn was unauthorized; (2) that the release by plaintiff bank, acting through its president, of A. C. Van Horn, one of the joint debtors, released the defendant.

We think both of these defenses are valid and that they are fully established by the evidence. It is contended by the plaintiff that Allen was the agent of defendant Baker for the purpose of securing the signatures of the other makers on the note, but we are of the opinion that Allen was the agent of the Ansley bank and the Pawnee bank for the

purpose of obtaining the renewals in question, and that notice to him of the condition upon which Baker signed was notice to the plaintiff. The case of *Brumback v. German Nat. Bank,* 46 Neb. 540, cited by plaintiff, is not in point, as we hold in this case that plaintiff must be charged with notice of the condition.

In *Huber Mfg. Co., v. Silvers,* 85 Neb. 760, it was held: "The unconditional release of one of several makers of a joint and several promissory note, without the consent of the other makers thereof, operates as a release of all."

We conclude that the judgment of the district court as to appellee Frank Baker is correct, and the same is

AFFIRMED.

WILLIAM SLEZAK V. STATE OF NEBRASKA.

FILED MAY 15, 1928. No. 26292.

1. **Evidence** examined, and *held* sufficient to support the verdict.
2. **Rape:** SENTENCE REDUCED. Sentence for assault with intent to rape reduced from seven to three years.

ERROR to the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed; sentence reduced.*

Waring & Waring, for plaintiff in error.

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

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, and HOWELL, JJ., and CLEMENTS and REDICK, District Judges.

REDICK, District Judge.

Plaintiff in error, defendant below, was convicted of an assault with intent to commit a rape upon a child of nine years of age, and sentenced to the reformatory for male persons at Lincoln for a period of seven years. Defendant brings the record here for review.

The errors necessary to be considered and relied upon by

defendant for reversal are: (1) That the evidence is insufficient to support the verdict; (2) that the court erred in refusing to allow defendant to show by nonexperts the facts and circumstances which led them to think that the state's principal witness was intoxicated; (3) that the sentence of the court is excessive.

We have examined the record with care, and while the evidence is of such a character that a verdict of not guilty by the jury might not have been reasonably subject to severe legal criticism, we are of the opinion that the evidence presented a case for the determination of the jury, is sufficient to support the verdict, and that defendant was afforded a fair and impartial trial. We do not, therefore, feel justified in disturbing the verdict on this ground.

The defendant offered to show that the mother of the complaining witness, at the time of the occurrence of the facts to which she testified, was intoxicated. This evidence was first ruled out by the trial judge, but afterwards, upon the statement in open court that such ruling was erroneous, the court permitted defendant's witnesses to testify that in their opinion the witness was drunk. In some instances, after the witnesses had stated that in their opinion the mother of complaining witness was drunk, the court refused to permit the witnesses to state the facts upon which their conclusion was based; in other instances such facts were permitted to be given. Under these circumstances we are unable to perceive any prejudicial error to the defendant. He had the benefit of the principal fact, if the jury believed that it had any bearing upon the credibility of the witness.

We have considered numerous other assignments of error regarding the admission and rejection of evidence by the trial court, but discover no prejudicial error therein.

We have concluded, however, that the sentence imposed upon defendant is excessive. The defendant is a young man just beyond the age of eighteen at the time of the offense, and so far as the record shows was industrious and of good character, the present being the only charge of a criminal nature ever brought against him. And while that

charge is one of the most heinous known to the statute and moral law and admits of no excuse, still the youth of the defendant and the extent of injury to the prosecuting witness are matters to be taken into consideration in determining the penalty. We are not disposed to minimize in the slightest degree the possible moral effect upon a female child of such an experience as that to which she was subjected by defendant's criminal act. She was, of course, greatly frightened and shocked, but received no physical injury of any kind. We conclude that a sentence of three years will meet the requirements of justice.

The judgment of the district court is modified, and sentence reduced to three years at hard labor, and affirmed as modified.

AFFIRMED; SENTENCE REDUCED.

FIRST NATIONAL BANK IN ALEXANDRIA, SOUTH DAKOTA, APPELLEE, V. L. H. ERNST, DEFENDANT: RUA F. ERNST, APPELLANT.

FILED MAY 18, 1928. No. 25969.

1. **Husband and Wife:** NOTE: LIABILITY OF WIFE AS SURETY. A note executed by a married woman, living with her husband in Nebraska, as surety only for his debt, is not binding upon her, unless it shall be made to appear that she intended to bind her separate estate for its payment.
2. ———: ———: ———: BURDEN OF PROOF. In an action against a married woman on a note, as above described, which did not relate to her separate estate, trade, or business, the burden is upon the party seeking to hold her liable to prove that she signed the note with intent to bind her separate estate for its payment.
3. ———: ———: ———: INTENT. Intent of a married woman to bind her separate estate for the payment of a note executed in Nebraska, as surety for her husband with whom she is living in Nebraska, where such note does not relate to her separate estate, trade, or business, is a condition precedent, in the absence of which she has no capacity to make a binding contract.

4. ———: ———: ———: PAROL EVIDENCE. A married woman, who, jointly with her husband, signs a note as surety only, which is dated and made payable in another state in which the common-law disability of married women to contract has been removed, and which note was delivered to the payee in Nebraska without a clause therein showing that she intended to bind her separate estate, will be permitted to show by oral testimony that, at the time of its execution, it was agreed between her and the payee that her separate estate would not be liable for the payment of such note, and it is error for the trial court to exclude such evidence. *Farm Mortgage & Loan Co. v. Beale*, 113 Neb. 293, distinguished.

5. ———: ———: ———: EVIDENCE OF INTENT. Where intent of a married woman is a direct issue, it is competent for her to testify that she had no intent to bind her separate estate, such intent being in the nature of an existing fact which she knows more about than any one else, the weight of such testimony being a matter for the jury to consider.

6. ———: ———: ———: RENEWAL NOTES. A renewal note, executed by a married woman as surety only for her husband, where no other or new consideration is shown, is subject to the same defense as the prior note.

7. **Contracts:** WHERE MADE BY POST. When a person in one state sends a contract by mail to a person in another, to be executed and returned to the sender, the sender makes the post office establishment of the United States his agent, and a deposit of the signed contract, by the receiver, in the post office, in an envelope properly stamped and addressed to the sender, completes the contract.

8. **Bills and Notes:** INNOCENT PURCHASER. One who purchases or has assigned to him, after maturity, a note signed by a married woman as surety only for the payment of her husband's debt is not an innocent purchaser and cannot enforce the note against the married woman if the payee of the note could not do so.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Reversed.*

F. C. Radke and *Magdalene Craft Radke,* for appellant.

Danforth & Seacat, Clare B. Davey and *S. P. Davidson, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and HOWELL, JJ., and CLEMENTS and REDICK, District Judges.

HOWELL, J.

Rua F. Ernst, a married woman, lived in Nebraska when the note in suit, for $1,320, was executed, and appeals from a judgment thereon. The note was dated "Alexandria, South Dakota, September 12th, 1923," "Payable at the First National Bank, Alexandria, South Dakota," to "The First National Bank *of* Alexandria, South Dakota." The note was indorsed: "Pay to the order of the First National Bank *in* Alexandria, S. D. Without recourse. Paul C. Keyes, Receiver of the First National Bank *of* Alexandria, S. D." The plaintiff bank will be referred to as the "in" bank, and the First National Bank *of* Alexandria as the "of" bank.

The "of" bank having become insolvent, its receiver sold the note to the "in" bank on January 30, 1925, after its maturity.

Mrs. Ernst pleaded coverture as one defense, claiming the note was a Nebraska contract; on and since September 12, 1922, at which time she gave a note of which the one in suit was a renewal, she has been living with her husband, a resident citizen, in Nebraska; the September 12, 1923, renewal note was obtained by Frank D. Peckham, president of the "of" bank, from her in Nebraska where it was actually executed in his presence, under an express agreement that the rights of the parties to the note "should be governed by the laws of Nebraska;" that no judgment would be asked against her thereon; that her separate estate would never be charged with payment, and that the note was so accepted by Peckham for the "of" bank. Her husband gave the first note for his individual debt of long standing, and, after he signed it, Peckham induced her to sign it, through trickery, deceit and fraud, and promised her the "of" bank would hold and not dispose of it; that no judgment would be taken against her; her property would not be charged with its payment; he desired her sig-

nature as a matter of form to get the bank examiner's approval; her signature was not asked as a maker, and the "of" bank would look to her husband only for payment. Then follows the usual allegations of reliance; of no consideration; the notes did not concern her property or business, were not given with reference to, upon the faith or credit of, or with intent to bind her estate; her husband received the sole consideration, and the "in" bank took the note in suit, after due.

Plaintiff alleged in reply: Rua F. Ernst was married; the note was "made, executed and delivered to the plaintiff by defendants *at Alexandria,* South Dakota;" the note was a "South Dakota contract," and it "was to be governed" by "certain sections of the Code of that state."

Neither note contained a clause concerning Mrs. Ernst's liability as a married woman, intent to bind, or that it was in reference to, her estate or business.

Section 1510, Comp. St. 1922, moderates the incompetency of a married woman to contract only to the extent that she "may bargain, sell and convey her real and personal property, and *enter* into any *contract* with *reference* to the same in the same manner, to the same extent * * * as a married man may." Section 1511, Comp. St. 1922, relates to her separate trade or business. There is no pretense that either note originated with her trade or business.

In *Farm Mortgage & Loan Co. v. Beale,* 113 Neb. 293, it is said: "The statute has removed the common-law disability of a married woman to make contracts only in cases where the contract made has reference to her separate property, trade, or business, or was made on the faith or credit thereof, and with the intent on her part to thereby bind her separate property. *Hale v. Christy,* 8 Neb. 264; *Godfrey v. Megahan,* 38 Neb. 748; *Grand Island Banking Co. v. Wright,* 53 Neb. 574; *Smith v. Bond,* 56 Neb. 529; *Farmers Bank v. Boyd,* 67 Neb. 497; *Northwall Co. v. Osgood,* 80 Neb. 764; *Marsh v. Marsh,* 92 Neb. 189." Such intent is not presumed. It must be proved by the promisee.

The evidence is conclusive that Mr. and Mrs. Ernst

signed and delivered both notes in Nebraska, the first one to Mr. Peckham in person, and the one in suit to the post office establishment of the United States. Mrs. Ernst knew nothing about the laws of South Dakota and, of course, had no intention concerning them. She testified, over objection, she intended that the Nebraska laws should govern. Where intent is a direct issue in a case, it is competent for the doer to state his own mind, as he knows more about it than any one else. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624, 632; *McCormick Harvesting Machine Co. v. Hiatt*, 4 Neb. (Unof.) 587; *Beach v. Beach*, 160 Ia. 346; *Preger v. Barnett*, 175 Mich. 494; *Edwards v. Svea Fire & Life Ins. Co.*, 141 Minn. 285; *Chambers v. Chambers*, 227 Mo. 262, 282; *Eckerd v. Weve*, 85 Kan. 752, 758.

The main question in this case is: Where was the note in suit executed and delivered, and with what intent?

While the writer entertains doubt as to some of the statements in the opinion in *Farm Mortgage & Loan Co. v. Beale*, 113 Neb. 293, the conclusion there reached was a proper one under the facts. Mrs. Beale signed the note in Nebraska. It was dated and made payable in Kansas City, Missouri. The facts and circumstances indicate, very strongly, that the note was delivered in Missouri, and it became a contract where it became effective by delivery.

In *McElroy v. Metropolitan Life Ins. Co.*, 84 Neb. 866, the rule is stated that, where parties to a contract "are in different jurisdictions, the place where the last act is done which is necessary to the validity of the contract is the place where the contract is entered into."

Upon the trial of the instant case, counsel for Mrs. Ernst offered to prove that, at the time the first note (which was renewed by the note in suit) was executed, one of the executive officers of the "of" bank was present at her home in Nebraska, transacting the business for the bank; that, before she would sign the note, it was agreed that she should not be bound for the payment thereof; the note would be governed by the Nebraska laws, and, by signing the note, she would not bind her separate estate

for its payment. The trial court erroneously rejected the offer.

It has been so many times held in this state that "intent" is the foundation of a married woman's liability, as surety only, and such intent may be shown by parol, it is not necessary to cite authorities on that question.

International Harvester Co. v. McAdam, 142 Wis. 114; *McElroy v. Metropolitan Life Ins. Co.,* 84 Neb. 866; *Union Nat. Bank v. Chapman,* 169 N. Y. 538, 57 L. R. A. 513; *Dulin v. McCaw,* 39 W. Va. 721; *Scudder v. Union Nat. Bank,* 91 U. S. 406; 5 R. C. L. 935, sec. 26; *Frasier v. Charleston & W. C. R. Co.,* 73 S. Car. 140; *Garrigue v. Kellar,* 164 Ind. 676; *Glenny Glass Co. v. Taylor,* 99 Ky. 24; *Burr v. Beckler,* 264 Ill. 230, L. R. A. 1916A, 1049; *Baxter Nat. Bank v. Talbot,* 154 Mass. 213, 13 L. R. A. 52, 55, all more or less directly hold that the place where a contract is consummated, *i. e.,* the place where the last act is done which is necessary to put the contract into effect, governs as to the capacity of the parties to contract, and that such rule of law applies to married women.

It is the law that, when a person in one state sends a contract by mail to a person in another state to be executed and returned to the sender, the sender makes the post office establishment of the United States his agent, and a deposit of the signed contract, by the receiver, in the post office, in an envelope properly stamped and addressed to the sender, completes the contract without further ado. *Burton v. United States,* 202 U. S. 344; *Patrick v. Bowman,* 149 U. S. 411, 424; 13 C. J. 300, secs. 115-121.

This court has many times held that married women's disabilities to contract are not entirely abrogated; that they can contract only in reference to their separate estate, trade, or business, or upon the faith and credit of their separate estate with intent to bind the same; that there is no presumption of such interest merely because they sign contracts; when coverture is pleaded as a defense, the burden is upon the plaintiff to establish such intent, and that "all other engagements and obligations are void." *Grand Is-*

land Banking Co. v. Wright, 53 Neb. 574; *Stenger Benevolent Ass'n v. Stenger,* 54 Neb. 427; *First Nat. Bank v. Grosshans,* 54 Neb. 773; *State Nat. Bank v. Smith,* 55 Neb. 54; *Westervelt v. Baker,* 56 Neb. 63; *Smith v. Bond,* 56 Neb. 529; *Farmers Bank v. Boyd,* 67 Neb. 497; *Farm Mortgage & Loan Co. v. Beale,* 113 Neb. 293, and many other cases.

While the *Beale* case, last cited, may seem to run counter to some of the principles hereinbefore stated, it can be said that is more apparent than real. We have examined the facts and briefs in that case with some care, and it is easily distinguished. There was nothing in that case to show where the note was delivered after Mrs. Beale signed it in Nebraska. The note was given to a Kansas City corporation, transacting and having its place of business in that city, to close a contract with Mrs. Beale's husband for Texas land which he purchased from the corporation. The note was dated and made payable in Kansas City, at the office of the corporation. There was no proof that any agent or officer of the corporation was present and accepted the note in Nebraska when Mrs. Beale signed it, nor that it was sent to her by mail and by her returned through that agency. It is reasonable to suppose, and is highly probable, that the note was delivered in Kansas City when the contract for the Texas land was finally executed.

The case before us is altogether different. Although the note signed by Mrs. Ernst was dated and payable in South Dakota, it was delivered in Nebraska, with the knowledge of the "of" bank that she was a married woman and a mere surety for her husband's debt. The note was a renewal of a prior note. She testified when she signed the first note and gave it to an officer of the "of" bank, they were both in Nebraska, and she knew nothing about the laws of South Dakota and did not intend to bind her estate. The officer testified he had difficulty in getting her to sign it at all. When she signed the renewal note, there was no new consideration or different intent than when she

signed the first note, so far as shown by the record. No part of the business transacted by her with the bank, concerning either note, took place elsewhere than in Nebraska. Plaintiff alleged, without attempting to prove, she expressly agreed she intended to bind her estate. The officer of the "of" bank frankly testified that, when he procured the first note, he agreed the "of" bank would not sell or dispose of the note. Mrs. Ernst offered to prove it was agreed she was not to bind her estate and her signing the note would be a mere formality and she would never be asked to pay it. This offer was erroneously rejected. As against all of that, the note was dated and payable in South Dakota—nothing else.

All of this falls far short of showing any intent on the part of Mrs. Ernst to bind her estate. Had the court received her testimony as to the conversation between her and the officers of the "of" bank when he procured the first note, it would have clearly and positively appeared that there was an express intent not to do so. As Mrs. Ernst had a complete defense to the first note (if what she testified to is true, and certainly if she had been permitted to testify according to the offer and that was true), she had a defense to the renewal note unless some new and additional consideration passed, when it was executed, or unless she gave the new note with an express agreement that it should constitute payment of the other. *Auld v. Walker,* 107 Neb. 676; *Berwyn State Bank v. Swanson,* 111 Neb. 141; *May v. First Nat. Bank,* 74 Neb. 251.

Much has been said in the briefs about the effect of a purchaser of accommodation paper. We do not think that question is necessarily in this case. We think the evidence in the case, as it now stands in this court, is sufficient to have justified the trial court in directing a verdict in favor of Mrs. Ernst, without being supplemented by the offered testimony; but, as we have no means of questioning what new evidence may be available on another trial, the judgment of the lower court is reversed and the cause remanded

to the district court for further proceedings in conformity with this opinion.

REVERSED.

GOOD, J., dissents from rule stated in the third paragraph of syllabus.

STATE OF NEBRASKA ET AL., APPELLEES, V. DWIGHT PAINTER, DEFENDANT: LOUIS HALBERT ET AL., APPELLANTS.

FILED MAY 18, 1928. No. 25981.

1. **Constitutional Law:** ACT RELATING TO RECOGNIZANCES. Chapter 110, Laws 1923, being "an act relating to recovery on forfeited recognizances, and to repeal sections 10040, 10041, 10042, and 10043, Comp. St. 1922," is void for indefiniteness and uncertainty, as well as in violation of section 14, art. III of the Constitution, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed."

2. ———: ———. It appearing that section 2, ch. 110, Laws 1923, repealing sections 10040-10043, inclusive, was an inducement to the passage of said act, said act is void in its entirety.

3. **Bail:** FORFEITURE. Under section 10039, Comp. St. 1922, the district court may default and forfeit a recognizance given by a person in a criminal prosecution before an examining magistrate for appearance and answer to the district court, when such accused person fails to perform the condition of such recognizance, and without first giving personal notice to the accused or his sureties.

4. ———: FORFEITURE: RECOVERY. When a recognizance is defaulted and forfeited under section 10039, Comp. St. 1922, the court, to which the accused is required to appear and answer, cannot summarily render judgment thereon against the accused or his surety. The recovery of the penalty of such recognizance must be by civil action, governed by the provisions of the Code of Civil Procedure, and subject to the provisions of chapter 22, Comp. St. 1922.

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

Dort, Cain & Dort, for appellants.

R. C. James, contra.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and HOWELL, JJ., and CLEMENTS and REDICK, District Judges.

HOWELL, J.

Appeal by Louis Halbert and F. Kirk, as sureties, from an order forfeiting a recognizance given in a criminal case.

On July 24, 1926, Dwight Painter was charged with crime in the county court. He and sureties entered into a recognizance for Painter's appearance in the district court on that day at 11 o'clock a. m., and from term to term until discharged. November 12, 1926, the district court, in the absence of Painter and sureties, without notice or knowledge, entered an order forfeiting the recognizance and gave judgment against them for $1,000, and the clerk of the court was ordered to issue warrant for Painter's arrest.

January 27, 1927, the sureties filed a petition to set aside the judgment and forfeiture. During the October, 1926, term of the district court, trial of the case was postponed, and the jury temporarily excused. Painter's attorney, it is claimed, through "inadvertence and misunderstanding," told Painter the case would not be tried until the November, 1926, term of court. The jury were "called back" about November 12, 1926. At that time, defendant not appearing, the recognizance was forfeited. Painter's attorney explained the circumstances relating to his "inadvertence and misunderstanding," and requested, without avail, that the case be continued to November 27. Upon learning of the forfeiture, petitioners paid a $200 reward, and other expenses, for Painter's apprehension, and surrendered him to the district court, where he was tried and

acquitted. The prayer of the petition was to vacate the forfeiture "and for such other, further or different relief as may be just and equitable, and such orders as to costs be entered as may be lawful and just."

Having carefully examined the record, the petition of the sureties to set aside the forfeiture, and the judgment rendered thereon, together with the law, we are clearly of the opinion that the forfeiture of the bond was in all things regular, and that there is nothing of which the sureties can legally complain, up to that point.

The troublesome question is whether or not chapter 110, Laws 1923, is a valid and constitutional enactment. The title reads: "An act relating to recovery on forfeited recognizances, and to repeal sections 10040, 10041, 10042, and 10043, Comp. St. 1922." That act consisted of two sections. Section 1, in so far as it is material here, reads: "Whenever *such* recognizance shall have been forfeited *as aforesaid,* it shall be the duty of the clerk of the district court, upon the request of the county attorney or of attorneys for boards of education, to issue a writ of execution against the property of the surety, and the sheriff to whom such writ of execution shall be directed and delivered, shall proceed immediately to levy upon the goods and chattels of the surety," etc. (Italics ours.) Section 2 reads: "That sections 10040, 10041, 10042, and 10043, Compiled Statutes of Nebraska, are hereby repealed."

It will be noticed that this is an independent enactment and purports on its face to be complete in itself. It does not appear to be an amendment to any other act or section of the law. It does not purport to amend either of the sections repealed. The words "such recognizance" and "as aforesaid" are without meaning, unless it is somehow made to appear that the section is intended to become a part of chapter 22, Comp. St. 1922, to follow section 10039 thereof. Section 14, art. III of the Constitution, contains this provision: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title.

And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed." Said chapter 110 does not "clearly express in the title" that its purpose is to amend any section or sections of the statute.

If it be said that the words "such recognizance" and "as aforesaid" refer to section 10039, Comp. St. 1922, and we examine that section, we find no provision therein for a judgment on the forfeiture. In that situation, the new act provides that the clerk of the court shall issue a writ of execution "upon the request of the county attorney." We know of no provision authorizing the issuance of an execution upon anything but a judgment, other than this act. Whatever might be said about the provision being, in effect, amendatory of the laws relating to executions generally, it adds complications to the new act.

That chapter 110 does not cover the whole subject or general scheme to which it relates is apparent. Its purpose not to amend any particular section is likewise apparent. Its terms are not comprehensive. Statutes, so indefinite and uncertain that the courts are unable to determine what the legislature intended, are void.

Section 10039 is not the only one concerning the forfeiture of a recognizance. Section 9946, Comp. St. 1922, provides for a recognizance to keep the peace, while section 10039 refers to "in any criminal prosecution, either to appear and answer, or testify in any court." Whether the words "such" or "as aforesaid" refer to one or the other is not definitely known.

An illustration of indefiniteness is found in 25 R. C. L. 811, sec. 63: "A statute prohibiting the sale in a specified county of intoxicating liquors within a specified distance of a church, designated by name, where there are two churches of that name in the county."

The only ground for assuming that those words refer to section 10039 is the fact that chapter 110 repeals the four sections following. It is true that a recognizance differs from an appearance bond, in that the one is a debt

of record, and the other is a contract with the state. We do not think that a default and forfeiture of a recognizance is, in a true sense of the word, a judgment upon which the clerk may issue an execution, either with or without request. The trial court seemed to be of the opinion that a formal judgment on the forfeiture should be entered. Such a proceeding certainly is desirable. As to a recognizance, we think it is not necessary that any formal notice be given to the principal or sureties as a condition precedent to either a forfeiture or a judgment upon a forfeiture under any state or federal constitutional provision. The purpose of the Constitution, as to amendments, is to prevent unnecessary confusion, and fixed policies existing by statute are not to be lightly or inferentially interfered with.

Sections 10040—10043 provided a very reasonable procedure in connection with the practice of courts in exercising the equitable power of remitting a recognizance penalty, in whole or in part. Chapter 110 is extremely harsh and arbitrary. It is not sufficiently definite and certain to be effective in and of itself, because of its own terms. If it were so, it would need no interpretation by resorting to other laws, not referred to, further than to determine whether it was *in pari materia* with other laws. The Constitution would not affect it if it only changed or modified existing statutes merely as an incidental result.

We conclude that the statute is too indefinite and uncertain, and offends against the Constitution. If we are correct in this conclusion, the whole enactment is void, since it is apparent that sections 10040—10043, inclusive, above referred to, in all probability, would never have been repealed but for section 1 of said chapter. Chapter 110 being void, the trial court proceeded erroneously, as section 10040 contemplates the prosecution of a "civil action for the penalty" fixed in the recognizance.

The forfeiture of the recognizance entered by the district court will stand. The judgment entered thereon is reversed, and this cause is remanded without prejudice to

proper proceedings under chapter 22, Comp. St. 1922, as the same existed prior to the enactment of chapter 110, Laws 1923.

REVERSED.

BEVERLY LAND COMPANY, APPELLEE, V. CITY OF SOUTH SIOUX CITY ET AL., APPELLANTS.

FILED MAY 18, 1928. No. 25980.

1. **Municipal Corporations:** ORDINANCES: ADOPTION: RECORD: CORRECTION. Where the permanent record of a city council does not show that the mayor signed an ordinance or that the "yea" and "nay" vote of the members of the council was taken and recorded at the time of its enactment, a *nunc pro tunc* order, by resolution, adopted eighteen months afterward, and when a new set of city officers had been elected and installed in office, cannot be permitted to change the record of such a jurisdictional act under the guise of a correction of the record.
2. ———: PAVING ASSESSMENTS: NOTICE. Where the published notice of a proposed meeting of a city council, called for the purpose of determining special benefits to property by reason of paving improvements and for levying assessments therefor, refers specifically to the particular ordinance which authorized the improvement, the assessments so levied cannot be sustained upon the authority of an ordinance other than that specified in the notice.

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

Stout, Rose, Wells & Martin, Sidney T. Frum and *George W. Leamer,* for appellants.

W. V. Steuteville, contra.

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

BRODY, District Judge.

This is a suit in equity to cancel and enjoin the collection of certain special paving assessments made against the

plaintiff's property in the City of South Sioux City. The questions presented are (1) the validity of the ordinance creating the paving district; (2) the authority of the village board or council to correct the minutes of a previous meeting to show that the "yea" and "nay" votes of the members of the council were taken and recorded and also that the mayor signed the ordinance at the time; (3) if the ordinance was invalid because improperly passed, was the assessment valid and binding under authority of another ordinance? and (4) whether the assessment was invalid because the property involved received no benefit from the improvement. Findings and judgment were in favor of the plaintiff, and the city appeals.

The appellant assigns twelve errors as grounds for reversal, but those above enumerated are the only ones urged at the hearing and necessary to consider.

The validity of other like assessments levied under this same project has been before this court on two previous occasions. *Rooney v. City of South Sioux City,* 111 Neb. 1; *Sioux City Bridge Co. v. City of South Sioux City,* 112 Neb. 271. In both of these cases the assessments were held invalid and void for the reason that the mayor did not sign the ordinance and therefore the ordinance never became operative.

City of South Sioux City is a city of the second class, and began proceedings to pave its principal street, and on March 22, 1920, the city council enacted ordinance No. 121 which provided for the improvement. This ordinance did not make provision for paving between the rails of a street railway track, and on April 17, 1920, the council passed ordinance No. 122 which was a duplicate of No. 121 with an additional section making provision for paving between the street-car rails. The assessments involved in this case were made thereafter and the paving constructed and completed. The plaintiff urges (1) that ordinance No. 122 was not signed by the mayor, as required by statute, and therefore void; (2) that the ordinance was not posted or published as required by law; (3) that the "yea" and "nay"

votes of the members of the council were not called and recorded upon the passage of the ordinance; (4) that the ordinance is void because it is confiscatory, and because the paving district included all the property within the city limits, and also authorizing paving of several different streets; and (5) that the assessments are in excess of benefits to the affected. Several other charges were also directed against the assessments.

The city, by its pleading and evidence, defends the assessment by denying that the mayor did not sign the ordinance, or that the "yea" and "nay" votes of the councilmen were not called and recorded, and further claims that, even if ordinance No. 122 be held invalid, the assessment is valid under authority of ordinance No. 121, and also general authority under the statutes.

Ordinance No. 122 was acted upon by the council on April 17, 1920. The minutes of that meeting do not show that the mayor signed the ordinance, and this court in the two previous cases heretofore mentioned has so held. Subsequent to those decisions, it is claimed by the city that the original ordinance had been lost, but that it had, in fact, been properly signed by the mayor, and on November 1, 1921, after the city had elected a new mayor and part, at least, of the council were of a different personnel, passed a general resolution which in effect stated that the mayor had signed the original ordinance, and that the "yea" and "nay" vote of the councilmen had been taken on April 17, 1920, and proceeded to correct the minutes of the April meeting accordingly. The city offered the oral testimony of the former mayor that he did sign the ordinance, and also of the city engineer, and one or two others, to the effect that they were present and saw the mayor actually sign the original. The city engineer testified that he particularly remembered it because the mayor had borrowed his fountain pen which was then filled with green ink, and that some comment was made at the time of the fact that the mayor was using green ink. The city urged that such oral testimony is admissible to prove the actual facts, and

that such a *nunc pro tunc* order was proper and conclusive.

It is a noticeable condition in this case that all of the proceedings of the council apparently were found in the book of records except this particular ordinance. Also a "yea" and "nay" voting record was made on all other actions taken. It is also a glaring fact that on two previous trials in this court on this same assessment no suggestion was made that the original ordinance had been lost. This situation cannot be overlooked by a reading and study of the record in this case. In the face of that situation, the council on November 1, 1921, eighteen months later, when a new mayor had been elected and in office and at least a large part of the personnel of the council had changed, passed a resolution correcting the minutes of the meeting held eighteen months earlier to state that the mayor did in fact sign the ordinance, and that the "yea" and "nay" vote was taken. The council, or a like body, does have the power to correct its minutes to show the actual facts, if done within a reasonable time. "But such a proceeding is fraught with so much danger that the rule should be administered with caution, the alleged unrecorded proceeding not being held established without clear evidence thereof. The presumption is, where no record of proceedings of a municipal council exists, that none took place. So also * * * where it does not appear on the record whether some mandatory requirement of statute in respect to procedure was or was not complied with, although regularity will be presumed, failure to comply with the statute may be shown by extrinsic evidence." 19 R. C. L. 903, sec. 202. The statutes require the record of a "yea" and "nay" vote of the council. Section 4331, Comp. St. 1922. To permit the record as made at the time to be changed by parol testimony would amount to a judicial repeal of a legislative enactment. *Farmers Telephone Co. v. Town of Washta*, 157 Ia. 447. This very ordinance required, as a condition to its enactment, that the mayor should sign. The record of both requirements should be

so plain that the interested citizens or successors in office could have no doubt of the action taken. It is to prevent just such a condition as we find in this case that the requirement of a complete record is made mandatory by the statutes. The temptation to correct an omission or oversight is not always irresistible, and in matters of this kind the record made at the time should control unless the contrary is self-evident and necessary.

We have carefully read all the evidence upon this subject. While the printed statements of the former mayor himself, and others, is to the effect he did sign, the general circumstances in the record strongly indicate that he was mistaken. The trial court who had the witnesses before it and heard them testify must have felt the same, for it specifically held that the mayor did not sign, and that the *nunc pro tunc* order was not sufficient. We affirm that finding.

It is argued by the city that, in the event the court should hold ordinance No. 122 was invalid and void, the assessment should be upheld upon the theory that ordinance No. 121 would still be operative, and that the assessment would be valid under its authority. The answer to that argument, in our opinion, is this: On September 7, 1920, the city council, as shown by the council's minute books, by motion properly adopted and on which there was a record "yea" and "nay" vote taken of each councilman, authorized the required publication of notice to property owners of a meeting of the council to be held on October 18 for the purpose of levying assessments to pay for improvements, "as set forth in ordinance No. 122 of the ordinances of the City of South Sioux City, Nebraska, and that a notice similar to the one attached hereto, marked exhibit A, be printed," etc. Exhibit A, the notice, provided for in the foregoing motion, contained the usual notice to property owners in the district that on October 8, 1920, at 10 o'clock in the morning, the council would meet, "for the purpose of passing a resolution, as provided by law, fixing the valuation of all lots or parcels of land to be assessed, * * *

as set out in ordinance No. 122 of the ordinances of the City of South Sioux City, Nebraska." This notice further set out proceedings that would be taken "as set out in said ordinance No. 122." Therefore, it cannot be disputed that the notice and all actions of the council pertaining to this particular assessment directed property owners' attention only to ordinance No. 122. If the purpose of requiring publication of a notice to property owners affected means anything, it can be only that such owners should take notice that a public body would proceed under the authority mentioned in the notice, and no other. If the council acts under an illegal authority, which would be the case if the ordinance specified was void for any reason, certainly the property owner could not be bound by some authority not mentioned in the notice as published. The city council or village board cannot be permitted to give a notice to taxpayers that they will proceed under a specified and specific ordinance and afterwards uphold their actions on some other authority. The proceeding must be upheld, if at all, solely on authority of the notice given.

The plaintiff also urged that the assessments were unreasonable and far exceeded the benefits to the property involved, and for that reason invalid. We deem it unnecessary to go into that question, in view of the necessity of disposing of the case on other grounds.

For the reasons above stated, the decree of the district court is

AFFIRMED.

IN RE ESTATE OF MARIE BUDER.
H. G. WELLENSIEK, GUARDIAN AD LITEM, APPELLANT, V. MARIA BRITZA, APPELLEE.

FILED MAY 18, 1928. No. 25098.

1. **Executors and Administrators:** APPOINTMENT. Under our laws, no authority exists for the appointment of an administrator when the deceased was a resident of and died in a foreign country, leaving no estate to be administered in this state;

but a transitory right of action granted by the laws of the the United States to recover moneys in the hands of the alien property custodian forms a sufficient basis for the appointment in this state of an administrator for the purpose of prosecuting such action on behalf of the estate of a decedent entitled to such moneys.

2. ———: ———: SITUS OF FUNDS OF ALIENS. Funds belonging to a nonresident decedent in the custody of the alien property custodian are ubiquitous and may be considered as having their situs in any state of the United States.

3. ———: JURISDICTION OF COUNTY COURT. The county court, when such funds are collected, has jurisdiction to determine the persons entitled thereto and to distribute the same.

4. **Action.** An action or proceeding at law will not be converted into one in equity, merely because the answer sets up an equitable defense to the claim.

5. **Appeal:** REVIEW. In a law action, where no motion for a new trial is filed, this court on appeal will examine the record only for the purpose of determining whether or not the judgment is supported by the pleadings.

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

H. G. Wellensiek, for appellant.

Claude S. Wilson and *Albert S. Johnston, contra.*

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

REDICK, District Judge.

An opinion was filed in this case January 24, 1928. Both parties have filed motions for rehearing. The motions will be overruled; but upon reconsideration of the case we have concluded that the opinion above mentioned should be withdrawn, and we will now proceed to a disposition of the case.

This is an appeal from a decree of distribution in the estate of Marie Buder, deceased; appellants, by their guardian *ad litem,* claiming to be heirs and entitled to one-

half the estate of the decedent. They were defeated in the county court and also in the district court and have brought the case here for review. The pleadings may be summarized as follows: Appellants, by guardian *ad litem,* filed their petition in the county court alleging that they were widow and children respectively of Christian Buder, since deceased; that said Christian and Maria Britza, *nee* Buder, were the only children and heirs at law of said Marie Buder, and prayed a distribution to them of one-half of the estate as the heirs of Christian Buder.

Maria Britza, appellee, filed an answer and cross-petition in effect admitting that she and Christian were the sole surviving children of Marie Buder, deceased, but alleged that in 1905, upon the death of Carl Buder, husband of Maria Buder, and upon the settlement of his estate, Maria Britza and Christian Buder, together with the widow, Marie Buder, and August Britza, husband of Maria Britza, entered into an agreement upon proper consideration whereby the said Maria Britza waived all her claim as heir in her father's estate, and Christian waived and released all his claims as future heir to his mother's estate; that upon the death of Marie Buder and on August 10, 1920, by the proper court in Germany to settle her estate, it was adjudged and determined that the contract above mentioned was valid, and the court issued its certificate to the effect that Maria Britza was the sole heir of Marie Buder. It was further alleged that January 4, 1924, appellants brought an action in the land court at Cottbus, Germany, against said Maria Britza and her husband to set aside the said certificate of inheritance and for a judgment that they were entitled to receive a share of the estate of said Marie Buder, deceased, and that February 12, 1924, said court entered a decree adjudging that the certificate of inheritance was valid and binding upon said appellants, and that Maria Britza was the sole heir of Marie Buder, and alleged that appellants were thereby estopped from claiming any interest in the estate of Marie Buder, and to deny that Maria Britza is the sole and only heir of said estate;

and prayed for the distribution of the entire estate to her.

The guardian *ad litem* for appellants filed a reply putting in issue generally the allegations of said answer, alleging that said certificate of heirship was false, based upon said alleged written agreement, and denying that said Christian Buder ever signed said agreement, but further alleged that said agreement was made without knowledge and in total ignorance of the bequest to Marie Buder hereinafter mentioned, and was without any consideration, and that the land court of Germany was without jurisdiction, as was also the court issuing the certificate of inheritance.

Marie Buder, the decedent, and Christian Buder were, and all of the parties claiming an interest in the estate are, citizens and residents of Germany and have never resided in the United States. The estate to be distributed consists solely of a legacy from Christian Neuman (the maternal uncle of Marie), who died February 12, 1916, to Marie Buder, decedent, in the sum of $25,000. Carl Buder, husband of Marie, died in 1905; Marie Buder died December 3, 1918, and Christian Buder died February 1, 1921, leaving appellants as his heirs.

The district court found in favor of Maria Britza, and dismissed the appeal of the guardian *ad litem*, and affirmed the judgment of the county court directing that all of the estate be assigned to Maria Britza. No motion for new trial was filed in the district court. The guardian appeals on behalf of his wards.

Copies of the record and proceedings of the German courts, including the certificate of inheritence and judgment of the land court, and a copy of the alleged contract were received in evidence by the district court, over objection of appellants that they were not properly certified or authenticated so as to be receivable in evidence.

The errors claimed and relied upon by appellants relate to rulings of the trial court upon the reception of evidence, the sufficiency of the evidence to support the decree, and the alleged illegality of the contract or release by Christian Buder of all interest in his mother's estate.

At the threshhold of this case, we are required to determine whether it is an action at law or a suit in equity; if an action at law then, in the absence of a motion for a new trial, by numerous decisions of this court, the only question before us is whether or not the judgment is supported by the pleadings, and we will not consider objections to the ruling of the lower court upon the reception of evidence, nor the question of whether or not the evidence is sufficient to support the judgment; *Summers v. Chisholm,* 89 Neb. 324; *Weller v. Sloan,* 91 Neb. 122; *In re Estate of Swan,* 82 Neb. 742, holding in such case that the sufficiency of the evidence is not before us for review. On the other hand, if it is a suit in equity, then we are required to try the same *de novo,* and while the absence of a motion for a new trial prevents consideration of errors in the reception of evidence, nevertheless the question whether or not the judgment is supported by sufficient competent evidence would remain and we would be required to examine the evidence upon that point.

What then is the nature of the case? The only question for the county court to determine was, who were the legal heirs of Marie Buder? This question is purely legal; no equitable considerations affect it, and in the absence of the alleged contract would be perfectly simple. One of the heirs presents the contract claiming that the other heir has thereby waived his right, and the defense to the contract is that it was not signed by the other heir, was without consideration, and was entered into in ignorance of certain facts which had no existence at the time, but occurred some eleven years later. The questions of the signing and consideration of the contract were purely legal, and the subsequent occurrence of unanticipated events, not provided for in the contract, could not affect its validity. It is suggested that, because the answer and cross-petition of appellee contained a plea of estoppel, the action is in equity. This was pleaded purely as matter of defense and did not convert the action from one at law to one in equity. *Raymond v. Toledo, St. L. & K. C. R. Co.,* 57 Ohio St. 271,

in which it was held: "Whether a case is one in equity or at law, does not depend upon the understanding of counsel, or of the trial court, nor upon the form of judgment rendered, but upon the nature of the action as shown by the pleadings." *Kostuba v. Miller,* 137 Mo. 161; *Kronson v. Lipschitz,* 68 N. J. Eq. 367; *Barnard v. German American Seminary,* 49 Mich. 444, in which it was said by Cooley, J.: "Courts of equity recognize them (estoppels *in pais*) in cases of equitable cognizance; but the courts of common law just as readily and freely"—citing cases. We are clearly of the opinion that this is an action at law, and that the only question for our determination would be whether the pleadings support the judgment. This would be answered in the affirmative, unless it must be held as a matter of law that the alleged contract which forms the basis of the decree is illegal, it being a release of a mere expectancy, and not of a present vested interest.

At common law such a release was void, but enforceable in equity if fairly made and supported by a sufficient consideration, upon the ground of estoppel. There is in this country some conflict in the authorities. A valuable discussion of the question is found in 9 R. C. L. 133-147. At page 143 (section 148) it is said:

"In passing on the question of the validity of an assignment or release of an expectancy by a prospective heir, the courts have not always distinguished clearly between the legal effect of the sale of his expectancy by a prospective heir to a stranger or person other than the ancestor, and the legal effect of a release of his expectancy by the heir to the ancestor himself. This apparent confusion of the two transactions is noticeable in the modern cases holding inoperative releases by prospective heirs to their ancestors"—citing note, Ann. Cas. 1913B, 451. "At common law a child could not release his interest in his parent's estate, because as he might never be the heir of his parent, he thus was considered as having nothing to release. This seems to be still the rule in some jurisdictions. But under the modern doctrine in most jurisdictions, such releases

will be enforced if fairly made and sustained by sufficient consideration. They usually operate by way of estoppel, and it has been held that this equitable defense by way of estoppel is cognizable by the court of probate."

We may assume, without examining the record, that the allegation of sufficient consideration for the contract in question was sustained by sufficient evidence to support the decree of the district court. The defense of estoppel was as cognizable by a court of law as one of equity. *Barnard v. German American Seminary, supra.* If the contract in question was valid either at law or in equity, it was a complete defense to claims of appellant. Furthermore, by the decree of the German court in the action brought by appellants, appellees are estopped to question the validity of the contract. And in 9 R. C. L. 144, sec. 149, the minority rule is stated: "In a few jurisdictions releases of expectancies of inheritance are not recognized, or at least are of questionable validity."

The legal situs of the fund constituting the legacy in question is in Germany, the domicile of the legatee under the familiar legal fiction that the situs of personal property follows the person. The actual fund is in this country and was in the hands of the alien property custodian at Washington at the time the administrator of the estate of Marie Buder was appointed in Clay county. Marie Buder died before receiving the legacy and, war with Germany intervening, payment was made to the alien property custodian by the executor of the estate of Christian Neuman. While Marie had no domicile in this state, nor any real or personal property actually located in Clay county where the administrator of her estate was appointed, and while Marie died at her domicile in Germany, there was at the time of her death a fund in the hands of the alien property custodian, to be distributed to her heirs when released by authority of the United States. This authority was given by section 3115½e, U. S. Comp. St. 1918, as amended March 4, 1923 (1925 Supp. to U. S. Comp. St. 207), permitting actions to be brought in the federal courts for the

recovery of funds in the hands of the custodian, and providing that the moneys shall be paid only to an administrator of the estate of a deceased claimant, appointed in the United States.

We think the county court of Clay county had jurisdiction to appoint the administrator in this proceeding for two reasons: (1) The fund in the hands of the custodian was ubiquitous, *i.e.*, it had its location in any state or county within the United States, and therefore was, constructively at least, in Clay county, which was a quite appropriate place to initiate these proceedings as the county from which the fund was taken in the first place by the custodian. *United States v. Tyndale,* 116 Fed. 820. And (2) the act above cited gave a cause of action, transitory in its nature, to the claimants of the fund, which presents a situation in line with our holdings in *Missouri P. R. Co. v. Lewis,* 24 Neb. 848, and *Missouri P. R. Co. v. Bradley,* 51 Neb. 596. The right of action so granted was sufficient to satisfy the requirement of the statute that a nonresident have property in this state to be administered. Having jurisdiction that court had the right, and it was required, to determine who were the heirs entitled to the estate and to make distribution thereof.

We conclude that the only question before us is whether the decree of the district court is supported by the pleadings, as to which there seems to be no question; and, therefore, our former opinion reversing the case for want of sufficient competent evidence to support the decree must be set aside. The effect of that opinion was to grant a new trial for reasons not open to our consideration in the absence of a motion for new trial.

It is therefore ordered that our former opinion be withdrawn and the judgment of the district court be affirmed in all particulars, and said district court directed to certify its decree to the county court of Clay county for further proceedings in conformity to this opinion.

AFFIRMED.

ALBERT H. BURKAMP, APPELLEE, V. ROBERTS SANITARY DAIRY, APPELLANT.

FILED MAY 18, 1928. No. 25805.

1. **Negligence**: QUESTION FOR JURY: TRAFFIC REGULATIONS. The violation of an ordinance or statute requiring automobiles and other vehicles to drive to the right of the center of the highway does not constitute negligence *per se*, or as a matter of law; but whether or not such violation constituted negligence is a question for the jury under proper instructions.
2. ———: ———: ———. The same rule is applicable to the violation of an ordinance requiring vehicles to display lights.
3. **Damages**: INSTRUCTIONS. An instruction is erroneous which tells the jury that, in fixing plaintiff's damages in a personal injury action, they may consider the pain and suffering which plaintiff "will probably suffer in the future;" only such pain and suffering as the evidence shows with reasonable certainty plaintiff will experience in the future may be considered by the jury.
4. **Courts**. Under the statute providing for the appointment of a supreme court commission, the decisions of such commission "shall establish no precedent and be authority only in the particular case."

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

Ziegler & Dunn, George W. Becker and *J. W. Weingarten,* for appellant.

Leon, Stalmaster & Beber, contra.

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

REDICK, District Judge.

The appeal in this case was heard before the supreme court commission, division No. 1, and an opinion rendered reversing the judgment of the lower court for error in the instructions. That opinion was approved by the court; upon which the plaintiff, appellee, filed a motion for rehearing, which was granted, and the case has been heard anew by the court. The action is for damages for personal inju-

ries to plaintiff and damage to his automobile, growing out of a collision with the milk wagon of defendant driven by its servant on one of the boulevards of the city of Omaha. Plaintiff recovered a judgment in the court below, and defendant appeals.

Among the grounds of negligence alleged are: (1) That defendant's servant, at the time of the accident, was driving upon the left or wrong side of the road, contrary to an ordinance of the city of Omaha; (2) that defendant's servant failed to keep a proper lookout for approaching vehicles; and (3) that defendant's servant failed to display a light at the front of his wagon as required by an ordinance of the city of Omaha.

The accident occurred on December 25, 1925, at about 4 o'clock in the morning, the plaintiff driving south and colliding head-on with defendant's wagon coming north.

The instructions complained of are Nos. 6, 7, 8, and 16. Instruction No. 6 is in the following language:

"You are instructed that it is provided by an ordinance of the city of Omaha with respect to the travel and traffic upon its public highways, among other things, as follows: 'Vehicles in motion shall keep between the curb to the right and the center of the highway.'

"It is also provided by the laws of this state that no motor vehicle shall be operated within any city, at a rate of speed greater than is reasonable and proper, having regard of the traffic and use of the road, and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person.

"You are instructed that these are valid provisions of law, and that it was the duty of the plaintiff and of the driver of the defendant's wagon to obey the same at the time of the accident. The defendant is not liable in this action simply and solely because its team and wagon were on the left-hand side or the west side of the boulevard, as they proceeded north, if you find that they were on the left-hand or west side of the roadway. But if you find that at the time of the accident defendant's horses and

milk wagon or either thereof were on the wrong side of the boulevard, *i.e.*, between the curb on the left and the center of the road, and that such fact was the sole cause of the accident, and that plaintiff was not negligent upon his part, then it will be your duty to return a verdict in favor of the plaintiff, for the damages he has sustained. And, if you find that the defendant's wagon or horses were on the left-hand side of the road, *i.e.*, between the left curb and the center, and that such fact was not the sole and exclusive cause of the accident, but did contribute to cause the accident, such fact would constitute negligence upon the part of the defendant, the degree of which and the effect of which will be for you to determine under the evidence and these instructions."

Instruction No. 7 told the jury that, if the defendant failed to comply substantially with the ordinance as to the display of a light, and that "its failure so to do was the sole and exclusive cause of the accident, and plaintiff was not negligent on his part, then the plaintiff is entitled to recover his damages sustained."

Instruction No. 8 told the jury that it was the duty of the driver of the milk wagon to use ordinary and reasonable care in keeping a proper lookout for approaching vehicles, "and if he failed so to do, and the accident was occasioned solely and exclusively because of any such failure on his part, and the plaintiff was not negligent in any respect, then the defendant would be liable for any damages sustained by the plaintiff." It further told the jury that it was the duty of the driver to use ordinary care in guiding his horses and keep them to the right of the center of the highway, and "if he failed in this respect, and such failure in any way contributed to occasion the accident, such failure would be negligence on the part of the defendant, the extent and degree and effect of which will be for you to determine under instructions hereinafter given you."

The question for determination is whether these instructions violate the well-established rule in this jurisdiction

that, except in cases where a statute imposes upon the defendant a mandatory duty to do some act for the protection or safety of individuals or property, the question whether or not the violation of an ordinance or statute amounted to actionable negligence is one for the jury, under proper instructions of the court, and does not ordinarily amount to negligence *per se,* or as a matter of law. The rule was clearly announced, after elaborate consideration of the cases, in *Stevens v. Luther,* 105 Neb. 184, where the case of *Walker v. Klopp,* 99 Neb. 794, announcing the opposite rule was disapproved, and the proper rule stated to be that, subject to the exceptions noted, the violation of a statute or ordinance is evidence of negligence, which the jury is entitled to consider in connection with all other evidence in the case. It is true that in the *Luther* case the court instructed the jury that a person violating the statute fixing the rate of speed for automobiles is guilty of negligence as a matter of law, but the objection to the instruction was not upon the grounds now under consideration. The contention of counsel there was: "If the court imparts to the jury the statute regulating the speed of automobiles, it should then say to the jury: 'It is for you to determine whether or not the excess rate of speed, if you find it was in excess of that fixed by statute, contributed to the injury, under all the facts and circumstances of the case.'" This did not challenge the correctness of the instruction as to negligence, and the criticism as made was held to be fully answered by the concluding part of the instruction, whereby the jury were told that it was for them "to determine the degree or amount of such negligence under these instructions, in view of all the facts and circumstances and other acts of negligence, if any, proved at the trial, and to determine whether such negligence was the proximate cause of, or contributed to the accident."

In *Dorrance v. Omaha & C. B. Street R. Co.,* 105 Neb. 196, the rule is again stated and an instruction approved telling the jury: "You are at liberty to take any such vi-

olation (of ordinance or statute) into consideration, along with all the other evidence in the case, in determining whether or not the party so violating the same was chargeable with negligence in and about the accident." And in *Taylor v. Koukal,* 107 Neb. 409, it was held that an instruction which informs the jury without qualification, that a failure to comply with an ordinance requiring lights to be exhibited on motor vehicles between certain hours, in itself, constitutes negligence, is erroneous. See, also, *Thomas v. Rasmussen,* 106 Neb. 442.

Counsel for appellee state that they have no complaint of the doctrine announced in these cases, but insist that they go no further than to say that an instruction is erroneous only when it tells the jury, *without qualification,* that the violation of an ordinance is negligence; and contend that the proper qualification was present in the instruction under consideration in the words, "such fact would constitute negligence upon the part of the defendant, '*the degree of which and the effect of which will be for you to determine under the evidence and these instructions.*'" The difficulty with this proposition is that the court deprives the jury of consideration of the question whether or not the act proved was in fact negligence, and leaves to them to determine only the degree or effect of such negligence. The court did not permit the jury to determine whether or not driving on the wrong side of the road, or failure to display a light, were negligent acts, but closed the door as to the quality of the acts. There is a wide difference between the determination of the existence of a fact, and the degree or effect of it when the fact is established. Instruction No. 7 did not contain the clause claimed as a qualification.

Defendant calls attention to the case of *Northrup v. Nystrom,* No. 25656, in which an instruction substantially in the language of No. 6 in the present case was sustained in an opinion by the supreme court commission No. 1 and approved by this court, the instruction having been given by the same district judge as in the present case. We will

not attempt to distinguish (if it can be distinguished) that case from the present one. It is only necessary to call to counsel's attention the provision of section 2, ch. 76, Laws, 1925, to the effect that "such proceedings (of the commission) shall not be published in the reports of the court or in any other reports and shall establish no precedent and be authority only in that particular case." While such decisions are entitled to great respect and generally announce correct principles of law, the legislature has denied them the force of precedents in other cases. It is to be very much regretted that the decision of the commission, which is composed of able men, learned in the law, should be found to run counter to the settled doctrine of the court and receive the approval of the latter. The probable explanation of the occurrence being the congested condition of the docket and the extraordinary burdens consequent thereon upon the court.

Counsel also cite *Whitlow v. Missouri P. R. Co.*, 94 Neb. 649, where the court instructed the jury that, if "the whistle was not sounded nor the bell rung, as required by the statute, and that the accident complained of was caused by the failure so to ring the bell or blow the whistle, and without any fault on the part of the plaintiff or his employee or servant who was at that time in charge of the property injured, then you should find for the plaintiff." In that case the precise question under consideration was not presented. The objection to the instruction was that it excluded from the consideration of the jury any and all other facts related to the case. But this contention was refuted, as held by the court, by the provision of the instruction that the accident occurred without any fault or negligence on the part of plaintiff or his employee or servant. Moreover, by the second syllabus the rule was announced substantially as herein given, as follows: "While the court may say what act or omission of a party is evidence of negligence, it is for the jury to say what conclusion such evidence warrants."

Instruction No. 6 above quoted was erroneous in that it

informed the jury that the act of defendant's servant in driving on the left-hand side of the road, whether the sole or contributing cause of the accident, was negligence *per se*. The same is true of instruction No. 7 and the latter portion of instruction No. 8. In both No. 6 and No. 7 the jury were instructed that the defendant was not liable simply and solely because his servant did not comply with the ordinances respectively concerned. This was a correct statement of the law, but is inconsistant with the other portions of the instructions to which our criticism is addressed.

One other assignment of error is necessary to be considered. By instruction No. 16 upon the measure of damages, the jury were told that they might consider "any physical or mental pain or anguish which the plaintiff has suffered because of his injuries, or any pain that he still suffers, or will probably suffer in the future." This was error in so far as it permitted the jury to allow damages for pain which the plaintiff will "probably suffer in the future." This language is too indefinite and conjectural. The only future pain and suffering which the jury is entitled to consider is such as the evidence shows with reasonable certainty he will experience. *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27; *Chicago, R. I. & P. R. Co. v. McDowell*, 66 Neb. 170.

We conclude that the disposition of the case by the commission was correct and that our former judgment should stand.

REVERSED.

OTTO E. LINDBURG, APPELLEE, V. JOHN R. BENNETT ET AL., APPELLANTS.

FILED MAY 28, 1928. No. 25640.

1. **Counties:** SALE OF REALTY. Under section 853, Comp. St. 1922, as amended in 1925, a county board has no power to sell any real estate owned by the county and costing over $1,000, without a vote of the electors of the county.

2. ———: LEASE OF REALTY. Under the powers given the county board by statute, the board has the general power to lease real estate owned by the county.

3. ———: ———: INJUNCTION. A county board will not be enjoined from leasing, for a term of 99 years, real estate owned by the county but not actually used by it nor needed for its actual uses, where there is no fraud involved, where the consideration is adequate, and where the covenants and provisions of the lease protect the interests of the county.

4. ———: ———. In the circumstances recited in the last paragraph above, a 99-year lease is not equivalent to a sale of the property.

5. ———: SALE OF REALTY: OPTION. The option of Lincoln Post No. 3 of the American Legion to purchase the real estate in case of a contemplated sale examined and discussed; *held*, under the record, that it is not operative because no sale of real estate is involved here.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed, with directions.*

Hainer, Flansburg & Lee, Peterson & Devoe, Max G. Towle, A. Farley Young, George I. Craven and *C. J. Campbell,* for appellants.

Clark Jeary, Clarence G. Miles and *J. C. McReynolds, contra.*

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

GOSS, C. J.

This is an equity suit in which the district court decreed that a 99-year lease of certain real property made by the county to two of the individual defendants was invalid. The county and the lessees appealed.

The suit to enjoin the performance of the lease was brought by a taxpayer, who alleged, in substance, that the county of Lancaster has long owned in fee lots four (4), five (5) and six (6), block ninety (90), Original Plat to the city of Lincoln, and that said property is commonly

known as the "City Auditorium;" that on July 7, 1925, the defendant county commissioners entered into a written lease of said premises for the term of 99 years with the defendants O'Shea and Rogers; that the same is in effect a sale of said premises, that such a sale cannot be made without a vote of the electors of the county, but that the matter has never been submitted to such a vote. Plaintiff prayed for an injunction preventing the lessees from entering upon the premises and for a decree declaring the acts of the county commissioners void and quieting the title in the county. The defendants, O'Shea and Rogers, answered, alleging that the county took the lots as part settlement of the shortage of a county treasurer in 1896, has ever since held the fee simple title, has, on occasions specified in the answer, leased the premises to other parties, with the history thereof, that it was leased to these answering defendants as shown by the copy of the lease attached to the petition, that they intend to carry out the provisions of the lease, and praying for a dismissal. Lincoln Post No. 3 of the American Legion, hereinafter called the Legion, as intervening defendant and cross-petitioner, pleaded that on February 19, 1925, the county, "the same not being its public grounds," leased the premises to it for a term of five (5) years from August 13, 1924, that the written lease gave the Legion a valid option during its term to buy the property at the price and on the terms of any contemplated sale to other parties, that it elected to exercise its option to take over the property on the terms of the O'Shea and Rogers "contemplated sale," as described in the petition, that the county commissioners and others seek by fraud and collusion to avoid cross-petitioner's contractual rights, and prayed specific performance of its option agreement. The Legion's pleading included W. Bruce Shurtleff and Charles Olson in its title as defendants and so refers to them in the body of the cross-petition, but we are unable to discover from the transcript in what manner they were made actual and formal parties to the suit in the lower court, but they participated as defendants in some of the

pleadings; and the amended præcipe filed by appellants lists them as defendants, as does also the præcipe of the cross-appellant Gee. George S. Gee also intervened somewhere along the line, also not shown by the transcript, as a citizen and taxpayer, in opposition to the O'Shea-Rogers lease. He alleged, among other things, that the real estate in question has become and is public grounds and cannot be sold or otherwise disposed of without a vote of the electors, alleged collusion to prevent bidding and competition, and prayed either that the Legion's prayer for a right to purchase under its option be confirmed, or that the O'Shea-Rogers agreement be declared void. The county commissioners answered separately, setting up the acquirement of the property, the history of its uses and income, that the property was never used for governmental purposes, that the lease to O'Shea-Rogers was expressly made subject to the existing lease of the Legion and is not a sale of the property, and prayed a dismissal. The foregoing merely sketches the main points of the voluminous pleadings in order to give a view of the issues as raised by the various parties.

A brief history of the case, condensed from the extended evidence, will help us to diagnose the case and will aid the reader to understand it. On March 24, 1896, a shortage of $36,000 was discovered in the official accounts of one who was then and for some time had been treasurer of Lancaster county. Soon thereafter he died. The claim of the county against his estate was allowed in full. Suit was brought in the district court against the bondsmen of the treasurer, naming also the representative of his estate as a defendant, to recover the shortage, and a settlement was made, with the approval of the county court, by which notes held by the treasurer and secured by mortgage on the lots in question were turned over to the county. Thereupon, and as a part of the settlement, the holder of the title conveyed the lots to the county, to satisfy his debt evidenced by the notes and secured by this mortgage. In the settlement the liability of the estate on the short-

age was credited in the sum of $13,546.56, which was the agreed value of the notes for the purpose of settlement. The county obtained a fee simple title by which it has ever since held and still holds the lots. The county has never used this real estate for any purpose other than to lease it for whatever revenue it could obtain in the ways hereinafter set forth. On September 5, 1899, the county executed a written lease, with the Lincoln Auditorium Association as lessee, to run 25 years from September 1, 1899, by the terms of which the lessee agreed to erect upon the lots an auditorium seating 3,400 people, at a cost of $15,000, to pay all special taxes, to furnish the auditorium free for all county and district political conventions and at cost to all city political conventions, to share equally with the county the net profits, divisible each three years, and at the end of the term all buildings, improvements and fixtures were to be turned over to the county, free of incumbrance. There were no profits and, the county consenting, the lease was surrendered in writing on February 20, 1903. On February 19, 1903, the county commissioners leased the premises to the Union Commercial Club for 50 years at $350 a year, the county board having on the same day, by a resolution, decided that the property was worth $8,000 and that the rental named would produce a higher rate of income than the county had to pay on bonds for borrowed money. The written lease provided that the club might erect on the premises a brick building for the use of the Commercial Club and at the termination of the lease the brick building, the auditorium, and all other buildings constructed on the premises by the lessee, its successors or assigns, should remain the property of the lessee and be removed. In 1904 the Union Commercial Club transferred this lease to the Lincoln Commercial Club. In 1919 the Commercial Club made a settlement with the county on account of its unpaid rent, and, by resolutions both of the county and of the club, the lease of 1903 was canceled. On August 13, 1919, the county leased the property in writing to the city of Lincoln for

the term of five years, at an annual rental of $350. On February 19, 1924, the county of Lancaster leased the premises in writing to Lincoln Post No. 3, American Legion, of Lincoln, Nebraska, for the term of five years from August 13, 1924, at a rental of $350 a year, to be paid on February 1 of each year, the lessee to pay all special taxes or assessments before delinquency. The lease contained, among other things, this provision:

"It is further agreed that the party of the first part (the county) shall have the right to sell the premises herein described, provided, however, that notice of such contemplated sale shall be given in writing to the party of the second part (the Legion) at least one year prior to the time fixed for the vacation of said premises by the party of the second part, and provided, further, that during such period the party of the second part shall have option to itself take over and buy the premises at the price and on the terms of such contemplated sale."

An examination of all the leases of this property ever made by the county prior to the one in suit shows that they all contained reservations of permission to use the premises by political conventions and that none of them required the payment by the lessees of any general taxes. The evidence shows that the gross rentals received from the property from the time it was acquired in 1896 up to July 7, 1925, amounted to $5,954.60, and during that period the amount paid out on account of the property a total of $928.50. It may be remarked that the spirit of the leases, and the uses for which they required the property to be reserved in part, did not look toward revenue as a main end. On July 7, 1925, the county, by its commissioners, leased said premises to the defendants, E. M. O'Shea and R. H. Rogers, for a full term of 99 years, beginning on the 7th day of July, 1925 (subject to the Legion lease, which will expire August 13, 1929), for a yearly rental of $4,000 from and after the expiration of the Legion lease. The written lease was duly executed and acknowledged by all parties thereto and was filed, all on

July 7, 1925. The lessees covenanted to pay all rates, taxes and assessments of every kind, that on or before 18 months after the expiration or termination of the Legion lease they would commence the construction of a modern fireproof building upon the premises, at least two stories in height, with foundations capable of sustaining a building eight stories in height, the building to be completed not later than one year after the commencement thereof, and to cost not less than $100,000, and to furnish a $25,000 bond to be approved by the county to insure the commencement and erection of said building. The lease is too long to abstract, but it contains the modern conventional provisions of 99-year leases. It may be noted that it contains no revaluation clause. It was made after wide publicity had been given the consideration of the matter through the newspapers and otherwise. The evidence shows that the proposed lease was widely discussed in the daily papers of the city both editorially and as news and that one of them published the proposed lease in full. It was the best offer, and apparently the only actual offer, received up to the time of the execution and delivery of the lease.

At the conclusion of the trial before the court, the court found that the county commissioners were without power to enter into the 99-year lease; that the contract is *ultra vires* and void; that the premises are public grounds belonging to Lancaster county within the meaning of the statutes; that the question of entering into said contract has never been submitted to a vote of the electors; that there was no fraud or concealment on the part of the county commissioners and that the consideration for the lease was not so inadequate as to amount to fraud; that there was no fraud in the conduct of the defendants O'Shea and Rogers and Shurtleff and Olson, and that there was no fraud or conspiracy against the Legion to deprive it of its rights under the option contained in its lease. The decree of the court canceled the lease, denied the prayer of the intervener, the Legion, for specific performance, and gave

a judgment for costs in favor of the interveners Gee and the Legion.

The appellants assign that the court erred (1) in holding that the property constituted public grounds and buildings, as distinguished from real estate of the county, within the meaning of the statutes; and therefore erred (2) in holding that the county commissioners had no authority to enter into a lease without a vote of the electors; (3) in holding that the county could not lease this property for 99 years; and (4) in holding that the 99-year lease was a sale or equivalent to a sale under the statute.

At the outset of the discussion, it may be set down that, like the trial court, we find nothing in the evidence to support any charge of active fraud, collusion or conspiracy on the part either of the county commissioners or of the lessees and their associates, or of their attorneys, all of whose conduct, either directly or by implication, is sought to be impugned in some connection or another in briefs and arguments by some of the parties. There appears no unlawful combination or confederation to deprive the county of title to its property or to interfere with the rights of the Legion in the premises. The lessees were seeking a desirable investment and the improvement of this property as an enhancement to their valuable improved property adjoining this on the east, as they had a right to do. The county, through its commissioners, was seeking some use of this property, so long held with meager returns, that would produce a net income commensurate with its value, as it had the right to do. If its commissioners acted within their powers and without fraud, conspiracy or collusion, then the courts cannot and will not interfere and substitute the judgment of the court for the thus exercised discretion of the commissioners. The inquiry here is as to whether they acted within their powers in making the 99-year lease.

So much of the general sections of the statutes as are involved are quoted in this paragraph:

"Each county which has heretofore been, or may here-

after be established in this state, according to the laws thereof, shall be a body politic and corporate." Comp. St. 1922, sec. 848. "Each county shall have power: First. To purchase and hold the real and personal estate necessary for the use of the county, and to purchase and hold for the benefit of the county, real estate sold by virtue of judicial proceedings in which the county is plaintiff or is interested * * * Second. To sell and convey, or lease, any real or personal estate owned by the county. Third. To make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers." Comp. St. 1922, sec. 851. "The powers of the county, as a body corporate politic, shall be exercised by a county board." Comp. St. 1922, sec. 850. A county board has the power: "First. To take and have the care and custody of all the real and personal estate owned by the county." And "Third. * * * To sell the public grounds or buildings of the county, and purchase other properties in lieu thereof." Comp. St. 1922, sec. 852. "Public Grounds. Sale. The county board shall not sell the public grounds as provided in the third subdivision in the preceding section without having first submitted the question of selling such public grounds to a vote of the electors of the county: Provided, in any case where the county has acquired real estate at a cost not to exceed one thousand dollars ($1,000) by gift, purchase or judicial proceedings in which the county is plaintiff or is interested, the county board may sell such real estate without submitting the question to a vote of the electors of the county." Comp. St. 1922, sec. 853, as amended March 31, 1925, Laws 1925, ch. 95, sec. 1. This amendment was in effect when the lease under examination was made.

The appellants argue, from these statutes, in substance, that a county has two qualities or characteristics: First, governmental or politic; and, second, private or proprietary; that such lands and buildings as are necessary to use for the purpose of carrying on the business of the county

are used in its governmental capacity, are therefore described in the statutes as "public grounds and buildings" and cannot be sold and conveyed without a vote of the electors; while such real estate as is acquired and held as an asset of the county, but not for physical and governmental use, is held in its private or proprietary capacity, and may, under section 851, aided by following sections, be sold and conveyed by the county board in the exercise of its judgment and discretion without a vote of the electors. They concede that a courthouse and grounds and a poor-farm are public grounds and buildings, but assert that real estate taken in settlement of a debt, as this was, and not used by the county in the exercise of any governmental function, is held under proprietary powers. On the other hand, the appellees contend that all such property costing over $1,000 is public grounds and buildings, and cannot be sold without a vote of the electors. They further insist that the 99-year lease of the property in question is equivalent to a sale thereof.

The appellants cite a previous case in this court, involving a 50-year lease of this identical property, as binding authority that this is not public grounds and buildings and that there is no limitation on the powers of the county board to make the lease. *Lancaster County v. Lincoln Auditorium Ass'n,* 87 Neb. 87. We find ourselves unable to accord with the expressed views of appellants as to the present effect of that case for two reasons: First, the opinion by Judge Letton shows (page 92) that the parties there agreed that the lots "were not 'public grounds' of the county, and that the board of county commissioners had the power, without first submitting the question to a vote of the electors of the county, to enter into the first lease, and afterwards, with the consent of the lessee, to cancel and set aside the same and release the property for the term of 50 years," so that case was considered and decided on other grounds than those under consideration here; and second, when that case was up in 1910, the legislature had not amended section 853, as heretofore shown

it did in 1925, so as to give at least some indication of legislative policy as to what lands owned by a county may not be sold by the county board without the authority of a vote of the electors.

Appellants assert that the phrase "body politic and corporate" as found in sections 848 and 850 is indicative of two distinct powers or qualities found in counties; that when the members of the county board deal with governmental matters they are acting as agents of the county in exercising its functions as a "body politic," but where they deal with other matters they act as agents of the county in exercising its functions as a "body corporate." Specifically they apply their theory and definitions here by saying that such lands as the county holds for the actual use of the county, like the courthouse and grounds and the poor-farm and buildings, it holds in its governmental capacity as a "body politic" and such are therefore "public grounds and buildings;" but such "lands" as the county otherwise holds, it holds as a proprietor in its corporate capacity as a "body corporate." From historical sources of the derivation of the term "body politic and corporate," as applied to a county, and from the term itself, we do not find support for splitting up the phrase. It is conjunctive rather than disjunctive.

In 2 Coke, Littleton, sec. 413, the learned author, in discussing bodies politic and corporate, says: "This is a body to take in succession, framed (as to that capacity) by policie, and thereupon it is called here by Littleton a body politike; and it is also called a corporation, or a body incorporate, because the persons are made into a body, and are of capacity to take and grant, etc. And this body politike, or incorporate, may commence, and be established three manner of ways, viz., by prescription, by letters patented, or by act of parliament."

"Bodies *politic and corporate* had been known to exist as far back at least as the time of Cicero; and Gaius traces them back even to the laws of Solon of Athens, who lived

some five hundred years before." *Warner & Ray v. Beers*, 23 Wend. (N. Y.) 103, 122.

The definition of "body politic" found in the preamble of the Massachusetts Constitution is widely quoted. "The body politic is formed by a voluntary association of individuals; it is a social compact, by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good." While the definition was prescribed for a commonwealth, the principle is quite applicable to the body of the people set apart in a county or a city to be a state agency or a unit for the purpose of certain local governmental functions.

That a county, even though a body politic and corporate, is a creature of statute and has only such powers as the legislature has conferred upon it is almost axiomatic. These powers are executed by the county board. The board of county commissioners has such powers as are specifically conferred on it by statute and such other incidental powers as are necessary to carry into effect the powers expressly granted. *Lancaster County v. Green*, 54 Neb. 98; *Berryman v. Schalander*, 85 Neb. 281. So it is more of an academic question here as to whether the county holds any certain real estate as a proprietor in a corporate capacity or as to whether it holds it in its governmental capacity. The question arises rather when it seeks to make disposition or use of property, whether the legislature has clothed the county board with the power, in the particular instance, to execute what they conceive to be within their functions. It is true that, where county real estate is devoted to actual public use, it has attached to it a governmental character or quality such as to cause it to be distinguished as public grounds; and where it is not used for such public purposes the county might well be said to hold it as a proprietor. In other words, we are of the opinion that, when a county holds or undertakes to dispose of any of its lands, the measure of its powers is not found solely in the inherent character of the lands, but

rather in the statutes giving the power to hold, and the power to make disposal, and in the general rules of law if and where the statute is not otherwise restrictive. In this connection, the appellees cite a suit brought against the county commissioners of Douglas county to compel them to provide rooms in the county courthouse for the municipal court of the city of Omaha, where it was laid down as the law applicable to such a situation that "A county does not possess the double governmental and private character that cities do. It is governmental in character only, and in that capacity acts purely as an agent of the state." *State v. Board of County Commissioners*, 109 Neb. 35. There the learned judge was writing an opinion involving county real estate in the form of a courthouse and grounds, but he was describing the character of the county rather than the character of the property. That the county acts purely as an agent of the state, as was there declared, is support for what we are saying here. Had lands like those of the instant case been involved, that opinion might well have given the same description of the character of a county and applied the same rule that, as the opinion said in direct connection with what we have quoted from it: "Property of the county, acquired by funds raised through taxation, is property of which the state can direct the use, management and disposition, so long at least as this is done for the benefit of the public."

The second subdivision of section 851 gave the county power "to sell * * * any real or personal estate owned by the county;" not only did section 850 say that the powers of the county should be exercised by the county board, but the third subdivision of section 852 gave the county board the power "to sell the public grounds or buildings * * * and purchase other properties in lieu thereof;" and section 853, while originally prohibiting the sale of "the public grounds as provided in the third subdivision of" section 852 without a vote of the electors, yet, as the legislature amended section 853 in 1925, and as that amended section was worded when the lease under consideration was made,

if there previously was any distinction between the "public grounds" of a county and the "real estate" of a county, costing less than $1,000, so far as the right of the commissioners to sell it without a vote of the electors is concerned, that act of the legislature, heretofore quoted, seems to have done away with the distinction. Real estate acquired "by gift, purchase or judicial proceedings" (section 853, as amended) covers all the conceivable ways in which any one may become the owner of real estate. In its most enlarged sense, "purchase" alone includes all lawful acquisition of real estate by any means whatever except by descent. *Watson v. Donnelly & Lynch,* 28 Barb. (N. Y.) 653, 658 (quoting 2 Blackstone, 241); *City of Enterprise v. Smith,* 62 Kan. 815; Tiedeman, Real Property (2d ed.) 659. The county acquired the Auditorium property by purchase. It might be said to have acquired it by judicial proceedings in the settlement of a law action. It cost more than $1,000. The amended statute expressly says it cannot be sold without a vote of the electors. Therefore, we are of the opinion that since section 853 was amended and the amendment became effective three months after the act was approved on March 31, 1925, a county board has no power to sell any real estate owned by the county and costing over $1,000, without a vote of the electors of the county. The legislature has indicated its policy on that subject by placing a limitation on the sale measured by the cost value of the land; and by including all real estate owned by the county in its restrictions of sale. We cannot interpret it otherwise without invading the constitutional department of our state government belonging to the legislature.

The next question to consider is the power of a county board to lease real estate acquired and owned by the county. The distinction between selling and leasing real estate is so well known that it needs little or no discussion. "A lease transfers to the lessee an interest in the realty less than the estate of the lessor, and as a result of such transfer the lessor has a reversion in such realty, while a con-

tract between the vendor and purchaser for the sale of realty binds the vendor to transfer to the purchaser the interest in such realty which the vendor possesses." 39 Cyc. 1175. By section 851 the legislature expressly gave to each county in the state, along with the power of sale, the power to lease any real estate owned by the county; and by section 852 it delegated to the county board the power to take and have the custody of all the real estate owned by the county and to manage the county funds and business except as otherwise specifically provided. We do not find, and counsel have not pointed out to us, any express or specific provisions limiting the powers of the county board as to the leasing of county real estate, though, as we have seen, the legislature has placed express and specific limitations on the powers of the county board as to the selling of county real estate. This would seem to indicate a legislative policy to leave to the county board power to lease such real estate as originally granted in the sections of the statute to which we have referred. Section 853 as amended cannot be said to repeal by implication the power to lease, because it does not treat of leasing in any respect whatever. We see no escape from the conclusion that, under the powers given the county board by statute, the board has the general power to lease real estate owned by the county. We do not wish to be understood that this rule is absolute; but that, if it be honestly exercised, without injury to the uses, interests and welfare of the county, the discretion of the board in leasing county real estate will not be enjoined by the courts.

This leads us to the inquiry as to the effect of a 99-year lease. Is it the equivalent of a sale? The appellees assert that it is and therefore is prohibited by amended section 853. They cite *Fawn Lake Ranch Co. v. Cumbow*, 102 Neb. 288, which arose in the potash era of the World War. The company had school land leases of a section of school land. It sought to enjoin the defendants from trespassing and removing the mineral waters from a lake on the land. The defendants answered, setting up a lease from the

commissioner of public lands and buildings, granting for three years the right to enter upon and occupy the premises "for the purpose of prospecting for minerals, petroleum, gas, potash, or other valuable substances." The trial court refused an injunction, but this court reversed the judgment of the district court because the plaintiff was entitled to the use of the school lands under its leases and because the legislature had never conferred "upon the board power to vest others with the right to enter upon the lands and remove the minerals therefrom." It is true the court concluded that the lease was a chattel real, and the minerals sought to be removed, being defined in the statute as real estate, must be considered in that light. To allow them to be removed under the defendants' mineral lease would not only be waste and thus violative of the terms of the school land leases of plaintiff but would be equivalent to allowing real estate to be sold. As we understand the decision, it does not attempt to distinguish between a lease and a sale generally, but holds that, without express authority from the legislature, the board has no power to execute such a lease as the one there under consideration.

The various appellees, in numerous briefs, cite too many cases to make it possible to take up and discuss them separately. But this is the substance of their argument to convince that the lease in question results in a sale and conveyance of the property: Under section 5586, Comp. St. 1922, defining "real estate," the lease, being for more than one year, is a chattel real and therefore real estate; under section 5587, defining "purchaser," the appellants are purchasers because an interest in real estate is conveyed to them for a valuable consideration; under section 5588 the lease in question is a deed assigning an interest in real estate; therefore, by the lease, the real estate is sought to be sold to the appellants. The main Nebraska case, construing these sections, cited by appellees and discussed at length in several of the briefs, is *Fawn Lake Ranch Co. v. Cumbow,* 102 Neb. 288, 297. After discussing the above sections and deciding that the lease in

question is a "chattel real" and is therefore real estate and not personal property, as a chattel real is personal property in some states, the opinion proceeds immediately to say: "Whatever view may be taken in some states with reference to the nature and character of such an instrument and of the right to remove minerals from the land, the legislative definition prevails, and the property must be considered as real estate. Without express authority from the legislature, the board has no power to execute such a lease as the one under consideration." The case so much relied upon by appellees, by these last quoted words, confounds their argument. In the instant case, the legislature, in express words of the statute, earlier quoted by us, gave the board authority to lease.

The appellees cite two cases from the supreme court of the state of Washington. There they have a provision in the state Constitution which (1) prohibits the ownership of lands by aliens (with exceptions and provisions not involved here) and which (2) provides that "all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void." In the first case, *State v. Morrison*, 18 Wash. 664, the court, considering a 99-year lease, after stating that it could not find any authority bearing directly upon the question, said: "We have concluded that a lease of lands in this state to an alien for a reasonable term might be upheld, but that the lease in question is for an unreasonable term, and consequently void." In the second case, *State v. Hudson Land Co.*, 19 Wash. 85, it was held that a lease of land to an alien for 49 years was void since it permitted that to be accomplished indirectly which could not be done directly. The decisions in these two cases were forced by the policy plainly expressed in the Constitution against any ownership of lands with the constitutional prohibition of "all conveyances of lands" to any alien. By reason of the constitutional provisions there, we do not regard these cases as applicable here, where our Constitution contains no such prohibition

and where our statute expressly allows the board to lease real estate owned by the county.

Other cases cited by the appellees, too numerous to analyze in this already extended opinion, find their answer in our statute law applicable to leases of county real estate.

A case very much like the instant case in its facts, and akin to it in the principles involved, arose in Chicago, and ultimately was reviewed in the supreme court. The Tribune Company had occupied under a lease three lots which were school property, the title to which was in the city of Chicago in trust. The company had improved the property with a building which it occupied for its business. The management of the property was vested in a board of education, subject to control by the legislature, and with powers defined by statute. The board had power to lease school lands. In May, 1880, the property was leased to the Tribune Company for 50 years. On June 15, 1888, the company and the school board entered into an agreement extending the lease to May 8, 1985. In 1907 the city of Chicago and the school board brought suit to cancel all the leases and agreements. On evidence and report of a master, the trial court dismissed the bill. Complainants appealed. The Illinois supreme court, in a well-reasoned opinion, affirmed the decree, holding that "A lease for a fixed and definite period, conditioned upon the payment of a fixed annual rental, even though for a long term of years, is a lease and not a sale, notwithstanding the language of the conveyance act and the act relating to judgments, which specifies that long-term leases shall be included within the term 'real estate.'" In the opinion, the court said:

"It is next argued that the leases, as extended until 1985, amounted to a sale of the property, which was beyond the power of the board of education, and the basis of the argument is that the terms were long. Reliance is placed upon the act in regard to judgments, which declares that leasehold estates, when the unexpired term exceeds five years, shall be included in the term 'real estate,' as used

in that act, and also upon the Conveyance act, as including leases like these. The question raised as to the nature or quality of a leasehold estate has little or nothing to do with the question whether these leases constituted a sale of the property. A decision that a lease for a long term is personal property or a chattel real, or real estate proper, would not affect the question whether the instrument is a lease or a sale. Words used in the statute are to be taken in their ordinary acceptation, and a lease, although for a long term, with payments of annual rent, is not a sale, which is a grant of absolute ownership. These leases were for a fixed and determinate period, conditioned upon the payment of fixed annual rental, and have all the characteristics of a lease and none of the features of a sale." *City of Chicago v. Tribune Co.*, 248 Ill. 242, 248.

The parties to that case, the statutes affecting it, and the principles of the common law applicable to it are such as to give it elements unusually common to the case at bar. The reasoning is cogent and is applicable here. On principle and on authority, without prolonging this discussion, we see no logical escape from the conclusion that the 99-year lease made by the county board was not a sale, but was in fact a lease.

The lease is conditioned upon the payment of an adequate annual rental with an agreement for valuable and permanent improvements to be made by the lessees who covenant to pay taxes and assessments of every kind. Upon failure of the lessees to perform its covenants the term ends. It contains no revaluation clause, but the evidence shows that this is not unusual in modern leases of this type. At the end of the term the improvements will belong to the lessor. There was no fraud in its procurement. It was a lease and not a sale and was made on behalf of the lessor within the authority of the law. When so made we cannot interfere with the powers of the board. To substitute our discretion for theirs would usurp functions not committed by the Constitution to the judicial department of our state government.

As a result, we deduce the following: A county board will not be enjoined from leasing, for a term of 99 years, real estate owned by the county but not actually used by it nor needed for its actual uses, where there is no fraud involved, where the consideration is adequate, and where the covenants and provisions of the lease protect the interests of the county. In such circumstances a 99-year lease is not equivalent to a sale of the property.

Having determined that the lease was made with authority and that it is not in effect a sale, it follows that the option of the Legion is ineffectual. It is an option to purchase if a sale be made. No sale being made, the option has nothing to operate on.

For the reasons stated, the judgment of the district court is reversed, with directions to enter a decree validating the lease as binding on all parties to the litigation.

REVERSED.

EMIL LUCKEY, ADMINISTRATOR, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS: T. B. HORD GRAIN COMPANY ET AL., APPELLEES.

FILED MAY 28. 1928. No. 25632.

1. **Death:** REMEDY. The civil remedy by an action against a wrongdoer for negligence resulting in the death of another person did not exist at common law and is a creature of statute.
2. ———: ———: WORKMEN'S COMPENSATION LAW. A wrongdoer who, as "a third person," is liable civilly for negligently causing the death of another person is not relieved to any extent by the workmen's compensation law, but is answerable for the pecuniary loss occasioned by his negligence.
3. **Master and Servant:** INJURY TO SERVANT: RIGHT OF ACTION: SUBROGATION. Under the workmen's compensation law, an employer, to the extent of his liability for compensation, is subrogated to the rights of the employee and the dependents and may bring and prosecute an action against a third person for the latter's negligence where it resulted in personal injury to, but not in the death of, the employee.
4. ———: ———: ———. Where an employer liable for com-

pensation refuses to bring an action against a third person for negligence resulting in personal injury to, but not in the death of, the employee, the latter may sue in his own behalf.

5. ———: ———: ———. Where an employer liable for compensation consents to an action by the employee to recover damages for personal injuries resulting from the negligence of a third person, the consent is equivalent to a refusal by the employer to sue the wrongdoer.

6. Death: ACTION: PARTIES. An action against a wrongdoer for negligence resulting in the death of another person must be brought in the name of the latter's personal representative who is the administrator of decedent's estate.

7. ———: ———: WORKMEN'S COMPENSATION LAW. The workmen's compensation law does not create a new, or any, cause of action against a wrongdoer for negligently causing the death of another person, nor authorize the widow of a deceased workman nor the dependents nor the administrator nor the employer to bring or prosecute such an action.

8. ———: ———: SUFFICIENCY OF EVIDENCE. In an action against a wrongdoer for negligence resulting in the death of a third person, the evidential facts and circumstances outlined in the opinion *held* sufficient to raise a question for the jury and to support a verdict in favor of plaintiff.

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

C. A. Magaw, Thomas W. Bockes and *Otto F. Walter,* for appellants.

Montgomery, Hall, Young & Johnsen, contra.

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

ROSE, J.

This is an action to recover $15,000 in damages for alleged negligence resulting in the death of Joseph Schmidt who left surviving him his dependent widow and six adult children. The administrator of decedent's estate is plaintiff. The Union Pacific Railroad Company, Louis Hostreitter, T. B. Hord Grain Company and Globe In-

demnity Company are defendants. For convenience the Union Pacific Railroad Company and the T. B. Hord Grain Company will be called respectively "railroad company" and "grain company." Hostreitter was an employee of the railroad company and Schmidt was an employee of the grain company. The Globe Indemnity Company was the "insurance carrier" of the grain company.

A tier of grain car doors owned by the railroad company and by it stored in piles in the elevator yard of the grain company at Humphrey fell on Schmidt October 22, 1923, and as a result of his injuries he died October 29, 1923. The doors were placed there for the use of the grain company in coopering grain cars.

Plaintiff in his petition pleaded that grain car doors in excess of current needs were stored by the railroad company on the premises of the grain company; that Hostreitter piled them too high in a negligent manner in violation of duties owing to employees of the grain company and that Schmidt, in due course of his employment and in the exercise of due care, went to the piles to get needed doors for the coopering of grain cars; that, while thus engaged, through the negligence pleaded, a tier of the doors fell on him and fatally injured him; that also as a consequence of such negligence the grain company, and the insurance carrier, became liable to the dependent widow for $15 a week for 350 weeks; that out of the damages recovered in this action the grain company and the insurance carrier will be entitled to compensation already paid and to unpaid instalments for which they are liable.

In an answer and cross-petition the grain company and the insurance carrier admitted the facts pleaded by plaintiff and alleged that by reason of the death of Schmidt his widow and next of kin were damaged to the extent of $15,000 and that out of the sum recovered by plaintiff in this action these answering defendants will be entitled to $5,891.75 on account of their liability to the dependent widow for compensation.

The railroad company and Hostreitter demurred to the

petition and to the cross-petition on the grounds that there is a defect of parties plaintiff; that the action is not prosecuted in the name of the real party in interest; that the grain company and the indemnity company are not proper parties defendant, but, if proper parties, are parties plaintiff.

The demurrer was overruled and the demurrants answered, repeating their demurrer, denying the negligence charged and alleging that the death of Schmidt resulted from his own negligence.

Upon a trial of the issues the jury rendered a verdict in favor of plaintiff and against the railroad company and Hostreitter for $2,000. From a judgment on the verdict the judgment defendants appealed. Upon a former hearing in the supreme court the judgment below was reversed and later a reargument was ordered.

It is contended by the railroad company and Hostreitter that the decision below cannot be permitted to stand for the reason that the administrator of decedent's estate is not the proper party plaintiff, being without authority to bring or maintain the action, and that therefore the demurrer should have been sustained and the petition dismissed. The question thus raised was well presented on both sides and requires consideration of a statutory provision in what is known as "Lord Campbell's Act," authorizing an action against a wrongdoer to recover damages for negligence resulting in the death of another person, and also requires consideration of a provision in the workmen's compensation law, an act imposing upon employers liability for compensation to the widow or widower and to the dependents of deceased workmen. Lord Campbell's Act, the earlier of the two statutes, contains among other provisions the following:

"Every such action shall be commenced within two years after the death of such person. It shall be brought by and in the name of his personal representative, for the exclusive benefit of the widow or widower and next of kin. The verdict or judgment should be for the amount of dam-

ages which the persons in whose behalf the action is brought have sustained, and the avails thereof shall be paid to and distributed among such persons in the same proportions as the personal property of an intestate under the inheritance laws." Comp. St. 1922, sec. 1383.

The workmen's compensation law provides:

"Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer, on account of any future instalments of compensation." Comp. St. 1922, sec. 3041.

Emil Luckey, administrator of the estate of Joseph Schmidt, deceased, brought this suit under Lord Campbell's Act, a Nebraska statute authorizing an action against a wrongdoer for negligence resulting in the death of another person, a legislative remedy having no existence at common law. The demurrer asserts that the administrator is not the proper party plaintiff. Lord Campbell's Act, referring to the action and to the deceased person, provides that "It shall be brought by and in the name of his personal representative." Comp. St. 1922, sec. 1383. The workmen's compensation law, a later act recognizing a remedy for the benefit of an employer liable for compensation, provides that, "Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person." Comp. St. 1922, sec. 3041. In connection with the two provisions, the decisive

question raised by the demurrer is narrowed to the authority of the administrator to sue the wrongdoer or "third person" who negligently caused the death of the employee. Questions relating to repugnance between the two provisions and to the repeal or modification of the earlier statute are limited to the right of the administrator to bring the suit. How the fund recoverable in the action should be distributed is not necessary to a decision. A wrongdoer who, as a third person, is liable civilly under Lord Campbell's Act for negligently causing the death of another person is not relieved to any extent by the workmen's compensation law. He is answerable for the pecuniary loss occasioned by his negligence. The third persons herein were the railroad company and Hostreitter. They were alleged wrongdoers and were defendants. The grain company or employer and the insurance carrier were also defendants and they consented to the bringing of the action—an affirmative step equivalent to a refusal to sue in their own right. The widow and the next of kin were represented by the administrator. No one entitled to share the avails of the litigation complains of the judgment rendered. It is clear, therefore, that the judgment defendants cannot be subjected to a double recovery, if the judgment below is sustained.

For the purpose of determining the proper party plaintiff in this particular instance the provision of Lord Campbell's Act authorizing decedent's personal representative to bring the action and the provision of the workmen's compensation law relating to subrogation should be construed together with a view to giving effect to both. In construing the workmen's compensation law it was ruled in a recent case:

"The right to bring an action against the third party rests with the employer until such time as the employee can allege and prove that his employer has neglected or refused to institute the action." *O'Donnell v. Baker Ice Machine Co.*, 114 Neb. 9.

An examination of the opinion therein leads to the con-

clusion that the question now under consideration was not decided. In that case the plaintiff himself was the employee. He was alone attempting to assert in court his own right to recover from a third person damages for negligence. He had been personally injured but not killed. He was in control of his own affairs and of course could not be represented by an administrator. As plaintiff in that case he had no right of any kind under the statute creating for the first time a civil remedy against a wrongdoer for negligently causing the death of another person. He was capable of suing and of being sued. The legislature had made his compensation, when paid by his employer, available for subrogation. In another case wherein an injured employee was himself the plaintiff Judge Letton said in a concurring opinion:

"If the employer, after paying the amount of the statutory compensation, refuses or neglects to bring his action against the negligent third party, this does not deprive the injured person of his right of action against the wrongdoer." *Muncaster v. Graham Ice Cream Co.*, 103 Neb. 379.

This language was quoted by the supreme court with approval in *O'Donnell v. Baker Ice Machine Co.*, 114 Neb. 9. The workmen's compensation law and the opinions construing it, therefore, settle the right of an employer who has paid compensation to sue a third person for negligently injuring, but not causing the death of, the employee.

The present appeal presents an entirely different question—Who is the proper plaintiff where the employee loses his life through the negligence of a third person? The administrator of the deceased employee's estate acted in that capacity under Lord Campbell's Act, a Nebraska statute authorizing an action against a wrongdoer for negligence resulting in the death of another person. That act specifically provides: "It shall be brought by and in the name of his personal representative, for the exclusive benefit of the widow or widower and next of kin." No one else is authorized to bring the action. *Wilson v. Bumstead*, 12 Neb. 1. The administrator is the "personal rep-

resentative." *Murphy v. Willow Springs Brewing Co.*, 81 Neb. 223. The workmen's compensation law does not create a new, or any, cause of action against a wrongdoer for negligence resulting in the death of another person nor authorize the widow nor the dependents nor the administrator nor the employer to bring or prosecute such an action. That authority is found alone in Lord Campbell's Act. The following rules designate the proper plaintiff under each of the statutory provisions construed:

Where the negligence of a third person results in the death of an employee the administrator is the proper plaintiff in an action for damages under Lord Campbell's Act.

Where the negligence of a third person results in personal injury to, but not in the death of, the employee, the employer, if liable for compensation, is the proper plaintiff under the workmen's compensation law, but in the event of his failure to exercise that right the employee may sue in his own name for damages.

Thus construed there is between the provisions under consideration no repugnance to repeal or modify by implication the authority of the administrator under the earlier statute to act as plaintiff in an action against a wrongdoer or third person for negligently causing the death of another person or employee. In respect to parties plaintiff both enactments are operative. As already stated the appeal does not require consideration of the statutory provisions involving distribution of the recovered fund among the beneficiaries.

It is also argued that in any event the judgment should be reversed for want of evidence to prove actionable negligence resulting in the death of Schmidt, the testimony on the main issue being challenged as speculative and conjectural and as wholly insufficient to prove, or warrant an inference of, the negligence charged. The point does not seem to be well taken. Negligence on the part of Schmidt is not shown. He was found fatally injured under a tier of wooden grain car doors that had fallen upon him. They had not been piled in the usual or customary manner. The

doors were longer than they were wide. Properly piled they should rest on each other crosswise, thus binding them together. In violation of custom and usage the pile that fell on Schmidt was in a single tier with the doors lengthwise. This tier, piled to an unusual height, obviously required little force to throw the center of mass without the base, endangering anyone who attempted to remove a door. Actionable negligence resulting in the fatal injuries was a logical inference from these and other evidential facts. There was therefore no error in submitting that issue to the jury.

Prejudicial error in the rulings on evidence or in the giving and refusing of instructions has not been found in the proceedings upon full consideration of the assignments of error presented. The reversal upon the former hearing is vacated and the judgment of the district court is

AFFIRMED.

THOMPSON, J., dissents.

MASSACHUSETTS BONDING & INSURANCE COMPANY, APPELLEE, V. ARTHUR R. NICHOLS ET AL.: HERMAN E. FAIRCHILD, APPELLANT.

FILED MAY 28, 1928. No. 24886.

1. **Statute of Frauds.** When a person, who is not "thereunto authorized by writing," subscribes the name of another person to a written agreement which creates a "special promise to answer for the debt, default or misdoings of another person," it follows that, under the fraud statute, such "agreement shall be void," as to such person whose name is so thereunto subscribed.
2. ———. The spirit of the fraud statute, having been adopted to prevent fraud, cannot be evaded by mere changes in the language of parties, nor by the form under which the transactions are disguised. Browne, Statute of Frauds (5th ed.) 218.
3. **Principal and Agent:** EXERCISE OF AUTHORITY. "Even when there is express authority for an attorney in fact to bind his principal as surety, it is the policy of the law to construe it strictly and to hold the principal not bound, unless the authority

is exercised within the undoubted limits prescribed." *Clinton v. Hibb's Ex'x*, 202 Ky. 304.

APPEAL from the district court for Jefferson county: ROBERT M. PROUDFIT, JUDGE. *Reversed and dismissed.*

Perry & Van Pelt and *Bartos & Bartos*, for appellant.

Kennedy, Holland, DeLacy & McLaughlin and *Denney & Denney, contra.*

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

DEAN, J.

This action was begun by the Massachusetts Bonding & Insurance Company, plaintiff, against defendants Arthur R. Nichols, L. A. Newell, A. F. Newell, H. L. Clarke, and Herman E. Fairchild. The defendants were either officers or directors of the Farmers & Merchants National Bank of Fairbury while it was a going concern. The action, as alleged by plaintiff, is based on an agreement of indemnity executed by the bank as principal and the plaintiff as surety and was given to cover school funds of school district No. 8, in Jefferson county, which were subsequently deposited in the bank. The bank failed and the plaintiff company paid over to the school district $7,951.70, which was its liability obligation under the bond. The above-named individual defendants are designated in the record as indemnitors. Some time after the plaintiff had paid over to the school district the amount of its deposit in the failed bank, this action was brought against the indemnitors upon their agreement of indemnity to recover the amount so paid, with lawful interest thereon from May 7, 1924, and for $650 attorney fees incurred in the prosecution of this action. Defendant Fairchild, *inter alia*, pleaded a general denial, and insists that, under the facts and the law, he should be relieved of liability on the grounds which are hereafter discussed. The individual defendants, above referred to, except Fairchild, did not appeal. The defendant

Fairchild's appeal is based on the judgment which was entered on the verdict of a jury.

Briefly, but with slight repetition, the material facts in respect of the merits follow: The bank was desirous of obtaining deposits in the sum of $15,000 from the treasurer of the school district. To this end the bank obtained the certified depository bond in suit from the bonding company. The latter company, however, was not satisfied with the financial statement which the bank submitted to it, and hence refused to execute the bond except on condition that the bank obtain a special indemnity agreement, to be executed by responsible indemnitors, and delivered to the plaintiff. The bank complied with this requirement. The plaintiff bonding company thereupon executed the above-mentioned indemnity bond. Fairchild, however, did not himself sign the agreement in suit. This is not denied, nor is it denied that Arthur R. Nichols, one of the five defendants, wrote the name of his codefendant Fairchild thereon. Nichols, however, was not authorized in writing, by Fairchild, to sign his name thereto.

Sections 2458 and 2560, Comp. St. 1922, form a part of the statute of frauds. The introductory paragraph to section 2458 and the second paragraph follow:

"In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith. * * * Second. Every special promise to answer for the debt, default or misdoings of another person."

Section 2560 reads:

"Every instrument required by any of the provisions of this chapter to be subscribed by any party, may be subscribed by his agent, thereunto authorized by writing."

Clearly, a statutory proposition of fundamental law cannot be more plainly stated than that contained in the foregoing citations from sections 2458 and 2560 of the statute of frauds.

Whether Nichols was clothed with lawful authority to

perform this office is the outstanding question presented by the record. Nichols testified that Fairchild verbally authorized him to subscribe his name to the indemnity agreement. Fairchild denied that he ever at any time authorized Nichols or any other person to write his name thereon. But the disagreement between Fairchild and Nichols, in respect of Nichols' alleged authority to sign, in view of the facts and the law applicable thereto, does not appear to be important, from the fact that authority to sign was not in writing. So that, even though Nichols was verbally authorized to sign by Fairchild, as Nichols contends, such signing, in view of the material facts and the law, is not binding on Fairchild.

One of the prime objects of the cited sections of the statute of frauds, in modern transactions and practice, is to prevent the introduction of the evidence of witnesses who depend solely upon memory to detail the facts in respect of transactions which are to be established by the introduction of written instruments which are signed by the party to be charged. And it is elementary that the authority of a principal given to an agent to make a single contract, whether in writing, or otherwise, does not confer an implied power upon such agent to make other contracts generally with other persons, even though of the same nature or kind.

In an analogous case, in an opinion by Root, J., we held that the contract of an agent given in the name of his principal for the sale of land is void under the fraud statute unless the agent's authority is in writing. *Ross v. Craven*, 84 Neb. 520; *Riiff v. Riibe*, 68 Neb. 543. "Even when there is express authority for an attorney in fact to bind his principal as surety, it is the policy of the law to construe it strictly and to hold the principal not bound, unless the authority is exercised within the undoubted limits prescribed." *Clinton v. Hibb's Ex'x*, 202 Ky. 304. Speaking generally it may be said that it is elementary that the signing of a bond, by an obligor whose signature was forged, cannot be ratified and does not render him liable thereon. *McHugh v. County of Schuylkill*, 67 Pa. St. 391, 5 Am. Rep.

445; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546. The spirit of the fraud statute, having been adopted to prevent fraud, cannot be evaded by mere changes in the language of parties nor by the form under which the transactions are disguised. Browne, Statute of Frauds (5th ed.) 218.

The conclusion is that the judgment of the district court must be and it hereby is reversed and remanded, with directions that the action be dismissed.

REVERSED AND DISMISSED.

HERMAN E. FAIRCHILD, APPELLEE, V. MASSACHUSETTS BONDING & INSURANCE COMPANY, APPELLANT.

FILED MAY 28, 1928. No. 25512.

This is a companion case to *Massachusetts Bonding & Ins. Co. v. Nichols, ante*, p. 93, and is governed by that case.

APPEAL from the district court for Jefferson county: HARRY D. LANDIS, JUDGE. *Reversed and dismissed.*

Kennedy, Holland, DeLacy & McLaughlin, and *Denney & Denney*, for appellant.

Perry & Van Pelt, contra.

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

DEAN, J.

This is an independent suit in equity by Herman E. Fairchild for a new trial of the case of Massachusetts Bonding & Insurance Company against Arthur A. Nichols and others, impleaded with Herman E. Fairchild, wherein the district court for Jefferson county entered a judgment against Fairchild and others for $8,502.94. This suit was commenced at a subsequent term of court, and upon a trial of the issues raised by the pleadings herein the judgment in the former case was set aside as to Fairchild and as to

him a new trial was granted. From that judgment the Massachusetts Bonding & Insurance Company appealed.

On direct appeal from the judgment against Fairchild for $8,502.94, it was held that he was not liable therefor. That judgment was reversed, with directions to dismiss the action as to him. *Massachusetts Bonding & Ins. Co. v. Nichols, ante,* p. 93. By direct appeal in that case Fairchild therefore obtained all the relief to which he was entitled. The present suit in equity for a new trial was therefore unnecessary, and for that reason the judgment granting a new trial in the equity suit is reversed and dismissed at the cost of Fairchild in both courts.

REVERSED AND DISMISSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLANT, V. FEDERATED MERCHANTS MUTUAL INSURANCE COMPANY, APPELLEE.

FILED MAY 28, 1928. No. 26260.

1. **Statutes.** It is a general rule that legislative acts will be held to operate prospectively and not retrospectively, unless a contrary intent or purpose is clearly disclosed.
2. **Insurance:** STATUTES ACT PROSPECTIVELY. Section 7816, Comp. St. 1922, as amended by chapter 124, Laws 1925, prescribing the classes of insurance which insurance companies may be formed to transact, construed, and *held* to act prospectively and not retrospectively, and not to limit the classes of insurance which a previously existing, legally organized company was authorized to write.

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

O. S. Spillman, Attorney General, and *T. J. McGuire,* for appellant.

Hall, Cline & Williams and *Roy B. Ford, contra.*

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

GOOD, J.

This is an action in *quo warranto,* instituted by the attorney general, in the name of the state, to oust the defendant from exercising in this state powers, which it claims, of writing certain kinds of insurance. To the petition defendant interposed a demurrer, which was sustained. Relator elected to stand upon his petition, and the action was dismissed. Relator has appealed.

In the petition it is alleged that the respondent is a mutual insurance company, organized under and by virtue of the laws of the state in conformity with chapter 45, Laws 1897, and acts amendatory thereto, and that it is engaged in writing the classes of insurance under subdivisions 1, 6, 8, and 12, of section 7814, Comp. St. 1922, as amended by chapter 124, Laws 1925; that, pursuant to the provisions of section 7816, Comp. St. 1922, as amended by said chapter 124, it is unlawful for the respondent to engage in all of the lines of insurance in said several subdivisions.

Said section 7814, as amended, authorizes the formation of insurance companies to transact 14 distinct classes of insurance, each class being especially described in the corresponding number of subdivisions of the section. Section 7816, Comp. St. 1922, as amended by said chapter 124, provides:

"No company shall be formed for the purpose of engaging in any other kinds of insurance than that specified in some one of the subdivisions of section 1 of this article (section 7814, as amended), or more kinds of insurance than are specified in a single subdivision, except that a company may be formed:

"1. For the purpose specified in subdivisions one and twelve; or

"2. For the purposes specified in subdivisions two and three; or

"3. For any or all the purposes specified in subdivisions three to fourteen, both inclusive, except subdivision ten."

It will be observed that there is no combination of classes

of insurance under which an insurance company may be formed for writing insurance specified in subdivisions 1, 6, 8, and 12, and, if this were the statute under which the insurance company was formed or organized, clearly it would not be authorized to transact all the classes of insurance specified in said subdivisions 1, 6, 8 and 12. It might be organized and transact business, under the first paragraph, for the purpose of carrying on the classes of business specified in subdivisions 1 and 12, or, under the third paragraph, for carrying on the classes of business specified in subdivisions 6, 8, and 12. There is no averment in the petition as to when the respondent company was formed, nor what classes of insurance it might lawfully write when organized.

The legislature of 1925 passed another act, known as chapter 126, Laws 1925, which amended section 7816, Comp. St. 1922, and contained an emergency clause by which the act went into effect on March 31, 1925. Section 7816, as by this act amended, in so far as applicable to the case in hand, is as follows:

"No company shall be formed for the purpose of engaging in any other kinds of insurance than that specified in some one of the subdivisions of section 1 of this article (section 7814, Comp. St. 1922), or more kinds of insurance than are specified in a single subdivision, except that a company may be formed:

"1. For the purpose specified in subdivisions one and twelve; or,

"2. For the purposes specified in subdivisions two, three and five; or,

"3. For any or all the purposes specified in subdivisions three to fourteen, both inclusive, except subdivision ten; *or a mutual company may be formed for any or all of the purposes specified in subdivisions one, six, eight and twelve.*" (Italics ours.)

Chapter 126, Laws 1925, was in force from and after March 31, 1925, until, at least, the taking effect of chapter 124, Laws 1925. By the express provisions of the third

paragraph of section 7816, as amended by chapter 126, Laws 1925, mutual insurance companies were authorized to be formed for any or all the purposes specified in subdivisions 1, 6, 8, and 12. It will thus be seen that from and after March 31, 1925, until, at least, the taking effect of chapter 124, Laws 1925, which became effective three months after the adjournment of that session of the legislature, the respondent was authorized to engage in all of the lines of business which, it is averred in the petition, it is writing. The parties to the action argue, and seek to have the court determine, whether chapter 126, Laws 1925, is repugnant to and inconsistent with the provisions of chapter 124, Laws 1925, and, if so, whether chapter 124, which was passed subsequent to chapter 126, operates to repeal chapter 126, in so far as they are in conflict. We do not think it necessary to determine this question, because it is not properly presented by the record before us.

It will be observed that the language of section 7816, Comp. St. 1922, as amended by chapter 124, Laws 1925, does not purport to restrict an *existing* insurance company in the lines of business which it may write, but has reference to companies *formed* under the law. It is a general rule that statutes will act prospectively and not retrospectively, unless a contrary intent or purpose is clearly disclosed. *State v. City of Kearney,* 49 Neb. 337; *McIntosh v. Johnson,* 51 Neb. 33; *Commercial Bank of St. Louis v. Eastern Banking Co.,* 51 Neb. 766; *Sharpe v. Grand Lodge, A. O. U. W.,* 108 Neb. 193. There is nothing in the statute which indicates any intent or purpose that it should operate retrospectively. We must hold, therefore, that it was intended to operate only prospectively. Such being the case, it would not affect the right of an existing insurance company to engage in writing the classes of business which it was, under the previously existing law, authorized to write. As already observed, the law, in existence immediately preceding the time that chapter 124, Laws 1925, became effective, authorized the respondent, being a mutual insurance company, to engage in writing all lines of insur-

ance mentioned and described in subdivisions 1, 6, 8, and 12, of section 7814, Comp. St. 1922. The petition, therefore, fails to show on its face that respondent was engaged in unlawfully writing any line of insurance.

It follows that the demurrer was properly sustained, and the judgment of the district court is therefore

AFFIRMED.

HERBERT H. HOWARD ET AL., APPELLANTS, V. J. H. JENSEN, COUNTY TREASURER, ET AL., APPELLEES.

FILED MAY 28, 1928. No. 26025.

1. **Schools and School Districts:** RURAL HIGH SCHOOL ACT: CONSTRUCTION. The prime effort in construing the rural high school act, sections 6373-6384, Comp. St. 1922, is to determine the legislative intention as disclosed by the provisions of the law and the general object to be accomplished.
2. ———: ———: TAXATION: INTENT OF LEGISLATURE. The intention of the legislature in the provisions of the rural high school act regulating the assessment and levy of taxes was to protect the taxpayer.
3. **Statutes:** CONSTRUCTION. The consequences that would result from construing the provisions of a statute should be taken into consideration in determining the intention of the legislature.
4. **Schools and School Districts:** RURAL HIGH SCHOOL ACT: TAXATION. The literal meaning of the word "shall" must be given consideration in determining the legislative intention of sections 6377, 6382, Comp. St. 1922, regulating the assessment and levy of a rural high school tax.
5. **Statutes:** TAXATION: MANDATORY PROVISIONS. Statutory provisions regulating the assessment and levy of taxes are mandatory when their object is the protection of the taxpayer.
6. ———: ———: ———. Statutory provisions for the levy of a tax are imperative.
7. **Taxation:** RURAL HIGH SCHOOLS. Compliance with the provisions of section 6382, Comp. St. 1922, requiring the trustees to present an estimate for adoption to the electors at an annual meeting on the first Monday of June is a condition precedent to the levy of a rural high school tax.
8. ———: ———. A rural high school district annual tax levy, based upon an estimate adopted by school electors at a meeting

on the second Monday instead of on the first Monday of June, as required by section 6377, Comp. St. 1922, *held* void.

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

Lewis C. Paulson, for appellants.

C. P. Anderbery and *J. L. McPheely, contra.*

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

LANDIS, District Judge.

This is an action wherein certain resident taxpayers of school district No. 67, of Kearney county, Nebraska, seek to enjoin the county treasurer from collecting the 1926 annual tax levy for the Lowell rural high school district, composed of two country grade school districts Nos. 67 and 2. The trial court dismissed plaintiffs' action, and they appeal.

The expenses of maintaining rural high schools are borne by the districts united for that purpose in proportion to their assessed valuation. The trustees prior to the annual meeting prepare an estimate of the sums necessary for maintenance for the coming year. This estimate is presented for adoption to the electors at the annual school meeting. The trustees certify to the county clerk and county superintendent the estimate adopted at the annual meeting, thereupon the board of county commissioners make the levy. Comp. St. 1922, sec. 6382.

Section 6377, Comp. St. 1922, provides: "The annual school meeting of each rural high school district shall be held at the schoolhouse, if there be none at some other suitable place within the rural high school district, on the first Monday of June of each year."

The appellants' complaint against the tax levy is that it is not based upon an estimate adopted by the school electors in an annual meeting as provided for in section 6377,

supra. The tax is based upon an estimate adopted at a meeting of the electors on the *second* Monday of June, 1926.

This appeal presents only one question, namely, what is the effect on the instant tax levy of the failure of the Lowell rural high school district to hold its annual school meeting on the first Monday of June, 1926? In the determination of this question the prime effort is to ascertain the legislative intention as disclosed by the provisions of the law and the general object intended to be accomplished. The rural high school act, sections 6373-6384, Comp. St. 1922, has as part of its general object an enforced contribution of money based on the assessed valuation of property within the district for the purpose of maintaining a school of more than eight grades. Among the protecting conditions precedent to the enforced contribution or tax are: (a) "The trustees shall, prior to the annual meeting herein provided, prepare an estimate of the sums required for the maintenance of the high school during the coming year and present such estimate for adoption to the electors at such annual meeting." Comp. St. 1922, sec. 6382. An annual meeting set on a definite date in terms "shall be held on the first Monday of June of each year." Comp. St. 1922, sec. 6377.

Appellees contend that section 6377 directs the holding of the annual meeting at a certain time, without negative words restraining the holding of it afterwards, hence this provision as to time should be held directory, and not a limitation of authority. The obvious intention of the legislature gathered from the provisions of the act was to protect the taxpayer. Definite regulatory provisions to base the assessment and levy of the tax are set out. Certain steps, the very essence of which are proceedings for the benefit and protection of the taxpayer, must be taken before the enforced contribution for support of the school is available.

The electors of school district No. 67 are required to hold their annual meeting on the second Monday in June of each year. In the instant case the rural high school district,

of which school district No. 67 is a part, held its annual meeting also on the second Monday of June, in school district No. 2. It might easily occur that thereby electors of district No. 67 would be prevented from attending this rural high school meeting. Under the circumstances it is fair to say that electors of district No. 67 would have to decide whether to attend their annual meeting or the rural high school district meeting when it is their legal privilege to attend both. The consequences that would result from construing the provisions of a statute should be taken into consideration in determining the intention of the legislature.

It is to be noted in considering the particular language used in sections 6377 and 6382 that the imperative word "shall" is used, and not the permissive word "may," whenever reference is made to the annual meeting. Standing alone, the literal meaning of "shall" might not have weight; but, in determining the intention of the legislature as to what is necessary upon which to base the assessment and levy of a tax, some consideration must be given to the generally accepted meaning of the word.

In *State v. Cones,* 15 Neb. 444, a *quo warranto* action, is announced the syllabus: "The annual school meeting of each school district for the election of officers is required to be held on the first Monday of April of each year, and there is no authority to adjourn the election to another day." In this case the election of a school treasurer at an adjourned meeting was held a nullity.

State v. Talich, 112 Neb. 723, also a *quo warranto* action, reannounces the quoted syllabus of *State v. Cones, supra.* Here, a moderator was elected at the annual meeting, but resigned at an adjourned meeting, where his successor was elected, and it was held that this could not be done because the electors at the adjourned meeting had no authority to elect officers or to accept a resignation.

The case of *Ryan v. Stumpenhorst,* 114 Neb. 69, announces the syllabus: "An act of the legislature of 1923, Laws 1923, ch. 1, providing in substance for farm bureaus,

construed, and *held* that the provision for filing a remonstrance within 20 days after the filing of the petition is mandatory, and the remonstrance filed 38 days after the filing of the petition, and the election had thereunder, are each void. In such case, mandamus will lie to compel the county board to proceed as if no remonstrance had been filed or election had." In the construction of this statute the use of "shall set aside" and "shall submit the question to a vote" were held to be imperative directions as to the time when and within which an act, such as filing a petition and remonstrance, must take place.

Acts required by a statute to make a tax chargeable are conditions precedent, and must be strictly complied with. *Hewes v. Reis,* 40 Cal. 255. "Statutory provisions regulating the assessment and levy of taxes are mandatory when their object is the protection of the taxpayer." 1 Desty, Taxation, p. 515. In tax laws, provisions for the levy of a tax are imperative. 1 Cooley, Taxation (4th Ed.) sec. 124; *Jones v. State,* 17 Fla. 411; *People v. Otsego County,* 51 N. Y. 401; *City of Indianapolis v. McAvoy,* 86 Ind. 587.

When the legislative intent as disclosed from the provisions of the act, the general object intended to be accomplished, the particular imperative directions are all considered, then we must hold that section 6377 definitely fixes a time when and within which the electors must approve the estimate to base the tax. It is one which must be obeyed according to the substantial import of its terms under sanction of having the proceeding adjudged void. There is a limitation of authority and power imperatively declared by the section. The previous decisions of this court herein cited by analogy confirm this construction. Section 6377 is for the benefit and protection of the taxpayer and should be mandatory. Suppose the school electors arbitrarily refuse to approve the estimate at the annual meeting on the first Monday. Then the legislature has provided protection for the school under section 6289, Comp. St. 1922, which makes it the duty of the county

superintendent to make the estimate, and the county clerk to make the levy.

Every thinking citizen is proud of the educational consciousness of our state, but it should be remembered that the continuance of such depends upon a satisfied taxpayer. Fifty-one and six-tenths cents of the average 1927 tax dollar was used to support public schools and state educational institutions. Report Tax Commissioner, 1927. The taxpayer is entitled on principle to mandatory construction as to every basic step in the levy and assessment of this enforced contribution. Where the legislature has declared imperative safeguards for the protection of the taxpayer, they should be strictly construed so certainty in their exercise shall obtain. To do otherwise would seriously harm education. The 1926 tax levy at issue is void. The judgment of the trial court dismissing plaintiffs' action is reversed, and the cause remanded, with directions to enter decree granting the relief prayed for in the petition.

REVERSED.

Rose, Dean and Howell, JJ., dissent.

IN RE JAMES CARBINO.
SARAHA FANCUILIO, APPELLANT, V. WILLIAM T. FENTON, APPELLEE.

FILED JUNE 1, 1928. No. 25909.

1. **Habeas Corpus.** It is a general rule that habeas corpus will not lie to discharge from custody one serving a penal sentence, if the court imposing such sentence had jurisdiction of the offense and of the person of the defendant, and the sentence was within the power of the court to impose.
2. ———. "The writ of habeas corpus cannot be used as a substitute for proceedings in error." *Hulbert v. Fenton*, 115 Neb. 818.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

North & O'Reilly, for appellant.

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

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

GOOD, J.

This is a proceeding in habeas corpus on behalf of James Carbino against the warden of the state penitentiary, to determine whether Carbino is unlawfully restrained of his liberty by the respondent. An appeal has been prosecuted from a judgment denying the writ and dismissing the proceeding.

From the petition and the return of the respondent, it appears that Carbino was convicted of murder in the first degree in the district court for Douglas county, and sentenced to imprisonment in the state penitentiary for the term of his natural life. The demand for the relief is grounded upon the contentions that Carbino, at the time of the commission of the offense charged and for a long time prior thereto and ever since, was and has been insane; that because of his insane condition he was incapable of committing any offense, and by reason thereof he was incapable of presenting and did not present the defense of insanity in his trial for murder; that therefore the judgment of the district court is void, and that defendant is unlawfully deprived of his liberty.

In this jurisdiction insanity is recognized as a defense in a criminal action, if it appears that at the time of the commission of the offense the defendant does not know right from wrong with respect to the particular act. If, as contended, Carbino was, at the time of the commission of the offense, insane, that was a matter which could and should have been presented in his defense on his trial for murder. Incidentally, it may be remarked that Carbino was represented in his trial by counsel, and no complaint is made that he was not properly represented by them. It is at least strange that neither the court, nor the jury, nor

any of Carbino's relatives, nor his counsel would discover the fact, if Carbino was so insane as not to be legally responsible for his action. The record in the instant case indicates that Carbino was not insane. We deem it unnecessary, however, to determine the question of whether or not he was, in fact, insane.

It is a general rule that habeas corpus will not lie to discharge one from a sentence of penal servitude, if the court imposing the sentence had jurisdiction of the offense and of the person of the defendant, and the sentence was within the power of the court to impose. In such case, the judgment is not void.

In *Hulbert v. Fenton,* 115 Neb. 818, it was held: "The writ of habeas corpus cannot be used as a substitute for proceedings in error." In *Michaelson v. Beemer,* 72 Neb. 761, this court held: "To obtain release by such a proceeding, the judgment or sentence must be more than merely erroneous; it must be an absolute nullity." And in the *Hulbert* case it was further held: "Where the trial court has jurisdiction of the offense and of the person of the defendant and has power to render the particular judgment or sentence in a proper case, habeas corpus will not lie upon the ground of mere irregularities in the judgment or sentence." Similar holdings have been made by this court in *In re Fanton,* 55 Neb. 703, and in *McElhaney v. Fenton,* 115 Neb. 299.

The record clearly discloses that the district court for Douglas county had jurisdiction of the person of Carbino and had jurisdiction of the offense, and that the sentence imposed was within the power of the court under the statutes.

The record appears to be free from prejudicial error, and the judgment is

AFFIRMED.

HOWELLS STATE BANK OF HOWELLS, APPELLEE, V. HANS E. ARPS, SHERIFF, APPELLANT: F. W. BOLAND, APPELLEE.

FILED JUNE 1, 1928. No. 26127.

1. **Exemptions.** Section 9039, Comp. St. 1922, construed, and *held*, that only those persons who are residents of the state of Nebraska and heads of families are entitled to the exemptions provided by the eighth subdivision thereof.
2. **Overruled Cases.** The second paragraph of the syllabus in *Roberts v. Moudy*, 30 Neb. 683, is overruled; and the opinion in *Shreck v. Gilbert*, 52 Neb. 813, in so far as it appears to exempt to a resident attorney, not the head of a family, his library, is disapproved.

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

George W. Wertz, for appellant.

W. M. Cain, contra.

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

GOOD, J.

This is an action in replevin. Plaintiff had judgment and defendant appeals.

Plaintiff claimed right to the possession of the chattels by virtue of a chattel mortgage. Defendant Boland was the owner of the chattels. Defendant Arps was the sheriff and, under an attachment issued in an action against Boland, had levied on and taken possession of the chattels and had them in his possession at the time this action was begun. The chattel mortgage was executed and given to plaintiff subsequent to the levy of the attachment. Boland was a physician, a single man and not the head of a family. He occupied a building in Howells as his office and residence in which he had his surgical instruments and appliances, medicine cabinet, office furniture, fixtures and household goods, which are the chattels involved in this action.

A single question is presented for determination: Were the chattels exempt to the defendant Boland? If they were exempt, then the levy of the attachment was wrongful, no lien was acquired thereby, and plaintiff would be entitled to possession. On the other hand, if the chattels were not exempt to Boland, then the sheriff, by virtue of his levy of the attachment, acquired a lien thereon and is entitled to possession.

The decision in this action rests on a proper construction of section 9039, Comp. St. 1922. In so far as applicable, section 9039 provides: "No property hereinafter mentioned shall be liable to attachment, execution or sale on any final process issued from any court in this state, against any person being a resident of this state and the head of a family." Then follow eight subdivisions, each describing a class of chattels that are exempt. We are concerned only with the last subdivision, which is as follows:

"Eighth. The tools and instruments of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business; the library and implements of any professional man.

"All of which articles hereinbefore intended to be exempt, shall be chosen by the debtor, his agent, clerk or legal representative, as the case may be."

It is argued on behalf of plaintiff that the above quoted provision exempts to a professional man his library and implements, whether he is the head of a family or not. Stress is placed on the word "any" in the clause, "the library and implements of any professional man," and it is contended that the word "any" in this clause exempts to every professional man his library and implements. Plaintiff cites and relies on the cases of *Roberts v. Moudy,* 30 Neb. 683, and *Shreck v. Gilbert,* 52 Neb. 813, to support its contention.

In *Roberts v. Moudy, supra,* the second paragraph of the syllabus is as follows: "The library and implements of a professional man, a resident of the state, are exempt under section 530 of the Code (section 9039, Comp. St. 1922),

whether he is the head of a family or not." This language certainly tends to support plaintiff's theory. The first paragraph of the syllabus in that case, however, discloses, and it was therein held, that the debtor was a resident of the state, the head of a family, and entitled to the benefit of the exemption law. Such being the case, it was clearly unnecessary for the court to go farther and determine whether or not one, who was not the head of a family, was entitled to the exemption claimed. Since it was unnecessary to a determination of the case, the rule announced must be regarded as mere dictum.

In the case of *Shreck v. Gilbert, supra,* the third paragraph of the syllabus is as follows: "The library of an attorney at law, a resident of the state, is exempt under section 530 of the Code of Civil Procedure (section 9039, Comp St. 1922)." While the opinion does not disclose whether the debtor in that case was the head of a family, resort to the record does show that the debtor was a resident of the state and the head of a family, so that, as applied to the facts as they existed in that case, the holding in *Shreck v. Gilbert, supra,* was proper, but the statement of law, standing alone, is misleading. It was unnecessary in the *Shreck* case to determine whether one, who was not the head of a family, was entitled to the exemption.

We think that a careful analysis of the statute makes it quite clear that the exemption must depend upon the first paragraph of section 9039 *supra,* and the exemption therein allowed is to "any person being a resident of this state and the head of a family." The argument that the eighth subdivision, standing alone, grants an exemption to any professional man is not sound. By examining the eighth subdivision, it is apparent that no exemption is therein provided. It merely describes a list or class of property, but, to determine that there is any exemption and who is entitled thereto, resort must be had to the first paragraph of the section above quoted. The first paragraph of the section must be read in connection with, and as though it

formed a part of, each of the separate subdivisions or classifications of property mentioned in that section.

The rule announced in the second paragraph of the syllabus in *Roberts v. Moudy, supra,* is not the law and is overruled. The opinion in *Shreck v. Gilbert, supra,* in so far as it appears to be in conflict with this opinion, is also overruled. Apparently, the learned trial judge rendering the decision in the instant case did not feel at liberty to disregard, but followed, the rule erroneously announced in *Roberts v. Moudy, supra.*

It follows that the judgment of the district court is erroneous and is reversed, and the cause remanded, with directions to enter judgment for the defendant.

REVERSED.

IRVIN R. MOREARTY, APPELLANT, V. CITY OF MCCOOK, APPELLEE.

FILED JUNE 1, 1928. No. 25952.

1. **Municipal Corporations:** CONTRACTS. Where a contract in written form is signed by a paving engineer who is to perform services in the construction of street paving for a city of the second class, of more than 1,000 and less than 5,000 inhabitants, which is delivered to such city, and, later, during the performance of the services, the city council directs the mayor to execute the contract, and the same is executed and a copy given to the engineer, who subsequently continues the work to completion, the contract becomes binding and its execution relates back to the first signing thereof by the engineer.
2. ———: ———: RECOVERY. Under such a contract as stated, if the engineer substantially performs the services required of him by its terms, he may recover from the city the compensation therein stated, in a suit thereon, and is not required to resort to an action *quantum meruit.*
3. ———: ———: ———: RECOUPMENT. In an action on such contract, the city may recoup damages, if any, which it suffered by reason of a failure to strictly perform the contract.
4. ———: ———: ———. The undisputed evidence shows that the contract in suit was performed by the appellant in all respects except that he failed to make the final estimates required,

and failed to make a valuation of the property benefited by the paving, and to assess the cost back against such property. *Held*, notwithstanding such failures, the appellant substantially performed the contract as required of him, and is entitled to recover the contract price for his services, less the reasonable and necessary expenses and damages, if any, which the city incurred and suffered, in completing said contract, as to the omissions stated.

5. ———: ———: RATIFICATION. A city may ratify a contract irregularly made in its behalf if it possessed power to make the contract in the first place.

APPEAL from the district court for Red Willow county: CHARLES E. ELDRED, JUDGE. *Reversed.*

Bernard McNeny, and *C. D. Ritchie*, for appellant.

Perry & Van Pelt, John F. Cordeal, and *L. H. Cheney, contra.*

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

HOWELL, J.

This is an appeal by plaintiff, also appellant, from a judgment against him rendered at the close of his testimony, on the motion of appellee, also defendant, dismissing plaintiff's petition and cause of action.

It is expedient to fix in mind the precise issues involved. Plaintiff's petition alleged: The plaintiff was employed as "consulting engineer" to assist in constructing all pavements and sewers in McCook to be let within one year from June 27, 1925. On that date plaintiff signed a written contract relating to that work, and delivered it to the defendant. About April 9, 1926, defendant signed that contract and delivered a copy to the plaintiff. During the year defendant contracted paving as follows: October 12, 1925, First street job for $126,301.03; January 18, 1926, Second street job for $210,007.64; and March 29, 1926, Third

street job for $197,429.55. Plaintiff performed the work required of him under the terms of the contract as to plans, specifications, estimates, supervision and inspection, and defendant received, accepted and retained the benefits thereof. The October, 1925, contract was completed and accepted July 12, 1926; the January 18, 1926, contract was completed and accepted August 12, 1926; the March 29, 1926, contract was completed and accepted October 11, 1926, by reason of which there was due plaintiff $26,686.86, less payments made to him by the city on November 23, 1925, $867.26, December 28, 1925, $1,910.50, and March 8, 1926, $800. Plaintiff prayed judgment for $23,109.10, interest and costs.

Defendant answered, admitting its incorporation, and denying all other allegations in the petition, and affirmatively alleged: About April 13, 1925, plaintiff accepted an appointment as its city engineer at a salary of $4 a day, for time engaged, but not to exceed $300 per annum. He took the oath of office and continued to be and act as city engineer until April 13, 1926. During all of that year defendant "was entitled to the time, *skill and services of plaintiff* at the salary so agreed upon, and that the *pretended contract and agreement, set forth in plaintiff's petition,* was and is *against public policy and void.*" Plaintiff was estopped because he disregarded his duties as "such city engineer," by improper advertisements for bids, improper blue prints, divulging information to preferred bidders, preventing competition, unskilful inspection, not requiring skilful work, permitting inferior material, allowing poor labor, causing acceptances of defective work and inferior quality of workmanship. Defendant prayed a dismissal of plaintiff's action, and for costs.

Plaintiff replied by general denial, and alleged that the work done by him was not such as would be performed by an ordinary city engineer; that he expended $14,369.56, in the performance of his contract, for other engineers, inspectors, surveyors and foremen, with the knowledge of defendant; that defendant adopted all plans and had re-

ceived his services and the services of those employed by him, with full knowledge of the details thereof; that the city council employed plaintiff as a "special engineer" to perform the work mentioned in plaintiff's amended petition, and that his compensation for said work was fixed by the defendant at the time of his employment to do said work.

The effect of the foregoing is admission of the contract and avoidance thereof, because plaintiff was city engineer on a salary of $4 a day, not to exceed $300 per annum. The city was entitled to his services as city engineer at the salary named, and "the pretended contract and agreement" was "against public policy and void."

The attempted plea of estoppel defeats itself since it presents conclusions amounting to nothing more than a mere breach of contract. The answer, in effect, admits plaintiff performed work contemplated in the written contract, in that it alleges, in general terms, wherein the performance of his duties were not efficiently complied with. So, in reasoning finally, it can be said the only issues before this court are: (1) Was the contract valid in law? (2) Did the plaintiff substantially perform the services required of him? (3) What sum, if any, is due from the defendant to the plaintiff under the provisions of the contract?

We have examined the record with care and are convinced that plaintiff never was the "city engineer" of the city of McCook on a salary. He performed all the work required of him by the written contract, except making the final estimates and assessments of the cost on benefited properties, which could have been done by him in six to eight days. Such failure affords a foundation for damages easily calculated, and the plaintiff should be paid the contract price for his services, less what was paid him by the city, plus the expenses of making final estimates and assessments. So far as the pavement is concerned, plaintiff fully performed his work, and the pavement was approved by the city and accepted.

The trial court, as shown by the bill of exceptions, stated its reasons for rendering judgment against the plaintiff. Among other things, it was said: "I am satisfied * * * that he (plaintiff) did not accept and never was the city engineer. * * * There is no question but that he did some work, beginning in May or June, 1925." Plaintiff did not complete the work. "He made no valuation of the work done for assessment against the property." We add, he did not make the final estimates for work done by the contractors. "He has founded his case upon a contract. * * * One of the first exhibits was the minutes of the proceedings of the council under date of April 9 (1926). The wording of the resolution * * * was that the mayor be authorized and instructed to sign the contract with the plaintiff * * * indicating by the very wording of it * * * that the mayor was never authorized to enter into any contract * * * prior to that time. * * * The contract became effective as the contract of April 9, 1926; prior to that it was a mere proposition." "He says that he entered into the contract and signed it himself, * * * and (it) was thereafter signed and executed by the defendant. * * * Now, there comes the question of departure and variance. * * * If work was performed prior to that time, and some of it was performed, it was performed without any agreement as to compensation. * * * Now, if he performed without any contract, * * * then, he cannot recover upon this contract at all, but must recover upon *quantum meruit.*" We have quoted thus extensively from the statements of the trial court, because it shows the precise question to be decided.

The evidence discloses, without conflict, that, on June 27, 1925, pursuant to prior negotiations, plaintiff signed the written contract in suit, which fixed his compensation and required him to give a $10,000 bond to the city, which recites: "Whereas, said principal has been employed by the city of McCook, Nebraska, as consulting engineer, covering certain paving work, in accordance with this proposal," conditioned that plaintiff shall "comply with all the terms, covenants and conditions of said contract," etc. The bond

was filed with the city authorities and accepted. Subsequent to that time, plans and specifications, blue prints and instructions to bidders were prepared by plaintiff and accepted and used by the city. Later, other and similar plans, etc., were prepared on two additional paving contracts. Those documents cover more than 120 legal size pages of single spaced typewriting. They were all accepted. They related to work aggregating $533,738.22. The three paving jobs were accepted by the city, one on July 12, 1926, and one on August 12, 1926, and one on October 11, 1926.

Plaintiff testified he prepared the plans and specifications, made surveys, set stakes and inspected and supervised all of the paving done. He had four inspectors, two of whom he paid $200 a month, and two $125 and $100, respectively. He also employed the Omaha Testing Laboratories and paid them 3 per cent. per square yard for 150,000 square yards of pavement. He remained at work until in October, 1926—"put in all of my time after June 27, 1925." The mayor testified that all of the city officers knew Morearty was on the job, and that the compensation he was to receive was talked over among them. A city councilman testified that Morearty was doing the engineering work when the contracts for paving were let, drew up the plans and specifications, and looked after the work, having inspectors and chemists employed.

A few days after the mayor signed the contract on April 9, 1926, a new council came into office. While it did not discharge plaintiff, it "just left him alone."

Defendant offered no proof. So far as the record shows, it is barren of any neglect of duty, misconduct or dishonesty on plaintiff's part; nor does it disclose any damage to defendant. There was no fraud in the signing of the contract by the mayor on April 9, 1926. It is fair to assume, from all the facts and circumstances, that a failure to sign the contract at an earlier date was the result of inadvertence or carelessness. If, in truth, the council had orally or tacitly agreed to pay for the services of plaintiff according to the contract terms, it was good morals for the

mayor to sign when he did. The city had received his services and the benefit of large expenditures. Before a party to a contract can deprive another of its benefits, he must plead and prove something more than appears in this case. The record does not even suggest healthy suspicion. Much is said in appellee's brief about the council meeting of April 9, 1926, being a special meeting and illegal.

On April 12, 1926, there was a regular meeting, the minutes of which show that the minutes of the meeting of "April 9 was read and approved." The minutes of October 12, 1925, show the allowance of a bill to plaintiff of $925. It also shows an acceptance of a paving bid for a part of District No. 8, "in accordance with the plans and specifications of I. R. Morearty, city engineer, on file." Another resolution was passed at that meeting, providing for the paving of other parts of District No. 8 "in accordance with plans," etc., "prepared by I. R. Morearty * * * now on file."

July 12, 1926, minutes approved and accepted paving in District No. 8 under the October 12, 1925, contract as "fully completed according to the terms of the plans and specifications" made by plaintiff.

Minutes of January 18, 1926, show contract for paving "in accordance with the plans," etc., "of I. R. Morearty." At the same meeting, it was resolved to pave a part of District No. 8 "in accordance with the plans," etc., "prepared by I. R. Morearty."

Similar minutes appear for March 29, 1926. There are many references, in the minutes, to I. R. Morearty, city engineer.

As to the law, we have little difficulty. It is contended by appellee that complete performance of a contract is a condition precedent to a recovery thereon. The authorities cited do not so hold. Substantial performance is all that is required.

The cases cited by appellee are sound law where applicable. No one will question that one who takes office must perform all official duties for the compensation fixed by

law. Morearty was not an officer; nor is it doubted that persons contracting with cities are bound to know the limitations of the power of the city to contract. Nowhere is it claimed in the briefs that the city of McCook had no *power* to contract. The question is: Did it contract? We think it did. Indeed, there was no issue presented as to the execution or validity of the contract except the allegation in the answer that it was void as against public policy, solely upon the ground that Morearty was an officer of the city and owed all his time and skill to the city for $300 per annum.

In *Standard Bridge Co. v. Kearney County,* 95 Neb. 455, it is held that a county may ratify any contract it has the power to make in the first place. The contract was written out in full and signed by Morearty on June 27, 1925. Its terms were never changed. It was delivered to and retained by the city. The bond for $10,000 was executed and accepted. The work was performed under its provisions. The amount Morearty was to be paid for his services was definite. The city made payments from time to time. No one was deceived. Section 4169, Comp. St. 1922, does not require the compensation of employees to be in writing; it may be fixed "at the time" of employment. Section 4180, Comp. St. 1922, provides for employing a "special engineer" for "improvement of streets," which it may "deem expedient."

In *MacLeod v. City of Washburn,* 178 Wis. 379, it appears that an attorney was employed. The city council "took no action looking toward the employment." The council had knowledge of his employment and acquiesced therein by passing a resolution "discontinuing plaintiff's service on behalf of the city." The court held: "A municipal corporation may ratify the unauthorized acts and contracts of its agents which are within the scope of its corporate powers, and such ratification is equivalent to previous authority"—quoting from *Koch v. City of Milwaukee,* 89 Wis. 220, 228.

On the question of substantial compliance with the contract, it was held in *Library Board v. Ohlsen*, 110 Neb. 146, that, where a contract for a building has been substantially performed, and "the building was accepted," the measure of damages to the accepter "would be the cost of remedying the defects." See, also, *Craig v. Weitner*, 33 Neb. 484.

For the reasons stated, the judgment of the trial court is vacated and the cause remanded, with permission to defendant, city of McCook, to amend its answer setting up its damages, if any, occasioned by the failure of appellant, the plaintiff below, to make the final estimates and assessments of the cost of the paving in question, if it so desires. Costs will be taxed to appellee.

REVERSED.

NORTHWEST READY ROOFING COMPANY, APPELLEE, V. CHRIS F. ANTES, APPELLANT.

FILED JUNE 1, 1928. No. 26003.

1. **Trade-Names:** INJUNCTION. As to the right to injunctive relief to protect a business name, this case is ruled by *Basket Stores v. Allen*, 99 Neb. 217; *Regent Shoe Mfg. Co. v. Haaker*, 75 Neb. 426; *Consolidated Fuel Co. v. Brooks*, 91 Neb. 421; and *Carter Transfer & Storage Co. v. Carter*, 106 Neb. 531.
2. **Equity.** The doctrine that a plaintiff who comes into a court of equity with unclean hands will be denied relief has no application, unless his wrongdoing has some proximate relation to the subject-matter sought to be litigated.
3. **Trade-Names:** INJUNCTION: LACHES. Mere laches is no defense to a suit in equity to enjoin a continuing wrongful and fraudulent use of a trade-name.
4. **Corporations:** TRADE-NAMES: INJUNCTION: DEFENSES. It is not a defense to a suit to enjoin the wrongful and fraudulent use of a trade-name, that the defendant is using such name in his business in this state, and the plaintiff is a foreign corporaation, doing business from a regular place of business in Nebraska, without having complied with the state statutes relating to foreign corporations.
5. ———: FOREIGN CORPORATIONS: NONCOMPLIANCE WITH STATUTE. The state of Nebraska, having prescribed certain con-

ditions upon which foreign corporations may do business in the state, prescribing certain monetary penalties for violation thereof, the state only can complain of a failure to conform to its statutory requirements, and the prescribed penalties are exclusive in so far as third persons are concerned.

6. **Technicalities** are not favorites of law or equity. Courts relish them as instruments to prevent injustice, but not to defeat justice.

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

Burkett, Wilson, Brown & Wilson, for appellant.

Crossman, Munger & Barton and *Woods, Woods & Aitken, contra.*

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

HOWELL, J.

Appellant, defendant below, comes by appeal to this court from a decree enjoining him from using the appellee's name, or any similitude, in his business. The petition shows that, in 1915, there was an Illinois copartnership in appellee's name, composed of E. D. and W. F. Schuth. They operated a branch in Lincoln, Nebraska, until in June, 1916, when they incorporated in Illinois and were taken over entirely by the corporation—name, debts, assets and business. In 1917 the Lincoln branch was moved to Omaha, maintaining, however, salesmen in Lincoln. In March, 1920, the appellee was incorporated in Nebraska for the purpose of taking over—and did—the Illinois corporation's business in this state, and has ever since conducted the business from Omaha. During the whole embraced period of time, the business was of the same character, still is, and will so continue to be. Prior to and during 1915 appellant was a salesman in Chicago for the copartnership. When the Lincoln branch opened, he was transferred to it and assisted in conducting the business

until in 1917, when the Lincoln branch was transferred to Omaha. Appellant remained with the Illinois corporation as its salesman and collector, under the supervision of the Omaha branch, for 18 months.

In 1918 appellant launched an individual business, of the same character, in Lincoln, under the name of "Northwest Ready Roofing Company," and has continued therein until the filing of the petition in this action, under that or similar deceptive analogues, changing them from time to time. He was doing business of the same kind, using the same methods, plans, materials, manner of advertising, and soliciting business in the same territory, with the same customers as appellee, in and from the same offices or place of business formerly occupied by appellee or its predecessors. There were other allegations, such as requests to appellant to cease his objectionable methods, confusion of names and business, publishing the name of appellee in telephone books and otherwise, etc., for his own benefit.

The answer admitted everything alleged in the petition, from 1915 to 1917 and prior thereto, that, since then, he has been doing the same kind of business as appellee and, in some instances, used a similar flag as that used by appellee for advertisement, and used the same name. Otherwise, the answer was a general denial, with affirmative allegations that the Illinois corporation never complied with the laws of Nebraska relating to doing business by foreign corporations; was an outlaw, pirate and evader of the statutes, and appellee was guilty of laches.

The proofs are conclusive that appellant's conduct cannot be defended or tolerated in the business world by the courts. In that phase, this case is ruled by *Basket Stores v. Allen,* 99 Neb. 217; *Regent Shoe Mfg. Co. v. Haaker,* 75 Neb. 426; *Consolidated Fuel Co. v. Brooks,* 91 Neb. 421; and *Carter Transfer & Storage Co. v. Carter,* 106 Neb. 531. This leaves the questions of laches and "piracy" to be considered.

This is not an action for damages, but one for injunctive relief that apprehends appellee's future business field. The

failure of a foreign corporation which comes into the state with property, fixes itself a home, pays taxes, submits itself to immediate and personal service of process, operated by domiciled management, and otherwise subjects itself to the laws of the state, to strictly comply with the statutes, does not so shock the conscience of the chancellor as to make it a prey to all evilly disposed persons. The state alone possesses power to correct such wrongs as offend against sovereignty alone. We do not have before us a case of balancing wrongs or comparing things *malum in se.* We have held that an unlicensed automobile is not an outlaw to be denied the protection of law. *Pratt v. Western Bridge & Construction Co.,* 116 Neb. 553. The appellee has at no time been a nuisance, trespasser, or outlaw. Section 682, Comp. St. 1922, provides that "each foreign corporation * * * owning or using a part or all of its capital or plant in this state * * * shall make a report in writing" within a time fixed. Sections 683 and 684 require what the report shall contain, and payment of an annual fee. Section 691 provides a money penalty for failure to report, while section 694 allows a remission thereof in the discretion of the "governor, secretary of state and attorney general." None of the sections mentioned prohibit corporations in appellee's class from doing business in Nebraska. If sections 634 and 639 do, they carry the penalty.

The following cases seem to settle the point that the state only can complain that a corporation has not complied with its laws: *General Film Co. of Missouri v. General Film Co. of Maine,* 237 Fed. 64; *Wright v. Lee,* 2 S. Dak. 596; *Fritts v. Palmer,* 132 U. S. 282; *Fortier v. New Orleans Bank,* 112 U. S. 439; *Reynolds v. Crawfordsville Bank,* 112 U. S. 405. Cases holding that an assignee of good-will may use the old name, *United States Light & Heating Co. of Maine v. United States Light & Heating Co. of New York,* 181 Fed. 182; that no state policy is violated, *Booth & Co. v. Weigand,* 30 Utah, 135; *Washburn Mill Co. v. Bartlett,* 3 N. Dak. 138; *Wright v. Lee,* 2 S. Dak. 596; *Kraft v. Hoppe,* 152 Minn. 143; that a statutory penalty is exclu-

sive, *Fritts v. Palmer,* 132 U. S. 282; *David Lupton's Sons Co. v. Automobile Club,* 225 U. S. 489; *Kraft v. Hoppe,* 152 Minn. 143—may be multiplied.

Laches is not a defense to an equity suit to enjoin a fraudulent imitator of another's business or trade name from persisting in the wrong. *Zweck v. Aberdeen Laundry & Dry Cleaning Co.,* 44 S. Dak. 176; *Nolan Bros. Shoe Co. v. Nolan,* 131 Cal. 271; 38 Cyc. 881. Laches, estoppel and limitations have some elements in common. Laches may be invoked prior to the running of the statute of limitations, but only upon equitable terms. It is not available to the appellant. His invasion of appellee's rights was deliberate, persistent, continuing, resourceful and, at times, elusive. We agree with every proposition of law stated in appellant's brief relating to equity rules—"unclean hands," *pari delicto,* and "piracy"—but fail to appreciate their application to the facts before us. Some of appellant's contentions are distinctly technical and are not accepted. A technicality should be temperately resorted to at all times, but not to defeat plain justice. Like every known rule of law, it may be liberally applied to oppose, not aid, a manifest wrong.

Every allegation, and more, contained in appellee's petition is sustained by the proofs, the most damaging having come from the appellant, himself.

The decree of the trial court is the only one that could be properly made, and it is

AFFIRMED.

CLAUDE COPLEY FLANSBURG, APPELLANT, V. NETTIE SHUMWAY, EXECUTRIX, APPELLANT: FARMERS IRRIGATION DISTRICT ET AL., APPELLEES.

FILED JUNE 1, 1928. No. 26333.

1. **Mortgages:** STATUTORY PROVISIONS. Statutory provisions in force at the time of the execution of a mortgage enter into and become part of the contract.
2. **Waters:** IRRIGATION DISTRICTS. Irrigation districts are quasi-

public corporations, in the sense that they are organized for general public good, with power to assess property within their boundaries for the purpose of raising revenue to secure water to irrigate arid lands.

3. ———: ———: ASSESSMENTS: PRIORITY. Irrigation district assessments are taxes, within the meaning of section 17, ch. 73, Laws 1903, and section 5825, Comp. St. 1922, making general taxes a first lien on real estate, and take priority over an existing mortgage lien.

4. **Mortgages**: FORECLOSURE: STIPULATIONS. The parties to a mortgage foreclosure suit, wherein certain irrigation district assessments were given priority over the mortgage lien, could not challenge the right and power of the district to levy assessments after having stipulated that the organization of the district was legal and the levy and assessment were duly made.

5. **Taxation**: LIEN. The lien of taxes regularly levied on real estate is, ordinarily, perpetual and can be divested only by payment or in some manner authorized by statute.

6. **Waters**: IRRIGATION DISTRICTS: TAXES: LIEN: PRIORITY. Where a county treasurer executed, in favor of an irrigation district, a tax sale certificate and receipts for subsequent taxes, but did not deliver them to the district, and no actual payment was made, the tax liens were not destroyed by the expiration of the statutory period for enforcing the liens under the certificate, and retained their right to priority over an earlier mortgage lien.

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

C. C. Flansburg and *B. M. Shumway*, for appellants.

Raymond & Fitzgerald, contra.

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

LANDIS, District Judge.

Appellant here, plaintiff below, obtained a decree of foreclosure. There is no controversy over plaintiff's mortgage, the amount, or that it was due. Certain taxes were given priority over the mortgage lien. Plaintiff's appeal raises the questions of the existence of the taxes, priority

of taxes, if existing, over contract lien, and effect of a tax sale certificate.

Defendant mortgagor, Nettie Shumway, files a separate appeal naming herself as coappellant, wherein she consents to the foreclosure of plaintiff's mortgage, but insists that the apparent lien of the taxes is of no force and effect because of the failure to enforce a tax sale certificate. The cause was heard upon an agreed statement of facts.

In 1910 a mortgage was executed on a parcel of land in an irrigation district, which was duly assigned to plaintiff. On the 6th day of January, 1917, the plaintiff executed and delivered a formal release of this mortgage which was recorded. The instant foreclosure decree is based upon a mortgage executed November 18, 1916, recorded December 18, 1916, securing a note dated January 1, 1917. One of the covenants of this mortgage was: "To pay all taxes, assessments and charges, of every character, levied or charged in Nebraska, which are now, or may hereafter become liens upon said real estate." This mortgage secured the same debt as the mortgage formally released by plaintiff January 6, 1917. In 1917, and each of the subsequent years 1918 to 1922, inclusive, there were levied upon the premises covered by the mortgage, state, county, school and irrigation district taxes, all of which were regularly assessed and levied as provided by law. The date upon which the particular irrigation assessment for the year becomes a lien is fixed in section 2877, Comp. St. 1922, as the 1st day of October in the year in which it is assessed. The state, county and school taxes were a lien from the 1st day of October of the year in which levied, under the 1903 revenue act, December 1st under the 1921 act, section 5822, Comp. St. 1922.

The taxes levied from 1917 to 1922, inclusive, have not been paid. In 1903 a new general revenue act was passed, the first since 1879. Section 17, ch. 73, Laws 1903, of that act provides: "All general taxes due the state, county, school district, irrigation districts, town, road districts, city or village, shall be a first lien on the real estate on

which levied and take priority over all other incumbrances and liens thereon." This section was in force until the 1921 law, where it appears as: "All general taxes due the state and its governmental subdivisions shall be a first lien on the real estate on which levied and take priority over all incumbrances and liens thereon." Comp. St. 1922, sec. 5825.

Statutory provisions in force at the time of the execution of a mortgage enter into and become a part of the contract. The 1910 mortgage which was assigned to plaintiff and formally released and the new mortgage of 1916 upon which the decree of foreclosure is based were contract liens upon land in an irrigation district, both subject to such liens of the kind specified as may afterward be acquired under the statute. Plaintiff contends that the assessments due the irrigation district are not in a strict sense taxes, but are special assessments, the lien of which is positively fixed by section 2877, *supra,* relating to irrigation districts. There is no attempt to fix priorities in this section as between liens. Reference for that must be made to section 17 of the 1903 act, and section 5825, *supra.* On the question of priority of special assessments over existing liens created by contract plaintiff cites *Lincoln Street R. Co. v. City of Lincoln,* 61 Neb. 109, and *City of Lincoln v. Lincoln Street R. Co.,* on second appeal, 67 Neb. 469. The first opinion, 61 Neb 109, was filed January 4, 1901, and the second opinion, 67 Neb. 469, February 4, 1903, while section 17, ch. 73, *supra,* became effective September 1, 1903. In these cases a contract lien was held superior to certain special paving assessments, but such holding was because of a statute, section 79, art I, ch. 13*a,* Comp. St. 1899.

Board of Commissioners v. Northwestern Mutual Life Ins. Co., 114 Neb. 596, cited by plaintiff, does not apply. There a drainage special assessment was held inferior to the contract lien because notice was not given to the mortgagee of record of the proposed organization of the district. There was no regularly assessed and levied special assess-

ment to create a lien so far as the mortgagee was concerned.

There is a distinction between the meaning of "taxes" and "assessments" based on different classes of public burdens. Taxes are imposed for general revenue, assessments for public improvements, mainly locally beneficial. Irrigation districts are quasi-public corporations in the sense that they are organized for general public good, with power to assess property within their boundaries for the purpose of raising sufficient revenue to secure water to irrigate arid lands. Irrigation districts have the power to levy taxes in the nature of assessments. This power is defined by statute. By including "irrigation districts" in section 17, *supra,* in reference to priority of taxes over contract liens, necessarily what taxing powers the district had would be intended. The priority between general taxes and special assessments is provided for in section 5826, Comp. St. 1922.

Assuming the existence of the taxes, we are forced to the conclusion that the trial court properly found plaintiff's contract lien inferior thereto.

Plaintiff and coappellant both claim that the irrigation district had no right or power to levy any special assessments on the land involved in the instant foreclosure because the same was sold with a perpetual water right attached. In view of the stipulation entered into, this contention is without merit. It was agreed that in the year 1917 "there was duly levied and assessed by the proper officials of the Farmers Irrigation District, in due form of law, upon the premises in controversy, the sum of $268.80 for general irrigation district purposes and the further sum of $134.41 for bond fund; that said assessment was duly certified by the county clerk of Scotts Bluff county, Nebraska, and duly enrolled upon the assessment rolls of Scotts Bluff county, which rolls were delivered to the county treasurer of Scotts Bluff county in accordance with the laws of Nebraska." "That for the years 1918, 1919, 1920, 1921, and 1922, there were duly levied and assessed by the

proper officials of the county and of the Farmers Irrigation District, which levies and assessments were duly enrolled and duly certified, all as required by the laws of the state of Nebraska, sums for state, county, school district taxes and for irrigation district taxes and assessments for the respective years and in the amounts following, all of which assessments were made upon the premises in this action." "That for all years subsequent to 1912 the Farmers Irrigation District duly levied and assessed taxes for irrigation purposes in accordance with the laws of the state of Nebraska, in funds for general irrigation purposes and for bond payment purposes; that such assessments and taxes for the years prior to 1917 were paid by the owner of said premises." It was further stipulated that the Farmers Irrigation District was duly organized in accordance with the statutes; that the premises were within its boundaries and have remained therein to date. Plaintiff and coappellant, having stipulated the organization of the district as legal, and the due levy and assessment of the taxes for irrigation purposes, cannot now challenge the right and power of the district to levy the assessments.

For the purpose of the instant case, we must assume the irrigation district had the right and power to levy the assessments in controversy. A direct agreement of the due exercise of a power ordinarily precludes asserting want of power.

1917 taxes on the land became delinquent, were advertised for sale, and were not sold for want of bidders. On December 16, 1918, the county treasurer of Scotts Bluff county issued a tax sale certificate to the irrigation district for these delinquent 1917 taxes. For the respective years 1918 to 1922, inclusive, the county treasurer issued tax receipts reciting that the taxes were paid by the irrigation district on this land as subsequent taxes. The tax sale certificate and the tax receipts reciting payment of taxes subsequent were retained by the county treasurer, were never delivered to the irrigation district, and are now a part of the records of his office. Nothing was received by the

treasurer for the tax sale certificate nor for the respective tax receipts issued as paid subsequent. No payment on account of the taxes and assessments for the years 1917 to 1922, inclusive, on coappellant's land has ever been made to the county treasurer, to the officials of any governmental subdivision, or to the officials of the irrigation district, and no part of said taxes have been actually paid. Under these conditions, plaintiff and his coappellant earnestly contend that all the taxes included in the tax sale certificate and noted as paid subsequent should be canceled of record; that the tax liens thereunder are destroyed and of no force and effect because the purchaser failed to enforce its tax sale certificate.

There are two distinct processes to the exercise of the power of taxation. One relates to the levying of the tax, the other to the collection of the taxes levied. A tax sale certificate comes under the provisions of the law which prescribe the manner of enforcing the payment of tax liens. The lien of taxes regularly levied on real estate is, ordinarily, perpetual and can be divested only by payment or in some manner authorized by statute. The way provided under our various revenue acts for a county or irrigation district to enforce its tax liens is by foreclosure and judicial sale. This cannot be done except based upon a tax deed or tax sale certificate. Delinquent taxes are advertised and the individual acquires a tax sale certificate upon the payment of money or its equivalent. The law maintains the lien in force for the statutory period to enable the purchaser to get his money with interest. If the individual purchaser takes no steps to enforce the tax lien which is acquired by the payment of money, it may be lost and the lien is canceled. However, in such event the county or irrigation district has received its taxes. When the county or governmental subdivision acquires a tax sale certificate no money is paid. It is simply a means to enforce the payment of the lien of taxes. If the statutory period passes without the county or irrigation district taking any steps to enforce the lien, the lien itself is not lost, because no pay-

ment of the lien has been made. In order to enforce the lien a repurchase of the taxes must be made for the years covered by the prior purchase. *Valley County v. Milford*, 70 Neb. 313; *Logan County v. Carnahan*, 66 Neb. 685, 693; Comp. St. 1922, sec. 2877.

In the instant case the state, county, school district and irrigation district have had no actual payment of the respective tax liens. They still exist, but the right to enforce them under the tax sale certificate issued has been lost. The stipulation by the parties that no money or its equivalent has been received by the county treasurer, the Farmers Irrigation District, or any of the officials thereof, nor any other governmental subdivision, for the taxes or assessments or any part thereof, makes plaintiff's and coappellant's contentions that these taxes do not exist and should be canceled and annulled untenable.

The trial court rendered proper decree under the issues and stipulation, and its judgment is in all things

AFFIRMED.

SOPHIA E. SHANAHAN, APPELLEE, V. FIDELITY-PHENIX INSURANCE COMPANY, APPELLANT.

FILED JUNE 1, 1928. No. 25986.

1. **Limitation of Actions:** REFORMATION OF CONTRACT: FRAUD. A cause of action to reform a contract of insurance for fraud or mutual mistake is barred by the statute of limitations in four years after the discovery of the fraud or mistake.
2. ———: ———: ———. Where an action at law is brought within the period of limitations upon an insurance policy, an amended petition seeking to reform the policy declares upon a new cause of action, and is barred by the statute of limitations, unless the amended petition is filed within four years from the time the cause of action declared upon accrued.

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

Stout, Rose, Wells & Martin and *Winthrop B. Lane,* for appellant.

W. F. Moran and *Edwin Moran, contra.*

Heard before GOSS, C. J., GOOD, THOMPSON, EBERLY, and HOWELL, JJ., and PROUDFIT and REDICK, District Judges.

REDICK, District Judge.

Action to reform a fire insurance policy and to recover a loss sustained thereunder. The property in question constituted the homestead of Sophia and Robert Shanahan, the title being in Robert. For several years prior to the issuance of the policy, plaintiff was living in the premises and the husband, Robert, was living in Colorado, but in September 1922, he returned to Nebraska City and was living with his wife in the premises at the time of the fire. The policy was issued June 10, 1920, for $2,000, in the name of Robert M. Shanahan, during his absence, and the premium paid by plaintiff.

The original petition by Sophia E. Shanahan against the insurance company and her husband was based upon the proposition that, as plaintiff had paid the premium and the property constituted the homestead of the parties, she was entitled to sue upon the policy. It was alleged in the petition, *inter alia,* that the husband was insolvent and attempting to collect the loss and use it for his own purposes without repairing the building, and an injunction was asked restraining the insurance company from paying the amount of the loss to the husband. The loss was alleged at $700 and judgment asked therefor. The insurance company answered, admitting the issuance of the policy and an adjustment of the loss with the husband at $279.05, offering to pay that amount into court, which was subsequently done, where it still remains. The husband filed no answer, but made default. Plaintiff replied, but it will not be necessary to take special notice thereof. The case was submitted to the jury, who returned a verdict for

the plaintiff for $608.33, on which judgment was rendered. Defendant insurance company appealed, and the judgment was reversed on the ground that, the policy having been issued to Robert M. Shanahan and no reformation thereof having been asked, the plaintiff could not maintain the action. The opinion was by the commission and closed with the following paragraph:

"Now, it appears that the loss has been adjusted between the defendant insurance company and the husband, who was the insured named in the policy, and that the money due under the adjustment is now in court. The husband defaulted in the action, and no doubt, on the record as it stands, the trial court has the authority to order the amount now in court turned over to plaintiff. But the limit of the liability of the insurance company is the sum so paid into court. We recommend that the judgment of the trial court be reversed and the cause remanded for proceedings in harmony with this opinion."

The opinion of the commission was adopted by the court and mandate issued in accordance therewith. Thereupon plaintiff filed in the district court an amended and supplemental petition setting forth the same matters as in the original petition, and in addition alleging that there was a mutual mistake in inserting the name of Robert M. Shanahan in said policy, and that the intention was to insure plaintiff's interest in said property, and asking a reformation and for judgment for $700. A new summons was issued and served upon the insurance company, which filed an answer denying any mutual mistake, alleging that the decision of the supreme court was a final disposition of the case, and that the action for a reformation of the policy was barred by the statute of limitations, and other matters not necessary to be stated. The case was tried to the court and decree rendered finding that a mutual mistake had been made, and that it was the intention of plaintiff to insure her interest in said premises, and decreeing a reformation of the policy and a judgment for plaintiff in the sum of $591.42. The insurance company appealed.

Whether or not, in view of the decision and mandate upon the former appeal, the district court had authority to permit the filing of an amended and supplemental petition, or whether its sole duty was to order the money deposited in court paid over to the plaintiff, is a serious question, but one which we do not deem necessary to decide in view of our holding upon the other question in the case.

The policy was issued June 10, 1920. The amended petition was filed July 23, 1926. The statute of limitations of this state against an action to reform a contract for fraud or mutual mistake is four years from the discovery of the fraud or mistake. Plaintiff's contention that the amended petition merely amplifies the cause of action set forth in the original petition cannot be sustained. The amended petition is upon an entirely different cause, which is barred by the statute. *Clifford v. Thun,* 74 Neb. 831. Plaintiff was aware of all the facts at the time the policy was issued. The evidence is undisputed that the policy was intended to be written in the name of Robert M. Shanahan, that matter having been discussed between plaintiff and the agent of the company, the latter informing the plaintiff that it would have to be so written as the title was in Robert. The plaintiff claims that the agent stated that in case of fire the house would be repaired. Defendant's agent denied this, but admits he may have stated that the house would be repaired or the loss paid at the option of the company, which is in accordance with the policy as issued. The evidence is entirely insufficient to establish any fraud, and the question is immaterial in view of the fact that payment of the loss is secured to plaintiff by the decree upon the former appeal.

As to the amount of the loss, we think the adjustment between the insurance company and Robert M. Shanahan, in the absence of any claim of fraud or mistake, is binding upon the plaintiff. She executed no proofs of loss and made no claim against the insurance company until the bringing of this suit, and we think the decision upon the former appeal is the law of the case on this question. It

further appears that since the loss by fire plaintiff and her husband have been divorced and the real estate in question conveyed to plaintiff. It is therefore proper that the fund in court be paid to plaintiff.

It is therefore ordered that the judgment of the district court be reversed and the cause remanded, with instructions to pay the fund in court to the plaintiff and dismiss the action.

REVERSED.

JOHN W. KELSO, APPELLEE, V. SEWARD COUNTY, APPELLEE: STANDARD BRIDGE COMPANY, APPELLANT.

FILED JUNE 1, 1928. No. 25685.

1. **Negligence:** EXCAVATION IN HIGHWAY. Under the circumstances of this case, a motor car driver plunging into an excavation in a public highway at night is entitled to recover when barricade was down and warning lantern not burning.
2. **Appeal.** When ultimate responsibility rests with one defendant, he cannot complain that the jury did not also find against his codefendant.
3. ———: INSTRUCTIONS. When an instruction is substantially correct, a case will not be reversed because it is possible to improve the phraseology thereof.

APPEAL from the district court for Seward county: HARRY D. LANDIS, JUDGE. *Affirmed.*

John W. Battin and C. A. Sorensen, for appellant.

Claude S. Wilson, Thomas, Vail & Stoner, Roy F. Gilkeson, Hymen Rosenberg, McKillip & Barth and *Albert S. Johnston, contra.*

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

WHEELER, District Judge.

The action was brought to recover damages to plaintiff's

motor car and for personal injuries sustained from driving into an excavation on the public highway a few miles north of Seward, Nebraska.

The defendant Standard Bridge Company, by contract with the defendant Seward county, was engaged in the construction of a new bridge. The new bridge was several feet shorter than the old one and during the construction operations an excavation eight or ten feet wide and about eight feet deep extended across the highway on both ends of the bridge. The defendant had provided a detour around the bridge, erected a barricade across the highway at each end and hung a red lantern on the bridge. About 4 o'clock on the morning of October 4, 1924, the plaintiff, driving his Maxwell car in a southerly direction, plunged into the excavation. The barricade was down; the warning lantern on the bridge was out. The question of defendant's care in erecting and maintaining suitable barricades and warning signals was submitted to the jury under proper instructions. Plaintiff recovered a verdict of $1,500 against the defendant Standard Bridge Company, but failed to recover against Seward county. The verdict is amply supported by the evidence as to damage to plaintiff's car, personal injuries actually sustained, negligence on the part of the defendant, and lack of negligence on plaintiff's part.

We were not favored with an oral argument. The negligence of defendant is not seriously controverted in defendant's brief, but the errors relied on for reversal in defendant's brief are: (1) The inconsistency of the verdict as being against the bridge company only, and not against the county; (2) the wording of the court's instruction on comparative negligence.

It is argued that the obligation of maintaining a safe highway, of keeping barricades up and warning signals lighted, rested equally upon the county and the bridge contractor, and that the jury could not consistently find negligence on the part of the bridge contractor, and not on the part of the county. The evidence is ample to sustain

a verdict against the county, had the jury rendered one. It would seem that defendant bridge company could not object merely because there was no verdict rendered against the codefendant, Seward county. Plaintiff could object, but did not. In *Cleland v. Anderson*, 66 Neb. 252, we held that, while a plaintiff could complain of a verdict as inconsistent in holding one of several joint defendants liable, the defendants could not. This seems logical, but we strayed from this doctrine in *Gerner v. Yates*, 61 Neb. 100, and in *Mansfield v. Farmers State Bank*, 112 Neb. 583. The point, however, is immaterial to the correct determination of this action. The contract between Seward county and the Standard Bridge Company, erroneously refused admission as evidence, is attached to the record and shows that the defendant Standard Bridge Company contracted to hold Seward county harmless from any claim for damages brought in consequence of any neglect to safeguard the work. Even if the verdict had been against both defendants, under its contract with Seward county, the defendant bridge company would have been obligated to pay it. The contract should have been admitted in evidence. The jury reached the same conclusion as would have been reached had judgment been obtained against both defendants and Seward county been required to sue the defendant bridge company on the contract. There is no need of "going around Robin Hood's barn" to reach the correct conclusion. The judgment in this case as it now stands is right.

The other complaint is the wording of the court's instruction No. 17 on comparative negligence. It is almost impossible to frame an instruction in such language that exception cannot be taken to it. Reasonably astute counsel can find as many faults with an instruction as with an abstract, but no case should be reversed unless the instruction is actually misleading. In the case at bar no better instruction was submitted by the defendants on the question of comparative negligence.

The comparative negligence statute, section 8834, Comp. St. 1922, reads as follows:

"In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury."

The court's instruction No. 17 covering the subject reads as follows:

"The law is, however, that the contributory negligence of the plaintiff shall not bar him of his recovery in case his contributory negligence is slight and that of the defendants gross in comparison, but in such cases the contributory negligence of the plaintiff, if any such is proved, shall be considered by the jury in mitigation of damages in proportion to the contributory negligence attributable to him. If, therefore, you find and believe, from the evidence that the defendants were guilty of negligence proximately causing the accident, and that the plaintiff was negligent too, and negligent in a way that contributed to the accident as a proximate cause, but that the contributory negligence of the plaintiff was slight and the negligence of the defendants was gross in comparison, you may yet properly find for the plaintiff, but in arriving at the amount of his recovery you should consider the contributory negligence of the plaintiff in mitigation of his damages in proportion to the amount of contributory negligence attributable to him."

The court's instruction is an approximately correct exposition of the statute. It is true that it omits to stress the proposition that, if the negligence of the defendants falls in any degree short of gross negligence under the circum-

stances, the contributory negligence of the plaintiff, however slight, will defeat a recovery, which this court has approved in *Morrison v. Scotts Bluff County*, 104 Neb. 254, and *Mitchell v. Missouri P. R. Co.*, 114 Neb. 72. The court's instructions were couched in such terms as to convey a correct meaning of an abstruse statute to an ordinary juryman. The omission of a further dilation upon slight and gross negligence was, we think, immaterial in the jury's determination of the issues. No substantial miscarriage of justice has actually occurred. The error, if any, was immaterial and should be disregarded.

The judgment being so well substantiated by the evidence, and no material errors appearing in the record, it should be affirmed without further delay.

AFFIRMED.

EDWIN LYMAN, ADMINISTRATOR, APPELLEE, V. WALTER B. HALL, APPELLANT.

FILED JUNE 8, 1928. No. 25874.

1. **Negligence:** PUBLIC BATHING RESORTS. Failure to place and maintain warning signs or notices indicating the depths of water in different parts of a public bathing pool conducted for private gain may be evidence of negligence.
2. ———: ———: DUTY OF PROPRIETORS. "Proprietors of a bathing resort, in discharging the duty of ordinary care for the safety of patrons, may be obliged to keep some one on duty to supervise bathers and rescue any apparently in danger; and may also be held liable for negligence if, on information that a bather is missing, they are tardy in instituting search." 22 A. L. R. 636; *Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb. 563, and 50 Neb. 214.
3. ———: ———: ———. "Not only is it the duty of the owners of bathing resorts to be prepared to rescue those who may get into danger while in bathing, but it is their duty to act with promptness, and make every reasonable effort to search for, and, if possible, recover those who are known to be missing." *Larkin v. Saltair Beach Co.*, 30 Utah, 86, 3 L. R. A. n. s. 982.
4. ———: ———: ———. It is the duty of a bathing resort

keeper who grants privileges for compensation to make reasonable provision to guard against accidents liable to befall bathers who indulge in aquatic sports for which he has provided facilities and this may require an attendant to render assistance.

5. ———: ———: ———: CARE REQUIRED. Ordinary care to provide a reasonably sufficient number of attendants for the protection of bathers at a public bathing resort conducted for private gain is a standard of duty in that respect.

6. ———: ———: ———. The duty to exercise ordinary care to protect patrons of a public bathing resort conducted for private gain does not make the proprietor an insurer of their safety.

7. ———: ———: DEATH OF BATHER: PROXIMATE CAUSE. Evidence of negligence does not of itself establish a cause of action, but in addition plaintiff must show that negligence pleaded by him was the proximate cause of the alleged injury.

8. ———: SUFFICIENCY OF EVIDENCE. In an action against the proprietor of a bathing resort to recover damages for the death of a bather by drowning, the evidence outlined in the opinion *held* insufficient to sustain a verdict in favor of plaintiff.

APPEAL from the district court for Hitchcock county: CHARLES E. ELDRED, JUDGE. *Reversed and dismissed.*

Butler & James and *J. F. Ratcliff*, for appellant.

Scott & Scott, contra.

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

ROSE, J.

This is an action against the proprietor and keeper of a public bathing pool to recover damages in the sum of $20,200 for alleged negligence resulting in the death of Richard A. Lyman. He was drowned in deep water while bathing in the pool. His father, Edwin Lyman, instituted the action as administrator of decedent's estate. Walter B. Hall is defendant, and the negligence imputed to him consists of his failure to give proper notice of the depth of water in different parts of the pool; to provide suitable

guards and directors; to provide competent persons to recover and resuscitate bathers when overcome by water.

Defendant in his answer admitted that he owned and operated the bathing pool and that plaintiff's son was drowned therein, but denied the negligence charged in the petition and pleaded contributory negligence of the son as the proximate cause of his death. The reply to the answer was a general denial.

Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $5,000, which was reduced by remittitur to $3,000. From a judgment for the latter sum, defendant appealed.

The principal assignment of error assails the overruling of a motion to direct a verdict in favor of defendant on the ground that the evidence was insufficient to prove actionable negligence as the proximate cause of the bather's death.

Failure to place and maintain warning signs or notices indicating the depths of water in different parts of a public bathing pool conducted for private gain may be evidence of negligence. *Beaman v. Grooms*, 138 Tenn. 320, L. R. A. 1918B, 305; *Larkin v. Saltair Beach Co.*, 30 Utah, 86, 3 L. R. A. n. s. 982.

A leading case on the liability for negligence in conducting for private gain a public bathing resort is *Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb. 563, and 50 Neb. 214. That case has been cited in many jurisdictions. The main features of the opinion were recently reduced in an illuminating note by an annotator to the following form:

"Proprietors of a bathing resort, in discharging the duty of ordinary care for the safety of patrons, may be obliged to keep some one on duty to supervise bathers and rescue any apparently in danger; and may also be held liable for negligence if, on information that a bather is missing, they are tardy in instituting search." 22 A. L. R. 636, and discussion of later cases.

The supreme court of Utah also expressed the view that

proper care for the safety of bathers may require the attendance of some suitable person with the necessary appliances to effect rescues, saying:

"Not only is it the duty of the owners of bathing resorts to be prepared to rescue those who may get into danger while in bathing, but it is their duty to act with promptness, and make every reasonable effort to search for, and, if possible, recover those who are known to be missing." *Larkin v. Saltair Beach Co.*, 30 Utah, 86, 3 L. R. A. n. s. 982.

It is the duty of a bathing resort keeper who grants privileges for compensation to make reasonable provision to guard against accidents liable to befall bathers who indulge in aquatic sports for which he has provided facilities and this may require an attendant to render assistance. *Decatur Amusement Park Co. v. Porter*, 137 Ill. App. 448.

Ordinary care to provide a reasonably sufficient number of attendants for the protection of bathers at a public bathing resort conducted for private gain is a standard of duty in that respect. *Levinski v. Cooper*, 142 S. W. (Tex. Civ. App.) 959.

The duty to exercise ordinary care to protect patrons of a public bathing resort conducted for private gain does not make the proprietor an insurer of their safety. *Bertalot v. Kinnare*, 72 Ill. App. 52; *Rom v. Huber*, 93 N. J. Law, 360, 94 N. J. Law, 258; *Levinski v Cooper*, 142 S. W. (Tex. Civ. App.) 959.

Evidence of negligence does not of itself establish a cause of action, but in addition plaintiff must show that negligence pleaded by him was the proximate cause of the alleged injury.

With these principles of law in mind, did plaintiff prove that actionable negligence pleaded by him was the proximate cause of the bather's death? The answer depends on the evidence and the inferences from evidential facts and circumstances and requires consideration of nearly 200 pages of testimony.

Some of the material facts are not in dispute. For pri-

vate gain defendant conducted a public bathing and swimming pool in what was called "Riverview Park," a resort at or near Stratton, Nebraska. Lengthwise the pool extended east and west. On or near the north bank a bathhouse, a refreshment stand, a diving board, and a diving tower were located. On the south side there were swings, a spring board and a band stand. Richard A. Lyman, a boy about 16 years of age, residing at McDonald, Kansas, and a younger brother were at Riverview Park July 4, 1926. In the afternoon they rented and paid for the use of bathing suits and went into the pool. They were in and out of the water at different times. Richard was strong both mentally and physically, but he could swim very little, if any, and between 4 and 5 o'clock, or a little later, he was drowned near the center of the pool in deep water. The story disclosed by the record cannot be read without emotion, but the sufficiency of the evidence to sustain the verdict must be determined independently of sentiment or pity.

Was defendant negligent in failing to perform his duty to give notice or warning indicating the depth of the water in different places? The pool was approximately 100 feet wide and 300 feet long. It had a sandy bottom sloping from a depth of 2½ feet at the west end to nearly 19 feet at the east end. There were three divisions indicated by two heavy steel cables stretched across the pool from north to south at the surface of the water. The first division was for little folks. It was 20 feet wide at the west end of the pool and near the north bank there was a sign: "Water not over 2½ feet deep." The next or middle division was apparently for general bathing. It was 30 feet wide and near the north bank between the cables there was a sign: "Water not over 4½ feet deep." The other division was that part of the pool between the east cable and the east end. It was obviously intended for swimming, diving and other aquatic sports. In size it was approximately 250 feet east and west and 100 feet north and south. Near the east cable on the north side of the pool there was a sign: "Deep Water. If you cannot swim, stay out." It was around the

latter division that the diving board, the diving tower and the spring board were located—all indicating deep water. In addition there was a life-boat near the bath-house. It was equipped with oars, rope and grappling hooks. The rear end rested on the north bank and the front end was headed toward deep water. Above it there was a sign: "For Emergencies Only." In conspicuous places in the bath-house where Richard A. Lyman and his younger brother rented bathing suits there were in large letters signs containing these words:

"No charge, whatever, is made for either the swings or slide, and we assume no responsibility, whatever, for any accident that may occur in their use. Unless you are an experienced swimmer and diver you are requested not to use them."

At the trial there was an effort to show that the letters on the signs were too small to impart notice for a sufficient distance; that the signs indicating the depth of the water were not high enough to prevent the bank from obscuring them; that the crowds between the signs and the bath-house cut off the view; and that personal warning was not given to the Lyman boys. They were together and were in and out of the pool for two hours or more. They were not seen in deep water. The circumstances indicate that they knew where the water was deep. The younger brother kept in the safety zone. Richard had the same opportunity for observation. He was a bright boy nearly 16 years of age. The slightest prompting of his own senses would have resulted in observing the depths of the water at different places, notwithstanding the crowds. The signs indicating the depth of the water were on the top of steel posts with the lower ends in the ground under the pool. The notices were above the water and faced toward the bath-house where they could be seen by bathers approaching the pool. There is nothing to show that the signs did not conform to the usual custom at bathing resorts or that defendant did not, in this respect, take such precautions for the safety of bathers as a person of ordinary prudence

would have taken under the circumstances. It seems clear that the verdict cannot be upheld for want of notice of the depths of the water and that, therefore, there was error in submitting that issue to the jury.

Was defendant's failure to provide suitable guards and directors the proximate cause of the bather's death? Two employees of defendant, according to their testimony, were qualified to act in those capacities and they said on the witness-stand that they were on active duty at the time. There was no charge or proof that more than two guards were necessary. Unless they were contradicted by circumstances or by failure to perform their duties in the emergency that confronted them, evidence of their qualification and of their proper services was not disproved. There were 50 or more persons in the pool. No one saw Richard as he was disappearing. How or when he got into deep water was not disclosed. He was missed by his younger brother who said on the witness-stand that he had seen some one struggling in the water and had thought it might be Richard, but the witness was apparently not satisfied with his identification, because he went to the bath-house to make a search and, not seeing Richard in the pool or elsewhere, an alarm was given. One of the guards testified he was at the time on duty over-looking the pool from the bathhouse. At the first alarm he ran to the life-boat, rowed south to the spring-board, the natural place to look for a missing swimmer, and began to cast with grappling hooks. He was joined at the spring-board platform by the other guard. After casting in vain five or six times, some one said the boy was farther north. The boat was then rowed northward near the center of the pool, where the water was at least seven feet deep. The second cast there resulted in bringing the boy's body to the surface. It was taken to the bank. Efforts at resuscitation were immediately made and were continued without avail for an hour or more. For the purpose of showing negligence, plaintiff adduced proof that the guard who first reached the life-boat had sold refreshments in the stand at different times

during the afternoon and was not continuously at his post of duty as a guard. This was not evidence of actionable negligence in the present case, if he was attentively watching the pool at the proper place for rescue when the bather disappeared, and his testimony to that effect is uncontradicted. The service of a life-guard may be required at different places at different times. Where many swimmers are engaged in aquatic sports in the same pool, it is common knowledge that divers disappear and return at other places without giving occasion for alarm or rescue. In the present instance no one knew exactly when or where the bather disappeared. Without resorting to speculation or conjecture the jury could not properly find that, except for the failure of the guard to miss the bather and to notice that he did not promptly reappear, there would have been no loss of life. The effort to rescue the bather upon the giving of the alarm was prompt and vigilant. There was evidence that the guards did not wear uniforms or badges to distinguish them from others as life-savers, but they immediately responded to the call of duty as soon as the alarm was given, and the omission, if negligence, was not the proximate cause of the bather's death. It follows that this issue also should not have been submitted to the jury.

Was defendant's failure to provide competent persons to recover and resuscitate the bather the proximate cause of his death? On this issue the evidence showed that defendant had not equipped his life-boat or bathing resort with a pulmotor, a modern instrument used in the work of resuscitation. On the other hand, there is uncontradicted evidence by a competent physician that the guards in a proper manner used standard methods of equal efficacy. The physician was promptly called, arrived within a few minutes and administered restoratives without success. He was called as a witness and in testifying expressed the opinion that the result would have been the same had a pulmotor been used. There was no testimony to the contrary. On the whole case, after an examination of the entire record

from every standpoint, the conclusion is that the plaintiff did not make a case and that the motion to direct a verdict in favor of defendant should have been sustained. Consequently, the judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

CLARENCE J. DAVIS, APPELLEE, V. LINCOLN COUNTY, APPELLANT.

FILED JUNE 8, 1928. No. 26447.

Master and Servant: INJURY TO EMPLOYEE: COMPENSATION. Evidence examined, and *held*, (a) to establish a compensable status in the plaintiff; (b) to sustain the degree of physical impairment as determined by the trial court, and the amount of compensation awarded therefor; (c) that the plaintiff was entitled to the allowance of a reasonable attorney's fee in the district court, and that the amount awarded, in view of the record, is not excessive.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

William E. Shuman, George N. Gibbs, and *A. J. Rhodes,* for appellant.

Hoagland, Carr & Beck and *Halligan, Beatty & Halligan, contra.*

Heard before ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and PROUDFIT and REDICK, District Judges.

EBERLY, J.

Clarence J. Davis was awarded compensation by the labor commissioner of the state of Nebraska against the county of Lincoln, Nebraska. Upon appeal by the county of Lincoln to the district court for that county, Davis recovered a judgment against the county of Lincoln for "$15 each week" for a period of 300 weeks, to begin to run from

February 6, 1925, (less 142 weeks already paid), and $12 a week, "from and after the last payment of compensation at $15 a week, for the remainder of his life." Attorney's fees were also taxed in the district court in the sum of $750. From this judgment the county of Lincoln appeals.

The contentions presented by the county on appeal are: (1) That the relation then existing between the county and the plaintiff at the time of the accident did not create a compensable status in the latter; (2) that the evidence of physical impairment does not sustain the degree of physical disability as determined by the trial court; (3) that the amount of the award is not sustained by the facts of the record, even though the degree of disability, as determined by the trial court, exists; (4) that the attorney's fees allowed are not authorized by the act under the circumstances of the case, and, if authorized, must be deemed excessive.

The evidence discloses without dispute that Davis had been employed by the corporate authorities of Lincoln county, Nebraska, in addition to other duties, to care for, supervise and perform necessary services in connection with the maintenance and protection of three bridges across the Platte river situated in Lincoln county, Nebraska, as occasion for such repairs and protection might from time to time arise. The services contracted for contemplated and involved, not only such repairs as might be incident to ordinary wear and tear, but also such as were necessary for the proper protection against the effect of the elements, storms, floods, and ice. For this purpose Davis was furnished by the county with appropriate tools and supplies, including "spud bars," for opening holes in ice for reception of blasting charges, pike poles, dynamite, powder, fuses, and caps. The last enumerated were for use in protecting the bridge during the season when the ice, formed in the Platte river during winter months, was breaking up, by preventing the formation of jams and ice gorges about the bridge or in the vicinity thereof which might be dangerous thereto. Plaintiff's contract did not involve con-

tinuous labor. His services necessarily would have to be employed whenever required for the proper protection of the bridges when, due to the forces of nature, the safety of these structures was imperiled. Neither could the time be anticipated with any degree of certainty as to when the services contracted to be rendered by him would be required. The contract necessarily contemplated the performance of work and labor without reference to the day of the week or the time of day.

The nature and surroundings of the transaction and which were necessarily in contemplation of the parties to the contract were such as to support the further conclusion that a "7 day week" of labor was within the contemplation of the parties; for only in that way could the exigencies of the situation be met.

These contractual relations had been in existence for more than a year prior to the accident. Bills for services rendered had been duly presented to, allowed, and paid by, in the regular course of business, the county authorities.

On February 6, 1925, while working pursuant to this contract under the personal direction of one of the county commissioners of Lincoln county, Nebraska, and employed in blasting ice which was then menacing the safety of one of the bridges referred to, the plaintiff was injured by the accidental explosion of dynamite then being used by the plaintiff in the undertaking and which was furnished him by the defendant county through a county commissioner then present.

The transaction before us fairly brings the plaintiff within the meaning of the term "employee," and the county of Lincoln within the designation of the term "employer," as those terms are used in our workmen's compensation act. And it also follows that the relation existing at the time of the accident, in a legal sense, is to be deemed compensable. Comp. St. 1922, secs. 3029, 3037, 3038.

A careful examination of the question of fact involved brings us to the conclusion that the trial court did not err in its determination as to the degree of impairment

suffered by the plaintiff as a result of the accident. It is to be remembered in this connection that "On appeal from the district court to the supreme court in a workmen's compensation case, findings of fact supported by sufficient evidence and findings of fact on substantially conflicting evidence will not be reversed unless clearly wrong." *City of Fremont v. Lea,* 115 Neb. 565.

The findings made by the trial court in the case we are now considering are amply supported by the evidence, and, thus considered, disclose that the plaintiff herein was totally and permanently disabled within the meaning of the workmen's compensation act of Nebraska. Comp. St. 1922, sec. 3044 (3); *Frost v. United States Fidelity & Guaranty Co.,* 109 Neb. 161; *Johnson v. David Cole Creamery Co.,* 109 Neb. 707; *Schlesselman v. Travelers Ins. Co.,* 112 Neb. 332.

It is contended on behalf of the county that the instant case presents the case of "continuous employment" as that term is used in section 3049, Comp. St. 1922, and that, therefore, the last clause, or rather sentence, of that section is controlling as fixing the basis of compensation.

"Employment," as defined by Webster, is: "1. Act of employing, or state of being employed. 2. That which engages or occupies; that which consumes time or attention; occupation; office or post of business; service." Webster's New International Dictionary.

It is obvious that the second, and not the first, clause of the definition is applicable to the term "continuous employment" as that term is used in the statute now before us. This conclusion is in harmony with our statutory definition of "employment," in connection with cognate legislation, which treats this term as synonymous with "work" and definable as: "Manual or mechanical labor, clerical, domestic or professional service." Comp. St. 1922, sec. 7725. That statutory term, as employed in the workmen's compensation act, has reference only to that which, in accordance with the contract of hire, "continuously engages or occupies;" (or) continuously consumes the time or attention of

the employee. "Continuous employment," therefore, in the true sense of the statutory terms employed, in the act under consideration, exists only when service or labor required in the performance of the contract service is substantially continuous. In the present case, while the county, by the terms of the contract of hire, had a paramount and continuous claim on the time and services of plaintiff, yet the services required thereunder, as a matter of fact, were not continuous. The terms of the contract of hire established by the record, not only permitted, but the parties thereto evidently contemplated that the plaintiff would engage in many other tasks, employments, or occupations, in addition to that referred to in the contract of hire. He was paid only for time actually devoted to the county interests. When he daily changed his occupation or "employment," it could not be contended that his employment, devoted to the benefit of the county, remained continuous.

It follows that the relation existing between the plaintiff herein and the county of Lincoln, under the terms of their contract and as carried out by plaintiff, was not that of "continuous employment." Therefore, the claim of the county that the basis of compensation in this case is the "average weekly income received from the county" cannot be accepted.

Section 3049, Comp. St. 1922, also provides: "Wherever in this article the term 'wages' is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident." Following these general words appears a provision relative to "occupations involving seasonal employment or employments dependent upon the weather," and "continuous employment." The last we have already discussed, and it is insisted on part of the appellant that the employment in this case was not "seasonal" or not "dependent upon the weather." This contention is accepted.

It follows, therefore, that wages, as applied in this case,

are to be determined by the statutory language first quoted. Section 3049, *supra.*

Section 3044, Comp. St. 1922, as applied to the facts in the present case, provides in substance that, for the first 300 weeks of total disability, the compensation shall be 66 2-3 per centum of the wages received at the time of the injury, and thereafter 45 per centum of the wages received at the time of the injury. It also provides that, for disability resulting from permanent injury for specified classes of injuries, "the compensation shall be" a certain named "per centum of daily wages during" a time specified.

At the time of the injury received by the plaintiff, the money rate at which the services rendered were recompensed, under the contract of hire, was 35 cents an hour. This case being neither one involving a "seasonal employment" nor "continuous employment," the daily wage, as the basis of statutory compensation, must be computed on the basis of 35 cents an hour as the "wages received at time of injury."

We find the judgment of the district court consistent with the rule here laid down, and the same is approved.

The allowance of attorney's fees in the total sum of $750 is objected to. In this connection the record discloses that after two hearings before the labor commissioner of the state of Nebraska, and after an appeal to the district court, amendments to pleadings were allowed by the district court, over objection of the plaintiff, which injected new questions into the case. The issues were, in fact, substantially changed. This necessitated, on part of plaintiff's attorneys, new and additional investigations both of fact and of law. On the trial of the case the value of attorney's services as rendered was the subject of oral testimony. Two witnesses whose competency is unquestioned testified as to what the legal services were worth, as performed in connection with the trial in district court, and placed a reasonable value of the same at $750. The qualifications, good faith and honesty of the witnesses are unquestioned in the record. No testimony whatever was produced by the coun-

ty to meet this evidence. Not a syllable appears in the bill of exceptions which in any manner qualifies, refutes or contradicts the unanimous conclusion which was placed before the court. The district judge who presided at the trial observed in a large degree the actual performance of the services testified to; he heard the witnesses; their uncontradicted testimony was accepted by him; and he found in accordance therewith.

Section 3048, Comp. St. 1922, provides: "Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are had before the compensation commissioner, a reasonable attorney's fee shall be allowed the employee by the court in the event the employer appeals from the award of the commissioner and fails to obtain any reduction in the amount of such award."

There can be no question in this case but what the employer appealed to the district court and failed to obtain a "reduction." It follows that the employee, under the facts of the record and as a matter of right, was entitled to have a reasonable attorney's fee taxed in his behalf in that tribunal. The question of a "reasonable attorney's fee" must be necessarily determined by the facts of the case in which allowed, and its amount is a matter, in a large degree, of discretion vested in the trial court. That discretion was exercised in the instant case, and in view of the record we cannot find that the district court erred in so doing.

It follows, therefore, that the judgment of the district court is correct, and is, in all things,

AFFIRMED.

JOHN BOSTEDER, APPELLEE, V. WILLIAM B. DULING, APPELLANT: MARY BARRETT, ADMINISTRATRIX, APPELLEE.

FILED JUNE 8, 1928. No. 26460.

1. **Appeal**: VERDICT. A verdict of the jury based upon sufficient evidence to support it, and which cannot be said by the court to be clearly wrong, will not be set aside merely because it

appears to be against the weight or preponderance of the evidence, as the weight of testimony is for the jury, and not for the appellate court.

2. ———: LAW OF THE CASE. The principle announced as controlling in our former opinion, as applicable to the facts of the record then before the court, viz., "An act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable," in view of the record now presented, *held* to be "the law of the case."

3. **Evidence** examined, and *held* to support the verdict and judgment of the trial court.

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

Reavis & Beghtol, for appellant.

Allen & Requartte and *E. G. Maggi,* for appellee Duling.

Adams & Zimmerman, for appellee Barrett.

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

EBERLY, J.

This is an action by John Bosteder, as plaintiff, for damages sustained by him occasioned by the wrongful acts and neglect of one William B. Duling and one Edward Barrett in connection with a defective ensilage cutting machine jointly owned by them. From a verdict and judgment in favor of the plaintiff and against both defendants, Duling alone appeals. Mary Barrett, the original defendant, as administratrix of the estate of Edward Barrett, deceased, however, also presents a brief in behalf of Barrett's estate.

This is the second appearance of this controversy in this court. *Bosteder v. Duling,* 115 Neb. 557.

Duling challenges the correctness of the adjudication against him on the general ground that the evidence is insufficient to sustain it. This general proposition as urged by him applies to three distinct questions arising in the

record, viz.: (1) That the evidence in no manner sustains the judgment against either of the defendants; (2) that the evidence establishes affirmatively that, at the time of the injury, Duling had "loaned" the plaintiff's services, with plaintiff's consent, to the defendant Barrett under such circumstances and conditions as to constitute Barrett plaintiff's sole master, and that thus the recovery against Duling could not be sustained; (3) assumption of risk on part of plaintiff.

At the former trial of this case in the district court that tribunal, at the close of plaintiff's evidence, sustained a motion directing a verdict for the defendants. On review of this proceeding, this court held that the determination thus made was "clearly against the weight of the evidence and the law applicable thereto." Reference is here made to the opinion by Thompson, J., in that case for statement of facts established by the evidence at the time before the court. *Bosteder v. Duling, supra.*

In the record now before us appears substantially all of the evidence presented for consideration of this tribunal at the first hearing thereof, together with additional evidence, cumulative in nature, introduced by plaintiff. The defendant also introduced evidence at the last trial in the district court which, at most, may be deemed contradictory to that of plaintiff. But the jury, in consideration of the conflicting evidence, found generally for the plaintiff and against the defendants on the issues of fact thus presented in the record and submitted to their determination. Their action is final. *Skala v. Michael,* 109 Neb. 305; *Caniglia v. Vacanti,* 106 Neb. 793.

On the question as to the joint liability of the defendants, in our former opinion appears the following statement with reference thereto: "The further question is presented that these defendants are not jointly liable, and, not being so, cannot under this record be held individually. The evidence presented brings this case clearly within our holding in *Schweppe v. Uhl,* 97 Neb. 328, wherein we held: 'An act wrongfully done by the joint agency or coopera-

tion of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally.' Further, as held by us in *Koehn v. City of Hastings,* 114 Neb. 106: 'If one suffers injury and damage as the proximate result of the negligence of two others, and the damage would not have occurred but for the negligence of each of such parties, both are liable to the person so injured.' " *Bosteder v. Duling,* 115 Neb. 557.

It would, therefore, fairly appear that, on the controlling questions now presented, this court has heretofore deliberated, decided, and announced its determination. It follows, in view of the record before us, that the conclusions of this court thus announced in our former opinion must now be deemed to be the law of the case. *O'Hara v. Davis,* 109 Neb. 615; *Lawson v. Union P. R. Co.,* 113 Neb. 745; *Merkouras v. Chicago, B. & Q. R. Co.,* 104 Neb. 491; *State v. Farmers State Bank,* 106 Neb. 387; *Scott v. Scotts Bluff County,* 106 Neb. 355; *Brightenburg v. Mulcahy,* 109 Neb. 423; *Harris v. Central Power Co.,* 111 Neb. 565; *Kerr v. Travelers Ins. Co.,* 103 Neb. 566.

On the question of assumption of risk presented by appellant, a careful consideration of the evidence in the record sustains the conclusion that the proof presented to, and considered by, the jury was ample to sustain the verdict as returned by them in the instant case, which, in effect, negatived appellant's defense on this ground. Indeed, the unquestioned ultimate facts of the transaction, as established by the evidence in the record before us, are such that it is doubtful whether any of the theories advanced by the appellant would operate to discharge him from liability for the results of the accident or secure for him relief from the judgment entered herein. At least, it may be said that ample proof sustains the conclusion that the defective machine, occasioning the injuries complained of, was originally purchased by Duling and the now deceased Barrett jointly; that it continued to be their joint property of which each enjoyed equal control as equal owners thereof, and was such at the time of the acci-

dent; that this machine was purchased, owned and maintained by its proprietors expressly to do the work of each upon the farms occupied by each, and to be operated by the labor furnished by both. It is thus fairly inferable that it was thus contemplated from the beginning by the joint owners that, as occasion required in the ordinary prosecution of their farm work, the machine in question should not only be employed and used by them as individuals and their joint employees, if any, but would also be furnished to and used by their individual servants and employees. The record also sustains the further conclusion that the particular kind or class of work in which this defective machine was employed by its owners, though performed for the benefit of each coowner as an individual, was treated by them as a joint undertaking, to be participated in by both with a view of securing more economical as well as more efficient service and results. This transaction then, as an entirety, bears many earmarks of a joint adventure, and would seem to be controlled by the principles applicable to that relation. *Peterson v. Nichols*, 90 Wash. 398.

"A contract establishing a joint adventure need not be express, but may be implied from the conduct of the parties." *Jackson v. Hooper*, 76 N. J. Eq. 185.

While our present transaction did not involve direct profits of a mercantile nature, it did contemplate mutual benefits to the parties thereto. Besides, expectation of profits is not a necessary element of a joint adventure. *Moore v. Hillsdale County Telephone Co.*, 171 Mich. 388.

While joint ownership of property alone does not create it, "A 'joint adventure' may exist where persons embark in an undertaking without entering on the prosecution of the business as partners strictly, but engage in a common enterprise for their mutual benefit; they each have the right to demand and expect from their associates good faith in all that relates to their common interests." *Jackson v. Hooper, supra.*

On the basis that we have before us what amounts to a

joint adventure, the rule applicable to the controversy would be: "Joint adventurers who are engaged in an enterprise requiring the use of mechanical contrivances are jointly and severally liable as joint tortfeasors." 33 C. J. 873, sec. 102. This question of joint adventure is, however, not necessary to the determination of this case. A careful examination of the facts of the record discloses that a simpler principle is applicable and a simpler question is controlling.

Defendant Duling admits joint ownership of the machine involved. The record sustains the evident conclusion of the jury that it was defective at the time of the accident, and that Duling knew it, or should have known it. Indeed, under his own evidence, there can be no question as to his knowledge, intent and purpose that on the day of this accident this defective machine was intended to be, and actually was, furnished to be operated by Bosteder in a place of danger. If Bosteder was then and there to be considered as the employee and servant of Duling, as a necessary incident of this employment would follow the duty of his master to furnish him with a reasonably safe instrumentality wherewith, and a reasonably safe place wherein, to do his work. But, on the other hand, if that contractual relation at the time of the accident be deemed as not to exist as to Duling, but to exist as between Bosteder and Barrett, still Duling, as an equal coowner of the defective machine furnished for Bosteder's use, under the facts in this case, was not relieved thereby from liability. The rule applicable to the then situation might, indeed, absolve him from liability as a master, but would be inoperative to absolve him from liability as a coowner furnishing machinery for the use of the servants of another.

"A person undertaking to furnish machinery or appliances for the use of the servants of another assumes a duty to furnish proper and safe appliances; and a negligent performance of such a duty, resulting in injuries to one engaged in doing the work or lawfully using the appli-

ances, imposes a liability on the person so furnishing the same for injuries sustained in consequence of such negligence. The obligation does not depend on a contractual relation between the person injured and the person whose negligence causes the injury, but on a failure to perform a duty assumed by one which results in injury to another." 18 R. C. L. 542, sec. 57. See, also, *D'Almeida v. Boston & Maine Railroad*, 209 Mass. 81; *Pearson v. Arlington Dock Co.*, 111 Wash. 14; *Roddy v. Missouri P. R. Co.*, 104 Mo. 234; *Bright v. Barnett & Record Co.*, 88 Wis. 299.

This court is committed to the view that it is a nondelegable duty of the master to exercise reasonable care to provide reasonably safe places to work, and to furnish reasonably safe and suitable appliances with which to work. This principle is alike applicable to him who undertakes to furnish machinery or appliances for use of the servants of another. If, in either case, he undertakes to perform this duty imposed by law through or by another, he acts at his own risk. If, therefore, the evidence be true that the plaintiff refused to work with this machine until repairs had first been made, and Duling was assured by Barrett that the machine had been fixed, when, in fact, it had not been repaired, and plaintiff, in turn, was induced by Duling to rely on Barrett's statement, good faith in the transaction can afford Duling no defense. And, on the other hand, if Duling had been duly notified or knew of the machine's defects and wholly failed to effect a correction thereof, he violated the plain duty which the fact of his coownership and the contemplated use of the machine imposed upon him, in view of the circumstances of this case.

In any event, therefore, it cannot be said that the verdict returned in this case and judgment entered thereon are not supported by the evidence of the record.

It therefore follows that the district court in the present case has proceeded in accord with law. The judgment of the district court is correct, and is

AFFIRMED.

HOWELL, J., dissents as to liability imposed on Duling.

CENTRAL NATIONAL BANK OF LINCOLN, APPELLEE, V. FIRST NATIONAL BANK OF GERING ET AL., APPELLANTS.

FILED JUNE 8, 1928. No. 25214.

1. **Banks and Banking:** INSOLVENCY. An action to impress a trust upon assets of an insolvent national bank is governed by federal law.
2. ———: ———: PREFERENCES. A *cestui que trust,* who seeks a preference out of the estate of an insolvent national bank in the hands of a receiver, must clearly prove that the trust property, or its proceeds, went into a specific fund or property which came into his hands.
3. ———: ———: ———. In such case, it is not sufficient to trace the trust property to the general assets of the estate and that it increased the value thereof.

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.*

Fred S. Berry, amicus curiæ.

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

HOWELL, J.

This case was appealed from a decree of the lower court impressing a trust, in favor of the Central National Bank of Lincoln, upon the assets of the First National Bank of Gering, in the hands of Charles F. Lyman, receiver, growing out of four notes sent by the Lincoln bank to the Gering bank, while open for business, for collection and remittance of proceeds.

After being twice argued orally here, Good, J., wrote an opinion (115 Neb. 444), in which Dean, Thompson and Eberly, JJ., concurred, reversing the lower court over a dissenting opinion by Rose, J. (115 Neb. 451), in which Goss, C. J., and Day, J, concurred. Eberly, J., wrote a

separate concurring opinion (115 Neb. 457). After a third oral argument, Rose, J., delivered an opinion (115 Neb. 472) in which the former opinion was overruled, to which Good, Thompson and Eberly, JJ., dissented (115 Neb. 478). Since that time, Day, J., died and the writer has been added to the court in his stead. A fourth oral argument has been made to the court as it is at present constituted.

The writer has spent a prodigious amount of time in the examination of the record, numerous briefs, adjudicated cases and the several opinions written by members of this court in this case, and is not disposed to add very much to its literature. To harmonize the multiplied decisions of state and federal courts would be an impossible task.

The alleged trust fund has to do with the assets of an insolvent national banking institution being administered by a receiver under laws of congress. Sections 3234, 5236, U. S. Rev. St. (1878), provide for winding up the affairs of such banks and for a ratable distribution of their assets among creditors. What are assets presents a federal question which necessarily must be determined by the national courts or by rules approved by them. *Empire State Surety Co. v. Carroll County,* 194 Fed. 593, 603 (5). The same case holds: "It is indispensable to the maintenance by a *cestui que trust* of a claim to preferential payment 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." It is supported by *State Bank of Winfield v. Alva Security Bank,* 232 Fed. 847, *Dudley v. Richards,* 18 Fed. (2d) 876, and other cases.

The writer has been very reluctantly driven to the foregoing conclusions as to national banks, but withholds commitment as to trust funds not imperatively ruled by federal law. The judgment of the district court is reversed and the cause remanded.

REVERSED.

GOSS, C. J., and DEAN, J., dissent.

ROSE, J., dissenting.

If the appeal presents a federal question, an imperative duty calls for the independent judgment of each member of the court in determining the issue, because the supreme court of the United States, as I understand the situation, has not spoken the final word on the subject and the federal courts inferior to that tribunal do not agree on the proper solution.

I am unwilling to surrender my own ideas of justice and equity for what I conceive to be a fundamental error that will disturb the banking and other financial interests and perpetuate in the judicial department of government an evil at variance with established rules of equity and the demands of justice. I deny that the congress or the federal courts have committed state courts to the doctrine announced by the majority of my associates.

The present action is one in equity to restore trust funds misappropriated by a faithless trustee. The facts on which the diversity of opinion arose were formerly stated as follows:

"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 exceed-

ing 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." *Central Nat. Bank v. First Nat. Bank*, 115 Neb. 444, 452.

The converted proceeds of the notes were traced into the possession of the dishonest trustee. The effect of the majority opinion is to saddle on the innocent and confiding beneficiary of the trust the burden of showing what the trustee did with the plaintiff's or the beneficiary's trust fund after it had been misappropriated and mingled with a mass of banking assets over which plaintiff, the owner, had no control. This is contrary to the universal rule of equity that it is the duty of a trustee to disclose to his beneficiary what became of the trust property and to account for it. The philosophy on which this latter precept is based came down through the centuries from the Chancellor of Galilee Who dictated the hallowed petition, "Lead us not into temptation," and Who decreed, "No man can serve two masters." This violated rule requiring a disclosure by the trustee himself sparkles in the dust of evolutional equity like polished diamonds in the rubbish of ages. Departing therefrom the majority announce the following doctrines:

"A *cestui que trust*, who seeks a preference out of the estate of an insolvent national bank in the hands of a receiver, must clearly prove that the trust property, or its proceeds, went into a specific fund or property which came into his hands.

"In such case, it is not sufficient to trace the trust property to the general assets of the estate and that it increased the value thereof." *Central Nat. Bank v. First Nat. Bank, ante*, p. 161.

The attempt to justify those rulings includes an act of the congress relating to distribution of the assets of insolvent national banks, and also the enforcement of that act by a federal court which is not the final arbiter on the question here presented for determination. If the question were controlled by federal precedents, which I deny, the language used by another federal court and quoted with approval by a chief justice of the United States supreme court is better authority and has the support of cogent reasons:

"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.

This doctrine is in harmony with a unanimous opinion of the supreme court of Nebraska, as shown by the following syllabus:

"Where a trustee mingles trust moneys with his own funds, *cestui qui 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.

Trust funds belonging to an innocent and confiding owner or beneficiary, when stolen or embezzled by an insolvent national bank acting in the capacity of trustee, and hid by it in a changed form among the general assets of the

bank are not bank assets in the hands of the receiver for the purpose of distribution to general creditors, within the meaning of the act of congress. If such a fund is not among the bank assets after it is traced by the beneficiary into them, the burden is on the dishonest trustee or the receiver to disclose that fact. The federal statute did not change the rules of evidence or the burden of proof or take away the accountability of the trustee as such. The federal Constitution protects the liberty to own and control property and neither the congress nor the court has power to take trust property from its hiding place, deprive the owner of it, and with it pay other debts of the false trustee.

I do not find in the federal statute anything to justify the rulings of the majority, nor do I impute to the legislative department of the federal government an intent to apply to the claims of general creditors private trust funds unlawfully in the assets of an insolvent national bank against the will of the owner. In absence of a ruling of the supreme court of the United States to the contrary, I shall attribute to the national congress the policy declared by Washington in his first inaugural address:

"The foundation of our national policy will be laid in the pure and immutable principles of private morality. There is no truth more thoroughly established than that there exists in the economy and course of nature an indissoluable union between virtue and happiness; between duty and advantage; between the genuine maxims of an honest and magnanimous policy and the solid rewards of public prosperity and felicity."

I adhere to what was said by this court in the opinion affirming the decree in favor of plaintiff for the restoration of the trust funds in controversy. *Central Nat. Bank v. First Nat. Bank*, 115 Neb. 472.

ELSIE ENGSTROM, APPELLANT, V. CECIL ENGSTROM, APPELLEE.

FILED JUNE 8, 1928. No. 26091.

Bastards. The word "unmarried," as used in section 274, Comp. St. 1922, relates to the mother of an illegitimate child at the time it was begotten and born, and not at the time of making the complaint.

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

G. F. Rose, for appellant.

Kemp & Brower and *Lower & Sheehan, contra.*

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

HOWELL, J.

This is an appeal from the sustaining of a demurrer by the district court to the complaint of prosecutrix and appellant in a bastardy proceeding. The complaint was in the following language: "On this 16th day of December, 1926, before me, G. F. Robinson, county judge within and for Nance county, Nebraska, personally appeared Elsie Engstrom, who, being by me first duly sworn, deposes and says upon oath that she is a resident of Nance county, in the state of Nebraska; that on the 30th day of March, 1925, she was delivered of a bastard child; that said child is still alive and residing with affiant; that affiant was at the birth of said child and at all times prior thereto an unmarried woman and that Cecil Engstrom is the father of said child."

A mere reading of the complaint, in connection with the statute relating to the subject before us, in the light of *Parker v. Nothomb,* 65 Neb. 308, affirmed on rehearing at page 315, makes it clear that the trial court erred in sustaining the demurrer thereto.

The judgment of the trial court is set aside and the cause remanded.

REVERSED.

IN RE ESTATE OF CHARLES STRELOW.
FRANK C. SCHULTZ ET AL., PROPONENTS, APPELLANTS, V. ROBERT STRELOW ET AL., CONTESTANTS, APPELLEES.

FILED JUNE 13, 1928. No. 25662.

1. **Wills:** PROBATE. By will A. bequeaths all his property without limitation to his brother B. as sole legatee, and nominates such brother as executor thereof, which will is without a revoking clause. B. dies without issue before the death of A. *Held*, that under section 1269, Comp. St. 1922, upon B.'s death the will lapsed, and was without force or effect; further, that on the death of A. such will was not entitled to probate.

2. ———: ———: BURDEN OF PROOF. A legatee or devisee who seeks probate of a claimed will carries the burden of alleging and proving, not only that the testator was possessed of authority and capacity to make the will, but also that the instrument is in legal form, and that he as such legatee or devisee, under the law as well as under the will, is entitled to the legacy or devise.

3. ———: STATUTORY PROVISION: ISSUE. The word "issue," as used in section 1269, Comp. St. 1922, means offspring of the named legatee or devisee, issue of his body, and lineal descendants of such offspring. Further, where such issue take under a will, they do so as substituted legatees or devisees, and not as heirs.

4. ———: LAPSED WILL. Record examined, and found that the trial court committed reversible error in permitting consideration by the jury of the 1909 will and the evidence relating thereto, either separately or in conjunction with their consideration of the 1925 will; also erred in submitting instruction 17 given on its own motion.

5. ———: PROBATE: REMARKS OF JUDGE. In an action for the probate of a will, where a physician is being examined as to the competency of the testator, a remark made by the trial judge, that "I think you are telling the truth, Doctor, I understand that. Be patient and answer the questions as nearly as possible"—is without the province of the court, and is erroneous and prejudicial.

6. **Attorney and Client.** It is an inherent duty devolving upon the courts to support the ethical standing of the bar by impressing upon its members the duty of holding as sacred that confidence which should and must ever exist between attorney and client.

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

Wilmer B. Comstock and *M. L. Poteet,* for appellants.

Meier & Meier, Robert R. Hastings and *Henry J. Beal, Jr., contra.*

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

THOMPSON, J.

This is an appeal had from a judgment entered on a verdict returned by the jury in the district court for Lancaster county, denying probate to an instrument claimed by proponents, appellants herein, to be the last will and testament of Charles Strelow, late of such county, dated December 30, 1925, and allowing probate to a purported will of such Strelow of the date of July 13, 1909, presented by the contestants, appellees herein.

The judgment of the trial court is challenged by way of numerous claimed errors presented by the motion for new trial, by the briefs and motions filed in this court, and by the argument in open court. However, from a review of the entire record, we have concluded to give consideration to but four thereof, to wit: (a) Did the trial court err in overruling the motion of proponents to strike from contestants' answer that part thereof relating to the 1909 will, or in admitting evidence respecting the same, or in granting the probate thereof? (b) If error was thus committed, were proponents thereby denied a fair trial as to the 1925 will? (c) Did the trial court err in giving instruction 17 on its own motion? (d) Did the trial judge commit reversible error by his statement, in the presence and hearing of the jury, that he believed the testimony of one of contestants' witnesses, upon a disputed point, to be true?

In our consideration of these errors, it becomes necessary to set forth some explanatory facts evidenced by the record. Charles Strelow and Theodore Strelow were bache-

lor brothers who became individually owners in fee of certain adjoining lands in Lancaster county, which they respectively farmed and received the usufruct thereof. They were hard-workers, and frugal. They lived and strove for each other. On July 13, 1909, each executed his last will and testament, in due and legal form, by means of which the one became the sole legatee of the other. The will of Charles, so far as material for our consideration, is as follows:

"First. I give, devise and bequeath to my brother, Theodore Strelow, all the property, real and personal, * * * which I may own or possess * * * at my death. Second. I hereby appoint my brother, the said Theodore Strelow, the executor of this my last will and testament, and request that no bond be required of him as executor."

Theodore's will was the same as that of Charles, except the names of the testator and legatee were reversed. These wills were then by them deposited with the county judge of such county for safe-keeping. Theodore died on November 5, 1925, never having been married, his father, mother, brothers and sisters having each and all preceded him in death, save his brother Charles. On November 27, 1925, one Robert R. Hastings was appointed guardian of the person of Charles Strelow, and the First Trust Company, a corporation of Lincoln, was appointed guardian of his property (as said in the briefs, owing to his extreme old age—80 or 81 years). On December 30, 1925, Charles Strelow executed, in due and legal form, the will in controversy herein, which, so far as material, provides in substance as follows: The first paragraph contains the usual direction authorizing the executor to pay the funeral expenses, debts, etc., out of his personal property. The second devises to the children of his sister Rike the sum of $5,000, to be divided share and share alike. In the third he states that he has not forgotten, nor been unmindful of, other children of certain of his brothers and sisters, but that it is his will and intention that they do not take or have any of his estate. The fourth is as follows:

"I give devise and bequeath to Albert L. Schultz, Henry F. A. Schultz and Frank C. Schultz, the sons of my old friend and neighbor Albert Schultz, the rest, remainder and residue of my property, both real and personal of every kind and nature wherever situated possessed by me at my death share and share alike."

In the fifth he appoints the last above named legatees (appellants herein) as his executors, and revokes all former wills by him made. On January 21, 1926, Charles died, never having been married, the death of his father, mother, and all brothers and sisters having preceded his demise. There were left surviving the nephews and nieces (contestants of the 1925 will and proponents of the 1909 will), together with the nephews and nieces named as legatees in the 1925 will, but no other kin. Shortly after the death of Charles, the above named Schultzes, legatees and suggested executors, jointly applied to the county court to have such will admitted to probate, the petition being in usual form. To this application objections were filed by appellees herein, being all of the other nephews and nieces of such Charles Strelow except those named as legatees in the 1925 will, a synopsis of such objections being in substance: That the testator, Charles Strelow, was at the date of the execution of the will 82 years and some months old; that he was not possessed of a sound and disposing mind, and was without testamentary capacity; that he had been adjudged to be senile by the commissioners of insanity of such county, and was at the time of the execution of the will under guardianship, having been found incompetent to care for himself or his property; that the contesting nephews and nieces were his next of kin (Theodore Strelow, the legatee named in the 1909 will, having died prior to the death of Charles); that such purported will of 1925 was obtained through the exercise of undue influence exerted over him by one O. B. Clark and the proponents Schultz; that the true last will and testament of such Charles Strelow, deceased, was made in the year 1909 (being the will of that date hereinbefore referred to); and objectors then, in the

usual form of a petition praying for probate of a will, offered such 1909 will for probate, and prayed that the 1925 will be disallowed. The case came on for hearing February 10, 1926, on the petition of the legatees Schultz, evidence was taken, and judgment entered denying probate of such 1925 will, and as to it the case was dismissed. The case was then adjourned as to the will dated July 13, 1909, and on February 24, 1926, judgment was entered admitting to probate as the last will and testament of said deceased the 1909 will, and granting the administration of the estate to the First Trust Company of Lincoln as administrator with will annexed; to all of which the Schultzes excepted. From the judgment disallowing the 1925 will probate, the Schultzes appealed to the district court for Lancaster county, which appeal was docketed as case number 92-115; and they also appealed from the judgment granting probate to the will of 1909, which appeal was docketed as case number 92-151. After the two cases were thus docketed, and the petition of the Schultzes, in usual form, was filed in case 92-115 praying for the probate of the 1925 will, the nephews and nieces interposed a motion in which the court was asked to consolidate case 92-151 with case 92-115, which motion, after due consideration, was overruled. On the same day an answer was filed by the contestants, similar if not identical with that filed in the county court, and, as in the county court, prayed that the 1925 will be denied probate, and the 1909 will be admitted to probate. The case was then called for trial to a jury, and the proponents of the 1925 will interposed a motion at the trial to strike from the answer of contestants the second clause thereof, to wit, all that part referring to and asking probate of the 1909 will, for the reason, in substance, that the same was redundant, immaterial, and under the record incompetent for any purpose. This motion was overruled, and in the further progress of the trial the nephews and nieces (proponents of the 1909 will), over the objections of the proponents of the 1925 will, were permitted to prove the due execution of the 1909 will, and to introduce it in evidence.

During the trial Dr. Zimmerer was sworn and examined on the part of these contestants as to the competency of Charles Strelow to excute the 1925 will. On direct examination the doctor had detailed at much length the mental and physical condition of such Strelow at the time and before the 1925 will was executed, and was being cross-examined by the attorney for the Schultzes in reference thereto, and was by such attorney asked the following question: "Well, how much like that, how near are you going to stick to what you said in direct examination and how much are you going to change it?" To which he answered: "Your Honor, I am trying to tell the truth as near as I can, and I haven't got any transcript of everything I said in the last six months." Thereupon the trial judge remarked: "I think you are telling the truth, Doctor, I understand that. Be patient and answer the questions as nearly as possible."

Considering first challenge (a): Did the trial court err in overruling the motion of proponents to strike from contestants' answer that part thereof relating to the 1909 will, or in admitting evidence respecting the same, or in granting probate thereof? As we have seen, these Strelow brothers remained single during their natural lives; that as to Theodore, his parents, brothers (except Charles), and sisters had each and all preceded him in death; that those nearest related to Theodore by blood at the time of his death, other than his brother Charles, were the contestants, nephews and nieces, and those nephews and nieces designated as legatees in the 1925 will (executed at a date subsequent to the death of Theodore). It has been seen further that the provisions of what we have referred to as the 1909 will of Charles limit the bequest as well as the suggested executor to Theodore Strelow. Thus, we must determine what effect the death of Theodore, sole legatee and devisee named in the 1909 will, had on such instrument. Did it, under the facts disclosed, lapse, or did it remain in full force? The right of one who owns property, either real or personal, to dispose of the same by will, is a limited right, created and controlled by legislative enactment, as

is the right of one to take and hold under and by virtue of such will. Hence, a legatee or devisee who seeks probate of a claimed will carries the burden of alleging and proving, not only that the testator was possessed of authority and capacity to make the will, but also that the instrument is in legal form, and that he as such legatee or devisee, under the law as well as under the will, is entitled to the legacy or devise. These burdens as to the 1909 will are imposed upon the appellees herein, and must be by them met. It may be admitted (but not determined), for the sake of our present consideration, that at the time of the execution of this instrument Charles Strelow was possessed of every legal qualification necessary to excute the same, and that it was, up to the time of the death of Theodore Strelow, his last will and testament; and that, if Theodore had outlived Charles, he would have become the sole legatee and devisee of his brother's estate. But, as we have seen, Theodore was first to die. This situation is met by section 1269, Comp. St. 1922, which provides:

"When a devise or any legacy shall be made to any child or other relation of the testator, and the devisee or legatee shall die before the testator, having issue who shall survive the testator, such issue shall take the estate so given by the will in the same manner as the devisee or legatee would have done if he had survived the testator, unless a different disposition shall be made or directed by the will."

The purpose of this section is to prevent the lapsing of the legacy covered by the will in case of the death of a legatee who is a "child or other relation of the testator, and the devisee or legatee shall die before the testator, having issue." Thus, such issue take as substituted legatees or devisees, and not as heirs. The legal meaning of the word "issue" as in this section used, considered in connection with the other provisions of the chapter of which this section forms a part, is controlling. At common law the death of a specifically named legatee or devisee prior to that of the testator caused the legacy to lapse. To prevent a general application of this rule, as we construe this chapter,

the legislative body was impelled to include in such chapter the section in question, thus removing from the operation of such rule a devise or legacy to a child or other relation of the testator, who dies before the testator and leaves issue. It will be further noticed that the devise must be made to a child or other relative, thus requiring the testator to select the child or relative and so indicate by his will the person to whom the word "issue" is to attach. The foregoing constrains us to conclude that the legislative intent and purpose can best be conserved by our holding that the word "issue," as used in the section of the statute under consideration, means offspring of the named legatee or devisee, issue of his body, and lineal descendants of such offspring. Applying the law as thus determined to the facts in this case, it is shown by contestants' pleading, as well as by the bill of exceptions, that Theodore died without issue, that he was the sole legatee and suggested executor named in the 1909 will, and that such will did not contain a clause revoking any former will. Therefore, by reason of the death of Theodore Strelow, the 1909 will was bereft of its every intended usefulness, and by its own terms had finished its purpose, had lapsed, and was without force or effect. Hence, that part of contestants' pleading referring thereto did not present an issue, was redundant and immaterial matter, and proponents' motion to strike the same, and the objections to the introduction of evidence in regard to such will, as well as the objection to the introduction of the instrument itself, should each and all have been sustained, and prejudicial error was committed by the trial court in not so ruling.

Having thus determined, we will state as to challenges (b) and (c), that the sinister influence of this incompetent evidence regarding the 1909 will on the jury, in its consideration of the issues which were presented by proponents' petition praying probate of the 1925 will, and the answer of contestants deleted of that part thereof directed to the 1909 will, must have been of such potency as to deny to proponents of the 1925 will a fair trial. Therefore, the

trial court committed reversible error in permitting consideration by the jury of the 1909 will, and the evidence relating thereto, either separately or in conjunction with their consideration of the 1925 will. It follows that, under this record, the jury should not have been permitted to consider other than the 1925 will, hence instruction 17 was not pertinent to the issues, and was prejudicial.

Considering now challenge (d): Did the trial court commit prejudicial error in making the statement heretofore quoted respecting the testimony of Dr. Zimmerer? As to this, it is sufficient to say that under our practice the jury are the sole judges of the credibility of the witnesses, and the weight to be given their testimony. Hence, it is our conclusion that such remark made by the trial judge was without the province of the court, and was erroneous and prejudicial. *Edwards v. Cedar Rapids,* 138 Ia. 421. In 2 Hyatt, Trials, sec. 1051, the rule is thus succinctly stated:

"The trial judge should scrupulously refrain from remarks or conduct tending or calculated to influence the minds of the jury. This is due to the parties as well as the jurors. The function of the jury is to determine the truth of the controverted issues from the competent evidence produced in their hearing, and the law as given them by the court, and that function should be kept before them from the beginning to the end of the trial, and there should be no departure from this standard by the court in any manner whatsoever; by remarks touching the management of the case by counsel, and reflecting upon their conduct in such management or otherwise; or upon the character of a witness, or the weight and credibility of their testimony."

Our attention has been called to a claimed error involving the question: Was it legal and ethical for an attorney of contestants (nephews and nieces) to appear as such, or to testify to other than formal matters in their behalf at the trial, under the facts disclosed? This challenge was not presented to the trial court, and neither was it presented in the briefs or motions filed in this court, and was

not called to our attention until at the oral argument. Thus, the question is not before us for determination. However, as to such challenge it might be well to state: The testimony of this witness given at the trial covers 86 pages of the bill of exceptions, details of which need not be given, further than to say that they embrace a disclosure of the acts and confidential relations and conversations had by and between Charles Strelow as client and such witness as his attorney. This relationship, the record shows, existed uninterruptedly from the 10th day of November, 1925, to the 15th day of December of that year, and, as detailed in evidence, served as a forceful factor in the consideration by court and jury of the mental capacity of Strelow to execute the will of December 30, 1925, as well as his mental and physical ability to resist the undue influence of designing persons, if such there were, in the making of said will. It is elementary that one desiring our consideration of claimed errors of the trial court must first have presented the same to such inferior tribunal. However, notwithstanding this rule, it is equally elementary that it is an inherent duty devolving upon this, as well as the *nisi prius,* court to support the ethical standing of the bar by impressing upon its members the duty of holding as sacred that confidence which should and must ever exist between attorney and client. Hence, as this case may be tried again, attention is called to section 8835, Comp. St. 1922, and *In re Estate of Bayer,* 116 Neb. 670. Also, see opinion in *Fitzsimmons v. State,* 116 Neb. 440.

The other claimed errors are not likely to again occur if a retrial is had, hence, owing to the length of this opinion, they are left undetermined.

The judgment of the trial court is reversed in its entirety, and the cause remanded for further proceedings in harmony with the opinion.

REVERSED.

LEROY STOHLMAN, APPELLEE, V. B. B. DAVIS, APPELLANT.

FILED JUNE 13, 1928. No. 25258.

1. **Physicians and Surgeons:** NEGLIGENCE. A physician or surgeon undertaking the treatment of a patient, and who fails in such treatment to exercise reasonable skill and care, or such skill and care as is ordinarily exercised by members of his profession in good standing, practicing in his or similar localities, is guilty of negligence.
2. ———: MALPRACTICE: TESTIMONY OF EXPERTS. In a malpractice case, it is not necesary to sustain the verdict for plaintiff that all expert witnesses called should consider the treatment pursued by the defendant improper; nor will the fact that all of such witnesses agree that a portion of such treatment is proper, under some circumstances, in itself defeat recovery.
3. **Trial:** EVIDENCE. Whenever there is evidence of so positive and significant a character as would support a verdict, if uncontradicted, it is the duty of the trial court to submit the case to the jury under proper, instructions. It is not the function of the court to weigh the evidence for the purpose of saying how the verdict should go.
4. **Physicians and Surgeons:** NEGLIGENCE. A physician or surgeon who leaves or abandons his patient in a critical stage of disease, without reasonable notice to enable the patient to secure another medical attendant, when the giving of such notice is reasonably possible, is guilty of culpable dereliction of duty, and, if damages are occasioned thereby, is liable therefor.
5. **Evidence** examined, and *held* to support the verdict.

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

Hainer, Flansburg & Lee, and *Gurley, Fitch & West,* for appellant.

Wilmer B. Comstock and *Frampton & Polk, contra.*

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

EBERLY, J.

This is an action by Leroy Stohlman against Doctor B. B. Davis and another for malpractice. The jury found for

plaintiff and against the defendant, B. B. Davis. The last named defendant appeals.

A brief summary of the facts developed at the trial is: The plaintiff, a youth of 18, was a sufferer of osteomyelitis. The seat of the trouble was in the right femur, a short distance above the knee. The onset of the disease first developed on November 10, 1923. He was taken from his farm home near Louisville, Nebraska, by his father, to the Clarkson hospital at Omaha, Nebraska, and there operated upon by Doctor B. B. Davis who had been employed to take charge of the case. The first operation occurred on November 12, 1923. On February 4, 1924, Doctor B. B. Davis performed a second operation at which time he removed a piece of the infected femur about four inches in length and one inch in width, stating that he had taken out all the bone he dared without incurring the danger of a fracture or a separation of the femur. No cast, splint or support was placed upon the leg after this operation until March 8, 1924, when a splint was applied, and on March 25, following, the leg was put in a cast.

During plaintiff's confinement in the hospital the weakened femur separated. The exact date of this occurrence is not fixed beyond dispute in the evidence. From plaintiff's testimony it may be inferred that it took place soon after the operation of February 4 while the limb was still without support of splint or cast, and that it remained in this condition without attention until March 8.

Doctor Lord, who appears in the case as a witness for the defendant and who was present and assisted in the operation on plaintiff's foot on March 8, testified, in substance, that he was called into the case by plaintiff's father; that in company with Doctor Herbert Davis he made an examination of plaintiff's foot on March 7; that, notwithstanding the existence of natural drainage, "some pus was retained;" that "the parts fluctuated;" that the conclusion arrived at in consultation between the two doctors that "drainage should be had immediately" was evidenced by the fact that "arrangements were made to attend to it the

next morning, March 8;" that at this operation on plaintiff's foot on March 8, it was developed that osteomyelitis, apparently originally seated in the metatarsal bone, had extended to other bones in the foot; that, in his opinion, there was osteomyelitis in the metatarsal bone for a considerable period prior to the time of the operation; that the exact extent of time during which this condition obtained would be impossible to state; neither would the doctor state that, had the operation of March 8 been performed a week earlier, the plaintiff might not have had an absolutely normal ankle.

It appears from the evidence that Doctor Lord did not discover the separation of the femur at the time of the operation on the foot on March 8. Later, it appears that he informed Stohlman's father that the femur had separated, and the record sustains the conclusion that at this time the witness was of the opinion that the separation "might have occurred prior to the time he got on the case."

On or about February 20, 1924, Doctor B. B. Davis became ill. For the purpose of a thorough examination and treatment he went to Rochester, Minnesota, to consult Mayo brothers, eminent specialists of that place. He did not return to Omaha until February 26 following. At the time of his return from Rochester he remained in Omaha but a few hours when he continued on to Arizona where he remained for a little over a month recuperating under the advice of the physicians consulted. During the few hours in Omaha on February 26, he called on Stohlman at the hospital. There had been an X-ray plate made which was examined by him, and a consultation was also had with Doctor Herbert Davis in whose charge Stohlman had been placed by Doctor B. B. Davis. The conclusion of the consultation was that osteomyelitis was developed in the right foot; that there was infection in some of the bones thereof, but that, as drainage was apparently good and the temperature then normal, it was thought that no immediate operation was necessary.

Doctor B. B. Davis, at the time of leaving for Rochester,

Minnesota, as well as when leaving for Arizona, wholly failed to notify either the plaintiff or the plaintiff's father of his intended absence. Stohlman was taken over wholly without his own consent or the consent of his father by Doctor Herbert Davis, and without knowledge or notice that Doctor B. B. Davis, by reason of his enforced absence, had practically abandoned the case. In fact, Stohlman and his father were not advised of the situation or of the absence of Doctor B. B. Davis until about March 7, 1924, at which time Doctor Lord took over the case and whose treatment thereof is not in any manner criticized in the evidence. The plaintiff was not discharged from the hospital until May 15, 1924. At that time his right leg had been permanently shortened about an inch, and the right ankle and foot were and still are in a condition of permanent immovability.

The first appearance of the trouble in the right foot was on November 14, 1923. At that time at a point just above and a little to the right of the big toe, it became swollen, inflamed, and discolored. It was treated by local applications with a varying degree of success until March 8, 1924, when a surgical operation, performed by physicians other than defendant, was had which fully disclosed that the true nature of the trouble was osteomyelitis. Thereafter it appears that Stohlman's progress to recovery was regular and continuous.

The trial judge narrowly defined the issues upon which the case was submitted. Only the following questions, in specific and definite form, were submitted to the jury for determination: Whether the defendant was negligent in omitting to apply to the leg a cast, splint or other support to prevent a separation of the femur which the disease disintegrated and weakened, and after a portion thereof had been removed by operation. Whether the defendant was negligent in failing to diagnose the disease of the foot as osteomyelitis, and to provide proper drainage therefor on or prior to March 8, 1924. Whether the defendant was negligent in abandoning plaintiff at a critical period of

plaintiff's illness without proper notification of his necessary absence.

The high standing of the defendant as a surgeon is not questioned in this action. The possession by him of the degree of knowledge and skill requisite to practice his chosen profession is an admitted fact of the record before us; in fact, the record discloses without any contradiction whatever that the defendant is exceptionally well qualified and has long enjoyed an extensive practice in the field of his chosen profession—that of general surgery.

The question before us presents and involves no question, therefore, of qualifications of the defendant. The inquiry is strictly limited as to whether Doctor B. B. Davis, in treating Stohlman, exercised the ordinary care, skill and diligence which, in view of his undoubted qualifications, the law would require to be exercised on behalf of his patient.

It may also be said as a general rule, in determining what constitutes reasonable and ordinary care, skill and diligence, the test is that which physicians and surgeons in the same neighborhood and in similar communities, engaged in the same or similar lines of work, ordinarily exercise and devote to the benefit of their patients.

There is no fixed standard in law by which a court is enabled to arbitrarily say in every case involving a charge of malpractice what conduct shall be considered as an exercise of reasonable and ordinary care, skill and diligence, and what shall constitute ordinary care, diligence and skill under any and all circumstances. The terms, ordinary care, ordinary skill, ordinary diligence, and like expressions, as applied to the conduct of physicians and surgeons with reference to their patients, have a relative significance, and cannot be arbitrarily defined.

Triers of fact in cases wherein these questions are involved are necessarily dependent to a degree, at least, on witnesses versed in the sciences of medicine and surgery. When a given state of facts, submitted to the jury, is such that reasonable men may fairly differ on the question as to whether there was negligence or not, the determination

of the matter is for the jury, as triers of fact. It is only where the facts are such that all reasonable men must draw the reasonable conclusion from them that the question of negligence or, in substance, of ordinary care, ordinary skill, and ordinary diligence, is ever considered as one of law for the court. *Grand Trunk R. Co. v. Ives,* 144 U. S. 408.

Considering the questions as submitted by the district court to the jury and in view of them, it may be said that the relations between physician and patient are personal and highly confidential, and on engaging a physician to treat his case a patient impliedly engages him to attend throughout that ailment, or until his services are dispensed with. The patient places himself in the hands of the physician and surgeon and thereafter relies upon the judgment or knowledge of the physician or surgeon in question. When a surgeon performs an operation, not only must he use reasonable care and skill in its performance, but also, in subsequent treatment of the case, it is his duty to give the patient such attention after operation as the necessities of the case demand, in the absence of any special agreement limiting the service or reasonable notice to the patient.

It is also to be remembered in this connection that the facts in the record disclose that the defendant, by his excellent preparation and for thirty odd years of successful practice, had acquired peculiar qualifications and special knowledge on the subject of surgery. In short, his employment by the plaintiff was, in fact, if not in name, the employment of a specialist or an expert in surgery. It would seem, in view of the nature of his employment and the circumstances and conditions of his patient, as shown by the record in this case, that to substitute for himself another physician of but three or four years' experience in the practice without any notice to, or agreement with, the patient involved or those representing him, would be not only a clear violation of duty but, in effect, to utterly abandon the case.

We do not overlook the fact that the doctor was ill; that

his physical condition prevented the rendition of further services. But his physical condition did not interfere with or prohibit the giving of due and ample notice of his disability to his patient or to his patient's father. The clear duty, under the circumstances, was imposed upon him either to secure the patient's acceptance of the substitution of his son, Doctor Herbert Davis, or to give him notice so as to secure another physician or surgeon of his own choice.

In view of the situation that existed at that time, and the manifest failure of the defendant to discharge his full duty imposed by the circumstances, we certainly approve the instructions given by the trial court which were substantially in accord with the conclusion stated.

The record contains ample evidence which, if believed, sustains the conclusion that, at the time the defendant herein left Nebraska for Arizona, the plaintiff was in a critical condition.

The undoubted rule applicable to the situation is that "a physician who leaves a patient in a critical stage of the disease, without reason, or sufficient notice to enable the party to procure another medical attendant, is guilty of a culpable dereliction of duty, and is liable therefor." 30 Cyc. 1576. See, also, *Burnett v. Layman,* 133 Tenn. 323.

On the question of whether the defendant was negligent in omitting to apply to the injured leg a cast or splint or some other support to prevent a separation of the weakened femur after the operation upon it, and as to whether the means taken by the defendant in treating and providing drainage for the infected foot, under the circumstances disclosed by the evidence, were in accord with the mode established and followed by his school of practice for the treatment of such cases, that is, in accord with good practice, and as to the nature of the results occasioned thereby, the evidence is certainly conflicting. The conflict is decidedly emphasized in the expert testimony introduced by the respective parties. But, as to the latter feature, this court is committed to the doctrine:

"In a malpractice case it is not necessary to sustain a verdict for the plaintiff, that all the expert witnesses called should consider the treatment pursued by defendant improper; nor will the fact that all such witnesses agree that a portion of such treatment is proper, under some circumstances, in itself defeat a recovery." *Hewitt v. Eisenbart*, 36 Neb. 794.

There can be no question but what, under the evidence in the record before us for examination in this case, reasonable men may draw different conclusions on the controlling issues involved herein. But, it fairly appears that this record contains evidence positive and significant in character which, uncontradicted, would support a verdict for the plaintiff. This being true, the fact that it was decisively and fully contradicted by the witnesses for the defendant does not militate against the force and effect and conclusiveness of the decision of the triers of fact in this case on the points then in dispute.

It is to be remembered that the jury to whom these matters were submitted under proper instruction by the district court, under our system, are the sole judges of the credibility of the witnesses and the weight given to their testimony. In this manner and on this basis only may the constitutional right of trial by jury be accorded litigants.

We are indeed committed to the doctrine that it is elementary that, in a jury trial, when different minds may reasonably reach different conclusions from a given statement of facts as to whether negligence has been established, the question of negligence is for the jury. *Casey v. Ford Motor Co.*, 108 Neb. 352.

The same principle applies to the evidence upon which the amount of damages was determined. While it is conflicting, and while triers of fact might have been justified, if certain evidence was to be believed, to have found against the plaintiff, yet their verdict discloses that other witnesses were accepted and other testimony believed which conflicted with the first evidence referred to.

In brief, it may be said that the questions presented in this case, and which are controlling in its determination, are wholly dependent upon the credibility of witnesses and the weight of testimony. It is thus to be determined as a question of fact. It was so determined by the jury against the contentions of the defendant. We do not find that the verdict is unsupported by the evidence.

It therefore follows that the judgment of the district court must be deemed right, and the same is

AFFIRMED.

GOSS, C. J., took no part in the decision.

O. M. CAMPBELL COMPANY, APPELLANT, V. BOYD COUNTY ET AL., APPELLEES.

FILED JUNE 13, 1928. No. 25978.

1. **Counties:** CLAIMS: APPEAL BY TAXPAYERS. An appeal by taxpayers lies to the district court from an order of the board of county supervisors allowing a claim against the county, although such action on the part of the board may be the result of a compromise over a disputed claim.
2. ———: ———: ———: TRIAL DE NOVO. An appeal from an order of the board of county supervisors allowing a claim brings the action to the district court for trial *de novo*.
3. **Record** examined, and *held* to sustain the action of the trial court in directing a verdict for the defendants.

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

Sterling F. Mutz, for appellant.

W. T. Wills and *J. A. Donohoe, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, and HOWELL, JJ., and PROUDFIT and REDICK, District Judges.

PROUDFIT, District Judge.

This action originated in a proceeding before the board of county supervisors of Boyd county wherein a claim was

allowed by the said board for $2,548 against said county in favor of O. M. Campbell Company, appellant herein.

Certain taxpayers of the county appealed from the order allowing said claim to the district court of said county. Pleadings were duly made up and the cause tried to a jury. At the close of plaintiff's case in chief, the defendant county moved for a directed verdict. Said motion was sustained and the jury directed to return a verdict for the defendants (appellees herein), and such verdict was returned and filed, and motion for new trial overruled and judgment entered for defendants, from which order overruling the motion for new trial and judgment, plaintiff prosecutes an appeal to this court.

The appellant appears to rely on two general propositions for a reversal of the action of the trial court, namely: (1) The compromise entered into between appellant and the supervisors of Boyd county was a ministerial act in its nature and not subject to review on appeal; (2) the supervisors having entered into the compromise in behalf of the county with appellant, the county was bound thereby and the taxpayers had no greater right to repudiate the compromise than the county itself or its board of supervisors.

Other propositions are discussed in appellant's brief, but, not being material to a decision of the cause, no good purpose would be served by alluding to or discussing them.

To support his two general propositions, appellant cites as authority the cases of *Lancaster County v. Lincoln Auditorium Ass'n*, 87 Neb. 87, *Gage County v. King Bridge Co.*, 58 Neb. 827, and *Green & Van Duyn v. Lancaster County*, 61 Neb. 473. The disposition of these cases was based upon a marked difference in the facts that plainly distinguishes them from the case at bar. It would prolong this opinion unnecessarily to point out the distinction in the cases cited, and so reference is merely made to that fact.

As to the right of the taxpayers to appeal from the action of the board of county supervisors, it is only necessary to refer to section 866, Comp. St. 1922, which provides as follows: "Any taxpayer may likewise appeal from the

allowance of any claim against the county by serving a like notice within ten days and giving a bond similar to that provided for in the preceding section." Appellant lays much stress on the fact that the amount allowed was by way of compromise of a pending claim, and that therefore this is not an attempt to appeal from an ordinary allowance of a claim. This argument is without merit. The action of the county board in allowing the claim of $2,548 was the exercise of judicial power on the part of the board, from which an appeal would lie to the district court. *Heald v. Polk County,* 46 Neb. 28. The action, being properly before the district court on appeal, was for trial *de novo,* and it was incumbent upon the appellant to establish all of the material allegations of its petition by a preponderance of the evidence. Section 867, Comp. St. 1922, provides that such appeal shall be tried and determined the same as appeals from justice courts; and section 9406 recites: "The plaintiff in the court below shall be the plaintiff in the district court; and the parties shall proceed, in all respects, in the same manner as though the action had been originally instituted in such court."

In *Box Butte County v. Noleman,* 54 Neb. 239, it is held that an appeal from the order of the county board allowing a claim against the county brings the matter to the district court for trial *de novo,* and issues should be joined in the district court as in cases appealed from a justice of the peace.

The pleadings place the rendition of services and the amount due therefor directly in issue, and the burden was upon the appellant to establish the performance of the contract in accordance with the terms thereof and to show the amount due thereon.

The record discloses a total lack of competent evidence on these vital points, and the trial court did not err in directing a verdict for the defendant, and the judgment therein rendered should be affirmed.

AFFIRMED.

The following opinion on motion to clarify opinion was filed December 6, 1928. *Motion sustained.*

PER CURIAM.

This matter comes on upon a motion to clarify the opinion herein filed June 13, 1928. The motion will be sustained. The uncertainty arises from an incomplete statement of the pleadings. Two causes of action were originally stated in the petition: (1) Upon an agreement for a compromise and settlement of an account for services performed under a written contract; and (2) upon the contract itself for the services rendered.

Upon the opening of the trial in the district court, before any evidence taken, plaintiff dismissed his second cause of action without prejudice by leave of court, as appears from the bill of exceptions. The case was tried upon the first cause of action only. A verdict was directed for defendant, plaintiff appealed, and the judgment was affirmed. The only question presented to and decided by this court was the correctness of the order sustaining defendants' motion for a directed verdict. It follows that the order of affirmance only disposed of the first cause of action, and had no effect upon the claim for services under the contract.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. ORD STATE BANK: VALLEY COUNTY, CLAIMANT, APPELLEE: I. A. KIRK, RECEIVER, APPELLANT.

FILED JUNE 13, 1928. No. 26047.

1. **Banks and Banking**: INSOLVENCY: TAXES. State, county and municipal taxes are a first lien upon the assets of an insolvent state bank in the hands of a receiver, and claim therefor need not be filed as ordinary claims of creditors.
2. ———: ———: ———. It is the duty of such receiver to pay all valid taxes on the assets of the bank before any payment to depositors.
3. ———: ———: ———. Where there were sufficient assets of the bank to pay the taxes, but the same have been paid out

to depositors, or sold in the process of liquidation, the taxes may be ordered paid out of the depositors' guaranty fund.

4. **Taxation:** BANK STOCK. Section 1, class B, ch. 165, Laws 1925, in so far as it purports to authorize a levy of taxes upon the shares of stock of banks, loan and trust, and investment companies, in excess of five mills on the dollar valuation, violates the rule of uniformity as to class required by section 1, art. VIII of the Constitution of this state, and to that extent is invalid.

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

C. M. Skiles, Butler & James and *Edward L. Vogeltanz,* for appellant.

George A. Munn, contra.

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

REDICK, District Judge.

Appeal by the receiver of the Ord State Bank, insolvent, from the allowance of a claim for taxes ordered to be paid from the depositors' guaranty fund. The receiver was appointed September 24, 1926, and on that date took possession of all real and personal property and assets of the bank. On October 4, 1926, by an arrangement between the department of trade and commerce, the receiver and the State Bank, Ord, Nebraska, a newly organized banking corporation, all the assets of the insolvent were sold and conveyed to said State Bank, free from any liens or claims except such as were assumed by the vendee, and which were described as liabilities of deposits subject to check, cashier's checks and time certificates of deposit. The contract of sale was approved by the court and all the assets delivered to the vendee. October 27, 1926, an order was made in the receivership proceedings fixing December 1, 1926, as the last date for filing claims, and the 6th day of

December as the time for hearing claims. Notice of these orders was duly given by posting and publication in newspapers, and on December 6, 1926, the court entered an order barring all claims not theretofore filed.

On February 3, 1927, the county of Valley, appellee, filed a claim against the insolvent bank for the sum of $578.74, for personal taxes for the year 1926 levied upon the shares of stock of said bank, and alleging that said claimant had no notice whatever of the time fixed for filing claims or the time of hearing the same, or of the closing of said bank, in time to permit filing said claim before said dates, and praying for an order on the receiver to show cause why said taxes should not be paid. An order was thereupon issued as prayed, and the receiver filed his return to said order objecting to the allowance of said claim on the following grounds:

(1) That the court had no jurisdiction, after the order barring claims, to allow the same except upon compliance with certain conditions of the statute, which was not done.

(2) An answer to the merits of the claim, admitting the assessment of the taxes in question, that the receivership proceedings are still pending, and that all the assets were sold as alleged, but denying that they were sold free from any lien for taxes of Valley county; and alleging that the State Bank bought said property subject to said tax lien, which it should pay.

(3) That said taxes were invalid as to any amount in excess of $99.10, for reasons which will be referred to later on upon the discussion of this defense.

The county of Valley filed a demurrer to the return, objections to jurisdiction, and answer of the receiver, on the ground they do not state facts sufficient to constitute a legal defense to the tax claimed. The demurrer was sustained by the court, and the receiver refused to plead further, but elected to stand upon his demurrer. The claim was allowed and the receiver ordered to pay the same out of any funds in his hands, and, if they were insufficient, that the deficiency be paid out of the depositors' guaranty fund by

the department of trade and commerce of the state of Nebraska; to which order and judgment the receiver excepts and appeals to this court.

The first objection of the receiver is to the jurisdiction of the court to allow the claim and order its payment when the same had not been filed prior to the order barring all claims. By section 21, ch. 191, Laws 1923, it is made the duty of the receiver, within seven days after the order fixing the date for filing and hearing claims, to mail to each known creditor of such bank a notice of the time and place of hearing on claims by the court; and it was further provided that any claim not presented within the time fixed by such notice should be barred, "unless the court shall by order direct payment thereof thereafter, which order may be entered upon a showing, within six months from time fixed by such notice, that the creditor did not have knowledge of the closing of said bank within the time to permit filing of the claim before the date fixed by the court for hearing on claims."

Section 24 of said act provided: "The claims of depositors, for deposits, and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and, subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership, including the liability of stockholders, and, upon proof thereof, they shall be paid immediately out of the available cash in the hands of the receiver." It was then provided that, if the funds were insufficient to pay the claims of depositors and holders of exchange, the court should determine the amount of the deficiency and certify the same to the department of trade and commerce, which should cause the same to be paid from the depositors' guaranty fund. The receiver reported to the court that there were no known creditors, and no notices were mailed as provided by the statute. It seems clear that, before the claim of a creditor would become barred by the statute, it should appear that the no-

tices required to be given by the statute had been mailed; but we think that the county was not a creditor, within the meaning of the statute, to whom notice was required to be mailed, for two reasons:

(1) The term "creditor" is defined by Webster as "one who gives credit in business matters; hence, one to whom money is due;" and in ordinary acceptation has reference to financial or business transactions. It is in this sense that the term is used in the statute.

(2) By express provision of the statute, claims for taxes are made prior liens upon the assets of the bank in the hands of the receiver, and it was his duty to pay them before paying the depositors.

Taxes are matter of public record, and it has been held in analogous cases that for that reason it is not necessary that they should be filed or proved as a claim against the estate. *In re Prince & Walter,* 131 Fed. 546, a proceeding in bankruptcy. And in estate proceedings it is said: "The more general view is that the requirement of presentation does not apply to claims for taxes and assessments, whether assessed before or after the death of decedent." 24 C. J. 325, sec. 946. Our attention is called by appellant to the case of *Midland Guaranty & Trust Co. v. Douglas County,* 217 Fed. 358, as holding that it is the duty of the county to present a claim for taxes in the receivership proceedings the same as any other claimant, but the case goes no further than to hold that it was proper for the county to appear in the receivership case and ask for an order for the payment of the taxes substantially as was done in the present case. The case cited *Millett v. Early,* 16 Neb. 266, which also held merely that it was proper for the county to file a claim in estate proceedings. In this connection it may further be observed that section 5996, Comp. St. 1922, provides:

"No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the treasurer's office and pay his taxes."

We are of the opinion that for the reasons above noted,

and the receivership proceedings being still pending, the court had jurisdiction to order the payment of the taxes.

The second objection of the receiver is that the assets were sold to the State Bank subject to the lien of the taxes. This was not in accordance with the terms of the contract whereby the State Bank assumed only liabilities for deposits subject to check, cashier's checks and time certificates of deposit. Furthermore, the taxes in question did not become a lien upon the assets of the Ord State Bank until November 1, 1926, and, therefore, as between the seller and the purchaser, the latter would take the property free of the lien in the absence of a contract to the contrary.

The third objection of the receiver that the taxes are invalid presents a more serious question. It is based upon the propositions: (1) That the same are unconstitutional as in violation of section 5219, Rev. St. U. S. (1878); and (2) that they are unconstitutional as violating the rule of uniformity required by section 1, art. VIII of the Constitution of Nebraska. Of these in their order:

By sections 5884-5889, Comp. St. 1922, provision is made for the taxation of intangible property, which it defines as including corporation shares or stocks, and for the manner of their assessment. Section 5884 provides that intangible property shall be separately listed and taxed on the basis of 25 per cent. of the mill rate levied upon tangible property. By section 5887 special provision is made for the return by banks and loan and trust or investment companies of the number of shares comprising their capital stock and the value of the shares on the 1st day of April, to be delivered to the county assessor. It is then provided: "Such capital stock shall thereupon be listed and assessed by him (county assessor) at the same rate as tangible property is assessed in the taxing district where the principal place of business of such association, bank or company is located." It will be noted that by this statute shares of stock in the hands of individuals, corporations and all other property owners, except banks and loan and trust or investment companies, were assessed at 25 per cent. of the

rate of taxation upon tangible property, while the same class of property, shares of stock of banks, loan and trust, or investment companies, was taxed at the full rate of taxation on tangible property. In *Merchants Nat. Bank v. City of Richmond,* 256 U. S. 635, it was decided that a statute and ordinance taxing national bank stocks at a greater rate than that levied upon intangible personal property in general were invalid as contravening section 5219, Rev. St. U. S. (1878) which provided that state taxation of shares in national banks "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state." Following the decision of that case, in *State Bank v. Endres,* 109 Neb. 753, we held that, if national banks were to be excluded from the operation of section 5887, state banks would also have to be excluded, because otherwise the taxes levied thereunder would lack the uniformity as to class required by section 1, art. VIII of the Constitution of Nebraska. That case was cited with approval in *Central Nat. Bank v. Sutherland,* 113 Neb. 126.

In 1925 section 5884, defining intangibles, and section 5887, were repealed by the legislature (Laws 1925, ch. 165) and intangibles were divided into two classes: Class A consisting of money, United States legal tender notes and other securities of the United States payable on demand, savings accounts, all bank deposits, bills of exchange, checks and drafts, to be taxed at 2½ mills on the dollar of the actual value thereof. Class B to include all other kinds of intangible property named in the section which is not included in class A, among which are included corporation shares or stocks, and providing that all intangible property in class B should be taxed at the rate of 5 mills on the dollar of the actual value thereof. It was further provided that the shares of stock in banks and loan and trust or investment companies should be "listed and assessed" by the county assessor "as intangible property at 70 per cent. of the mill rate at which tangible property is assessed in the taxing district where the principal place of business of such

association, bank or company is located." Is the act of 1925 in violation of section 5219, Rev. St. U. S. (1878) and section 1, article VIII of the Constitution of this state? We are not concerned in the case before us whether or not the act is invalid as applied to national banks, and we will, therefore, confine ourselves to the question whether it violates the state Constitution. It will be observed that the act first provides for the taxation of corporation shares or stock at 5 mills upon its actual value, and then provides that the shares of stock of banks and loan and trust or investment companies shall be "listed and assessed" at 70 per cent. of the mill rate at which tangible property is assessed. If by this language the legislature intended that the capital stock or shares of banks should be taxed at a rate equal to 70 per cent. of the taxes levied upon tangible property, then a different rate of taxation is provided for the same class of property, as related to banks, from that levied against the shares of stock of other corporations, and is equally in violation of the constitutional requirement of uniformity as to class. It may happen that 70 per cent. of the rate of taxation upon tangible property will be precisely 5 mills upon the dollar, in which event no harm would be done, but the probability of such an event is ephemeral, and is purely a matter of chance. If the application of the 70 per cent. rate should exceed 5 mills upon the dollar of valuation, or be less than 5 mills, in either event the rule of uniformity would be violated. In the instant case the application of the 70 per cent. rate resulted in the taxation of the shares in question at the rate of 29.2 mills whereas the rate of assessment was 5 mills on all other corporate stock or shares except banks, loan and trust, or investment companies. We are unable to perceive that the defects of the statute of 1922 have been remedied by the act of 1925, and are constrained to hold that the last named act is unconstitutional for the same reasons for which the former was held invalid.

The taxes equitably due upon the shares of stock of the Ord State Bank at the rate of 5 mills upon the dollar of

the actual valuation as assessed is the sum of $99.10, as to which no complaint of invalidity is made; but it is contended by the receiver that no part of the taxes in question is a charge upon the depositors' guaranty fund. In *Farmers State Bank v. Nelson,* 116 Neb. 541, we held: "It is the duty of the guaranty fund commission lawfully in control of a state bank, out of the assets thereof, to pay taxes lawfully levied upon the intangible property of such bank as a demand having priority to rights of the depositors and creditors it represents."

The taxes in question, so far as valid, are a lien upon the assets of the bank in the hands of the receiver, and it was his duty to pay them. Instead of paying them, and before any opportunity for filing claims against the bank was presented, the receiver, with the consent and approval of the court and the department of trade and commerce, sold and delivered all of the assets of the Ord State Bank to the State Bank of Ord, leaving nothing in his hands with which these taxes could be paid. In *State v. American State Bank,* 114 Neb. 740, we held that, where assets of the bank sufficient to pay taxes were in the hands of the receiver and were used for the payment of depositors, it was not error for the court to order the taxes paid from the guaranty fund. This case was cited with approval and followed in *Farmers State Bank v. Nelson, supra.* It does not appear from the record in this case what was the value of the assets of the Ord State Bank which came into the hands of the receiver; but it is conceded that all of its assets, real and personal, were turned over to the receiver and sold to the State Bank. Under these circumstances, in the absence of any allegation that the assets so received were insufficient to pay the taxes, we are entitled to assume that they were so sufficient.

We conclude that the district court erred in sustaining the demurrer to the return and answer of the receiver; that the taxes in question in excess of $99.10 are invalid and not a lien upon the assets of this bank; that the remainder of said taxes, $99.10, with interest at 10 per cent. from

December 1, 1926, were a valid lien upon the assets of the bank, and that, in the absence of sufficient assets remaining in the hands of the receiver to pay the same, they were a charge upon the depositors guaranty fund.

It is therefore ordered that the judgment of the district court be reversed and proceedings remanded, with instructions to enter judgment in favor of the claimant for $99.10, with interest at 10 per cent. from December 1, 1926, and order the same paid out of the depositors' guaranty fund.

REVERSED.

GEORGIA PRIEST, APPELLANT, V. BUSINESS MEN'S PROTECTIVE ASSOCIATION, APPELLEE.

FILED JUNE 13, 1928. No. 26105.

1. **Witnesses**: REPRESENTATIVE OF DECEASED. One entitled to present claim for compensation for the death of an employee under the workmen's compensation act is the representative of a deceased person.

2. ———: COMPETENCY: TRANSACTIONS WITH DECEASED. In a proceeding for compensation for the death of an employee under the workmen's compensation act, the officers and directors of a mutual assessment association, members thereof, have a direct legal interest in the result, and are incompetent to testify as to any transaction or conversation had between the witness and the deceased person against the legal representative of the latter.

3. ———: ———: ———. Transactions in which a deceased person took part are not of themselves incompetent, but evidence thereof may be given by persons not disqualified by statute.

4. ———: EVIDENCE: LETTERS WRITTEN BY DECEASED. A letter proved by competent evidence to have been written by deceased is competent evidence, in a proper case, to prove an admission, or for any other proper purpose, though the adverse party is the representative of deceased.

5. **Master and Servant**: WORKMEN'S COMPENSATION ACT: INDEPENDENT CONTRACTOR. Evidence examined, and *held* sufficient to sustain the finding of the district court that deceased was an independent contractor, and not an employee entitled to compensation under the workmen's compensation act.

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

Allen & Requartte, for appellant.

Good, Richardson & Good, contra.

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

REDICK, District Judge.

This is a proceeding under the workmen's compensation act to recover compensation for the death of Barney B. Priest, initiated by his wife, Georgia Priest. The claimant will be referred to as the plaintiff, and the employer as the defendant. Compensation was allowed by the commissioner at $15 a week for 350 weeks, and defendant appealed to the district court, where the award was set aside and judgment entered in favor of defendant. Plaintiff appeals to this court.

The plaintiff claims and alleges that the deceased, who was her husband, was an employee of defendant and died as the result of an accident arising out of and in the course of such employment, on March 15, 1926.

The defendant denies these allegations, and claims and alleges that at the time of his death said Barney B. Priest was manager for defendant of the state of South Dakota and was an independent contractor.

It will be necessary to state somewhat in detail the facts as disclosed by the record and about which there is not much dispute, but as to the proper inferences to be drawn from those facts the parties are in wide disagreement. From the evidence offered by plaintiff it appears that Priest first became connected with defendant about May 1, 1924, the nature of which connection being evidenced by a contract in writing excuted a few months later. The contract appointed Priest as "special agent to solicit desirable risks for health and accident insurance" for the association. Certain commissions were provided, together with bonus

commission of 50 cents per application. The contract then provided:

"It is further agreed that the party of the first part agrees to give the party of the second part an opportunity to take charge and become state manager of the first state opened after July 1, 1925, and commission and consideration for handling said state to be agreed upon after the party of the first part becomes admitted. In the event the party of the second part does not want to take charge of the first state opened it is further agreed that he shall have the first privilege of any state opened so long as this contract is in force and effect, until he gets a state that is desirous to him.

"It is further agreed that party of the first part will pay party of the second part one hundred dollars per month flat as traveling expenses so long as he remains with the association.

"The party of the second part shall have authority to appoint his agents to work under him for the party of the first part, and shall receive as an overwriting commission the difference between the commission paid the subagent and the commission stated in this contract."

The contract then provided that, in case the association was converted into a stock company, Priest should receive $5,000 of stock, and contained a provision for cancelation by either party upon 60 days' written notice, and a provision that Priest was to remit in cash all nets to the association with the applications.

July 5, 1924, defendant wrote Priest a letter insisting upon his putting in all his time for the company, at least eight hours a day, and forbidding him to sell any other kind of insurance or represent any other company.

Witness O'Sullivan, secretary of the company, testified as to the relations of the parties and the manner of conducting the business during a period ending January 5, 1925, when the witness left the employ of the company. His testimony was to the effect that Priest was under the control of the company, who designated the places where

he was to go and the work he was to do, and that he was under the direction of the office at all times, but that he had no right to reject applications or cancel policies, and that, as usual in such cases, the terms of the policies, premiums, the right to reject applications and to cancel licenses of agents was with the company. Plaintiff also offered in evidence a copy of the "Monthly News" of the defendant company for April, 1926, containing an account of Priest's death, and closing with the statement: "On January 1, 1926, Barney was appointed state manager of the state of South Dakota, and it was in the development of that state that he was killed. Salesmen will come and go, but it will be a long time bofore the B. M. P. A. will have in its ranks another one like B. B. Priest."

Much of the evidence offered by defendant was objected to as incompetent, and it therefore seems proper to consider it in two divisions, and, first, that which is concededly competent. It appears that at least up to the 1st day of January, 1925, Priest was operating under the contract above referred to exclusively in the state of Nebraska; and about that date, or late in 1924, the company obtained permission to do business in the state of Kansas. About the same time Priest expressed dissatisfaction over the fact that he was not receiving as large commissions as one Minor, another agent of the company, who testified to the fact and that they talked to Moreland, president of the company, about Priest going into Kansas. This was in January, 1925, and shortly thereafter Priest did go to Kansas, and on March 15, 1925, wrote Moreland: "Will send you cash on all business from now on as I think I am even for the month you promised me that $300 and expenses." He had previously, February 12, 1925, written from Kansas City, Kansas, asking them to send his salary check. May 15, 1925, he wrote from Atchison, Kansas, saying: "Just as soon as it quits raining I am coming to Lincoln and get routed in some part of Nebraska or Kansas where I can make a living." Priest remained in Kansas about two months and returned to Nebraska, carrying on his work

there as before (whether under the contract or a new arrangement uncertain) until early in February, 1926, when he went to South Dakota. He was delayed on account of lack of funds and disposition or sale of his renewals. On January 16, 1926, he wrote Moreland saying he could not get away before a week and to send "that $150 as I want to get all my little bills paid up before I leave." And on January 19, 1926, he again asked for the $150 so he could get to South Dakota, and on January 30 again expressed his anxiety to get to South Dakota, and saying he wanted to get all lined up before he started and to "start with a clean slate." January 26, 1926, Priest received from defendant a check for $100 and on the same day executed his note to defendant for $345, and on February 23, 1926, a note for $100.

The complete account between Priest and the company from September 1, 1924, to March 1, 1926, from the books of the company, appears in evidence, together with some items added subsequent to his death. These will be referred to later. The account contains no entry on the credit side of the $100 a month expense money referred to in the contract, nor the $300 a month salary while he was in Kansas, and charges Priest with the amounts collected by him for premiums upon policies and other items, and shows a balance due from Priest to the company on March 1, 1926, of $1,302.90. This is apparently accounted for from the failure of Priest to make remittances with his reports. It appears from Priest's letters that he was in the habit of retaining the premiums collected to pay his traveling expenses, and he did this with $300 salary in Kansas, resulting in an indebtednes to the company. After Priest's death two items aggregating $12.90 were added to the debit side; August 16, 1926, a credit, called "adjustment," of $935.01, which left a balance due on the account of $380.79. There may be some doubt as to the competency of Moreland and Schmidt to identify the books of account *(Martin v. Scott,* 12 Neb. 42); but no specific objection was made on that score, nor to the accounts for want of proper foundation.

They may be omitted from consideration, being referred to only as explanatory of the transaction between Moreland and plaintiff now to be mentioned. Moreland testified that in August, 1926, he and the plaintiff went over the account of Priest with the company, and the balance above mentioned was agreed upon and a copy of the account given Mrs. Priest and the bookkeeper instructed to give plaintiff the two notes above mentioned, the same having been credited to the account, and Mrs. Priest promised to pay the balance of $380. This evidence is not disputed by Mrs. Priest. In explaining the items of the account, Moreland testified that the $800 salary to January 1, 1925, and $300 salary for a month Priest was in Kansas were included in the adjustment item of $935.01, and the $345 note.

Depositions of several witnesses were taken in South Dakota to the effect that while Priest was up there in March he was looking for agents to undertake the sale of policies in defendant company under him, telling them he was manager in South Dakota. From the evidence of these witnesses this is the work upon which he was engaged while on the trip upon which he met his death. It also appears that he solicited insurance on his last trip. The evidence does not disclose any transactions with the home office originating in South Dakota, nor any communications of any kind betwen Priest and the company, except a letter of March 11, 1926, in which Priest asked some instructions as to how certain printed supplies connected with the new agency were to be used, and the reply thereto expressing pleasure that he had "finally reached the goal." It should be here noted that the letters of Priest were competent evidence. They were objected to as being "transactions with a deceased person;" but such transactions are not themselves incompetent, only certain persons are not permitted to testify concerning them. True, some of the letters were identified by Moreland, who was incompetent to do so, but no objection was made at the time that no foundation had been laid for their introduction. If there had been, the requisite evidence would prob-

ably have been secured. However, they are sufficiently identified by a comparison with Priest's signature to letters introduced by plaintiff.

The above constitutes substantially all the evidence offered by either party, except evidence claimed to be incompetent as being offered by witnesses having a direct legal interest in the suit, and the plaintiff being the representative of the deceased party. The effect of this testimony may be briefly stated as tending to prove an abandonment by the parties of the written contract above referred to, and consists of conversations between Moreland and Priest in January, 1925, in which Priest expressed his dissatisfaction with his work in Nebraska and wanted to go to Kansas, and resulting in an agreement that he should do so at a salary of $300 a month and expenses, to take effect January, 1925. He also testified to another conversation in May, 1925, in which Priest said he was not going to stay in Kansas, and witness told him he could come back in Nebraska and work under the same kind of contract that Minor had, which called for larger commissions than were provided in the written contract, but without any allowance for expenses, which Priest agreed to until the company entered South Dakota. Another conversation in January, 1926, in which they talked about the contract for South Dakota, witness telling him that he would get 80 per cent. commission on all quarterly business, 40 per cent. on all annual business and 5 per cent. on volume, that he should hire and discharge the men and pay them whatever commission he wanted to, not over what he himself was allowed, and whatever he could save to be his as an overwriting commission; that nothing was said in regard to salary; that Priest had not worked on salary since March, 1925; that he was under the impression a written contract for South Dakota had been drawn up, but was unable to find it, and none was ever signed; that the company, at Priest's request, advanced him $100 for his expenses in removing to South Dakota; that the company did not give Priest any instructions as to how he was to conduct the

business in South Dakota, but he was authorized to do so in his own way.

Another witness, whose testimony was objected to upon the same ground, was A. C. Schmidt, a director and assistant secretary of defendant company. He testified that he was present at the conversation in January, 1926, between Moreland and Priest regarding the South Dakota contract, and his testimony is to the same effect as that of Moreland.

Section 8836, Comp. St. 1922, provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of the deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness."

The objection to the testimony of Moreland and Schmidt above detailed seems to be well taken. This testimony had to do with transactions and conversations with a deceased person, and the plaintiff is the representative under the provisions of the workmen's compensation act permitting the claim for compensation to be made by the widow, next of kin, or administrator of the estate. *Coster v. Thompson Hotel Co.*, 102 Neb. 585. The only difficulty we have had is upon the question whether or not Moreland and Schmidt have a direct legal interest in the result of the suit. The defendant is a mutual assessment company, and debts and claims against it can only be met by assessment of the members. The by-laws provide that, if the regular assessment be insufficient for payment of claims and expenses, the directors shall have power to order further assessments, apportioned at the legal rate, and the statute requires assessments to be made to pay all losses, and upon failure to do so the officers to become individually liable therefor. Comp. St. 1922, secs. 7861-7866. The by-laws require the officers and directors to be members of the association, and therefore it may be assumed that Moreland and Schmidt were such members. It seems clear that, if the claim of plaintiff is allowed, members of the associa-

tion would be subject to an assessment for its payment and thus have a direct interest in the result. It is argued that for all that appears in the record the company may have sufficient reserve to pay the claim, and that therefore the liability to assessment is so remote as to not constitute that direct legal interest referred to in the statute, but we think the liability of the witnesses is sufficient to disqualify them.

In support of his contention that the evidence is competent, counsel for defendant cite the case of *Bost v. Supreme Council,* 87 Minn. 417, in which it was held that one Gilbert, who was a member of the fraternal association was competent as a witness as to conversations had with the insured, under a statute prohibiting all persons interested in the event of suit from testifying, and is directly in point for the defendant. It may be remarked in passing that the subject of such holding was not referred to in the syllabus. The judge writing the opinion referred to *Perine v. Grand Lodge, A. O. U. W.,* 48 Minn. 82, as sustaining the holding. Upon examining that case it will be found that the witness whose testimony was held competent was not a member of the society at the time of the death of the assured, and at the time of giving his evidence was a member of a subordinate lodge, and the testimony was insufficient to establish, with reasonable certainty, that he would be subject to an assessment to pay any judgment which might be recovered; and the writer of the opinion closed by saying: "Had it appeared that a recovery in this action would directly and certainly subject St. Cyr (the witness) to an assessment of any amount, either by the grand lodge or by the subordinate lodge, he would undoubtedly have an interest in the event of the suit, within the meaning of the statute." It therefore appears that the *Perine* case referred to in the *Bost* case makes for the plaintiff.

The only other case referred to in that connection was *Marvin v. Dutcher,* 26 Minn. 391, to the effect that the disqualifying interest must be such that the witness having

it will either gain or lose by the direct legal operation of the judgment therein, or may be prejudiced in some right by the use of the judgment against himself in some other action or proceeding, which is a substantial statement of the rule existing in this state.

The *Bost* case, however, was followed in *Havlicek v. Western Bohemian Fraternal Ass'n,* 138 Minn. 62, holding that the financial secretary of the local lodge was not an incompetent witness as to transactions with deceased, and also citing *Perine v. Grand Lodge, A. O. U. W.,* 48 Minn. 82, and distinguishing *Peterson v. Merchants Elevator Co.,* 111 Minn. 105, holding that a stockholder of a corporation was so directly interested that he could not testify. These decisions are not convincing.

Appellee also cites *State Bank of Dexter v. Fairholm,* 201 Ia. 1094, holding that neither the president nor cashier of a bank were incompetent to testify as to transactions with the husband or to conversations with him relating to execution of the note in suit by reason of the witness' connection with the plaintiff bank, basing their holding upon the fact that the statute did not exclude the agent of a company from testifying. Moreover section 4604 of the Code of Iowa excluded only parties to the action, which sufficiently accounts for the holding.

On the other hand, in consonance with the general holding, it was held in *Tecumseh Nat. Bank v. Magee,* 61 Neb. 709, and in *Dickenson v. Columbus State Bank,* 71 Neb. 260, that a stockholder in a corporation has such a direct legal interest as to render him incompetent under the statute, in an action in which the corporation was interested. In *Tecumseh Nat. Bank v. Magee, supra,* the test for the determination of the interest of the witness was whether he would gain or lose by the direct operation and effect of the judgment, or whether the judgment would be competent evidence for or against the witness in another action. In either event his interest was such as to disqualify him.

Tested by these rules, it would seem reasonably clear that Moreland and Schmidt were incompetent under the statute to testify to transactions and conversations with Priest. Being officers of the association it will be assumed, in the absence of evidence to the contrary, that they were members thereof and, under the by-laws of the association and the statutes of the state referred to, would be subject to assessment if it were necessary to pay a judgment in this proceeding. It is argued, however, that it is not shown but that the reserve of the association would be sufficient to satisfy the judgment. There is no evidence upon the point, but we do not think that the contingency renders the interest of the witnesses so remote as to render them competent. The reasons for excluding a stockholder of a corporation are of equal cogency when applied to the member of an assessment association. Upon the dissolution of either body the members would have an interest in the distribution of its assets and therefore are alike interested in any proceeding whereby they might be depleted. We think the depletion of the assets or the levying of assessments may be considered as resulting from the direct operation of the judgment. In proceedings to collect the judgment the members could not contest the existence of the indebtedness, and therefore the judgment would be evidence against them. They were interested in preventing the recovery of the judgment and therefore disqualified from testifying to transactions with decedent against his representative. The instant case, when submitted to the tests laid down in *Tecumseh Nat. Bank v. Magee, supra,* seems to fulfill them.

In *Cronin v. Supreme Council of the Royal League,* 199 Ill. 228, it was held that a member of a beneficiary association was within the disqualifying statute.

The question remains whether or not, excluding the incompetent testimony of Moreland and Schmidt, plaintiff has produced sufficient evidence to sustain a finding that at the time of his death Priest was an employee of defendant.

It has been frequently said that the basis underlying compensation statutes is the proposition that the industry in which the claimant is employed should bear the loss of his injury or death growing out of and in the course of his employment. If we can discover in what industry Priest was engaged at the time of his death we will have found the party liable for the compensation provided by statute.

The evidence is not conclusive upon the question. The plaintiff claims that by the written contract in evidence Priest became an employee of the defendant (we do not decide the point), and that in the absence of competent evidence of a change in their relations, the same continued to the time of his death. This may be conceded, but the defendant claims that the presumption is destroyed by the subsequent conduct of the parties, showing, as is claimed, that when Priest went to South Dakota he became an independent contractor engaged in a business of his own. The facts tending to show such change of relations and an abandonment of the written contract are, that Priest changed his place of work from Nebraska to Kansas at a fixed salary of $300 a month and expenses, in about February, 1925; that upon his return to Nebraska he worked under a contract substantially the same as that of Minor, and not under the written contract, and later, about January 1, 1926, was appointed state agent for South Dakota, as contemplated by the terms of the written contract, his compensation to be agreed upon. There is no competent evidence that any agreement was ever concluded as to his compensation as state manager.

As further evidence of abandonment of the written contract, defendant points to the giving by Priest of the note for $345 on January 26, 1926, the advance to Priest on that day of $100, which Priest refers to as $150, to enable him to go to South Dakota, and Priest's note for $100 dated February 23, 1926. It is important to note in this connection that the contract under which Priest began his connection with defendant provided that "he shall have the

first privilege of any state opened so long as this contract is in force and effect, until he gets a state that is desirous to him," indicating an understanding that in that event the contract should end and a new one be entered into as provided for therein.

It further appears that while in South Dakota Priest was engaged in activities properly looking toward the establishment of an insurance agency of which he would be the head in that state.

We think it must be conceded that the management of an insurance agency which employs subagents for soliciting insurance of various kinds and for a number of companies may be considered as an industry in itself, enjoying the privileges and bearing the burdens of the workmen's compensation act; and that such industry may be established though the business is confined to writing insurance for one company. Persons engaged in that industry are in no sense employees of the insurance companies represented by them. Such agencies are numerous and well known to the business world. It has not been brought to our attention that a claim was ever made that agents in that business were employees of the single or several companies they represent, and the plaintiff in this case makes no such claim. In *Christensen v. Protector Sales Co.*, 105 Neb. 389, Christensen "undertook to sell defendant's products to the retail trade on a commission basis." He was assigned a territory, given an advancement, furnished with samples and advertising matter, took two orders for merchandise, and on the second day was accidentally killed while traveling by automobile in his territory. Defendant had other salesmen working under a similar agreement, each assigned to separate territory. We held that a finding that plaintiff was an independent contractor was sustained by sufficient evidence, Morrissey, C. J., remarking:

"The relationship existing between these parties may be likened to that between insurance solicitors and their companies. When day dawns the agent is free to work or play. If he idles away the day, he does so at his own loss. The

company has the right only to revoke the agency agreement. Christensen was free to make his sales by writing letters to the dealers within his territory; he might have called them by telephone, or he might have employed subagents."

Was Priest such an agent at the time of his death? The question is by no means free from difficulty; in fact, we have found it a very perplexing one. Upon a critical examination of the competent evidence in the record, we have reached the conclusion that the reasonable view to take of the situation is that at least on January 1, 1926, Priest ceased to be an employee of defendant and entered upon an independent career as owner and manager of an insurance agency in South Dakota, under the appointment of defendant, but not subject to defendant's control as to the manner in which such agency should be conducted, where, in the state, it should be established, nor under any superintendence or supervision of defendant, such as is present in the relation of employer and employee; that Priest was engaged in a separate industry and his relation to defendant was that of independent contractor. We are at least convinced that the plaintiff has failed to establish by sufficient evidence that Priest was an employee of defendant at the time of his death, and that the finding that he was an independent contractor is sustained by sufficient evidence. It follows that the judgment of the district court is right, and it is AFFIRMED.

GORDON STATE BANK, APPELLEE, V. EDWARD W. HINCHLEY ET AL., DEFENDANTS: GRACE CARNEY ET AL., APPELLANTS.

FILED JUNE 15, 1928. No. 25660.

Mortgages: FORECLOSURE: SALE: INCREASE OF BID. In the confirmation of a judicial sale under a decree of foreclosure of a mortgage, under the statute now in force, where the owner of the property is not in justice and equity injured thereby, it is not error for the court to allow the bidder to increase his bid on the hearing for confirmation of the sale.

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

Lloyd H. Jordan and *A. C. Plantz,* for appellants.

R. L. Wilhite, contra.

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

PER CURIAM.

This is an appeal from an order confirming a sale of real estate on decree of foreclosure of a mortgage. No bill of exceptions was filed in this court. The only questions involved arise on the record. All center around one point, which we will state.

The decree appears to have been dated October 1, 1924, and for the sum of $1,939.48, with interest at 10 per cent., and costs. This lien found in favor of the plaintiff was subject to a certain prior lien. The land was once offered under an order of sale issued pursuant to the decree and was sold for $500, subject to incumbrances of record. This sale was set aside. The land was again offered for sale and was sold to the Gordon State Bank of Gordon, appellee, for $500, subject to incumbrances of record, which the court found, in his journal entry and order for confirmation, to amount to $3,000, the plaintiff's lien on said day amounting, as the court also found, to the sum of $2,342.52. The court being of the opinion that $3,500 was not a fair value for said real estate, thereupon the plaintiff, in open court, raised his bid to the sum of $2,342.52, subject to the unpaid first mortgage and unpaid interest thereon and taxes against said real estate. After duly considering said bid, which he found would amount to a payment of $5,342.52 for the land, the court found "that the last mentioned bid by the plaintiff is a fair value for said real estate and a fair consideration for the same, and that said real estate would not bring to exceed more than said bid

if again offered for sale." Thereupon the court overruled the objections to confirmation and confirmed the sale.

The only real question for consideration is whether the court erred in allowing the plaintiff to raise his bid on the hearing for confirmation.

In *Green v. State Bank,* 9 Neb. 165, the order confirmed the sale "upon the plaintiff stipulating to convey the property purchased by it at said sale to the defendant upon receipt of $2,000 within sixty days from this date." The court, it was said, had no authority to impose such condition or to change or modify the terms of the sale. In *Fitch & Co. v. Minshall,* 15 Neb. 328, it was held that the court could not make its confirmation conditional. In *Griffith v. Jenkins,* 50 Neb. 719, the confirmation order showed that the purchaser, in open court, raised his bid without disclosing why or that any condition was imposed by the court.

Under the law formerly, when the real estate levied upon was appraised, it could not be sold for less than two-thirds of the appraised value. The regularity of the sale and fairness of the price are now determined by the court, which determines what circumstances and conditions will justify confirmation. The court has equity powers in passing upon a judicial sale, and may exercise sound discretion and even impose conditions so long as they are not arbitrary.

Appellants were not prejudiced, and should not complain of error in their favor, if any.

In the confirmation of a judicial sale under a decree of foreclosure of a mortgage, under the statute now in force, where the owner of the property is not in justice and equity injured thereby, it is not error for the court to allow the bidder to increase his bid on the hearing for confirmation of the sale.

For the reasons stated, we are of the opinion that there is no merit in the appeal. The judgment of the district court is therefore AFFIRMED.

MERIDIAN HIGHWAY BRIDGE COMPANY, APPELLANT, V. CEDAR COUNTY, APPELLEE.

FILED JUNE 15, 1928. No. 25945.

1. **Taxation.** Under section 5820, Comp. St. 1922, "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade."
2. ———: BOARD OF EQUALIZATION: DISCRETION. The sound discretion reposed in the board of equalization to hear and determine the valuation of property will not be disturbed by this court, unless so manifestly wrong that reasonable minds cannot differ thereon.

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

B. Ready & Son, for appellant.

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

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

GOSS, C. J.

The Bridge Company appeals from an order fixing the valuation of the Meridian Highway bridge in Cedar county, Nebraska, at $400,000 for purposes of taxation for the year 1926.

The Cedar county assessor fixed the valuation at said sum and, on a hearing before the board of equalization of the county, wherein the Bridge Company protested that the assessment was too high and requested an adjustment, the board made an order adhering to the assessment; and on appeal and hearing before the district court the objections of the Bridge Company were overruled and the valuation by the board of equalization was sustained and approved. On the overruling of a motion for a new trial the case was brought here for review. In addition to the conventional errors that the findings are not supported by the evidence, and are contrary to the evidence and to law, and

errors of law occurring at the trial, it is assigned that the income from the bridge was not considered in fixing its value and that the value of the bridge stock, likewise, was not considered.

It is alleged in the petition, and admitted in the answer, that the Meridian Highway Bridge Company is a corporation, with its principal place of business in Yankton, South Dakota; that on October 16, 1924, the bridge in question was completed and opened for public travel across the Missouri river, with its northern terminal in Yankton and its southern terminal in precinct No. 2 in Cedar county; that 70 per cent. of the bridge is in Cedar county; that for the year 1926 the county assessor of Cedar county valued that part of the bridge in Cedar county at $400,000, which the company alleged to be excessive and to which it filed its objection before the board of equalization, and, upon a hearing on June 19, 1926, the board of equalization overruled the objections and fixed that valuation; and that said bridge was built to be used as a combined railroad and wagon bridge. The petition alleged that, to give the bridge the proper strength for a railroad bridge, it was necessary to expend three times the amount of money necessary for a wagon bridge, and that the expenditure made for railroad purposes is bringing no income whatever and there are no prospects, even remote, of its being used for railroad purposes.

The evidence is not as complete as we would like to have it. No testimony was offered upon behalf of the county. The entire bill of exceptions, including two exhibits, consists of eleven pages.

There was testimony showing that the bridge cost the sum of $1,169,367.17. Just to give something of a view of its liabilities, we learn, from a statement introduced in evidence, that it has bonds outstanding of $270,000, capital stock $823,325, undivided profits $13,615.24, and reserved for depreciation $21,925.64; its operating statement for the year 1925 shows that its chief receipts are bridge tolls, $62,478.80, and its principal disbursements are, ex-

penses $19,324.26, interest on bonds $17,100, depreciation of bridge $17,540.51. These items account for all but a few hundreds of its receipts and disbursements. The total receipts being $63,051.60 and disbursements $55,005.80, according to the statement, the net profit remaining was $8,045.80.

The county assessor was made a witness for the plaintiff. His testimony in full is as follows: "Q. Mr. Fornisch, you are the present county assessor of Cedar county? A. I am. Q. And as such assessor you fixed the value of the Meridian Highway bridge, did you? A. Yes, sir. Q. At $400,000? A. Yes, sir. Q. And from that you, or rather the board of equalization, made an assessment, did they not? A. Yes, sir. Q. In fixing the valuation at $400,000, did you or the board of equalization take into consideration the earnings of the bridge? A. We did not."

Cross-examination. "Q. What did you take into consideration in fixing the value? A. I took nothing but the physical valuation. Q. That is what you did in this case? A. Yes."

There is nothing shown in the evidence as to the amount of taxes that would be produced by the valuation fixed. At the rate of state taxes for the year 1928, the state taxes would be $1,500, county taxes are usually a like amount, and school taxes may roughly be estimated at an amount equal to both the county and state. So, in the ordinary course, merely for the purpose of throwing some light on the consideration, it may be said that the total taxes on the valuation fixed would be in round numbers approximately $6,000 for the one year in which the assessment in question would be in effect.

Under section 5820, Comp. St. 1922, "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade." It is rather difficult to estimate the value of property like that of the bridge in question in the market in the ordinary

course of trade, because there is so little trading in or selling of such properties. Other tests have to be applied than those arrived at by actual barter.

Just what was meant by the assessor himself in his expression "physical valuation" is not explained. In connection with the context, it is quite likely he meant the actual valuation as he viewed it in his capacity as assessor. He testifies that he and the board did not take into consideration the earnings of the bridge. There is nothing in the evidence to show either that these earnings or the value of the stock in the company were or were not brought to the attention of the board of equalization in their hearing. It does not matter much, as the question here is as to the actual value of the property for taxation purposes. The reasons that guided the assessor and the board might be helpful in determining the action of the court.

However, let us analyze the matter of capital, earnings and net income as if they had been presented to the board of equalization. Over $800,000 of the cost value of the bridge was in Cedar county. This, as we understand it, was the first valuation for purposes of taxation since its completion. For potential uses it was a railroad bridge as well as a bridge for vehicles. The event has proved that, up to the time of trial, the owners had no contract for its use by railroad. It actually cost a total of about $800,000 more than it would have cost for the use of vehicles alone. On what needed to have been a cost of less than $400,000, it had a gross operating income of $62,478.80, with expenses of $19,324.26. This would have left a fair margin for a reasonable return in a formative year on the necessary capitalization for a vehicle bridge. For we may assume that toll bridges, like most new ventures, require publicity and advertisement before they become known. For the purpose of testing this it would be interesting to compare the income of 1925, furnished at the trial, which took place on January 14, 1927, with that of 1926. We are without that aid, as no inquiry was made by either party as to income for 1926 for what light it might throw upon

the valuation fixed by the board in the spring of 1926. The board had a right to attribute some actual value to that portion of the bridge devised and intended for railroad purposes. It could not be said in 1926 that it was not of some substantial value. To compare it with property more within common knowledge we might consider an alfalfa field, which in the year of catching a crop is of comparatively little use or value; or an office building, which for the first year, or often longer, produces a small net income. And yet will any one say that neither the field nor the building shall be taxed so low as to bear no fair relation to its ultimate value, based on its intended use? So, attributing some actual value to that portion of the bridge erected with special reference to railroad uses and considering the earnings in the first year after the opening of the bridge, there was a reasonable basis for the actual value of $400,000 as fixed by the board and approved by the district court. There was some testimony of the president of the company that in the past some of the stock had sold for $20 to $25 a share, but this would not be indicative alone of a valuation of the property so very far different from the valuation contended for by the county.

We are loath to interfere with the sound discretion reposed in boards of equalization to value real property at its actual value. Where the action of such a board does not appear to have been exercised arbitrarily nor to have omitted to take into consideration the proper and necessary elements to be considered in fixing the value, its action ought not to be disturbed. Here the valuation might have been rather high for the particular year, and yet we do not feel disposed to find, on what evidence was submitted to us, that it was. We think the proper rule is that the sound discretion reposed in the board of equalization to hear complaints and determine on the valuation of property will not be disturbed by this court, unless so manifestly wrong that reasonable minds cannot differ thereon.

This principle is found in *Field v. Lincoln Traction Co.*, 74 Neb. 418, and *Woods v. Lincoln Gas & Electric Light Co.*, 74 Neb. 526.

We conclude that the judgment of the district court is right and it is

AFFIRMED.

JOHN MARTIN, GUARDIAN, ET AL., APPELLANTS, V. C. FRANK REAVIS ET AL., APPELLEES.

FILED JUNE 15, 1928. No. 25957.

1. **Contract** set out in the opinion examined, and *held* to be unambiguous.
2. **Contract**: CONSTRUCTION. Where, in litigation, an unambiguous written contract is drawn in question, its construction and legal effect is for the determination of the court, and not the jury.

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

Adams & Zimmerman and *Herman Ginsburg*, for appellants.

F. B. Baylor, contra.

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

GOOD, J.

This is an action to recover from defendants, who are attorneys at law, $1,666.66, which it is alleged belongs to plaintiffs and is wrongfully withheld by defendants; also to recover, as a penalty, thrice the amount retained, on the theory that it was procured by deceit practiced by the defendants. Defendants admit the retention of the $1,666.66; assert that it was due them as attorney's fees under a written contract of employment as attorneys for plaintiffs, and deny that any deceit was practiced. On a trial of the issues, after all the testimony was taken, a verdict was directed for defendants. Plaintiffs have appealed.

From the record it appears that Mary Barrett, a maiden lady, possessing an estate of approximately $100,000, died testate, leaving her surviving, as her next of kin and heirs at law, a number of sisters and brothers and children of deceased sisters and brothers. In her will she made 13 specific bequests, aggregating $14,050. One clause of the will bequeathed a legacy of $5,000 to Elizabeth Cunningham, a sister of testatrix. There was a residuary clause in which she bequeathed and devised the residue and remainder of her estate to her brother, William Barrett, upon the condition that he should pay all the other bequests and legacies provided for in the will. The latter part of this clause is, in part, as follows: "It is my will and intention and I do hereby direct that the said William Barrett, to whom I give my entire estate, both real and personal property, subject, however, to the payment of all the specific bequests and legacies mentioned in my will." The sister, Mrs. Cunningham, predeceased the testatrix.

Shortly after the death of Miss Barrett, her next of kin and heirs, other than her brother William, employed defendants to resist the probate of the will of Mary Barrett. At the time of the employment the defendants were informed that William Barrett claimed that he did not have to pay the $5,000 bequest to Mrs. Cunningham. After some conversation and preliminary investigation, a written contract of employment was entered into. The contract was dictated by Mr. Beghtol to the firm's stenographer in the presence of a number of the interested parties, after which the contract, or copies thereof, were signed by the various parties. The contract provided:

"Whereas, the undersigned are heirs of Mary Barrett, deceased, and desire to employ the firm of Reavis & Beghtol as their attorneys to represent the undersigned in litigation arising out of a proposed contest of the will of said Mary Barrett.

"Now, therefore, it is agreed that said Reavis & Beghtol will act as attorneys for the undersigned in all matters arising out of the will of Mary Barrett deceased in what-

ever court or courts the same may be brought and shall receive as their only compensation therefor an amount equal to thirty-three and one-third per cent. of the property or money realized by the undersigned from the estate of the said Mary Barrett, it being understood that said attorneys are not to compromise said suit without the consent of the undersigned."

Pursuant to this employment, the defendants prepared and filed objections to the probate of Miss Barrett's will. A hearing was had in the county court, resulting in the overruling of the objections and admitting the will to probate. Contestants appealed to the district court, where defendants conducted the trial, lasting about a week, which resulted in a judgment sustaining the will. Thereupon, the defendants, after further consultation with their clients, instituted in the federal court an action on behalf of the children of Mrs. Cunningham for the construction of the will, whereby it was hoped to obtain a decree, holding that the clause in the will devising the residue of Mary Barrett's estate to William Barrett, upon the condition that he pay the specific bequests in the will, would be held a condition precedent to the vesting of title in him; that, on account of the death of Mrs. Cunningham, a payment of the legacy could not be made to her and the condition precedent could not be performed; that the residuary devise and bequest to William would lapse and would be disposed of as though testatrix had died intestate; and with a view to obtain the Cunningham legacy for plaintiffs.

Defendants in the action in the federal court, who were the executors of the will of Mary Barrett, filed a motion to dismiss the action which, under the federal practice, amounted to a demurrer to the petition. In other words, the filing of such motion was the equivalent of saying that the facts therein alleged were insufficient to entitle the plaintiffs to any relief. Necessarily, this implied that the plaintiffs were not entitled to the legacy which had been bequeathed to their mother, Elizabeth Cunningham. The federal court overruled the demurrer, and immediately

thereafter the executors paid to Reavis & Beghtol, as attorneys for the Cunningham heirs, plaintiffs in this action, $5,000, the amount of the legacy left to Elizabeth Cunningham. Defendants in this action immediately wrote letters to their clients, informing them of the receipt of the $5,000 and making a statement as to the amount to which each was entitled after deducting one-third thereof for attorney's fees and some small items of expense, and enclosed checks for the respective amounts. These checks were recived by the plaintiffs and cashed, and they retained the proceeds without objection. Several months later, the federal court decided that the payment of the Cunningham legacy was not a condition precedent to the vesting of the residuary estate in William Barrett. It then became apparent that plaintiffs could receive nothing further from the estate of Mary Barrett, and this action was begun.

Plaintiffs contend that the written contract is ambiguous and that they were entitled to introduce oral testimony to explain what was meant by its terms, asserting that they were intended to and did mean that defendants in this action were to receive a sum equal to one-third of the amount which they should recover by the litigation over and above the legacy to Elizabeth Cunningham.

We think this contention is not well-founded. A careful examination of the contract makes it apparent that its terms are clear, easily understood and are not ambiguous. The contract provided in unequivocal terms, which any ordinary person could understand, that defendants in this action were to receive for their legal services one-third of the amount which plaintiffs might realize out of the estate of Mary Barrett. In this action no reformation of the contract is sought, and, had it been, the evidence is insufficient to sustain such a contention.

In *Clark v. Hall*, 54 Neb. 479, it is held: "Where a written contract is the basis of an action and neither party asks for a reformation thereof, it is the duty of the court to ascertain its meaning and enforce it accordingly." And in *Western Mfg. Co. v. Rogers*, 54 Neb. 456, it is held: "The

interpretation of a written contract is for the court and not for the jury, when it is capable of being construed by its terms alone, unaided by extrinsic facts." Like rulings are made in *Ricketts v. Rogers,* 53 Neb. 477, and *Meyer v. Shamp,* 51 Neb. 424. Moreover, in the present action the plaintiffs, themselves, pleaded the contract in their petition and, in the absence of any demand for reformation, are bound by the terms of the contract as pleaded. *Carey v. Zabel,* 112 Neb. 16.

Under the rules thus announced, the contract itself being unambiguous, it follows that its construction and legal effect was a question for the court and not for the jury.

Plaintiffs further contend that both parties to the contract of employment understood it to mean that counsel were to receive only one-third of what was secured by defeating the probate of the will, or, at least, that this was the understanding of the plaintiffs in this action; that defendants knew that plaintiffs so understood the contract, and that therefore this interpretation should be placed upon the contract.

There is no evidence to sustain this contention. After the terms of the contract were dictated, it was read over and there was no discussion of its terms or the meaning thereof; nor was there, at any subsequent time, any such discussion between the parties to the contract. In this connection, it is also significant that, after the will contest had been finally disposed of in the district court, and plaintiffs and their counsel, defendants in this action, had concluded to abide by that decision, the action in federal court was begun without any other agreement or understanding as to attorney's fees. It seems quite clear that plaintiffs and defendants relied upon and understood that the written contract still covered and fixed the terms of employment for that litigation; and yet, if the contention now made by plaintiffs is true, there could have been no compensation to the attorneys for the services to be rendered in the federal court. There is no basis for the contention that both parties to the contract understood it to have the

meaning contended for by plaintiffs. The evidence discloses that the defendants in this action rendered extensive legal services for the plaintiffs; that, by the written contract entered into, they were entitled to the amount which they retained for legal services. This disposes of the first cause of action.

The second cause of action is grounded on the assumption that the amount retained by defendants as counsel fees was procured by deceit, and that plaintiffs are entitled to recover thrice the amount as a penalty, pursuant to the provisions of section 265, Comp. St. 1922. The record does not disclose that defendants were guilty of any fraud or deceit or of any unprofessional conduct, and is absolutely barren of any fact which would support the second cause of action.

On the record made, there was nothing to submit to the jury. The trial court properly directed a verdict for the defendants. The record is free from error, and the judgment is

AFFIRMED.

CHARLES CECH, APPELLANT, V. JOHN H. COSTELLO, APPELLEE.

FILED JUNE 15, 1928. No. 25853.

1. **Fraudulent Conveyances:** SALE IN BULK. "One who obtains possession of a stock of merchandise pursuant to a purchase thereof in bulk, without having complied with the provisions of section 2561, Comp. St. 1922, commonly known as the 'Bulk Sales Law,' will be held to be a trustee for the benefit of the creditors of his vendor and liable as garnishee." *Home Pattern Co. v. Gore*, 113 Neb. 535.

2. ———: ———: LIMITATIONS. Ordinarily, and in the absence of facts which constitute an equitable estoppel, a creditor under the bulk sales law may assert his right against one who has purchased, in bulk, the merchandise of his debtor without compliance with the provisions of such law, at any time within the general statute of limitations.

3. **Estoppel.** "In order to constitute an equitable estoppel by silence or acquiescence, it must be made to appear that the facts upon which it is sought to make the estoppel operate were known to the parties against whom the estoppel is urged." *City of Lincoln v. McLaughlin*, 79 Neb. 74.

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

Wallace S. Porth and *McElfresh & Walker*, for appellant.

W. M. Cain and *B. F. Farrell, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and HOWELL, JJ., and CLEMENTS and REDICK, District Judges.

CLEMENTS, District Judge.

This action was brought by Charles Cech against John H. Costello to recover $2,850.81, interest, and costs.

The plaintiff pleads that he was a creditor of one Walter Wolfe, the owner of a stock of merchandise, in Schuyler, Nebraska; that such stock of merchandise was sold in bulk to the defendant, John H. Costello; that in such sale no attempt was made to comply with the bulk sales law; that the plaintiff's claim was not paid, but was reduced to judgment; that an execution issued thereon and was returned unsatisfied; that an affidavit for garnishment in aid of execution was filed in the district court for Colfax county against the defendant; that the defendant answered therein, and that his answer was unsatisfactory.

The defendant, as a defense to this action, pleads in substance: Admits the purchase of the goods; alleges that the plaintiff had actual notice of the sale, but did not seek to enforce his claim until nearly a year after the sale and until the purchase price of the goods had been fully paid, and claims that the plaintiff is thereby estopped to recover from the defendant under the provisions of the bulk sales law.

The case was tried to a jury. At the close of the evidence each party moved for a directed verdict. The court discharged the jury, entered a finding for the defendant, and dismissed the action. The plaintiff appeals.

The facts in this case are not greatly in dispute and, as shown by the pleadings and evidence, are as follows:

On January 1, 1922, one Walter Wolfe was indebted to the plaintiff in the sum of $2,500 for wages as a farm laborer, and on that date made and delivered to the plaintiff his promissory note to evidence such indebtedness, due and payable one year from date. Said Walter Wolfe, at the time said note was given, was the owner of and operated a grocery and meat business in the city of Schuyler, Nebraska. He continued to own and operate said store until March 25, 1923, when he sold the same to the defendant for the sum of $17,000; $8,000 of which was for the stock of merchandise. At the time of this sale, the note of the plaintiff was due and unpaid, and plaintiff was a creditor of the seller of said goods. The sale of the merchandise was made in bulk, and no attempt was made to comply with the provisions of the bulk sales law. Comp. St. 1922, sec. 2561. The contract of sale was signed March 25, 1923. The invoice was taken Sunday, March 26, 1923, and the possession of the store and merchandise turned over to the purchaser on the evening of that day. No inventory was taken five days before the sale. The purchaser did not demand or receive of the seller a written list of names and addresses of creditors of the seller, with the amount due or owing to each; nor did the purchaser, five days before taking possession of such merchandise or paying therefor, notify personally, or by registered mail, the creditors of the seller, of the proposed sale, and of the price, terms and conditions thereof. On the day that the sale was made, the plaintiff was working on the farm of Walter Wolfe, some distance from Schuyler. On that evening he came to Schuyler, and learned from his mother that a sale of the Wolfe store had been made. He went to the store on that evening, and saw the defendant behind the

counter, serving customers. He went to the store the next day, Sunday, and found it locked. He looked through the window and saw an invoice being taken. He learned the next day, Monday, that the sale had been completed, but did not learn then, nor until after the garnishment proceedings had been commenced, the terms and conditions of the sale. He waited about one year before bringing suit on his note.

From these facts the trial court found he was estopped from asserting his claim as a creditor against the purchaser of the goods, under the provisions of the bulk sales law. In this, we think the court erred.

"One who obtains possession of a stock of merchandise pursuant to a purchase thereof in bulk, without having complied with the provisions of section 2561, Comp. St. 1922, commonly known as the 'Bulk Sales Law,' will be held to be a trustee for the benefit of the creditors of his vendor and liable as garnishee." *Home Pattern Co. v. Gore,* 113 Neb. 535.

Defendant Costello concedes that this is the law applicable to sales of merchandise in bulk, and concedes that in the sale to him of the Wolfe stock the bulk sales law was not strictly complied with, but contends that the plaintiff had knowledge of the sale before its completion, and could have readily estimated the probable price, terms and conditions, and that this was a sufficient substituted compliance with the statute, citing, *Home Pattern Co. v. Gore, supra.* There is nothing in this case to sustain such a theory. In the *Gore* case, the court said:

"The record nowhere shows that the purchaser sent the required notice to any creditor, as the statute plainly says he should do, for the only communication between any of the parties to the sale and the creditor was the request made by Gore, the seller, that a representative of the creditor be sent to make the appraisement. This request by Gore cannot be construed to be a notice sufficient to comply with the statute, for it does not appear that this communication contained any notice of the price, terms or condi-

tions of the sale. Nor does the participation of Chapman in the routine work of appraising the stock amount to a waiver on the part of appellee of its rights under the bulk sales law."

If notice to a creditor that a sale is being made and participation of a representative of the creditor in the invoice and appraisement of the merchandise is not a sufficient notice under the statute, how can it be said that knowledge by the creditor that a sale is in progress and an invoice being taken, derived, not from the parties to the sale, but casually, will constitute such notice, and how would a farm laborer, by looking through a window at an invoice of a stock of merchandise being sold, be able to estimate the probable price, terms and conditions of such sale. The court is satisfied that there was not a sufficient compliance with the bulk sales law, and that defendant, Costello, in the purchase of the Wolfe stock became a trustee for the benefit of Wolfe's creditors, of which the plaintiff was one.

The defendant says, however, even if this be true, the plaintiff cannot recover herein because he is estopped to assert his claim against the defendant by his laches in not bringing any suit on his note for nearly one year after the sale of the merchandise, and after this defendant had paid the full purchase price thereof. No time limit is fixed by the terms of the bulk sales law within which a creditor must assert his right against a purchaser who buys without compliance with the provisions of the law. Ordinarily, and in the absence of facts which constitute an equitable estoppel, a creditor under the bulk sales law may assert his right against one who has purchased in bulk the merchandise of his debtor without compliance with the provision of such law at any time within the general statute of limitations. There can be no equitable estoppel in this case for two reasons:

"In order to constitute an equitable estoppel by silence or acquiescence, it must be made to appear that the facts upon which it is sought to make the estoppel operate were

known to the parties against whom the estoppel is urged." *City of Lincoln v. McLaughlin,* 79 Neb. 74.

The only possible theory upon which an equitable estoppel in this case can be based is that plaintiff did not attempt to assert his right until after the defendant had paid the last instalment of the purchase price, and thus changed his position to his damage. But the plaintiff had no knowledge that there were any deferred instalments. The terms and conditions of the sale were not made known to him. He had a right to assume that the purchase price had been paid at the completion of the sale.

A buyer of a stock of merchandise in bulk, who negligently fails to require the seller to furnish him a certified list of his creditors, will not be heard to assert mere laches as against a creditor who fails to promptly notify him of his claim, or take steps to enforce it.

Charles Cech was a farm laborer, unacquainted with his rights under the law. He knew nothing of the terms or conditions of the sale. He attempted to collect his claim without applying to the defendant. A procedure which, if it had been successful, would have been to the benefit of the defendant. He was forced to turn to the defendant or lose his claim.

There are, in the record, no facts that justify a finding that he was estopped to bring this action.

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

REVERSED.

RATHBONE COMPANY, APPELLEE, V. CURTIS C. KIMBALL, APPELLANT.

FILED JUNE 15, 1928. No. 26550.

1. **Judgment: TRANSCRIPT: LIEN.** A transcript of a judgment of the district court of one county, when filed in another county, does not become a lien upon the property of the debtor until entered upon the judgment record of the latter county.

2. ———: STATUTES: LIEN. Statutes of this state, set out in

the opinion, governing liens of judgments in state and federal courts, examined, and *held* to be in exact conformity as relates to such judgments and the liens thereof.

3. ———: JUDGMENTS OF FEDERAL COURTS: LIEN. Judgments of the federal courts of the district of Nebraska are liens upon the property of the judgment debtor only in the county in which they are rendered, unless a transcript thereof is filed and entered on the judgment record of other counties of the state; when so filed and entered they become liens.

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

Lester L. Dunn, for appellant.

Peterson & Devoe, contra.

Herman Aye, amicus curiæ.

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

REDICK, District Judge.

This is an action for specific performance of a contract for the sale of real estate under the terms of which the vendor agreed to furnish an abstract of title showing title of record in the grantor, free of incumbrance.

The defendant filed a demurrer to the petition upon the ground that said petition failed to state facts sufficient to constitute a cause of action; demurrer was overruled, and defendant declining to plead further, and electing to stand upon his demurrer, judgment was entered for specific performance, and defendant appeals.

The ground of the demurrer was that the petition failed to allege that the abstract furnished by plaintiff included certificates as to judgment liens against the plaintiff in the records of the federal courts of the several federal divisions in the state of Nebraska, except the division of which Lancaster county, in which the real estate was located, is a part; the defendant claiming that such certificates were necessary in order to show unincumbered title in the plaintiff.

Appellant in his brief states the problem to be solved in the following language:

"The sole issue presented on this appeal is whether federal judgments in the state of Nebraska are a lien on all property of a judgment debtor within the state of Nebraska without the filing of any transcript thereof, or whether federal judgments are a lien without transcript only in the county in which the judgment of the federal court is entered."

The question is important and new in this jurisdiction, and involves construction of the act of congress, August 1, 1888, 25 U. S. St. at Large, ch. 729, p. 357, and sections 8937, 8939, Comp. St. Neb. 1922, and section 8986, as amended by chapter 59, Laws 1927.

Section 1 of the act of congress of August 1, 1888, is as follows: "An act to regulate the liens of judgments and decrees of the courts of the United States.

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled: That judgments and decrees rendered in a circuit or district court of the United States within any state, *shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state*: Provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the state of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state."

Section 8986, *supra*, as amended, reads as follows: "The lands and tenements of the debtor within the county where

the judgment is entered, shall be bound for the satisfaction thereof, only from the day on which such judgments are rendered. All other lands, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution: Provided, that a judgment or decree shall be considered as rendered when the court announces its findings of such judgment or decree and enters such finding on the trial docket."

Sections 8937 and 8939 are as follows:

8937. "The transcript of a judgment of any district court in this state may be filed in the office of the clerk of the district court in any county; and such transcript shall be a lien on the property of the debtor in any county in which such transcript is filed in like manner as in the county where such judgment was rendered, and execution may be issued on judgment obtained by such transcript as on the original judgment: Provided, such transcript shall at all times be affected and be in the same plight as the original judgment."

8939. "A transcript of any judgment or decree rendered in a circuit or district court of the United States, within the state of Nebraska, may be filed in the office of the clerk of the district court in any county in this state, and such transcript, when so filed and entered on the judgment record, shall be a lien on the property of the debtor in any county in which such transcript is so filed, in the same manner and under the same conditions only as if such judgment or decree had been rendered by the district court of such county: Provided, such transcript shall at all times be affected and be in the same plight as the original judgment."

It will be observed that by the act of congress above quoted the same was to be in effect only, at least so far as transcripted judgments are concerned, in such states as should pass laws authorizing "the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and

requirements relating to the judgments and decrees of the courts of the state." The precise question for determination, then, is whether or not the above quoted laws of Nebraska have provided for liens of judgments rendered in the federal courts of the state in exact conformity with liens of judgments in the state courts, and is separated into two propositions by the briefs, (1) as to liens of judgments in the county where rendered, and (2)) as to such liens where the judgment is transcripted to other counties.

Inasmuch as the objection to the abstract in question relates only to the lien of judgments in counties other than that in which they were rendered, it may not be acutely necessary to consider the first proposition; but, in view of the importance of the question and its somewhat close relationship to the second proposition, we have concluded to discuss it briefly and announce our views upon it. Herman Aye, an attorney of this court, was permitted to file a brief as *amicus curiæ,* and makes the point that under the Nebraska laws as they now stand "a judgment creditor in the federal courts of Nebraska can obtain a lien in the county where the judgment is rendered only by filing a transcript of such judgment in the office of the clerk of the district court for such county, whereas the holder of a judgment in a state court obtains a lien upon the lands of the debtor in the county by mere rendition thereof;" thereby contending that a lack of conformity exists. We are unable to accept this view for the following reasons:

The act of congress antecedent the proviso provides that judgments of federal courts "shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state." This language makes the judgment of the federal court a lien under precisely the same conditions that it would become a lien if rendered in a state court of general jurisdiction, and, in effect, incorporates in the act of congress the state statute, the same as though it had been therein copied *in extenso.* It is, there-

fore, perfectly clear that the provisions of section 8986, as amended, are by the act of congress made applicable to judgments of the federal courts, which are invested with the same qualities as to their binding effect upon the lands of the debtor as are given to domestic judgments. It is true that federal judgments are not mentioned in the section and that it purports to deal only with judgments of state courts, nevertheless, as above noted, the act of congress incorporates it, and no further legislation is required to make it applicable to federal judgments. The act is broad enough to make it applicable to the state statute existing at the time of the passage of the act, and also to respond to changes or amendments of such statute affecting the judgments of state courts. The act of congress was intended to limit the existing rule when the state passed the statutes referred to *Rhea v. Smith,* 274 U. S. 434. If it be contended that section 8986, as amended, because it did not refer to federal court judgments, was not a compliance with the conditions of the proviso of the act, then the federal act preserved the lien in the county where the judgment is rendered. It cannot be presumed that congress intended to permit the lien of judgments of its courts in the county where rendered to be defeated or destroyed by failure of the state to act. The effect of such failure was to leave the federal act in full force. Assume, if you will, that the state has failed to act with reference to judgments in the county where rendered; nevertheless, the state having made adequate provision, as later shown, for transcripted judgments in other counties, the limitation of the former rule sought to be accomplished is complete *pro tanto.*

Considerable space in the briefs is devoted to the discussion of the repeal by congress of the third section of the act of August 1, 1888, as amended by the act of March 2, 1895, 28 U. S. St. at Large, ch. 180, p. 813, and section 2, ch. 30, Laws Neb. 1889, which were to the effect that nothing in the act should be construed to require the docketing of a judgment of the United States court or the

filing of a transcript thereof in any state office within the same county in which the judgment was rendered; but, in view of our construction of existing statutes, we do not deem it necessary to enter upon this field. We are convinced that the judgments of the federal courts, in the county in which they are rendered, are in precisely the same situation as regards liens upon the property of the judgment debtor as judgments of state courts of general jurisdiction.

As to transcripted judgments, this involves sections 8937 and 8939, as above quoted. Appellant contends that under the first section, by the mere filing of a transcript of a domestic judgment in another county, the same became a lien upon the property of the debtor, while under the second section the transcript of a judgment of the federal court did not become a lien until it was *"filed and entered on the judgment record,"* and that, therefore, there is a lack of that exact conformity required to put into effect the act of congress; the result being, as he contends, that the judgment of the federal court is a lien upon all the lands of the judgment debtor throughout the state, and that, therefore, the abstract in question should contain certificates as to liens from every county in the state; or at least, from the records of the federal courts in each federal judicial district of the state, and *amicus curiæ* makes the same contention. The proposition is of considerable force, and its correctness, in all probability, would have to be conceded if the two sections quoted were the only ones to be considered; but we think counsel have failed to give proper weight to this language in section 8937: "And such transcript shall be a lien on the property of the debtor in any county in which such transcript is filed *in like manner as in the county where such judgment was rendered.*" By this language, to determine the quality of the lien of the judgment, we are compelled to inquire under what conditions a domestic judgment became a lien in the county in which it was rendered. Prior to its amendment, sec-

tion 8986, providing for liens of judgments in the county where rendered, was as follows:

"The lands and tenements of the debtor within the county where the judgment is entered, shall be bound for the satisfaction thereof, from the first day of the term at which judgment is rendered; but judgments by confession, and judgments rendered at the same term at which the action is commenced shall bind such lands only from the day on which such judgments are rendered. All other lands, as well as goods and chattels of the debtor, shall be bound from the time they shall be siezed in execution."

The amendment of 1927 merely changed the date of the incipiency of the lien to the date when rendered, and defined the latter. It did not affect the essential condition requisite to the existence of the lien. Prior to the amendment of 1927 this section had been upon the statute books for over forty years, and in *German Nat. Bank v. Atherton,* 64 Neb. 610, we were called upon to construe it with reference to the operation of a judgment as a lien. In that case a judgment had been duly rendered and spread upon the journal of the court, but not entered upon the judgment index, and it was held that as against a subsequent purchaser the judgment did not become a lien until after it had been properly indexed, following *Metz v. State Bank,* 7 Neb. 165. In those cases attention was called to what is now known as section 9509, Comp. St. 1922, requiring clerks of courts of record to keep a judgment record, and providing:

"The judgment record shall contain the judgment debtor and the judgment creditor, arranged alphabetically, the date of the judgment, the amount of the same, and the amount of costs, with the page and the book where the same may be found."

Now, if a transcript when filed in a county other than that in which the judgment was rendered is to be a lien "in like manner as in the county where such judgment was rendered," as prescribed by section 8937, and a judgment in the county in which it is rendered is not a lien until it is

entered upon the judgment index or record, it would seem to follow that the mere filing of the transcript in the other county would be insufficient to constitute a lien, but that, in addition, to acquire that quality, it must be entered upon the judgment record; otherwise, it would become a lien in different manner from judgments in the county where rendered.

If this is the correct interpretation and construction of section 8937, of which we have no manner of doubt, then the words "and entered on the judgment record" in section 8939 require compliance with no other or different condition than is imposed in the case of domestic judgments. Appellant cites the case of *Rhea v. Smith,* 274 U. S. 434, which holds that state statutes governing the liens of judgments of the federal courts must be in *exact* conformity to the laws governing judgments of state courts. The rule so announced is binding upon this court, but the statute of Missouri under consideration in that case was entirely different from the ones we are considering; it attempted to provide that, before a judgment of the federal court should be a lien in the county where rendered, a transcript thereof should be filed in the state court of such county; whereas a state judgment became a lien immediately upon rendition. It is apparent that the ruling in that case is not controlling in this.

We conclude that the laws of this state governing judgment liens of federal courts and state courts are in exact conformity and that the district court was right in sustaining the demurrer to defendant's answer, and that the judgment for the plaintiff should be affirmed.

AFFIRMED.

CLARENCE DINGLE, APPELLANT, V. AXEL H. GILBERT, APPELLEE.

FILED JUNE 22, 1928. No. 26017.

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

W. M. Hopewell and *B. C. Enyart,* for appellant.

J. A. Singhaus, contra.

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

PER CURIAM.

This is an action to recover a real estate broker's commission. The defenses tendered by the answer were, first, the statute of limitations; second, that plaintiff did not procure a purchaser ready, able and willing to buy defendant's land, and that no valid contract for the sale thereof was ever procured by defendant. At the conclusion of all the testimony, the trial court directed a verdict for defendant. Plaintiff has appealed, but in his brief he has totally ignored several provisions of rule 13 of this court. In his brief he fails to state the issues tried in the court below and how they were decided, and there are no assignments of error in the brief.

Because of plaintiff's failure to comply with the rule of the court respecting the preparation of briefs, the judgment of the district court is

AFFIRMED.

CATHERINE M. PAYNE, APPELLANT, V. OSCAR B. CLARK, APPELLEE.

FILED JUNE 22, 1928. No. 25681.

1. Appeal: INSTRUCTIONS. Where instructions to the jury are requested and refused, but the instructions given by the court on its own motion had the same effect as those refused, error does not result therefrom.
2. ———: REMARKS BY COURT. Under the record in this case, error will not be predicated upon remarks made by the court in the presence of the jury, when his attention was not then called to the matter by objection or otherwise, so as to give him a timely opportunity to correct the prejudicial effect, if any.

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

R. S. Mockett, H. W. Baird and *Francis V. Robinson,* for appellant.

Comstock & Comstock, contra.

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

GOSS, C. J.

This is an action at law by plaintiff to recover of the defendant on three causes of action for money alleged to have been collected and retained by him while acting as her attorney and for certain damages alleged against him. Defendant filed answer and cross-petition praying for judgment for services rendered in addition to those for which compensation had already been received by him. The jury returned a verdict for plaintiff for one dollar and found against defendant on his cross-petition. From an order overruling her motion for a new trial and entering judgment on the verdict, the plaintiff appealed.

The appellant and appellee sustained the relation of client and attorney for nearly three years prior to July 18, 1922, when that relation ceased. He brought and conducted the suit for divorce against her husband in the district court, where she was unsuccessful, and on appeal in this court, where the cause was reversed by an opinion by the commission, adopted August 8, 1921, directing a judgment for absolute divorce and for alimony in the sum of $25,000, payable in ten equal annual instalments with interest at 6 per cent. In addition thereto, her attorney was allowed a fee of $1,500 in addition to all other allowances, to be taxed as costs. The total allowances for attorney's fees appear to have been $1,800. After the judgment was entered as directed, the attorney continued to represent the client in matters relating to the collection of her judgment and in the investment of the proceeds of her divorce suit, until July 18 or 19, 1922, when differences arose between them over money matters and he was discharged. In her first cause of action she charged that he had collected and

received a total of $1,800 as attorney's fee allowed in both courts, that he had retained $500 as fees out of a $2,000 collection on her account on August 13, 1921, and $4,665.24 on or about March 22, 1922; that said amounts were obtained by fraud, deceit and bad faith on defendant's part, and that the total of $6,965.24 constitute an excessive charge for services, by reason of which she prayed for treble damages on the alleged fraudulent items, or a total of $15,948.27, with interest on the first cause. For her second cause of action she alleged that on December 1, 1921, the defendant collected $500, part payment on a $2,000 note given as evidence of that sum loaned for her out of a collection of $2,500 on her alimony judgment on August 13, 1921. On that she asked $523.33 with interest. Her third cause of action was based on the charge that the defendant refused her demands made July 19 and 20, 1922, to surrender to her a will drawn for her by him in June or July, 1921, claiming he had delivered it to her soon after its execution. For this she prayed judgment for $25, as the reasonable cost of drafting another will.

The defendant joined issues by answer and cross-petition. He alleged the engagement by her on and prior to November 21, 1919, to procure a divorce and alimony from her husband, as well as to recover the possession of certain property she owned; that she represented she had no money to pay costs and attorney's fees and that she would, upon obtaining funds, amply and generously compensate him for his services and would reimburse him for advances; that he undertook said work, relying on said promise, and secured the reversal in the supreme court of the judgment of the trial court; that thereafter plaintiff assigned to defendant an amount equal to an interest of 20 per cent. of her recovery in the divorce action and authorized him to collect and enforce the payment; that he brought an equitable action to recover property in Douglas county and secured a settlement on the basis of plaintiff's claim; that he negotiated agreements with regard to several properties in the interest of the plaintiff, advanced

upwards of $1,100, which plaintiff has refused to pay. Defendant traverses the various allegations of the petition, sets up items claimed to be due him amounting to $4,074.88, and prays for an accounting and for judgment. The result was as stated at the beginning of this opinion.

The evidence is voluminous and it is a law case. It was submitted to the jury on conflicting evidence. It will suffice to state such of the evidence as appears necessary in a discussion of the errors assigned.

The 124 errors set up in the motion for new trial have been reduced to 22 in the assignment of errors in the brief of appellant. The first one relates to the second instruction given to the jury in the following language:

"Under the law and the evidence in this case it appears beyond dispute that the defendant received from the plaintiff on and before the 24th day of March, 1922, money and property of the value of $5,165.24 as an attorney's fee in the case of Payne v. Payne, and that he was not entitled to the same because he was fully paid for his services by award of fees made him in the supreme court, and because in any event the contract and assignment upon which he took the said $5,165.24 was void as against public policy unless said fee was given defendant by the plaintiff as an honorarium with full knowledge on her part that she was under no legal obligation to let him have the same and was in full possession of all of the facts in regard to her lawsuit and in regard to what her attorney had done in connection therewith.

"If you find by a preponderance of the evidence that said money and property received by the defendant was such gift or honorarium, and also that plaintiff is not entitled to recover on her second and third causes of action, you should find against the plaintiff upon her petition and proceed at once to the consideration of the cross-petition of the defendant. If on the other hand you find that such money and property received by the defendant was not given him as a mere honorarium or gift, you will find for the plaintiff upon her petition in at least the sum of $5,165.24, with

interest at the rate of 7 per cent. per annum from the 24th day of March, 1922. But of course she cannot have this recovery and also a recovery of triple damages as prayed."

Before discussing this instruction, we desire to call attention to subsequent assignments of error relating to five instructions requested by the court, in which the court was asked to instruct in substance: That an attorney is required to exercise the highest order of good faith and to inform a client of all facts in his possession which might influence the client to enter into or refuse to execute the contract in issue; that assignments or conveyances by client to attorney, while the relationship exists, are regarded with disfavor and are presumed to have been improperly secured; that there is a presumption of unfairness or invalidity attaching to a contract for compensation between attorney and client after the establishment of the relation; that the burden rests with the attorney to show that the contract was fair, just and equitable, and, in the absence of such proof, the transaction should be treated as constructively fraudulent; and, again in varied language, that dealings between an attorney and client are *prima facie* fraudulent.

To comprehend the relation of the instructions thus refused with the instruction given, it is necessary to realize to some extent what the evidence was in the matter of compensation to be made to the attorney for services. There was no agreed fee in advance and thus the implied contract was for reasonable compensation. The courts had evidently allowed as temporary and final attorney's fees a total of $1,800. There was testimony before the jury on behalf of defendant that, after the plaintiff had discussed the matter with others, she had signified an intention to pay him 50 per cent. of the amount realized on the judgment for alimony. On thinking it over, after the allowance of $25,000 alimony by this court, she made up her mind to give him 35 per cent. But by the time they came together to consider the compensation she concluded that 20 per cent. was right and so she made an assignment in writing of

that proportion to him. Omitting the recital of the judgment against her husband and its inducing words, the remainder of the instrument follows:

"Therefore, in consideration of services rendered by O. B. Clark and his counsel to her through all of said litigation and all of her personal matters heretofore arising, the said Catherine M. Payne now assigns to the said O. B. Clark 20 per cent. of all moneys secured by her in the litigation growing out of the divorce action of the assignor against Charles T. Payne, and authorizes the said O. B. Clark to do all things with regard to collection and enforcement of payment of said judgments the same as assignor otherwise might.

"Catherine M. Payne."

The defendant had tried this instant case on the theory that he was entitled, in addition to the court allowances, to one-fifth of all property recovered for the plaintiff from her husband, and that this assignment assured such compensation. The plaintiff was seeking to destroy, in the mind of the jury, the force of the written assignment, and these requested instructions were directed toward that end. The trial court refused the requested instructions, not because they did not express correct rules of law, but because, in the view he took of the case, they did not go far enough. He went further and told the jury that the attorney had been fully paid for his services in the divorce case by the award of fees made in the supreme court. In any event, the court told them, by the instruction complained of, the contract and assignment was void as against public policy unless the fee of $5,165.24 was given by her to the defendant as an honorarium with full knowledge that she was not obliged to let him have it and in full possession of all the facts in regard to her lawsuit and what her attorney had done in connection therewith. Considerable space is devoted in the briefs to a discussion of the significance of the term *"honorarium"* in the instruction. The court evidently was using it in its general meaning of a voluntary donation or gift, as more fully explained

by the context. It seems to us that, if any one is in a position to complain of this, it is the defendant, and not the plaintiff. We do not wish to be understood, by quoting the instruction, to be commending it to be followed in similar cases, but we fail to see how the plaintiff was prejudiced by it or by the refusal to give the instructions offered by plaintiff. The defendant might have built up a more persuasive argument for error in the instruction, had the verdict and judgment aggrieved him. It is a well-known rule that, where instructions to the jury are requested and refused, but the instructions given by the court on his own motion have the same effect as those refused, error does not result therefrom. The doctrine applies here.

The next assignment of error, both in sequence and in importance, relates to alleged prejudicial remarks made by the trial judge. Counsel for defendant was pursuing a line of questions that seemed to be eliciting facts more in relation to the divorce suit than to the case on trial. Counsel for plaintiff objected "to this line of testimony as incompetent, irrelevant, immaterial, and not proper cross-examination." In sustaining this objection, the court made a statement consisting of about twenty lines, when printed. Counsel for plaintiff was perhaps so well satisfied with a favorable ruling on his objection already made that he voiced no objection whatever, as shown by the bill of exceptions, to the remarks of the court made in sustaining his said objection. If he had objected to the particular part of the statement of the court to which he now objects, the court would, in all probability, have withdrawn or modified it. Under the record in this case, error will not be predicated upon remarks made by the court, in the presence of the jury, when his attention was not then called to the matter by objection or otherwise, so as to give him a timely opportunity to correct the prejudicial effect, if any.

We find no other errors assigned that seem to us worthy of prolonging this discussion. On the whole, we are of the opinion that the case was tried with due regard for the rights of both plaintiff and defendant, was fairly submit-

ted to the jury with respect to the rights of the plaintiff, that there is no error in the record, and that the judgment of the district court is right and ought to be and is

AFFIRMED.

RUTH F. DUNBAR, APPELLANT AND CROSS-APPELLEE, V. JOSEPH O'BRIEN, APPELLEE AND CROSS-APPELLANT.

FILED JUNE 22, 1928. No. 26005.

1. **Nuisance:** INJUNCTION. Old lumber maliciously piled on a city lot by the owner for the sole purpose of shutting out the light and air from a neighbor's windows is a nuisance that may be abated by injunction.
2. ———: ———. Whether an injunction against a malicious nuisance should be denied on the ground that the wrongdoer abated it after he had been sued depends on his good faith and the attending circumstances.
3. **Easements.** Adverse user for the statutory period of ten years may create an easement consisting of the right of a lot owner to enter upon a vacant strip of another's adjoining lot and use it for the purposes of painting the former's house on the boundary line, washing windows, and making necessary repairs.

APPEAL from the district court for Otoe county: JOHN B. RAPER, JUDGE. *Affirmed in part, and reversed in part.*

Thomas E. Dunbar and *A. P. Moran,* for appellant.

Paul Jessen, contra.

Heard before ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and PROUDFIT and REDICK, District Judges.

ROSE, J.

This is a suit in equity to abate a private nuisance and to protect an easement. Ruth F. Dunbar, plaintiff, owns a lot fronting south on First avenue in Nebraska City. Joseph O'Brien, defendant, owns the adjoining lot on the west. The west wall or the eaves of the house in which plaintiff resides with her family are on the west line of her lot. The east wall of defendant's house is perhaps eight

feet farther west. Neither party disputes the title to the lot of the other. The petition contains pleas that defendant piled old lumber and other debris close to the west wall of plaintiff's house in front of her basement windows, thus shutting out light and air, annoying her and damaging her in her property rights; that in committing the wrongs alleged defendant was prompted by malice with intent to annoy and punish plaintiff without serving any useful purpose of his own; that he maintained the nuisance described months after he was requested by plaintiff to abate it.

It is also alleged in the petition that, by prescription or adverse user for more than the statutory period of 10 years, plaintiff and her predecessors in title acquired an easement consisting of the right to enter and use a strip of ground west of her house for the purpose of washing windows, of placing and removing screens, of painting and of making needed repairs; that a fence prevents access from the rear; that defendant forbade access for any purpose and closed her front passageway by a lattice between the houses.

The relief sought by plaintiff is an injunction abating the nuisances and preventing defendant from interfering with her right to exercise her easement.

The answer of defendant contained general denials of facts relating to nuisances and easements; admitted that he erected a lattice extending from the east side of his house to his east lot line; alleged that plaintiff's basement windows were placed in the west wall of her foundation in September, 1925, and that her workmen then trespassed upon his lot, leaving thereon piles of broken rock and other rubbish which he was required to remove, and that consequently he forbade further trespassing; that any use of his lot by plaintiff or former owners of her lot was by his permission and not by the exercise of any right claimed by them.

The answer contains also a cross-petition alleging that plaintiff collects rain-water from the roof of her house and discharges it in a volume on defendant's lot, thus injuring

the foundation of his house and damaging his fruit and vegetable cave. He prays for the dismissal of plaintiff's suit and for an injunction preventing her from trespassing on his lot and from discharging rain-water thereon.

The facts pleaded by defendant were put in issue by a reply to his answer and by an answer to his cross-petition.

Upon a trial of the issues the district court denied an injunction to prevent defendant from interfering with the passage of light and air through the windows in plaintiff's basement; enjoined interference with an easement consisting of the right of plaintiff to use the strip of ground under her west eaves for the purposes of washing windows, placing and removing screens, painting and making necessary repairs; denied an injunction restraining plaintiff from discharging rain-water from the roof of her house upon defendant's lot. Plaintiff appealed and defendant took a cross-appeal.

Was plaintiff entitled to an injunction to prevent defendant from shutting off the light and air from her basement? The trial court found and the evidence showed that defendant unnecessarily piled old lumber and other debris close to the west wall of plaintiff's basement in front of her windows. The work necessary for this annoyance required defendant to move lumber and other materials from the rear of his lot to plaintiff's windows. If the pile was not intended for a continuing nuisance, the additional work of removing it was necessary and all without any benefit to himself. For several months he shut out light and air from plaintiff's basement after he was requested to remove the obstructions. He allowed the debris to remain there until after this suit was brought. The relief based on this nuisance seems to have been denied by the trial court on the ground that defendant removed the obstructions before the case was tried. The proper inference from the evidential facts is that defendant acted through malice and used his property to annoy and punish his neighbor without serving any useful or æsthetic purpose of his own. The fundamental liberty to own and control property implies the

duty of the owner to respect the equal rights of others. Contrary to a majority of former opinions of the courts the modern view, based on reason and justice, is that the owner of property is not permitted to use it for the sole purpose of inflicting malicious injury upon his neighbor. Referring to the majority rule in cases where the courts declined to interfere with malicious structures, the supreme court of Alabama said:

"The doctrine of these cases, based on the alleged right of the owner of land to use it according to his malicious fancy, and without any advantage to himself or his land, for the sole purpose of injuring his neighbor in the lawful and beneficial use of his adjoining property, has been carried to such an extent as in many cases to be justly characterized as 'odious.' And hence statutes have been passed in a number of states abrogating the principle on account of the unjust and injurious effects resulting from its enforcement. The authority of precedents, however, must often yield to the force of reason, and to the paramount demands of justice, as well as the decencies of civilized society, and the law ought to speak with a voice responsive to these demands. We have examined the decisions and the reasoning of the various courts upon this question; and, unfettered by any precedents of our own, we are led to the deliberate conclusion that the majority view, as above stated, is founded upon a vicious fallacy, and is violative of sound legal principle as well as of common justice." *Norton v. Randolph,* 176 Ala. 381, 40 L. R. A. n. s. 131.

This is in harmony with the Michigan rule, which has been stated as follows:

"A fence erected maliciously, and with no other purpose than to shut out the light and air from a neighbor's window, is a nuisance." *Flaherty v. Moran,* 81 Mich. 52, 8 L. R. A. 183.

Referring to the maxim meaning "So use your own as not to injure another's property," the supreme court of North Carolina said:

"The ancient maxim, * * * *Sic utere tuo ut alienum non lædas,* is not founded in any human statute, but in that sentiment expressed by Him who taught good will toward men, and said, 'Love thy neighbor as thyself.' Freely translated, it enjoins that every person, in the use of his own property, should avoid injury to his neighbor as much as possible. No one ought to have the legal right to make a malicious use of his property for no benefit to himself, but merely to injure his fellow man. To hold otherwise makes the law an engine of oppression with which to destroy the peace and comfort of a neighbor, as well as to damage his property for no useful purpose, but solely to gratify a wicked and debasing passion." *Barger v. Barringer,* 151 N. Car. 433, 25 L. R. A. n. s. 836.

The principle applied in the cases cited was adopted by this court March 14, 1914, when the following rule was announced:

"A landowner will be enjoined from erecting a fence on his land to the great damage of his neighbor, and without any useful purpose on his part, but for the sole purpose to annoy and punish the party injured." *Bush v. Mockett,* 95 Neb. 552.

In the present instance there is nothing in the evidence to prove a justification for the creation or maintenance of the obstruction in front of plaintiff's windows. When this suit was brought plaintiff was entitled to an injunction abating the nuisance. Defendant, by his wrongful conduct, caused plaintiff to resort to the district court for equitable relief. Whether the right to an injunction was defeated by the removal of the debris depends on the good faith of defendant. He was prompted by malice in the first instance, and there is nothing in his pleadings or proof to show that he will not repeat his annoyance, if the litigation ends without any restraint upon his future conduct. On this phase of the case the circumstances disclosed by the evidence on all the issues indicate error in the order denying equitable relief.

Did plaintiff prove the existence of an easement permitting access to the west wall of her house and the use of a strip of ground for the purpose indicated?

In *Omaha & R. V. R. Co. v. Rickards*, 38 Neb. 847, the court held:

"An easement in real estate may be acquired by open notorious, peaceable, uninterrupted, adverse possession for the statutory period of ten years."

In the present case there is evidence tending to prove the following facts: Plaintiff's house was standing in its present location as early as 1898. For more than ten years continously thereafter owners or occupants of plaintiff's lot had access from the front to defendant's lot and used a narrow strip on the east side of it for the purpose of painting, and washing windows. This use was open, notorious and peaceable without permission of the owners, and after 1925 was first interrupted by defendant, who purchased his lot in 1912 and went into possession in 1913. The easement was continuously exercised by plaintiff and former owners or occupants of her house. On the contrary, there is testimony tending to prove that there was no path in the passageway claimed by plaintiff; that owners of defendant's lot did not have notice at any time that a portion of his lot was used adversely by plaintiff and former owners or occupants of her lot; that any such use was permissive, and not adverse. While the evidence on this issue is conflicting to some extent, the preponderance seems to be in favor of plaintiff, whose easement was acquired before defendant purchased his lot, and not subsequently lost. Defendant testified in effect that the husband of plaintiff requested permission for workmen to make repairs on the west side of her house, but this did not amount to an abandonment of the easement or to an admission that it had no existence. A courteous request by a neighbor for such permission, directed to the owner of the fee, did not necessarily disprove an existing right to enter without it. It is clear that the necessary use of the passageway for plaintiff's purposes would not wear a path. After the ease-

ment was legally acquired, notice of its continuous use was unnecessary. In the decree below the trial court confined the easement to the ground under the eaves. The evidence shows that step-ladders were used, and they seem to be necessary. Their use obviously requires more ground than that covered by the eaves. The width of the easement is determined by necessity, and not by convenience. The former use of a strip to the extent of three feet in width seems to be reasonable and should be protected. The easement does not give plaintiff any right to the fee or to annoy defendant or to litter or injure his lot or to enter his premises for any purpose other than to wash windows, to insert and remove screens, to paint, and to make necessary repairs. For these purposes a passageway two feet wide at the east end of the lattice constructed by defendant will be required.

In so far as the decree below denies an injunction to prevent plaintiff from discharging rain-water on defendant's lot, it seems to be correct, and to that extent is affirmed. Otherwise, the judgment of the district court is reversed and the cause remanded for the purposes of a supplemental decree conforming to the views herein expressed, the costs in both courts to be paid by defendant.

JUDGMENT ACCORDINGLY.

SARAH E. MUNSELL ET AL., APPELLANTS, V. CITY OF HEBRON, APPELLEE.

SHELDON S. ROUSE, APPELLANT, V. CITY OF HEBRON, APPPELLEE.

FILED JUNE 22, 1928. NOS. 25600, 25601.

1. **Municipal Corporations:** SPECIAL ASSESSMENTS. Special assessments for paving by a municipality upon privately owned property for the public benefit in excess of the benefits to the owner of the property so assessed are unauthorized.
2. ———: ———. The owner of property in a municipality cannot lawfully be assessed for a public improvement thereon or adjacent thereto beyond the amount of the present benefit or

such reasonably prospective benefit as such owner may derive from the improvement in question.

3. ———: ———: BURDEN OF PROOF. When a party attacks a paving assessment as void in a city of the second class having a population under 5,000, the burden is on him to prove the invalidity of the assessment. *Whitla v. Connor*, 114 Neb. 526.

4. ———: ———: IRREGULARITIES. "Special assessments for improvements," under section 4286, Comp. St. 1922, cannot be enjoined for lack of jurisdiction on the ground of mere technical irregularities in the manner of making the levy. *Biggerstaff v. City of Broken Bow*, 112 Neb. 4.

5. ———: ———: ———. "Where a city council, acting within its jurisdiction and exercising properly delegated power, assesses property for the benefits of paving, mere irregularities in the proceedings do not necessarily invalidate the assessments." *City of Superior v. Simpson*, 114 Neb. 698.

6. ———: ———: SPECIAL BENEFITS. "The vital principle underlying special assessments is that the value of the property taxed has been increased in a sum at least equal to the assessment levied. To levy a tax without a corresponding increase in value is to take private property for public use." *Schneider v. Plum*, 86 Neb. 129.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Reversed, with directions.*

Richards & Richards, for appellants.

Walter C. Weiss, Harvey W. Hess and *Peter I. Harrison, contra.*

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

DEAN, J.

Hebron, in Thayer county, has a population of a little over 1,500 inhabitants. Zeriah B. Munsell and Sarah E. Munsell, husband and wife, and Sheldon S. Rouse, hereinafter called plaintiffs, own certain city real estate situate in paving district No. 1 in Hebron. The Munsell real estate was taxed and assessed, under a special paving assessment, for $3,180.72, by the Hebron city council for cer-

tain city street paving improvements adjacent to the Munsell property, and the Rouse property was likewise taxed and assessed in the sum of $2,115.41, for like paving improvements adjacent to his property. On appeal to the district court the special assessments were affirmed and judgment was rendered pursuant thereto. The plaintiffs, alleging error, have brought the record here for review.

The Munsells have no interest in the Rouse property, nor has Rouse any interest in the Munsell property. On submission of the record to this court all plaintiffs joined in a single brief. The defendant city's brief relates to both the Munsell and the Rouse property under a stipulation which provides that both actions "may be briefed and submitted together and treated in all respects as one appeal."

The plaintiffs contend that the above several assessments are excessive under the facts and the law. The Munsells and Rouse each filed separate petitions in the district court, but the petitions so filed, in substance and effect, are practically identical, except as to the names of the plaintiffs, the descriptions of their respective properties, and the amount of the respective assessments, and the like.

The Munsell property consists of about 13 acres, which is divided into two separate tracts, one of which is owned by Mrs. Munsell and the other by her husband. The only improvements on the land are the house, barn, and outbuildings. The Munsell tract, however, is connected with the Hebron sewerage system. The Rouse property is not so connected. But all of the properties involved in this suit are on the outskirts of the town and it appears that none of the land involved herein is plotted nor is it divided into lots. Plaintiffs Munsell insist that their land is not suited for residential purposes in part on account of a draw thereon which would require grading and filling. All plaintiffs take exceptions to the paving assessment, and this in large part on account of the remote location of their land from the central or main part of the business section of Hebron.

The Rouse property has a paving frontage of about 417 feet and consists of about four acres. This property is lo-

cated opposite the Munsell property. A house and barn and other outbuildings are on the Rouse property. The evidence tends to prove that it would be practicable to locate another residence on the Rouse tract. But the Munsells and Rouse all contend that there is now no demand for any of the land of the parties plaintiff for residential or business purposes. An engineer employed by the city testified in part: "Q. Do you figure that the benefit in any case could be less than the cost of paving? A. No. Q. And the proposed assessment as you have prepared it for the city council is based purely and simply on the cost of the paving in front of each piece of property? A. Yes." The defendant city however in its brief observes that "it is clear that the engineer simply acted as a * * * technical expert for the city council in preparing this tentative schedule."

In support of their argument the Munsells and Rouse cite section 6, art. VIII, of the Constitution of Nebraska. This section, so far as applicable to the facts, follows:

"The legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment, or by special taxation of property benefited."

Clearly the council did not follow certain of the provisions of section 4286, Comp. St. 1922, which, among others, contains the following recitals in respect of municipal assessments:

"First. Such assessment shall be made by the council or board of trustees at a special meeting, by a resolution fixing the valuation of such lot assessed, taking into account the benefits derived or injuries sustained in consequence of such contemplated improvements, and the amount charged against the same, which, with the vote thereon by yeas and nays, shall be spread at length upon the minutes."

The plaintiffs produced five or more witnesses, and their evidence supports the plaintiffs' contention that none of the tracts involved herein are plotted nor divided into lots,

and that both tracts, owing in large part to their location on the outskirts of the town, are not available, under present conditions, for the erection of town residences thereon, but are suitable mostly for truck farming, poultry raising, and the like. The witnesses produced by plaintiffs testified in substance that the Munsell property was worth from $6,500 to $7,500 before the paving was constructed and that the value was enhanced by the paving $500 to $1,000 or thereabouts. And in respect of the Rouse property the evidence fairly discloses that it was worth from $7,000 to $8,000 before the paving and that the paving enhanced its value in an amount not to exceed from $500 to $1,000. From the record it appears to be fairly established that the plaintiffs come within the meaning of section 4286, above cited, and the decisions. The plaintiff Rouse was called as a witness by the defendant city and aside from him the city produced no witnesses.

The facts herein are not new in this jurisdiction. In a recent case we said that, where a party attacks a paving assessment as void in a city of the second class having a population under 5,000, the burden is on him to prove the invalidity of the assessment. *Whitla v. Connor,* 114 Neb. 526. In 1878 Omaha constructed a sewer in the channel of an adjacent creek at a cost exceeding $30,000 and imposed a special assessment on all the real estate in the sewer district for its payment. The district court affirmed the proceedings, but on appeal to this court, in a well-considered opinion by Maxwell, C. J., the judgment was reversed on the ground that special assessments could only be levied upon adjacent property specially benefited, and only to the extent of the benefits. *Hanscom v. City of Omaha,* 11 Neb. 37. And we have held that "special assessments for improvements," under section 4286, Comp. St. 1922, cannot be enjoined for lack of jurisdiction on the ground of mere technical irregularities in the manner of making the levy. *Biggerstaff v. City of Broken Bow,* 112 Neb. 4.

"Where a city council, acting within its jurisdiction and exercising properly delegated power, assesses property for

the benefits of paving, mere irregularities in the proceedings do not necessarily invalidate the assessments." *City of Superior v. Simpson,* 114 Neb. 698. See *Broghamer v. City of Chadron,* 107 Neb. 532.

"The act of a city in ordering the paving of a street and the assessment of the cost on abutting property is a legislative determination (a) that the improvement is expedient and proper and (b) that the abutting property will be benefited. Courts do not review legislative acts performed in a regular and statutory way. It follows that the cry of over-assessment will be entertained by the court,— not a denial of any assessment. * * * Benefits capable of instant demonstration and mathematical accuracy are not necessary in order to support an assessment." *Chicago, R. I. & P. R. Co. v. City of Centerville,* 172 Ia. 444.

In *Schneider v. Plum,* 86 Neb. 129, at page 131, in an opinion by Root, J., this is said: "The vital principle underlying special assessments is that the value of the property taxed has been increased in a sum at least equal to the assessment levied. To levy a tax without a corresponding increase in value is to take private property for public use."

The assessment of taxes by a municipality upon privately owned property for the public benefit, without payment for such assessment, in excess of the benefits to the owner of the property assessed, is a usurpation of power. In other words, the owner of property in a municipality cannot lawfully be assessed for a public improvement thereon or adjacent thereto beyond the amount of the present benefit or such reasonably prospective benefit as such owner may derive from the improvement in question. From the evidence in the present case, in respect of benefits, and the law applicable thereto, it appears to us that the levy of the assessment and the action of the city council complained of, in respect of such excess only, is an arbitrary exercise of municipal power.

From the meager testimony introduced in respect of the benefits we are of the opinion that a fair estimate of the

benefits to each tract does not exceed the sum of $1,000 and that the respective assessments should be reduced accordingly. The judgment of the district court is therefore reversed and the cause is remanded, with directions that the assessments be made pursuant to the views above expressed.

REVERSED.

IN RE ESTATE OF JAMES COMBS.
JEREMIAH COMBS ET AL., APPELLANTS, V. HARRIET SUSANNAH MUMFORD ET AL., APPELLEES.

FILED JUNE 22, 1928. No. 25456.

1. Wills: CONSTRUCTION. No rule of law is better settled or more in accord with good sense than that which requires the intention of the testator to be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No particular words, no conventional forms of expression, are necessary to make an effective testamentary disposition of his property.
2. ———: ———. The court, without much regard to the canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it.
3. ———: ———. The language, "I hereby direct that my estate both real and personal, remaining after the death of my wife, shall descend to my legal heirs in equal shares in accordance with the laws of descent and distribution of the state of Nebraska," construed, and *held*, by implication, to exclude such wife as a devisee of the remainder, and to designate the heirs of the blood of the deceased testator as the devisees intended.

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

G. L. Godfrey and *J. L. McPheely*, for appellants.

Lewis C. Paulson, Chappell & Wilson and *King & Bracken, contra.*

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

EBERLY, J.

By appropriate pleading in the form of an action to construe a will, the following situation is presented: The deceased, James Combs, a resident of Nebraska, died April 7, 1919, leaving a widow, but having no children or descendants. He owned, at the time of his death, a home consisting of two lots and a dwelling situated thereon in which he and his wife resided, and also personal property. His wife had children by a former marriage. The testator's "heirs of the blood" consisted of brothers and descendants of deceased brothers.

Combs' will was admitted to probate on petition of the widow. It contained the following provisions pertinent to the question before us: (1) That debts should be paid out of personal property, and if this be insufficient for the purpose contained, there should be the sale of "so much of my real estate as may be necessary for that purpose;" (2) a bequest to his wife of the "use, income and occupation of all estate, both real and personal, during her natural life;" (3) that the bequest of all money on hand or in bank at the time of his death to his wife was to be absolute.

The third paragraph of the will is as follows: "It is my wish and I hereby direct that my estate both real and personal, remaining after the death of my wife, shall descend to my legal heirs in equal shares in accordance with the laws of descent and distribution of the state of Nebraska."

The real question presented is: Does the term "my legal heirs," as thus used, embrace and include the widow of the testator?

It may be said that, under the provisions of section 1226, Comp. St. 1922, the widow possessed the undoubted right to elect within one year whether she would take the "lands so devised, or the provision made for * * * her in the last will," or take under the terms of the statute of descent. In the instant case, the widow failed to exercise this right within the time and in the manner provided, and came squarely within the terms of section 1227, Comp. St. 1922, whereby she is conclusively deemed to have elected to take

the real estate devised or other provision made by the last will and testament.

This right of election is personal and does not pass to the heirs. *Fergus v. Schiable,* 91 Neb. 180.

It is conceded that the real estate involved in this controversy was the homestead and occupied by the testator and his family at the time of his death.

Section 2832, Comp. St. 1922, provides that, where the homestead is selected (as in this case) from the husband's estate, "it vests on" his death in the surviving widow for life, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will.

It would seem that the sections of our statutes heretofore referred to dispose of this case with little difficulty. It is plain that the husband cannot cut off his wife by will unless she consents. The law sanctions his right to will all of his property, or any part of it, to his surviving wife, subject only to such conditions over which she has complete control. Only such property as the will does not dispose of descends to his heirs. The wife, under the circumstances of this case, must take as one or the other; that is, as devisee or as heir, not both. The last clause of section 1226, Comp. St. 1922, so states, "unless it plainly appears by the last will and testament of the deceased to have been so intended by the testator." It follows that in the case before us the words of the will constitute the measure of the widow's rights and which, under its terms, is acquired by her as a devisee only.

It thus becomes a matter of mere construction of terms employed. Wills are to be construed according to the reasonable intent of the testator as evidenced by the language of the will, giving to the words their ordinary meaning. *Harris v. McPherson,* 112 Neb. 410.

No rule of law is better settled or more in accord with good sense than that which requires the intention of the testator to be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No

particular words, no conventional forms of expression, are necessary to make an effective testamentary disposition of his property. The court, without much regard to the canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it. *Albin v. Parmele,* 70 Neb. 740; *McCulloch v. Valentine,* 24 Neb. 215; *Lesiur v. Sipherd,* 84 Neb. 296; *Heywood v. Heywood,* 92 Neb. 72; *Draper v. Eager,* 112 Neb. 611.

All parties to the litigation fairly agree that the will, in plain, unmistakable terms, vested in the widow a life estate in the real estate and in the personal property of which the testator "died seised," and also provided for an absolute gift to her of "all money on hand or in bank." At this point the agreement ends. It would seem, however, that this instrument just as definitely indicates as the ultimate devisees of the real estate and personal property involved, after the wife's death shall terminate her life estate or interest therein, persons of whom the words, "my legal heirs in equal shares in accordance with the laws of descent and distribution of the state of Nebraska," are descriptive. It must be admitted that the term "my legal heirs" construed, in the light of surrounding circumstances, with reference to all of the language employed in the will, must be relied upon to designate the ultimate devisees, the ultimate remainderman. It would seem that the fact that the testator desired to dispose of the title to his property to the exclusion of his wife with her consent by will indicates that he did not desire to have it come back to her after his death for distribution to her heirs. It appears absurd to conclude that the testator intended to give her only a life estate living, and after her death cast a fee simple title on her, dead. Had he wanted his widow to share in his property as a remainderman to the partial exclusion of his heirs of the blood, it would have been easy to have evidenced such intention by use of appropriate words. This he failed to do.

It must be remembered that we are bound to give due

effect, if possible, to all the language employed in the will. The words, "in equal shares in accordance with the laws of descent and distribution of the state of Nebraska," are manifestly inconsistent with the wife's receiving a vested interest, as a remainderman, of one-half of the estate then passing by the will. The words quoted carry the sense of a limitation or exclusion. If, in fact, two classes of persons exist, to one of which the words employed and quoted apply strictly and as an entirety, and to the other class have only a partial application, it would seem logical that only the class to which they apply as an entirety would be within their proper purview. If this be true, it follows that "my legal heirs" is descriptive of a class, identified by the terms of the will as the devisees intended, and identical with the class of persons who, in the event of intestacy, would have inherited the subject of the present devise under the laws of Nebraska in equal shares. Obviously, the wife or widow was not one of this class, for here, if she inherits at all, she inherits one-half of this estate. This, in turn, leaves, as the sole persons to whom the words "my legal heirs" (who would inherit in equal shares) apply, those who were heirs of the testator's blood at the date of his death, viz., his brothers and their descendants, and as such they are entitled to inherit.

The conclusion is that, in view of the language employed in the will, the subject-matter to which the will relates, and the circumstances surrounding the execution of the instrument, the term "my legal heirs," as employed therein, designates only the heirs of the blood of the testator, and in them is thereby vested the estate of remainder.

It follows that the judgment of the district court construing the will in question must be, and is, reversed, with directions to enter a judgment in accord with the conclusion of this opinion.

REVERSED AND REMANDED.

NEBRASKA STATE BANK OF VALPARAISO, APPELLANT, V. O. J. MAY ET AL., APPELLEES.

FILED JUNE 26, 1928. No. 26012.

1. **Record** examined, and found that the verdict of the jury is amply supported by the evidence and the law applicable.
2. **Appeal.** "The theory adopted at the trial as to the issues will be followed on appeal." *Norton v. Bankers Fire Ins. Co.*, 115 Neb. 490.
3. **Estoppel.** Where one of two innocent persons must suffer a loss occasioned by the wrongful act of a third person, the one who made it possible for the third person to commit the wrongful act should bear such loss.
4. **Instructions** given considered, and found to correctly state the law pertinent to the issues.

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

J. Lloyd McMaster and *H. N. Mattley*, for appellant.

George I. Craven, contra.

Heard before ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and PROUDFIT and REDICK, District Judges.

THOMPSON, J.

In this action the plaintiff, appellant, sought recovery on two promissory notes, signed by defendants, appellees, apparently as makers. The petition was in usual form. Default was entered as to defendant May, and defendant Haack interposed the defense that he was but a surety on the notes, and that by reason of certain stated obligations resting on the plaintiff, payee, by it uncomplied with (such as procuring to be filed in the proper counties certain chattel mortgages), he as such surety had been released. To this answer plaintiff interposed a general denial, followed by a plea of facts which, if found to be true, would amount to a waiver, if not a complete estoppel. Trial was had, verdict and judgment rendered in favor of plaintiff as against defendant May, and against the plaintiff as to

defendant Haack, to reverse which latter plaintiff appeals.

In substance, the claimed errors relied on for such reversal are: That the verdict of the jury is without evidence to support it, and is contrary to law; that the court erred in refusing to give the instructions tendered by the plaintiff, and erred in giving certain other instructions on its own motion; and the court further erred in refusing to grant a new trial on grounds of accident and surprise.

To quote a part of the evidence would serve no useful purpose, and to quote it in its entirety would be to unduly extend this opinion. However, it might be well to state that from it we find: That appellant is the successor of the Farmers State Bank of Agnew, Nebraska, and as such succeeded to its interest in the notes here involved, and hence the case stands, under the record, as if the action were one between the original parties to the instruments in question; and the case is governed by section 4669, Comp. St. 1922, which provides in part: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable." We further find: That the jury were warranted in concluding that Haack was but a surety on each and every of the notes disclosed by the record as having been given by May; that each and all of such notes, save the first, was a renewal note; that, at the time of the execution and delivery of the respective mortgages given to secure these notes, the property covered thereby was permitted to remain in the possession of the mortgagor; that plaintiff failed and neglected to procure these mortgages, or certified copies thereof, to be filed in the county in which the mortgagor resided, as provided by statute, and as under the facts alleged and proved it was its duty to do; and that by reason of such failures the property mortgaged passed into the hands of innocent purchasers for value, and was lost to Haack, to his damage in an amount equalling the face of the notes with interest added.

Section 2550, Comp. St. 1922, so far as material to this case, provides: "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditor of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk of the county where the mortgagor executing the same resides."

The case having been tried on the issues tendered by the pleadings, our determination here necessarily is so limited. *Norton v. Bankers Fire Ins. Co.*, 115 Neb. 490. This theory as to the issues is proved, not only by the pleadings, the evidence, and the instructions offered by plaintiff, but also by the instructions given. Thus the main issue was one of fact, rather than one of law. The evidence in many material instances, as between that of plaintiff and that of defendant, is acutely contradictory; hence, the jury's determination of such disputed facts is final. Further, it is a wholesome rule that, where one of two innocent persons must suffer a loss occasioned by the wrongful act of a third person, the one who made it possible for the third person to commit the wrongful act should bear such loss. By analogy this conclusion finds support in *Berkovitz v. Morton-Gregson Co.*, 112 Neb. 154, and cases therein cited.

Applying the law to the evidence, we are led to conclude: That the verdict of the jury is right, and should not be disturbed; that the instructions given correctly state the law applicable, and error was not committed in giving the same, or in refusing to give the instructions tendered by plaintiff; further, that the court did not err in denying a new trial on grounds of accident or surprise.

The judgment of the trial court is

AFFIRMED.

ANNE K. YATES, APPELLANT, V. NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, APPELLEE.

FILED JUNE 26, 1928. No. 25228.

1. **Insurance**: ACTION ON POLICY: DEFENSES. Where an insurance company, before being sued, as in this case, bases its refusal to pay life insurance to the beneficiary solely upon the ground that the policy had lapsed before the death of the insured, it will not be permitted to assert other and different defenses after litigation is begun.
2. ———: ———: ———: ESTOPPEL. In such case, where the answer of the insurance company sets up a different ground of defense than that given as a reason for nonpayment of the policy, and no reply is filed, but the action is tried as though there was a reply, if facts showing an estoppel are admissible and admitted for other purposes, it is not necessary that estoppel be specially pleaded.
3. ———: POLICIES: CONSTRUCTION. Life policies written by insurance companies are to be construed most strongly against them.
4. ———: ———: INCONTESTABILITY. An incontestable clause in a life policy, "After one year from the date of issue, this policy shall be incontestable except for nonpayment of premiums," means what it says, and time for contest begins to run from the "date of issue."
5. ———: ———: ———. An incontestable clause in a life policy is for the benefit of both insured and beneficiary, and applies before and after the death of insured.
6. ———: ACTION ON POLICY: PLEADING. It is not necessary to specially plead an incontestable clause in a life policy when it is attached to, and made a part of, the petition.
7. ———: ———: DEFENSES: ESTOPPEL. It appearing from the pleadings and evidence that the company made no contest, of any sort, of the policy in suit, for more than eight years after the "date of issue," it cannot now make the defense of suicide or that insured came to his death by his own hand or act.
8. ———: ———: ———: ———. It appearing, when plaintiff demanded payment of the policy, the company refused the same for the sole reason that the policy lapsed for nonpayment of premiums before the death of insured, it cannot now defend on other or different grounds, of which it had knowledge as being actual or probable.

9. ———: ———: QUESTION FOR JURY. Death of insured being admitted in the company's answer, and whether the policy had lapsed during his life for nonpayment of premiums being the only defense available, it was error for the trial court to withdraw the case from the jury.

10. ———: ———: ———. Under the pleadings and evidence, the jury should have been permitted to determine whether insured died while the policy was in force.

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

Frank C. Yates and *Nelson C. Pratt,* for appellant.

C. J. Baird and *L. C. Hupp, contra.*

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

HOWELL, J.

This is an appeal from a judgment of the district court for Douglas county, dismissing plaintiff's cause of action. Appellant was plaintiff, and the parties will hereafter be referred to as plaintiff and company.

The action was based upon a policy of insurance for $2,000, issued June 14, 1913, to John B. Lindsey, husband of plaintiff, she being named as beneficiary.

At the close of plaintiff's testimony, the company moved for a directed verdict. The court sustained that motion, discharged the jury and ordered plaintiff's action dismissed.

The pleadings have given us some trouble, and we deem it necessary to analyze them by paragraphs.

Paragraph 1 of the petition alleges the corporate entity of the company; the issuance of the policy to John B. Lindsey on June 14, 1913, a copy of the policy is attached to the petition, and made a part thereof, and its acceptance by Lindsey, *"now deceased,"* at Omaha. Paragraph 1 of the answer admits those allegations.

Paragraph 2 of the petition avers that Lindsey resided in Omaha and paid all dues required to keep the insurance

in force to and including January 14, 1915. Pargraph 2 of the answer admits the residence of Lindsey, concedes the insurance was in force to January 14, 1914, and denies payment of dues beyond that date.

Paragraph 3 of the petition alleges that, about April 13, 1914, Lindsey was employed and resided in Omaha, disappeared at that time and has not since been heard from. Paragraph 3 of the answer denies those allegations for want of sufficient information to admit them. Having admitted Lindsey's death, in paragraph 1, there is little, if anything, left of paragraphs 3 of the petition and answer.

Paragraph 4 of the petition alleges the plaintiff was the wife of Lindsey; vigilant efforts to find him; inability to trace him; his absence for seven years, and his death about April 13, 1914. Paragraph 4 of the answer states lack of information to admit, and therefore denies, those allegations. Affirmative matters of defense are alleged: (1) Lindsey died, if dead, "by his own hand or act" within one year from the date of the policy; (2) no proof was furnished of the death of Lindsey; and (3) a tender of premiums paid.

The only tender made was the offer in the answer. It was not actually made or kept good, and was offered only "in case proof should be furnished of his death as alleged in the petition." There was no allegation in the petition that Lindsey died by his own hand, or act, or suicided. As stated before, his death was admitted, and it only remained to be shown when it occurred, and not necessarily how it occurred. The denial was, death did not occur about April 13, 1914. By turning to paragraph 5 of the answer, it will be observed the company alleged the policy "had not been in force" one year, "and the first year's premium had not been paid," by reason of which, "said policy lapsed."

Paragraph 5 of the petition alleges the policy was in force at "the date of death of said John B. Lindsey;" plaintiff advised the company of the death and offered to make proof, and had submitted proof thereof; demanded payment, and the company "failed, refused and declined" to

pay. Paragraph 5 of the answer denied the foregoing, and alleged the issuance of the policy on June 14, 1913, "in consideration of the application" for the insurance, "and of the payment of the advance annual premium of $55 together with the sum of $12.04 for temporary insurance to January 14, 1914," the payment of future like annual premiums, and "defendant agreed to pay, upon proof of his death, to his wife, Anne K. Lindsey, the sum of $2,000;" except the $12.04 for temporary insurance to January 14, 1914, the required premiums were not paid; in case of nonpayment of any premium when due within the first three years, the policy shall cease and all rights forfeited; that the policy had not been in force for a year at the time of the alleged death, and the first year's premium had not been paid, because of which the policy lapsed; "that more than five years have elapsed since the alleged cause of action accrued, and the same is barred by the statute of limitations."

Paragraph 6 of the petition and the answer are merely formal, the answer including a general denial.

When the case was called for trial, the company was permitted to amend its answer by interlineation, and plaintiff was given leave to file reply. A jury was at once drawn and the trial proceeded without a reply being actually filed. Thus, the issues were permitted to loosely stand. So far as the record goes, issues the reply might have presented, or that were assumed, were not limited. No objection was made to any testimony as not being within issues. The field was open to plaintiff so long as the company acquiesced, as to any issue available within the proper functions of a reply, and the evidence properly received.

Pruned to crux, the petition declares that plaintiff's husband died about April 13, 1914, having insurance with the company for $2,000 in full force, evidenced by a policy issued June 14, 1913, naming her as beneficiary, and the company owed her the money.

The company admitted such a policy was issued, that insured was dead, and it had not paid the policy.

To avoid payment, the company set up four grounds of defense; (1) The policy lapsed for nonpayment of premiums before insured died. (2) Insured committed suicide. (3) No proof of death had ever been furnished the company. (4) The claim was barred by the statute of limitations. As we read the evidence and the pleadings, there is but one controlling ultimate question to be determined, and that is: Did the insured die within one year from the date of the policy, and before it lapsed for nonpayment of premiums?

At the trial two letters were received in evidence, which were objected to by the company for the reason they were "incompetent, irrelevant, immaterial, no foundation laid." No objection was made because they were not within the issues. The trial court was not asked to, nor did it, rule on that question. One letter was written May 3, 1921, by plaintiff's attorney to the company, saying: "We * * * hereby make demand upon you for the payment of the benefits under this policy. You will please prepare proofs of death and send same to us to be filled out. This is to inform you that John B. Lindsey disappeared on the 13th day of April, 1914; that he has not been seen or heard of, and the circumstances surrounding his disappearance are such as to be very strongly presumptive of his death. * * * You will please give some attention to this matter within the next ten days, as we have been authorized by our client that, unless action is taken by the company for the payment of the benefits under this policy, to immediately institute suit." The other letter was written May 16, 1921, by the company to the attorney, saying: "Replying to your letter of May 3, company advises us that policy No. 264010, on the life of John B. Lindsey, lapsed for nonpayment of the six months' note of $14, given in part payment of the first premium and became due July 14, 1914, and has no value."

This action was commenced December 7, 1921. At the time the company wrote the letter of May 16, 1921, every defense it sought to interpose by answer was complete, if

good, and known to it, including limitations. In *Mitchell v. Brotherhood of Locomotive Firemen and Enginemen,* 103 Neb. 791, it is said:

"Defendant knew of the statements made in the application. It was also advised, before it promised to pay the loss when proofs were furnished, of the fact a witness had testified before a special master in United States district court, that decedent had received an injury in a railroad wreck on December 5, 1905, that he was operated upon, a portion of his skull removed, and a silver plate placed over the opening, and had since suffered from dizzy spells and epilepsy. This was sufficient notice of a probable defense, and if it desired to assert it, it should not have put its refusal to pay upon the other ground only. We are of the opinion that defendant is estopped to defend upon the ground set up in the amended answer."

Had the company furnished the blanks for proofs as requested, it would have learned all the facts. Its reply to plaintiff was, in effect, the company is not concerned about how the insured died or when he died, because the policy lapsed for nonpayment of the premium note which "became due July 14, 1914." Whether the reason was a good one, or bad, it precluded itself from setting up another after litigation started.

Powers v. Bohuslav, 84 Neb. 179, Good, C., now an honored member of this court, was dealing with a suit for commissions on a brokerage contract for the sale of land. The broker secured a purchaser, and the landowner refused to convey the land, giving a certain reason therefor. When sued, he set up another and different defense. On page 184, the court said: "Defendant, having failed to object upon the ground that the purchaser was willing to pay all cash, instead of deferring a part of the purchase price, until after litigation was instituted, will not now be heard to make such defense." In that case, the reply was a general denial, and no estoppel was pleaded.

In *Hilmer v. Western Travelers Accident Ass'n,* 86 Neb. 285, 291, this court, speaking through Root, J., with ref-

erence to another case in this court, in which the insurance company denied the policy was in force, said: "The company also urged a defense based upon an agreement in the policy. Manifestly it was not just to permit the company to insist that the policy was void for one purpose and valid for another." Further in the opinion, on page 292, it was said: "But, if a person before suit refuses to satisfy a demand for particular reasons stated by him to the plaintiff, he will not be permitted after litigation has commenced to change his ground and defend upon entirely different considerations."

Strictly speaking, inconsistencies of the kind we are talking about are not to be said to fall under estoppel or election. They partake of both, but it seems to be a rule of procedure based upon manifest justice. 10 R. C. L. 698, sec. 26.

The letters were material and relevant to issues before the court for other purposes than estoppel. The proper rule, in such case, is well stated in *Hirsch Rolling Mill Co. v. Milwaukee & F. R. V. R. Co.*, 165 Wis. 220, in these words: "However, if the facts showing the estoppel are within the issues made by the pleadings and the evidence showing the estoppel is admissible for any purpose thereunder, it is not necessary that the estoppel should be specially pleaded." In view of the fact that the instant case was tried without a reply as though one was filed, and that the two letters were in evidence on other issues, it is rather technical to hold plaintiff to strict rules of pleading. The facts, being properly before the court, should not be ignored. We have recently held, in *Northwest Ready Roofing Co. v. Antes, ante*, p. 121, that technicalities will not be permitted to work injustice.

What has been said disposes of failure to furnish the company with proofs of death. In addition, however, it may be said, a total denial of liability under the policy automatically disrupts that defense.

The next defense urged is suicide.

The policy, a copy of which is attached to the petition,

contained two clauses, in the order copied, as follows: (1) "If the insured, whether sane or insane, shall die by his own hand, or act, within one year from the date hereof, this policy shall be void and shall have no value; but in such event the company will return the premium paid." (2) "After one year from the date of issue, this policy shall be incontestable except for nonpayment of premiums."

Preliminary to discussing these provisions, attention is called to the last sentence in paragraph 4 of the company's answer, which reads: "Further answering, tenders a return to the plaintiff of the premium paid in case proof should be furnished of his death as alleged in the petition."

Aside from the fact that the tender pleaded is not unconditional, depending upon the furnishing of proofs of death which the company had waived, it was conceded at the oral argument that no actual tender had been made. Much has been said in argument about inconsistencies in the answer. We do not care to discuss that point. We will assume the several defenses have been sufficiently pleaded. The company is in no position to claim suicide, since it has at all times denied the proof was sufficient to show death. From its standpoint, it cannot claim, on this appeal, the benefits of the suicide clause. It obtained the decision of the trial court on other grounds and has not itself appealed.

The suicide and incontestable clauses in the policy must be construed together. The suicide clause is limited to one year. The incontestable clause is so plain that it is not open to construction. It presents a matter of simple arithmetic. Take the date of the issuance of the policy from the date of the time the company enters a contest, and the difference will show whether it is one, more, or less than one year.

The company wrote the contract and sold the insurance on its own terms. It was free to limit or eliminate time for contesting the policy. We are not concerned with the meaning of the word "contest," since the company at

no time questioned the policy by notice, suit, or otherwise, until May 16, 1921. It is no answer to say the company was not sued nor claim made within one year. If it desired to contest, it must have done so within one year. The company has no right to require an insured, or beneficiary, to assert a claim at such time as will benefit it, or to sue in time for it to answer within the year.

It has been contended in other cases that incontestable causes do not relate to deaths occurring during the restricted period, and that it is only when insured dies thereafter that the obligations of the policy become absolute. This is answered in *Mutual Life Ins. Co. v. Hurni Packing Co.*, 263 U. S. 167, 176: "The argument is ingenious but fallacious, since it ignores the fundamental purpose of all simple life insurance, which is not to enrich the insured but to secure the beneficiary, who has, therefore, a real, albeit sometimes only a contingent, interest in the policy. It is true, as counsel for petitioner contends, that the contract is with the insured and not with the beneficiary, but, nevertheless, it is for the use of the beneficiary and there is no reason to say that the incontestability clause is not meant for his benefit as well as for the benefit of the insured. It is for the benefit of the insured during his lifetime and upon his death immediately inures to the benefit of the beneficiary. * * * 'The incontestable clause in a policy of insurance inures to the benefit of the beneficiary after the death of the insured as much as it inures to the benefit of the insured himself during his lifetime. The rights of the parties under such an incontestable clause as the one contained in this contract do not become fixed at the date of the death of the insured.' In order to give the clause the meaning which the petitioner ascribes to it, it would be necessary to supply words which it does not at present contain. The provision plainly is that the policy shall be incontestable upon the simple condition that two years shall have elapsed from its date of issue; not that it shall be incontestable after two years if the insured shall live, but incontestable

without qualification and in any event." Further on in the opinion, it was said: "Dealing alone with the provision here under review, we are constrained to hold that it admits of no other interpretation than that the policy became incontestable upon the sole condition that two years had elapsed." In that case, the contestable period was exceeded by only one day, when the insurance company took the first action to avail itself of protection.

The *Hurni* case was followed in *Great Southern Life Ins. Co. v. Russ*, 14 Fed. (2d) 27, where it is said the following are not open to debate: "(1) That the incontestable clause is valid: * * * (2) That the clause is to be construed liberally, and as covering false representations and fraud on the part of the insured: * * * (3) That, where the policy provides that it shall be incontestable after stated time from 'date of issue,' the time for contest begins to run from the date of the policy. * * * (4) That the clause inures to the beneficiary of the policy and applies even where the period elapses after the death of the insured." Each foregoing proposition is fortified with many citations. It was held an answer, filed after the period stated for contest in an action instituted prior thereto, was too late, did not relate back and stated no defense.

Why should the law not be such? The contract was written and sold by and on the company's own terms, at a price it fixed. It had the benefit of the premium and, in refusing to pay, asks the courts to give it relief from its own solemn engagements. It had the right to contract itself into a pocket and, having made the sale, should be required to respect and fulfil its part. The company's counsel claim that, if insured suicides within a stated time fixed in the policy, the company will not be held liable, and cite *Miller v. National Council, K. & L. of S.*, 109 Neb. 199, and *Nebraska Transfer Co. v. Chicago, B. & Q. R. Co.*, 90 Neb. 488. The latter case does not touch the question. The *Miller* case relates to a by-law limiting liability to one-fifth of the contract in the event of suicide within

two years, has nothing to do with an incontestable clause and is not in point.

Without casting doubt upon the foregoing, there is the other reason that the company is precluded from asserting suicide as a defense. It denied liability solely on the lapsing of the policy. What we have said as to the defense of the statute of limitations applies with equal force to suicide.

This leaves the only defense open to the company. That Lindsey was dead when this action was instituted is admitted. Whether the policy had lapsed when he died is a question of fact. Whether he died by his own hand, or act, is immaterial except to determine whether he died, as alleged in plaintiff's petition, about April 13, 1914. We are not impressed that the evidence was sufficient to go to the jury on death from tuberculosis, but do not foreclose further proof on that issue, if there be any. We think, and it was frankly so conceded by counsel for the company at oral argument, the evidence is sufficient to call for a jury determination on the questions: When did the insured die? and, was the policy then in force? In withdrawing those questions from the jury, the learned trial judge was in error.

The second headnote in *McLaughlin v. Sovereign Camp, W. O. W.*, 97 Neb. 71, cited by company's counsel, stated the rule that, after seven years, an absentee is presumed dead, but there is no presumption that death occurred at any particular time. Notwithstanding the great learning of the judge who presided at the trial of this case in the district court, we cannot dissuade ourselves from a conviction that the judgment is erroneous.

We have examined, with great care, the propositions of law presented by counsel for the company, each of which might well be conceded. They do not deal with the entire situation, and are only applicable when the entire question is segregated into parts.

The judgment of the district court is reversed for a new trial in keeping with this opinion.

REVERSED AND REMANDED.

COLFAX COUNTY BANK, APPELLEE, V. EMIL KONVALIN ET AL., APPELLANTS.

FILED JUNE 26, 1928. No. 26067.

1. **Witnesses:** COMPETENCY. The grantee of a deceased person is the latter's legal representative as against an attacking creditor, seeking to set aside the conveyance as fraudulent.
2. **Fraudulent Conveyances.** In an action to set aside a fraudulent conveyance based on a consideration of past-due indebtedness, evidence *held* insufficient to show existence of valid debts.

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

M. F. Harrington and *Clifford B. Scott,* for appellants.

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

Heard before ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and BEGLEY and REDICK, District Judges.

BEGLEY, District Judge.

This is a creditor's bill brought by Colfax County Bank against Frank Konvalin, Anna Konvalin, his wife, and Emil Konvalin and Agnes Konvalin, his wife, to set aside as fraudulent a certain conveyance of real estate in Pierce county, Nebraska, executed by Frank Konvalin and wife to Emil Konvalin. Frank Konvalin died before the trial of suit and the action proceeded against the other three defendants. Trial resulted in a decree setting aside the deed as prayed, and Emil Konvalin and Agnes Konvalin, his wife, have appealed.

On April 18, 1924, Frank Konvalin and Anna Konvalin, his wife, conveyed 240 acres of land in Pierce county, worth approximately $30,000, subject to a mortgage of $7,690, to his son Emil Konvalin. At said time said Frank

Konvalin was surety on a note for $8,169.57, given by his son Charles to plaintiff bank, all of which was known to the parties to said deed. On September 22, 1924, the plaintiff brought suit on said note in Stanton county, and thereafter recovered a judgment and caused a transcript of same to be filed in Pierce county, and, after issuance of execution and its return unsatisfied, filed this creditor's bill to have said deed set aside on the ground of fraud. Defendants Emil Konvalin and Agnes Konvalin in their answer claim that the property was conveyed to Emil in good faith and for a valid and adequate consideration of a past-due debt in the sum of upward of $23,000, and an agreement for future support of the grantors.

Frank Konvalin, grantor, was made a party defendant to the suit, but died before issue made up. In the trial a controversy arose as to who was the personal representative of said Frank Konvalin, deceased. The lower court permitted Emil to testify as to conversations with his deceased father, but in answer to a special written interrogatory at the close of the case held that he was incompetent to testify, and, if competent, the court was not satisfied that his testimony as to such conversations and transactions was true. Section 8836, Comp. St. 1922, has been construed many times by this court to mean that a personal representative is one that has succeeded to the rights of the deceased, either by purchase, descent, or operation of law. Here the defendant grantee claimed to succeed to the rights of the grantor by purchase. He was sued jointly with his grantor. Whatever rights Frank Konvalin had for transferring his property to his son Emil, or for withholding it from the plaintiff, his said son now has. He is, therefore, the representative of his father in this case and his testimony as to transactions and conversations with his deceased father was competent. *Holladay v. Rich,* 93 Neb. 491. The case of *Adler & Sons Clothing Co. v. Hellman,* 55 Neb. 266, relied upon by appellee, is easily distinguished from the case at bar. In that case the grantee was also executrix of the deceased's estate.

Under section 1329, Comp. St. 1922, it is the duty of the executrix to bring an action. She refused and the creditor brought it in her stead. It was held that the creditor occupied the position of the executrix in the suit and as to them the claim of defendant was adverse and she was not permitted to testify by reason of her refusal to carry out her duty as executrix. No such situation confronts us in this case.

This brings us to the important and controlling question in the case: Was the transfer made in good faith and for a valuable consideration? The facts surrounding the conveyance of land between relatives will be closely scrutinized where fraud is charged, to discover if the conveyance was made for the purpose of hindering, delaying or defrauding creditors. This rule was recognized by the defendants in the lower court and they assumed the burden of proof. Emil contends that, at the time of the transfer herein and as part of the consideration therefor, his father owed him $7,200 commission for negotiating the exchange of Boone county land for Dodge county land in 1915, and for commissions for negotiating the exchanging of the Dodge county land for the Pierce county land, by reason of an oral agreement with his father made at or before the time of each of said exchanges. His uncorroborated evidence on these matters, the staleness of the claim, the family relationship, and the peculiar circumstances surrounding the same are insufficient to carry the burden of proof which he assumed. He further contends that his father was owing him an additional sum of $14,295, by reason of money loaned to his father, taxes paid and improvements erected on the Pierce county land during the period from 1918 to 1923, on the express agreement of his father to repay the same. His testimony in this case shows that he, his wife and family, and his father and mother occupied the premises as one family, and lived upon the produce therefrom; that he had no specific agreement with his father to retain the proceeds of the land, convert them into money and loan same to his father, or

that he had any other income from which to secure money. He fails to account for the proceeds from the premises during this period or to prove any agreement absolving him from the payment of rent for same. The only agreement which he claims was that made in 1910 when he, as a boy of 18 years, took over the management of the farm to pay off the debts, and his testimony as to that arrangement is vague and unsatisfactory. After 1915 the debts seem to have all been paid, and whatever moneys he paid to or on behalf of his father were moneys derived from the income from the farm, and therefore belonged to the father, and not to defendant. Likewise, the improvements and repairs put upon the farm were made with money earned upon the farm. The claim of Emil in this regard is also inconsistent with the acts of the father. His father always claimed ownership of the farm and stock and equipment. There is evidence that on signing plaintiff's note he stated in the presence of Emil that he owed only $6,000 and intended selling farm in payment of debts and dividing the remainder among his children. In 1921 his father gave Emil the sum of $6,000 and raised the amount by a mortgage upon the farm. In his financial statement furnished the mortgage company he stated that he owed only the sum of $6,000, and owned all of the stock and machinery on the place. This was a circumstance to show the grantor's fraudulent intent in this action. *Leach v. Edgerton,* 203 Ia. 512.

The agreement to furnish support for the grantor and his wife seems not to have been carried out. The mother now lives with a daughter, and the only support furnished was the sum of $25. The grantee seems also to have acquired the proceeds of a certain insurance policy upon the life of his deceased father, which was previously held in the name of his mother as beneficiary.

From a reading of the testimony we are convinced that the defendants have failed to sustain the burden of proof by showing that this transfer was made in good faith and for a valuable consideration. The evidence indicates that

it was made with knowledge of plaintiff's debt and for the purpose of hindering and defrauding the plaintiff in the collection of its judgment. The decree of the trial court is therefore AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, ET AL., APPELLANTS, V. VALENTINE STATE BANK: MRS. WALTER FLOWERS, INTERVENER, APPELLEE.

FILED JUNE 26, 1928. No. 26021.

Banks and Banking: ACTION FOR DEPOSIT: INSUFFICIENCY OF EVIDENCE. In an action by a married woman to recover a claimed amount as a deposit in a bank, evidence showing that the deposit was made in 1916 and no demand was ever made by her for any part of the amount nor for any interest thereon for more than nine years, and that the bank had credited the deposit to credit of the husband's account and by him it was subsequently withdrawn by checks, together with evidence that regular monthly statements had been returned to both husband and wife showing the condition of their respective accounts, without any objection from the wife, *held* not sufficient to support a finding and decree in favor of the wife.

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

O. S. Spillman, Attorney General, C. M. Skiles and *J. C. Quigley,* for appellants.

W. C. Heelan, contra.

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

BRODY, District Judge.

Mrs. Walter Flowers, the appellee, filed her claim for $1,065.50 with the receiver, as the claim of a depositor against the insolvent Valentine State Bank. The receiver disallowed the claim, and Mrs. Flowers appealed to the district court, and that court found in her favor, entered judgment accordingly against the bank and allowed the claim as a judgment against the state guaranty fund com-

mission. The receiver and the guaranty fund commission appeal to this court.

On February 20, 1916, Mrs. Flowers deposited in her name, as Alice Flowers, the sum of $65.39 in the Valentine State Bank. On May 8, 1916, there was deposited in the same bank the sum of $1,065.50. This last deposit was in the name of Mrs. Walter Flowers and was made by F. M. Walcott, her attorney. Mrs. Flowers claims that when she made the deposits she intended to retain and keep the same as her own personal property, and that she never authorized or empowered any one to withdraw any of the deposits. No checks were drawn by her, nor was any demand ever made by her until 1925.

By his answer the receiver of the bank says, so far as the deposit of $65.39 is concerned, Mrs. Flowers has drawn out the entire amount by her check and there has been a complete withdrawal thereof; and as to the second deposit, of $1,065.50, says that it was made by F. M. Walcott, who was attorney for Mrs. Flowers, in the name of Mrs. Walter Flowers, and says that on the same day, after the deposit slip had been issued, Mrs. Flowers instructed an officer of the bank to credit the account to the credit of her husband, W. G. Flowers; that pursuant to that request and acting under such instructions the bank transferred the deposit to the account of her husband, that the account thereafter ran as common property of both the husband and this claimant, and claims that the money represented by this deposit had subsequently been withdrawn on the husband's general checking account.

This inquiry concerns only the deposit of $1,065.50, as it is clear, from the evidence, that the first deposit by Mrs. Flowers has been closed by subsequent withdrawals. The sole question to be determined is whether or not Mrs. Flowers authorized or directed that the deposit of $1,065.50 should be transferred or credited to the account of her husband.

It is undisputed that the original deposit was made in the name of Mrs. Walter Flowers and was made by F. M.

Walcott, her attorney, who was living at that time. She says that she received this money from her father's estate, and that the same was received after banking hours and that Mr. Walcott made the deposit for her and in her name, as shown by the original deposit slip. This was on May 8, 1916. The deposit was made as a general deposit without interest. Mrs. Flowers claims that she has never withdrawn any of the account, nor ever authorized or empowered any one to transfer the same to any other person. She admits that she has never made any demand for the money, or any part of it, until about 1925 and after the bank became insolvent. She produced the original deposit slip in support of her contention. The duplicate deposit slip which was retained by the bank shows a pencil notation written in the handwriting of one of the bank officers or employees, as follows: "Deposit to the account of W. G. Flowers." The bottom part of this deposit slip is mutilated and torn off, together with a part of the pencil notation. The record does not show that this notation was made by Mrs. Flowers or at her direction, and no written authorization of Mrs. Flowers was produced, nor was any witness able to testify directly that she ever authorized such transfer. No officer of the bank could recall any of the particulars to the transaction other than as above stated, together with the bank ledger sheets, which were introduced in evidence, showing the separate accounts of both Mrs. Flowers and her husband, W. G. Flowers. Mrs. Flowers admits she made no demand for payment of this money or any part of it until early in 1925, nine years, at least, after the original deposit was made. The bank pleads that, on the first of each month following the original deposit, they sent a statement of the account to each depositor together with canceled checks, and that they sent the same to Mrs. Flowers and also to her husband, and that neither Mrs. Flowers nor her husband ever made any complaint as to the condition of their account as shown by these statements. As defense the bank pleads an account stated, estoppel, and the statute of limitations.

As there is little direct evidence in this case, it is necessary to give a complete picture of the whole situation, which, in substance, is as follows: Mr. and Mrs. Flowers were ranchers and farmers residing in Cherry county, and, according to her testimony, at least a part of the operations were carried on in her name. She says that much of the time she operated the ranch herself while her husband was doing other work. She says she never drew any checks on the bank on either her own or her husband's account, and the bank officials say they have no specific knowledge or recollection of this item, but that the husband did a considerable checking account at the bank, and also borrowed considerable money from the bank. The ledger sheets of the bank show only two or three entries in the separate account of Mrs. Flowers, which were in February and March of 1916, and the account balanced and closed on April 19, 1916. During the years following 1916 it is admitted by Mrs. Flowers that she and her husband were borrowers of considerable money at the bank, and as security for payment of which they gave chattel mortgages on their personal property. Like a great many other farmers and ranchers following the years 1919 and 1920, they became heavily involved financially, and in 1924 or 1925, after they had lost the ranch by foreclosure, they held an auction sale of all their personal property, and while this sale was being held the bank garnisheed the clerk of the sale and out of that proceeding obtained payment of some $300 or $400 owing to the bank by the Flowers. It was following this garnishment proceeding that Mrs. Flowers made the first demand on the bank for the account at stake in this action.

While Mrs. Flowers denies that she ever authorized the transfer of this account to the credit of her husband and none of the officers, now with the bank, testifies to this particular transaction, the ledger sheets of the bank show that on May 6, 1916, deposit was made to the credit of her husband, W. G. Flowers, in the sum of $1,065.50, and that

thereafter Mr. Flowers made deposits and checking and withdrawals. On March 8, 1917, he had overdrawn some few cents. Deposit sheets for subsequent years are not shown, but it is clear, from the record, that these people continued to be customers of the bank until 1925.

It does not seem possible that any person in comparatively meager circumstances would let over $1,000 remain in an open checking account with the bank for nearly ten years without giving it any attention or at least placing it so it would draw interest. It is almost as startling as to read of a big business man completely forgetting a deposit of $5,000,000. It may happen. But it is so incredible as to at least cast a heavy shadow of doubt. It does not seem possible that this woman, who was more or less active in assisting her husband in the operation of considerable of a ranch business and knew that he was borrowing money more or less extensively at the bank and who at least had knowledge, if not actually joining in the execution, of chattel mortgages to secure loans of money from this particular bank, would leave a deposit of over $1,000 lying idle without interest in the same bank for nine or ten years. The evidence offered by the bank was to the effect that on the first of each month they sent a statement to each depositor showing deposits, withdrawals, and balances, together with canceled checks, and that such statements were sent to both Mrs. Flowers and to her husband, and that the statement would show Mrs. Flowers' account was closed, and the husband's account would show the transfer of this particular deposit to his account, and that no objection had ever been made to these statements. Mrs. Flowers admits that she had access to these statements and could have inspected them had she desired, but says that it was her husband's account, and that she did not pay any attention to it; and that she did not know the bank had transferred the money to her husband's account. It may be so, but it does not seem within the bounds of reason that, in such a situation as these people who were having a hard struggle during these years, an item of this

size would be completely forgotten and lost for a period of approximately nine years. Mrs. Flowers admits that the bank sent monthly statements of the accounts of both herself and husband, and no objection was made for more than nine years.

The evidence in this case is not sufficient to support the finding and decree of the district court. The decree is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

HOWELL, J., dissents on the facts.

JOHN I. TAMINOSIAN, APPELLANT, V. ELLEN G. TAMINOSIAN, APPELLEE.

FILED JUNE 26, 1928. No. 26093.

Divorce: DECREE MODIFIED. Evidence examined, and *held* to support a decree of divorce in favor of the wife, on her cross-petition, but modified to permit minor child, custody of whom is given to mother, to visit with the father one day in each week.

APPEAL from the district court for Douglas county: EDMUND B. CARRIGAN, JUDGE. *Affirmed as modified.*

C. E. Walsh, for appellant.

Shotwell, Ready & Shotwell and *Paul S. Sutton, contra.*

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

BROADY, District Judge.

This is an action for divorce brought by the husband who is appellant in this court. The wife, the appellee, by answer and cross-petition asked for affirmative relief on the grounds of cruelty and nonsupport. The trial court awarded a divorce to the wife and, in lieu of alimony, decreed the full title of the home property to the wife, and permanently enjoined the plaintiff, the husband, from coming upon the premises for any purpose or from appearing

near the premises in a threatening and menacing manner. The parties occupied the premises as a home and also a cleaning establishment and rug repairing business, which they operated at their home, and this business, other than the rug branch, was given to the wife exclusively. The husband appeals and complains bitterly against the award of the premises to the wife and the injunction preventing him from going upon the property. He also complains against that part of the decree that awards the custody of all the children to the wife and restraining him from the use of the trade-name in the cleaning business.

These parties are naturalized Armenians and were married in 1906. They have three children, two daughters, about 21 and 19 respectively, and a son 13 years of age. The two eldest are self-supporting and the son is a school boy and part time, at least, sells newspapers. At the time of the marriage the husband either owned or bought the lot on which the home now stands and since then has made the house his present home and has made some additions thereto. During all of this time they have conducted a clothes cleaning business, and the plaintiff is an expert oriental rug-repair man and has conducted a more or less extensive business in that line in one part of the premises. The evidence shows that the principal income from the business for the family has been the cleaning and pressing business, and that the wife has done most of the hard work in that department. While the husband disputes that statement and claims that he has done most of the work, the testimony of the children and others amply supports the contention of the wife that she herself did most of the actual work in the cleaning and pressing department. The husband says in one place that he was "general manager" and "I did all the soliciting and then when I went to fish I did the soliciting and brought work to the house."

It would serve no useful purpose to attempt to review the evidence in this opinion. It is sufficient to say that for a number of years these people have been quarreling more or less bitterly. While the wife's showing of physi-

cal cruelty is not very convincing, there is evidence that at one time he took hold of her by the throat; and the son tells us that on that occasion, or soon after, he found his mother lying on the floor crying. One of the daughters testifies that the father used abusive language to the mother, stated that she did not want to repeat it to the court, and said that when the father would start in on these outbursts she would leave rather than remain and hear it. The children all testify in the highest terms of their mother, to the effect generally that she was hard-working and industrious; that she kept a good home for them. They also testify that the mother was the main support of the family, and that she did practically all of the work in the clothes pressing and cleaning business. The evidence amply supports the decree in awarding a divorce to the wife.

As to the award of the property and business to the wife, the evidence shows clearly that the wife is the main worker in at least the clothes cleaning and pressing business. The husband did little, if anything, more than possibly soliciting business and making collections and matters of that kind. The income of the business is meager and not at all lucrative. One daughter, at least, is self-supporting, and remains at home and has paid for some time the building and loan dues on the home property. The property is worth from $5,000 to $6,000, and at the present time is incumbered for $3,000, and, from reading the record on this question, we think the district court correctly found that the equity in the property does not exceed $2,000. The cleaning and pressing business was carried on under the trade-name of "Dundee Cleaning Company," and is the principal source of income of the family, and the continued operation of the business is the only source of income which the wife has in support of herself and minor child. The award of the premises and the business to the defendant was proper. It would be doing less than nothing, in view of the conditions existing in this family, to permit the husband to go upon the premises, and the injunction to prevent the husband from going upon the premises and

interfering with the wife in any way in the peaceable occupation of the premises is proper.

While the decree of the district court is somewhat indefinite as to the right of the father to visit the children or have the children with him, the father bitterly complains on his part and expresses an affectionate desire to visit with and retain the affection of the children. We do not feel that either parent should be deprived of the love and affection of his own children so long as the same can be agreeably retained. The daughters are practically of age now and ought to be able to determine that question for themselves, and we think, so far as the decree attempts to prohibit the father from visiting the children, it should be modified to the extent of permitting the daughters to visit with the father, if they so desire. But under the circumstances in this case the visitations should be at a place other than at the home of the mother, unless it should be with the mother's consent. The father should also have the right to have the son with him one day in each week, if the boy wants to go with him, provided the father does not molest or interfere with the mother or her peaceable occupancy of the home premises.

The decree of the district court is modified to the extent that the children be permitted to visit the father as above indicated, and affirmed in all other respects.

AFFIRMED AS MODIFIED.

ISAAC R. L. WILES, APPELLANT, V. FARMERS IRRIGATION DISTRICT, APPELLEE.

FILED JUNE 26, 1928. No. 25701.

1. Waters: IRRIGATION DISTRICTS: LIABILITY. In the absence of negligence, an irrigation company incurs no liability by improving an existing drainage course.
2. ———: ———:———. Excessive seepage is a common enemy in an irrigation country. In relieving agricultural lands from seepage, an irrigation district is only liable for negligent constructon or operation of its seep ditches after it obtains the right of way therefor.

3. **Evidence** examined, and *held* to support verdict for defendant.

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

Morrow & Morrow, for appellant.

Raymond & Fitzgerald, contra.

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

WHEELER, District Judge.

This is an appeal by the plaintiff from a judgment entered upon a jury verdict for the defendant in an action against an irrigation district for damages for flooding plaintiff's land.

Plaintiff's quarter section lies about two miles north of the North Platte river in Scotts Bluff county, Nebraska. On the north side of the river the country is flat and level for about two miles, then the ground arises somewhat abruptly from 80 to 100 feet to what is known as the table land. The table land is comparatively level and gradually rises in a northerly direction 10 or 15 miles to the hills. This configuration extends for many miles up and down the river. At intervals long draws traverse the table land almost at right angles to the river. Plaintiff's land lies at the base of the table almost at the outlet of one of these long draws, locally known as "Nine Mile canyon," into which an area of from 40,000 to 50,000 acres of land drains. The whole area is irrigated from canals running along the north edge of the table.

With the extension of irrigation came seepage. When water was placed on the land for agricultural purposes it raised the general water table, and in places lower than the canal seeped to the surface. This condition necessitated drainage. The defendant company, to counteract the effect of its irrigating system and to save the land under it for agricultural purposes, deepened the Nine Mile canyon and

with plaintiff's permission constructed a ditch running north and south along the natural line of drainage to carry the seepage to the North Platte river. In September, 1923, a heavy rain storm flooded Nine Mile canyon and the flood-waters coming down the ditch deposited silt and debris on plaintiff's land. There is some testimony to the effect that before the flood plaintiff's land was worth from $50 to $75 an acre and after the flood about $15, and other testimony to the effect that it was only worth $10 or $15 an acre before the flood and about the same afterward. The only crop on plaintiff's land was salt hay and sweet clover. Plaintiff asked for $10,000 damages.

According to the pleadings the action was based upon the negligent construction and operation of defendant's ditch, in that it contained no riprapping or drops; that defendant did not keep it open and dredged out, and that it was so constructed that there was an abrupt change of grade on the north of plaintiff's land, which caused a deposit of silt and gravel. The damage was done by flood-waters, and not by seepage. The trial judge took from the jury the question of negligence in the construction and operation of the ditch, and instructed the jury to find for the plaintiff, if the defendant's ditch did not follow the natural course of drainage and diverted the canyon water over plaintiff's land. The jury found for the defendant under this instruction. The instruction was more favorable to the plaintiff than he was entitled to. In this case a recovery for plaintiff could only be predicated upon defendant's negligence in the construction or operation of the drainage ditch.

Upon appeal plaintiff advances the proposition that, where an irrigation district constructs a ditch to care for seepage water, it becomes liable for any damages resulting thereby. We are not in accord with this proposition. Seepage is a natural result of irrigation—a necessary concomitant detriment of an agricultural benefit. It is a common enemy which it is both the right and duty of the irrigation district to relieve landowners from. In fighting seepage an

irrigation district only becomes liable for negligence in the construction, care, or operation of its seepage ditches.

The only issues in this case are those of fact—whether defendant's ditch followed the natural course of drainage; whether defendant's operation constituted an improvement of a natural watercourse; and whether there was any negligence on the part of the defendant in the construction and operation of its drainage ditch. The jury found for the defendant on all of these issues. While the record shows some conflict in the evidence as to whether defendant's ditch followed the established watercourse, the preponderance of the evidence establishes the fact that it did. The damage was done by storm-water, not by the seepage flow. Defendant diverted no storm-water into the Nine Mile canyon drainage area and brought no flood-water upon plaintiff's land which would not have flowed there in the absence of the seepage ditch. There is no testimony as to negligence or as to any manner in which defendant's ditch could or should have been improved, either in construction or operation. The instructions were more favorable to the plaintiff than the law warrants, and the judgment for the defendant must be, and is, AFFIRMED.

AUGUST BRANDEEN, APPELLANT, V. RALPH M. BEALE ET AL., APPELLEES.

FILED JUNE 27, 1928. No. 26382.

1. **Pleading:** DEMURRER. A motion to strike a petition from the files because the facts pleaded are insufficient, having been sustained by the court, is in effect a general demurrer; it admits the truth of all well-pleaded facts.
2. **Limitation of Actions:** SUIT TO VACATE JUDGMENT FOR FRAUD. In a proceeding brought under section 9160, Comp. St. 1922, to modify or vacate a judgment on account of fraud, after the two years from the rendition of the judgment, if the petition shows that the facts were discovered within the period of limitation and fails to show any good reason why the two years should be extended, it is not error for the court, on motion or demurrer, to strike the petition from the files.

3. **Statutory Provisions.** Section 9160, Comp. St. 1922, in subdivision three, gives power to the district court after the term to vacate or modify its judgments for irregularity in obtaining judgment. Under section 9167, the statute of limitations is fixed at three years, and under section 9168 the provisions of the sections are applicable to the supreme and county courts.
4. **Judgment:** VACATION: IRREGULARITIES. Section 9160, Comp. St. 1922, may not be invoked by a litigant in a separate suit in equity to vacate or modify a judgment for irregularity in obtaining it, after such judgment, in a suit between the same parties, on the same issues, has been pronounced by this court as regularly obtained.

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

C. C. Flansburg and *John S. Bishop,* for appellant.

Claude S. Wilson, Roy F. Gilkeson, Hymen Rosenberg and *Sterling F. Mutz, contra.*

Heard before GOSS, C. J. ROSE, DEAN, GOOD and HOWELL, JJ., and PROUDFIT and REDICK, District Judges.

GOSS, C. J.

Plaintiff appeals from an order, made December 1, 1927, dismissing his action against the defendants, upon the plaintiff refusing to plead further and electing to stand upon his petition after the court had made orders, on October 6, 1927, sustaining separate motions of defendants to strike the plaintiff's petition from the files.

This is the fourth appearance of this litigation in this court in one form or another. The prior occasions were (1) in *Brandeen v. Beale,* 110 Neb. 686, decided July 13, 1923, lost by plaintiff in the district court, wherein Brandeen appealed and secured a reversal on the ground that the guardianship proceedings attacked by him were void; (2) in *Brandeen v. Lau,* 113 Neb. 34, decided December 31, 1924, won by plaintiff in the district court, wherein defendants appealed and secured a reversal on the ground that a *nunc pro tunc* order made in the guardianship pro-

ceedings, after the mandate in the first case went down, should have been recognized by the district court in error proceedings from the county court; and (3) in *Brandeen v. Beale,* No. 25436, a commissioner's opinion, decided October 13, 1926, not reported, but which is the law of that case under the statute relating to opinions written by the commission and approved by the court. Laws 1927, ch. 69. In that case, Brandeen had appealed from an order of the district court dismissing his action against John D. Lau and H. P. Lau Company, on motion of the defendants for judgment on the pleadings, without prejudice to his proceeding in the county court. The petition in that suit was for damages against the defendants for a conspiracy to destroy his business. The defendants had answered setting up as defenses the guardianship proceedings, including the *nunc pro tunc* proceedings of January 14, 1924. The plaintiff replied, challenging the guardianship of Beale and the *nunc pro tunc* decree in those proceedings in almost the identical manner he has attacked them here. The opinion affirmed the judgment of the district court sustaining the motion of defendants for judgment on the pleadings. In that opinion the court said: "The appellant, if he felt that a fraud had been practiced upon him in the procurement of a judgment appointing a guardian over him, had a clear and statutory remedy. Section 9160, Comp. St. 1922, provides that a district court shall have power to vacate or modify its own judgments and orders after term, among other things—'For fraud practiced by the successful party in obtaining the judgment.' Section 9168 provides that the provisions contained in section 9160 apply also to the supreme and county courts."

It seems that Brandeen then brought this action in the county court, following the suggestion above quoted from the opinion in the last case. He apparently, however, relies not only on that fourth subdivision thus quoted but also on that portion of the third subdivision of section 9160 giving power to the county and district courts to vacate or modify its judgments after term for "irregular-

ity in obtaining a judgment or order." The transcript alone does not contain all of the related and helpful facts required to make this rather confusing case clearer. In the briefs of both parties, however, we discover statements to the effect that the proceedings were begun in the county court after the mandate in the last case before our court (No. 25436, heretofore quoted) had been made effective in the district and county courts by proper entries, Brandeen evidently filed in the county court, on January 5, 1927, an application or petition that the *nunc pro tunc* order obtained by Beale, appointing him guardian of Brandeen, be set aside because induced by fraud of the defendants and because irregularly made. Ultimately, on August 5, 1927, the county court sustained the motion of defendants to strike the petition for the reason it showed on its face that plaintiff was not entitled to bring or maintain the action. Brandeen's transcript on appeal from the county court was filed August 15, 1927, in the district court.

The transcript of the district court proceedings shows that the petition was filed August 25, 1927; that on October 6, 1927, the court sustained the separate motions of the defendants Lau and Beale to strike the petition from the files on the ground it shows on its face that plaintiff is not entitled to bring or maintain the action; and that, on December 1, 1927, the plaintiff refusing to plead further and electing to stand on his petition, the case was dismissed.

At most, there are only two questions at issue in the case: Whether the court erred in striking the petition from the files; and whether the court erred in dismissing the case. In reality they are one. In effect the parties assent to this in their arguments. They agree, also, that a motion to strike a petition from the files because the facts pleaded are insufficient, having been sustained by the court, is in effect a general demurrer, it admits the truth of all well-pleaded facts.

Many things are discussed in the briefs. It seems to us our only task is to discover what facts are well pleaded

in the petition and to decide whether they sustain plaintiff's cause of action against the defendants.

The plaintiff alleged that, on June 6, 1921, the defendants filed in the county court a petition for the appointment of a guardian for the plaintiff, a copy of which is attached and made a part of the petition. An examination of this copy shows that the petitioner was described merely as "a creditor of the said August Brandeen." The petition further alleges the issuance of notice of hearing on the same day as the filing of the petition, served on the following day on plaintiff; that the filing of the petition and the subsequent proceedings in the county court "were a part of a fraud or conspiracy on the part of the defendants to unlawfully obtain possession of the property of the plaintiff and to deprive him of his property and liberty and condemn him to a civil death;" that thereafter, between June 7, and June 22, 1921, "in furtherance of said conspiracy and in order to induce plaintiff not to appear in said guardianship proceedings, the defendants, orally, falsely and fraudulently represented to the plaintiff that said petition for the appointment of a guardian was filed through inadvertence, error, or mistake and would be withdrawn and said proceedings dismissed; that the plaintiff should not worry or trouble himself about said petition or proceedings, did not need to go to any expense in the matter, and did not need to attend the hearing on June 22, 1921, or be represented thereat, because the defendants would dismiss said proceedings;" believing the representations true and relying thereon, plaintiff did not appear to oppose the appointment, he believed the guardianship proceedings had been dismissed, and would have appeared in opposition had he not relied upon said promises; that he had and has a complete defense to the application for guardianship, that he was at all times mentally and physically strong, able to manage his business, and was in fact operating his business and managing his property, as defendants well knew, and that said appointment was procured by false swearing and by the fraud and conspiracy of the defendants as

alleged; that on June 22, 1921, the defendants, in violation of their representations and promises to have the guardianship proceedings dismissed, secretly and wrongfully appeared in the county court, concealed from and failed to disclose to said court the facts of their inducement to plaintiff not to appear, and that plaintiff was competent and personally conducting his business, but they falsely and fraudulently represented that the plaintiff was incompetent, and that he consented to or desired the appointment of a guardian; that by reason of said fraud and deceit the county court was misled, deceived and tricked into entering a judgment or decree appointing the said Beale as guardian of the person and estate of plaintiff, a copy of said decree being attached to and made a part of the petition; that the petition did not state facts sufficient to confer jurisdiction upon the court and the decree was invalid and the proceedings wholly void, as later declared, on July 13, 1923, by the supreme court, in the case of *Brandeen v. Beale,* 110 Neb. 686; that on January 7, 1924, the defendants served on plaintiff notice of a motion to "correct the record *nunc pro tunc,*" to be heard in the county court on January 10, 1924, and "that the plaintiff appeared specially in said court and challenged the jurisdiction of the court and its power to hear said motion because of lack of jurisdiction of both the person and the subject-matter; that such special appearance was argued and submitted to the court and taken under advisement; that there never was any hearing on said motion in said county court; that no showing in support of said motion was filed; that no witness was sworn or examined; that no evidence was offered or received; and the plaintiff did not have his day in court and was denied opportunity to oppose the appointment of a guardian of his person and property and was stigmatized as incompetent and condemned to 'civil death.' * * * That there was irregularity in entering said *nunc pro tunc* order or decree in that it was entered contrary to the course of law and the practice of said county court; without any ruling upon the special appearance of the plaintiff; with-

out any hearing on said motion to 'correct the record *nunc pro tunc;*' without giving the plaintiff his day in court or opportunity to oppose said motion; without any showing being filed, or offered, or received in support of said motion; without any witness being sworn or examined; without any evidence being offered or received; and that it was based upon the personal recollection of the judge alone, or on 'facts locked in the breast of the judge,' and not on any paper or file in the case, or the minutes of the judge, or an entry of the clerk made at the time; that it was a transparent expedient or device to validate a void proceeding and escape from the decision of the supreme court holding said proceedings void and said county court without any jurisdiction of the cause of action or the person of this plaintiff; that the court was without jurisdiction of the person of this plaintiff; that the court was without jurisdiction of the subject-matter of said proceedings; that it was a mutilation of the record and not a correction; that this plaintiff was competent and not subject to guardianship; that no notice of the time and place of hearing 'no less than fourteen days before the time so appointed,' as required by section 1589 of the Compiled Statutes of Nebraska for 1922, was given; that there was no 'full hearing and examination,' as required by section 1590 of the Compiled Statutes of Nebraska for 1922; that there was no examination of the plaintiff, or of any member of his family, or of any physician who knew or had examined or observed the plaintiff or of any disinterested witness claiming to have knowledge of the mental condition or competency of the plaintiff."

"Wherefore, the plaintiff prays that said *nunc pro tunc* order or decree pretending to appoint the said Ralph M. Beale guardian of the person and estate of the plaintiff be set aside and vacated and found and declared to be invalid and of no force and effect, and for such other, further and different relief as may be equitable and just."

Attached to the petition and made by reference a part thereof are four exhibits, among which is the order com-

plained of, dated June 22, 1921, which was the date of the original order appointing Beale guardian in the county court. The order was actually entered on January 14, 1924, and under its authority Lau's relation to Brandeen was extended in the original petition for guardianship by the words "and friend" added to the former description of "creditor."

On January 5, 1927, as the commencement of this present case, appellant filed his petition in the county court to set aside the order on the two grounds of fraud and irregularity. The appellees say that the statute of limitations has run against the action for fraud, and that the action for irregularity has been concluded by the facts and by the prior litigation.

As to the statute of limitations on the cause of action for fraud: The fourth subdivision of section 9160, Comp. St. 1922, grants power to the district court to modify or vacate its judgments after the term for fraud practiced by the successful party; section 9161 provides for the proceedings by petition; section 9167 provides that proceedings to vacate or modify a judgment or order for the cause mentioned in the aforesaid fourth subdivision must be commenced within two years after the judgment was rendered or order made; and section 9168 makes the provisions of these sections applicable to the supreme and county courts. The sections here referred to, relating to the action based on fraud, were considered in *Krause v. Long*, 109 Neb. 846, and the rule was stated, as supported by cases, as follows:

"The rule obtains in this and some other jurisdictions that equity will not afford relief if the complainant has a remedy by statutory proceeding in the original action, and that to be entitled to equitable relief against the enforcement of a judgment procured by fraud the party must not have neglected to avail himself of a statutory remedy. *Van Antwerp v. Lathrop*, 70 Neb. 747; *State v. Lincoln Medical College*, 86 Neb. 269; *Bankers Life Ins. Co. v. Robbins*, 53 Neb. 44; *Proctor v. Pettitt*, 25 Neb. 96; 23 Cyc. 981; *Wirth*

v. Weigand, 85 Neb. 115; *National Surety Co. v. State Bank,* 56 C. C. A. 657; *Thompson v. Laughlin,* 91 Cal. 313."

It seems perfectly apparent that Brandeen knew for a long time before the entry *nunc pro tunc,* on January 14, 1924, substantially all, if not all, the facts as to the fraud charged by him as the procuring cause of the guardianship over him. At any rate, all the fraud he now charges was known to him on that date and he cannot be permitted to take advantage of the two-year statute of limitations on the ground of fraud by his petition filed nearly three years after the order last complained of was made. We may state the rule as applied to this phase of the case in these words: In a proceeding brought under section 9160, Comp. St. 1922, to modify or vacate a judgment on account of fraud, after the two years from the rendition of the judgment, if the petition shows that the facts were discovered within the period of limitation and fails to show any good reason why the two years should be extended, it is not error for the court, on motion or demurrer, to strike the petition from the files.

We proceed to consider the cause of action for irregularity in entering the order or judgment. The same section of the statute, 9160, but in subdivision 3, gives power to the district court after the term to vacate or modify its own judgments for irregularity in obtaining the judgment. Under section 9167 the statute of limitations in this phase is fixed at three years. Section 9168 makes these provisions applicable to the supreme and county courts. The suit was commenced on January 5, 1927, to vacate the order entered January 14, 1924. Thus it was within the period fixed by statute. The appellees contend that the entry of this *nunc pro tunc* order was not an irregularity within the contemplation of the statute and that it has already been passed upon in the litigation between the parties.

By reference to the record in *Brandeen v. Beale,* No. 25436, we find that, in Brandeen's reply filed in the district court on January 20, 1926, it was pleaded, with reference

to the justification afforded by the *nunc pro tunc* order, set up in the answers of the defendants, that the plaintiff appeared in the county court January 10, 1924, and objected to the consideration of the motion for the judgment for the reason, among others, that the court lacked jurisdiction of both the person and the subject-matter; and he pleaded that the county court had no jurisdiction or authority to make or enter such order, alleging, as he does in the present case, that there was no hearing on the merits, no witnesses examined, no ruling on his objections to jurisdiction; previously in the case of *Brandeen v. Lau,* 113 Neb. 34, the same questions had been litigated between the parties, the district court had held with Brandeen, and this court had reversed the district court and held that the county court had jurisdiction to render the *nunc pro tunc* judgment complained of. We think that the facts deduced from these former hearings show that, ever since the fall of 1921, Brandeen has been aware of the alleged fraud perpetrated upon him by the appointment of a guardian, and that he has sought in the two cases cited to attack the regularity of the order then and now complained of. Counsel for appellant has cited many instances in which judgments have been set aside for irregularities and has sought to apply them here. Their appeal would have been cogent at an earlier stage of the litigation over this particular branch of the case, but we are of the opinion that this court, particularly in the case of *Brandeen v. Lau,* 113 Neb. 34, definitely foreclosed appellant from further attack on the regularity of that judgment. It is the law controlling this case. Section 9160, Comp. St. 1922, may not be invoked by a litigant in a separate suit in equity to vacate or modify a judgment for irregularity in obtaining it, after such judgment, in a suit between the same parties, on the same issues, has been pronounced by this court as regularly obtained.

We are of the opinion that the judgment of the district court was right, and it is AFFIRMED.

STATE, EX REL. CITY OF LINCOLN, RELATOR, V. L. B. JOHNSON, AUDITOR OF PUBLIC ACCOUNTS, RESPONDENT.

FILED JUNE 27, 1928. No. 26607.

1. **Municipal Corporations:** ISSUANCE OF BONDS: GENERAL ELECTION. A state-wide primary is a "general election" within the meaning of that term as used in the Lincoln Home Rule Charter in the grant of power to issue municipal bonds upon a majority vote.
2. ———: CHARTER PROVISIONS. In matters relating exclusively to municipal affairs, the Lincoln Home Rule Charter prevails over conflicting provisions in a state statute containing legislation on the same subject applicable to cities of different classes generally.
3. ———: ISSUANCE OF BONDS. Under the Lincoln Home Rule Charter, a majority vote is sufficient to carry a proposition to issue municipal bonds for the purpose of establishing and equipping an aviation field for aerial traffic.
4. ———: GOVERNMENTAL PURPOSES: AVIATION FIELD. An equipped municipal aviation field is both a "public service property" and a "public utility" within the meaning of the Lincoln Home Rule Charter and the establishment of such a field is a governmental purpose for which bonds may be voted and taxes levied and collected.

Original proceeding in mandamus to compel respondent to register certain bonds issued by relator. *Writ allowed.*

C. Petrus Peterson and *Charles R. Wilke,* for relator.

O. S. Spillman, Attorney General, for respondent.

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

ROSE, J.

This is an original application for mandamus to compel the auditor of public accounts to register and certify municipal bonds in the sum of $100,000 issued by the city of Lincoln for the purpose of establishing and equipping an aviation field for aerial traffic. The proposition to authorize the bonds was submitted to the voters of the city at a

state-wide primary April 10, 1928—a general election within the meaning of the "Home Rule Charter." *State v. Marsh,* 107 Neb. 607. There were 6,330 votes for and 6,173 against the bonds. One ground on which the auditor declined to register them was that the bond proposition submitted to the electors did not receive 60 per cent. of the total vote as required by the statute relating to the issuance of such bonds in cities of different classes. Comp. St. 1922, sec. 4607. The city contends that the statute cited does not control the city of Lincoln, which is governed by a Home Rule Charter containing provisions for the voting and issuing of municipal bonds for "public service property" and for "public utilities" upon a majority vote of the electors. Lincoln Home Rule Charter, art. 2, sec. 1; art. 8, sec. 11. If the local Home Rule Charter of Lincoln controls, instead of the statute relating to cities of different classes, the bonds in controversy were authorized by the majority vote at the general election April 10, 1928. Discussing the power of the city of Lincoln under its Home Rule Charter this court said:

"A city may enact and put into such charter any provisions for its government that it deems proper, so long as they do not run contrary to the Constitution or any general statute." *Schroeder v. Zehrung,* 108 Neb. 573.

In considering the constitutional power of a city to frame a charter for its own government, it was held in a later case:

"The purpose of the constitutional provision is to render cities independent of state legislation as to all subjects which are of strictly municipal concern; therefore, as to such matters general laws applicable to cities yield to the charter." *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51.

The statute requiring a vote of 60 per cent. of the electors to carry a proposition to issue bonds for the purpose of acquiring and equipping a municipal aviation field applies to metropolitan cities and to cities of the first and the second classes. It does not apply alike to every part of the state,

but is legislation confined to municipal affairs in cities of three classes and does not prevail over conflicting provisions in a Home Rule Charter. In authorizing such bonds upon a majority vote, the Home Rule Charter deals with municipal affairs alone and under the authorities cited makes the statute requiring more than a majority vote inapplicable to the city of Lincoln. In this particular the auditor's position, though taken in good faith, is untenable.

The auditor refused to approve the bonds on the further ground that an equipped aviation field is not a "public service property" or a "public utility" within the meaning of the Home Rule Charter, an "aviation field" not being specifically enumerated in the provisions authorizing the voting and the issuing of municipal bonds. This position seems also to be untenable. The city of Lincoln has power—

"To acquire, maintain and operate public service property and to redeem such property from prior incumbrance in order to protect or preserve the interest of the city therein, and to exercise such other and further powers as may be necessary or incident to the powers conferred upon such city." Lincoln Home Rule Charter, art. 2, sec. 7.

As already stated, another provision authorizes municipal bonds for "public utilities" upon a majority vote of the electors.

In a sense the Home Rule Charter is the Constitution of the city. It is a frame of municipal government and is intended to be more permanent in its nature than an ordinary statute. In general features it is in a form to meet changing conditions as they arise. An equipped aviation field in or near the city is a means of making aerial service available to passengers. The service includes the transportation of mail and freight. The field is furnished for a public purpose for which taxes may be imposed in the exercise of governmental power. In this view of the question raised by the auditor, an equipped municipal aviation field is both a "public service property" and a

"public utility" within the meaning of the Home Rule Charter which authorizes municipal bonds upon a majority vote.

WRIT ALLOWED.

FRANK E. SHARP V. STATE OF NEBRASKA.

FILED JUNE 27, 1928. No. 26320.

1. **Jury**: EXCUSE OF JUROR FOR CAUSE. Where a prospective juror shows on *voir dire* that he has conscientious scruples against returning a verdict for murder in the first degree, which may be punished by death, he may, upon being challenged by the state for cause, be properly excused.
2. ———: QUALIFICATION OF JUROR. A prospective juror who discloses on his *voir dire* that he has talked to a person who was a witness on a former trial, but which conversation he does not remember and from which conversation he formed no opinion, but formed an opinion from reading newspapers, is not thereby disqualified, provided he states, notwithstanding such opinion, he can and will disregard the same and return a fair and impartial verdict based wholly upon the evidence and instructions of the court.
3. **Homicide**: VERDICT SUSTAINED. The record, evidence and instructions of the court examined, and *held* to justify a verdict of murder in the first degree, and the imposition of the death penalty by the jury.
4. ———: MOTIVE. Motive is not an essential element of murder. The absence of evidence tending to show motive is a circumstance in favor of the accused, but proof of motive is not indispensable to conviction.
5. **Criminal Law**: INSTRUCTIONS. An instruction, telling the jury, "If you find beyond reasonable doubt that defendant purposely, intentionally, maliciously, deliberately, and with premeditation, killed his wife, * * * you will find him guilty of murder in the first degree," etc., is not error, when taken in connection with other instructions to the effect that "before you can properly find the defendant guilty, you must find that his guilt has been established by the evidence beyond a reasonable doubt."

ERROR to the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Max V. Beghtol and *Donald Gallagher,* for plaintiff in error.

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

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

HOWELL, J.

Error to the district court for Lancaster county, prosecuted by Frank E. Sharp, sentenced to death for the killing of his wife.

The case is here for the second time, a prior similar sentence having been reversed in *Sharp v. State,* 115 Neb. 737, because of errors not now before us.

The information charged Sharp with "unlawfully, feloniously, purposely, and of his deliberate and premeditated malice" killing Harriet A. Sharp.

Seven errors are assigned for the reversal of the judgment, summarized as follows: (1) Overruling defendant's objection to swearing the jury, because of conscientious scruples against imposing a death penalty, on the part of many jurors excused for cause; (2) overruling defendant's challenge, for cause, of Juror Carey; (3) error in giving instruction No. 5; (4) excluding the deposition of one William Evans offered by defendant; (5) excluding the opinion of William Evans as to palm prints, offered for testing the knowledge of Carmody, a state witness, on that subject; (6) the court's refusal to dismiss the information as to first degree murder for insufficient evidence to show defendant "deliberated or premeditated the crime;" (7) the evidence does not support the verdict. These assignments will be considered seriatum.

(A) It is contended that section 10134 (3), Comp. St. 1922, which reads: "In indictments for an offense the punishment whereof is capital, that his (juror's) opinions are such as to preclude him from finding the accused guilty of an offense punishable with death," etc.—does not disqualify

a juror who answers that he possesses conscientious scruples against "the inflicting of the death penalty on a first degree murder."

Haddix v. State, 76 Neb. 369, 376, discusses the question, and there is dicta which seems to favor the contention, but it was followed by the statement: "The question, however, presented in this record is whether, under *any circumstances*, any conviction or prejudice of the juror, *however strong*, even if it would preclude the infliction of the death penalty, should be ground for challenge. * * * A juror, then, who has such opinions as to preclude him from inflicting the death penalty in any case * * * is not, therefore, qualified," etc.

Juror Termaah said, "I believe I have" conscientious scruples "against death penalty on a first degree murder charge," but no opinion that would prevent a verdict for first degree murder if he could punish in some way other than by death. This probably presents the most meager ground for challenging any juror. The juror was examined by defendant's counsel. He did not seek to develop how deep-seated were the juror's scruples, although he was afforded ample opportunity, and was in no way prevented from making full inquiry. The juror might have been able to disregard his scruples in fulfilling his sworn duty to enforce a law, even though he would not favor such a law originally. The accused was not legally prejudiced by having a juror excused who, so far as shown, might under some state of facts enforce the extreme penalty provided by law. Defendant could not legally demand a juror who would not fully enforce the law. Jurors and judges enforce laws every day against which they may have a prejudice in the sense that they may not believe them to be wise enactments. No conscientious juror or judge will allow his convictions as a unit of society to obstruct laws enacted in the manner prescribed by society as a whole.

Perhaps the other extreme arose in the case of Juror Engel. He said he had conscientious scruples against the

death penalty, irrespective of the verdict, the amount of testimony, or circumstances.

We have read the *voir dire* examinations of all jurors excused for conscientious scruples. The two instances stated illustrate extreme views. The views of the other excused jurors fall somewhere between.

The question is exhaustively discussed in *Rhea v. State,* 63 Neb. 461. In addition to the cases there cited, that case has been followed in *Pumphrey v. State,* 84 Neb. 636, and *Taylor v. State,* 86 Neb. 795, 805. In the last case, it is said: "It thus appears that this question is so well settled that a further discussion of it is unnecessary, and it must be resolved against the defendant's contention."

(B) It is next contended that the court erred in overruling defendant's challenge, for cause, of Juror Carey. This juror said he lived in University Place, heard of the case, had talked about it some with a relative of the deceased, who lived in University Place, two or three months after the first trial was over with; thought he had no opinion of guilt or innocence, and had no conscientious scruples against death penalty as long as it is in the statute, and would abide by the evidence; not acquainted with Carey family living in Bethany who were witnesses; never talked with any of them; slightly acquainted with Wilson family in University Place; talked with Mr. Wilson about the case; not intimate with him; never knew him until the summer of 1927; in real estate business in University Place 17 years; talked no more with Wilson than what had been in the papers; was assessor and, when doing that work, the case came up; thinks Wilson naturally evidenced a little bitterness, he being a relative, but did not exhibit a great deal of animosity toward Sharp; did not remember just what was said; thought "he told me no more than I had read in the newspapers;" from what he read and was told by Wilson, rather thought he formed an opinion at that time; it was not caused by what Wilson said, but by reading the newspapers only; thought it could be changed by

evidence, but felt that something would have to be shown to change his mind. The juror was then challenged and the court examined him. Thought he could put such opinion out of mind and enter upon the trial of the case without any opinion, and decide on the evidence just the same as though he had never had any such opinion; did not think he had a definite opinion, but would naturally have ideas as to what the evidence was; heard nothing but what he could decide on the evidence as given; may have had the facts confused, at the time he formed the opinion, "but, of course, I said I could decide on the evidence." Notwithstanding any view he may have had, based upon the reading of the newspapers, juror thought he could take his seat as a juror, hear the testimony, listen to the instructions, and forget all about any view he had upon it, or opinion, and consider the case upon the evidence and the instructions of the court, and felt absolutely certain he could do so, and could and would put aside any opinion or viewpoint he ever had, and enter upon the trial with such freedom of mind that would not require any evidence to be produced to put such a previous opinion out of his mind; he voted for Mr. Towle for county attorney. The challenge was overruled, and legally so, although we think the question here presented might well have been eliminated by the trial court in the exercise of its statutory discretion, in so serious a case where life is at stake. *Ringer v. State,* 114 Neb. 404; *Barker v. State,* 73 Neb. 469.

(C) The next error relates to instruction No. 5, given by the court. It is based upon the following words: "If you find beyond reasonable doubt that defendant purposely, intentionally, maliciously, deliberately, and with premeditation, killed his wife, * * * you will find him guilty of murder in the first degree," etc. The only complaint is the failure of the court to insert the words "from the evidence" after the words "reasonable doubt," claiming that the court gave the impression that the jury were at liberty to indulge in speculation and conjecture. We cannot

agree. The rule that instructions must be construed reasonably, in their entirety, is so well established that we no longer cite authorities to support it. The second paragraph of the instructions given plainly told the jury that one charged with a crime is presumed to be innocent until proved guilty beyond a reasonable doubt, "and, before you can properly find the defendant guilty, you must find that his guilt has been established by the evidence beyond a reasonable doubt." The next paragraph defines reasonable doubt.

The fourth paragraph states it is undisputed that Harriet A. Sharp was killed during the night of March 16 and 17, 1926, and the jury should "at once turn your attention to the question of who did the killing." Then follows the language complained of in instruction 5.

Paragraph 14 of the instructions says: "You should consider this case upon the evidence introduced and the law as given by the court." It is to be presumed that jurors are ordinarily intelligent men, and it is difficult to see how any such persons could understand, or be led to believe, that they were to speculate or engage in conjecture about the necessity of finding the defendant guilty, from anything but the testimony introduced upon the trial.

(D and E) The next errors complained of relate to the exclusion of a so-called deposition of Captain William Evans whose testimony was sought in Chicago. He refused to testify. As the record disclosed, there had been correspondence between Captain Evans and Mr. Beghtol, counsel for accused, concerning the palm prints of defendant's hands. His counsel state that, as Captain Evans was a world renowned fingerprint expert, had an opinion and had conversed with Carmody, a state witness, concerning the same, the so-called deposition should have been received to overcome any presumption that Evans entertained opinions adverse to the accused. They say defendant should have been permitted to show thereby that Captain Evans refused to testify, and they should have been permitted to

test the knowledge of the expert Carmody by using the opinions held by Captain Evans which were expressed in letter form. These are novel claims. Mr. Towle and Mr. Beghtol were present in court and both had personal knowledge of the refusal of Captain Evans to testify. To prevent an adverse presumption, as was feared, Mr. Towle could have been called to so testify. Besides, the record clearly shows Captain Evans' refusal. As to the correctness of the refusal of the court to allow questioning Carmody about the letter of Captain Evans, we entertain no doubt. The letter was not under oath; it was not in evidence; and, at most, would be hearsay. It might have been proper to question witness Carmody generally as to whether he knew the opinions of, and had talked with, Captain Evans; that they examined the prints together, and that the prints examined were properly identified, and, after talking with Evans, the witness was made less certain of his own testimony. Those matters could have been put directly to the witness, and they were, to a certain extent, but not fully pursued.

(F and G) The next assignments are (F) the refusal of the court to dismiss the information as to murder in the first degree, for insufficient evidence to show the defendant "deliberated and premeditated the crime," and (G) the evidence does not support the verdict. These two assignments may be taken together. Both depend upon the evidence as a whole.

Until now, we have not been troubled with any of the assignments. The principal question is as to the sufficiency of the evidence to support the verdict.

Preliminary to the discussion of the evidence, it may be well to state what is malice, deliberation, premeditation, and, incidentally, motive.

Murder, as defined by section 9544, Comp. St. 1922, in a case like this, is the killing of another "purposely and of deliberate and premeditated malice." The charge is that defendant "unlawfully, feloniously, purposely, and of a de-

liberate and premeditated malice," killed Harriet A. Sharp.

Malice may be said to exist when the heart is dead to social duty, bent upon prohibited mischief, and there is a deliberate mind to kill. 29 C. J. 1084, sec. 61; *Vollmer v. State,* 24 Neb. 838; *Carr v. State,* 23 Neb. 749; *Davis v. State,* 51 Neb. 301; *Housh v. State,* 43 Neb. 163. It is nothing more than the existence of a mental state, however sudden or abbreviated in point of time. *Francis v. State,* 104 Neb. 5; 29 C. J. 1113, sec. 97. Motive is not essential to prove malice, deliberation, or purpose. *Pointer v. United States,* 151 U. S. 396, 413. Malice may be shown by acts and the manner of their performance. Where the mind of the actor is sound, or rational, in the sense that it comprehends, the fact of killing, the manner of accomplishment, total absence of circumstances tending to show justification or mitigation may, and often do, show undeniable malice. When deeds result in killing, and can be interpreted in no other sense than cruel, brutal, savage and deliberate, they may establish unmistakable malice, whether or not motive is shown. Motive is not an essential element of murder. Its presence or absence is material in determining whether the killing was done by accused and was malicious and premeditated. If it appears that the accused killed his victim in a persistent, cruel and barbarous manner, without provocation or justification, malice, in the legal sense, is proved. In such case, proof of motive would not make guilt more certain.

The proofs in this case show that the deceased was beaten to death by fifteen or more blows from a hammer, owned and in possession of accused, which could not have been used for any innocent purpose. Deceased was defenseless. It is claimed that any one of the several blows would have killed, and, therefore, only the first can be considered in interpreting the state of mind of the accused. The statement does not seem to afford a foundation for judicial discussion. The case calls for a careful and patient inquiry.

The accused was about 50 years old. January 3, 1924, he

married deceased who had four children, three of whom lived with them until about 8 o'clock p. m. on March 16, 1926. During much of the intervening time, accused and deceased did not live in peace, but had many quarrels; during the day of the murder, they had been arguing and were unfriendly. Accused was "mad" when they left home between 7 and 8 o'clock in an automobile, ostensibly to go to a dance. They went to the home of one Wilson, a relative of deceased, in University Place, where they visited a few minutes, about 8 o'clock, in apparent good humor. From there, they started east. Neither was again seen by any witness until about 10:30 o'clock that evening, when accused appeared in the street near the home of one Carey a few city blocks northeast of the Wilson home, where he attracted attention by holloing and repeating he had been robbed of his coat, money, watch and wife. One Donohoe at the Carey home went into the yard and talked to accused, who was blindfolded and whose hands were bound behind him by heavy wire. The blindfold was tied in a tight, hard knot. In releasing the hands, Donohoe "just pulled" them apart, the wire being tight on the left hand, but loose on the right.

Accused went into the Carey home; cold beads of sweat were standing on his face; he was shivering and seemed very cold; exhibited hands and wrists to witnesses, calling their attention to marks; they saw no blood.

Accused then went, three times, with officers, over the route he said he was taken by robbers, claiming he could follow the course by reason of the motion of the car in its turnings, and because of rough places, street-car tracks and elevated sidewalks over which they passed. At times, he directed, in advance of reaching turns, crossings, tracks and walks, where to make turns. He said he had been robbed of *all* of his money. The following morning, he borrowed a dollar with which to purchase breakfast, saying he had no money. When officers removed his clothing, they found four $1 bills in his trousers watch-pocket, which

he later explained by saying, on some prior occasion he and his wife attended a dance and found when he changed his trousers he had no money, and then made up his mind he would not be caught in that fix again, so he put $4 in his trousers watch pocket for future emergency.

He said he and wife left the Wilson home about 8:15 to 8:20, going east; his wife spoke of a flat tire; he turned south, one house was "all lit up," and he said to his wife, "We will stop in front and look at the tire;" got out of his car; a car came from the south and stopped; a man said, "I'll fix it for you, you get back in the car," and stuck a gun on him; the man told accused to drive; he got behind the wheel and two men got in; when the man with the gun got in, accused's wife looked around and said, "My God" or "My goodness," and collapsed; they drove 200 feet beyond a culvert and was told to stop; accused had been ordered to take off his overcoat, and a man said, "I will take care of that overcoat," and took it; another fellow in the car said, "Take off your coat and vest," which he did; he was then ordered to "Take off your shirt;" accused took off his collar, tie and shirt and handed them over, and then asked, "Can't I put my coat and vest back on?" and the man said, "Yes; I guess so;" accused did so and handed the man the overcoat; then another car drove up behind "just as I was handing my overcoat to him;" the other man took the overcoat, so accused could not see him, and put it over the lights of the other car; the man tore up the shirt of accused; accused put on his coat, vest and necktie and buttoned up the vest; then the other man blindfolded him; accused had $4 in the watch pocket, and the robbers took $12.25 or $12.35 from his pants pockets; was in the front seat of his own car when blindfolded; robbers took his money right after he was blindfolded (before that, he testified he didn't know whether they took his money or watch before or after he had been blindfolded). One man ordered him out of the front and into the back seat of the car, and there searched him. The man first

wired one hand and then the other. One man got into the car and sat in the back seat with him; tramped on his feet; the man drove around with accused and Mrs. Sharp; one man said, "Head toward Omaha;" drove around 15 or 20 minutes after they got to going; did not know exactly where he was put out of car.

In trying to get out of the car, accused struck his wife's head; was told to "Get out of here;" as he got out, he slipped and bumped nose on side of the car; blindfold was then over both ears and eyes; had feet between seats to brace himself; one man reached across and put his knees against accused's leg and was doing something with accused's wife; accused could feel, by the spring of the seat, man was surging; car sounded like it struck the "X" with a thud; last heard the thud when man quit surging; man was doing something with wife when he had his knees against accused; man was pushing wife against leg of accused; did not hear any blows struck; the commotion happened twice, the first not very long after man got in the car; drove 10 or 12 blocks; went over a high sidewalk, rougher than before, and the same things happened again; still blindfolded when accused last got out of car; when accused got feet on ground, man said, "Stay here and we will be back, and if you are not here we will fill your hide full of bullet holes, so it will not hold shucks;" then the man closed the car door and drove away; accused heard another car stop a little way off; after the car passed, accused got into the center of the road, scraped his feet along until he found the road where a car had been during the day when it was thawed out; stood five or ten minutes and heard two cars go by to the north, then went about a block; heard street-car; followed the track back south to where he heard the street-car; then heard a dog; tried to release himself; didn't try to do much, as there was nothing he could do; went a little further and heard a door shut; holloed 12, 15 or 20 times, and a lady answered, who turned out to be Mrs. Carey; Donohoe took the bandage off and

accused asked him to take the wire off; denied that the blood spots were found on any of his clothes except his vest; when the officers spoke of blood, he did not tell them of slipping and striking his nose on the car, or hitting against his wife's head; hurt his nose when he slipped and fell (at that time, the nose was covered with the blindfold, and there was nothing visible to show there was any blood on the blindfold). Accused claimed the robbers turned round at a certain place in the road, describing it. A witness, with a flashlight, examined the road and there were no tracks, although the grading was fresh.

While at the Carey house, accused spoke of having $4 in his watch-pocket, saying he did not know whether the robbers got it or not, and then pulled out the money and showed it to witnesses, and put it back in his pocket, indicating that he knew of the $4 before he borrowed the $1 for breakfast.

At a creek bank, not far from the place where the death car was found, foot-prints were discovered, which were measured and were practically the same as those of accused. The shoes of accused fitted into the tracks, and they corresponded.

Accused was put out of the car and left by the robbers not far from the Carey home.

Before the body of deceased was found, but after accused felt he was suspected, one Jones asked him where he got all of the blood on him, and was told, "I don't know, but it didn't come off of that woman." There were blood spots on several garments and shoes; some blood had soaked through the trousers onto the underclothing; the car and body were found about 4½ miles north of Carey's place; a flashlight, which one witness testified belonged to accused, was found buried in loose earth around a telephone pole. Senator Jeary experimented with tracks made by Sharp's shoes, and compared them with foot-prints found near the creek bank. He testified they were exactly the same.

The death car was found in front of Schmidt's place, near which there was a puddle of blood; at 8 p. m., on the night in question, it was not there. Schmidt's sister visited him between 8 and 9:20 p. m. at his home; car was not there at 8 p. m., but was there about 9:10 to 9:20, and was there the next morning. The distance from the point, where accused said the robbers put him out of the car to the Carey house is three or four blocks. The distance traveled from the Wilson home, over the route followed by robbers, to the place where accused was last put out of the car is about 50 blocks, or about 3 1-2 miles. To walk from the latter place to the Carey home, as nearly as we can judge, accused had from 9 o'clock, or a little before, until 10:30. To walk from where the death car was found, if accused was there, he would have had approximately from 9:10 or 9:20 until 10:30. Some time was spent by the accused with the robbers—perhaps 25 to 35 minutes, according to his own story. According to the testimony of others, the death car had reached Schmidt's place not later than 9:20 p. m.; so, within about one hour from the time the accused left the Wilson home (about 8:10 or 8:15), the death car was seen at the Schmidt place. Palm prints of the hand of accused, connecting him with murder, were proved.

There are other facts and circumstances shown, of more or less minor importance, which we will not attempt to detail.

As against the foregoing, we have the unsupported testimony of the accused and a few speculative circumstances of little import. The robber theory is not convincing. So far as known, the deceased was assaulted only while she was being murdered with hammer blows, and had no money about her. There is no intimation that any one suspected deceased had money. No greater motive or reason for murdering deceased than the accused is even suggested. Accused had some opportunity for identifying the robbers, as they were in front of the house "all lit up," at least as much as did deceased. If the murder was com-

mitted by robbers, their actions were most peculiar. The accused first stopped his car for the purpose of looking at a flat tire. That must have taken a minute or so. Two robbers in a car, accused said, drove up and stopped. They were there with the accused and deceased alone for a time; then came a third car, with another robber who seemed to know precisely what was going on and what was expected of him by his associates, his conduct being such as would indicate a connection with the other two robbers. The first two robbers were not alarmed by the appearance of the third. The third robber apparently pursued the same objective as the first two.

The third robber could not have worked in such perfect harmony with the others without predeliberation. It is inconceivable that three men would jointly follow a predetermined sexual assault.

The story of the accused is hard to reconcile with any common sense view of the evidence. No person was seen with the deceased, or known to be with her, between 8:20 and about 9 o'clock, when the death car was found before Schmidt's home, except the accused. That the deceased fainted on sight of the robbers, and no blows were struck while accused was with the wife, is significant. If robbery was the motive, it could have been accomplished without resistence or alarm from an unconscious woman. If it be suggested that another kind of assault was intended, it would seem ridiculous to say that three men would join in such an aggregated and conglomerate prosaic act.

The jury having heard the evidence and reached its conclusion, a most rational one, it is not for this court to disturb their verdict. The accused served a felony term a number of years ago in the penitentiary of this state. While we do not attach much importance to that incident, yet, when taken with all the other facts and circumstances and seeing and hearing accused testify, it was a matter for the jury to consider in determining his credibility. A prior jury, having heard practically the same testimony,

came to a like conclusion. They were the triers of fact, made so by law.

While the writer of this opinion has no fondness for capital punishment, he has neither inclination nor desire to evade responsibilities imposed by law. In *Deerkop v. State,* 196 Wis. 571, decided May 8, 1928, a conviction of first degree murder was affirmed on circumstantial evidence showing far more weakness than the evidence before us, but having some similarity. The court concluded with this language: "If the story of his whereabouts * * * appeared to be a fabrication, the jury were warranted in believing that the defendant and the deceased repaired to Williams Lake * * * and that the defendant came away * * * after the deceased had been murdered." This is applicable to defendant's story that he was not in the vicinity of the death car in front of Schmidt's place on the evening of the murder. If the foot-prints found a short distance from the death car were made by accused, then, of course, his story was a fabrication. If it be conceded that the accused murdered his wife, it would be difficult to find a more fitting occasion for the application of the death penalty than is here presented. We must concede that he did. The jury have so found. They fixed the penalty of death, as they had a legal right to do. Accused has had a fair trial, free from error, even of a technical character. The verdict of the jury and the judgment of the district court are approved and affirmed, and Friday, the 19th day of October, 1928, between the hours of 6 o'clock a. m. and 6 o'clock p. m., of said day, is fixed as the date for carrying into effect the sentence of the district court.

AFFIRMED.

W. G. SUMMERS, APPELLEE, V. AUTOMOBILE INSURANCE COMPANY OF HARTFORD, APPELLANT.

FILED JUNE 27, 1928. No. 26130.

1. **Insurance: PLEADING: WAIVER.** Waiver of the terms of a hail insurance policy is an affirmative defense, which, to be available, must be pleaded.

2. ———: DIRECTION OF VERDICT. In an action against an insurance company for recovery of loss of crop under the terms of a hail insurance policy, where there is no evidence of value of the crop destroyed, it is the duty of the court to direct a verdict for defendant.

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

Montgomery, Hall, Young & Johnsen and *Davis & Davis,* for appellant.

B. A. Rose and *E. M. White, contra.*

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

BEGLEY, District Judge.

Action to recover damages for partial loss of crop under terms of a hail insurance policy. Answer admitted insurance under the policy, but alleged that it contained a provision that the company was not liable for loss unless sworn proof of loss should be furnished the company within 60 days after such loss, setting forth specific information relative to the loss, and that this was not done. Reply was a general denial. On the trial the defendant moved for a directed verdict both at close of plaintiff's evidence and at the close of all the testimony, which were overruled. The jury returned verdict for plaintiff for $367.50, the amount sued for. From a judgment on which defendant appeals.

The plaintiff's evidence showed that he made no sworn proof of loss as provided by the terms of the policy, but that he notified defendant's agent the day after the loss, who wrote a letter to the company, and later a man appeared at the place claiming to represent the company as an adjuster, but he went away without making such adjustment. Plaintiff contends this constitutes a waiver, but his difficulty is that he has not pleaded a waiver and therefore is not entitled to prove one. A waiver must be plead-

ed and cannot be proved under a general denial. *Sweet v. Antelope County Farmers Mut. Ins. Co.*, 91 Neb. 561.

Appellant complains of the insufficiency of the evidence to prove a loss or damage. The only evidence of damage was given by B. F. Ulm, a witness for plaintiff, who testified that in his opinion the corn crop was damaged between 30 and 35 per cent. and oats and rye between 40 and 50 per cent. There is not a word of testimony as to the number of bushels damaged or destroyed or the market value thereof, and the verdict can only be based on conjecture. The method of proving damages for loss or destruction of crops is set forth in *Hopper v. Elkhorn Valley Drainage District*, 108 Neb. 550, and *Pulliam v. Miller*, 108 Neb. 442. The motion for directed verdict should have been sustained on this ground.

The trial court, inadvertently perhaps, in its opening instruction instructed the jury as a fact "that there is now due and owing this plaintiff from the defendant insurance company the sum of $367.50," instead of stating that same was made as the claim of the plaintiff. In view of the fact that there was no evidence of damages, this was prejudicial and is doubtless what caused the jury to make the finding which they did.

For the foregoing reasons, the judgment is reversed and the cause is remanded for new trial.

REVERSED.

STATE OF NEBRASKA V. ART BOYD.

FILED JUNE 27, 1928. No. 26579.

1. **Criminal Law**: WRIT OF ERROR: PLEADING. Even if the right to a writ of error *coram nobis* exists in this state, which is not decided, a petition, which as ground for its issuance states only a fact which was known to the party applying before the judgment attacked was rendered, is insufficient.

2. ———: ———. A writ *coram nobis* does not lie to bring into the record facts known to the applicant before judgment, and

which he negligently or intentionally failed to bring to the attention of the court.

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

O. S. Spillman, Attorney General, Lloyd Dort and *George Heinke,* for plaintiff in error.

Dale P. Stough, contra.

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

REDICK, District Judge.

Application for a writ *coram nobis.* The facts necessary for a proper understanding of the question submitted are as follows: The applicant, Art Boyd, hereinafter referred to as defendant, on November 15, 1924, was sentenced by the district court for Otoe county to the penitentiary of this state to serve not less than three years nor more than ten years for the crime of burglary. He was thereafter committed to the penitentiary and there remains. On February 17, 1928, he filed this application for a writ *coram nobis* to correct said judgment and sentence on the ground that the same was erroneous in this, that the court should have pronounced a determinate sentence—one for a definite period of time. It appeared upon the hearing of the application that the defendant, prior to his conviction of the crime of burglary, had been confined in a penitentiary in the state of Iowa; that this fact was not known to the judge pronouncing sentence and did not appear of record in that proceeding at the time sentence was passed.

Under the statutes, the period of punishment for the crime charged was from one to ten years, the term to be fixed by the trial court; but by section 10248, Comp. St. 1922, the court was given power to impose an indeterminate sentence: "But the court imposing such sentence may in its discretion and providing such person has not previously been confined in any penitentiary impose upon such

person an indeterminate sentence." This indeterminate sentence might be for any period within the minimum and maximum periods provided as penalty for the crime charged. The writ was allowed by the district court April 4, 1928, and corrected judgment entered sentencing defendant to the penitentiary for a period of five years from and after November 15, 1924, and the state appeals. Two questions are presented by the record:

(1) Does the common-law remedy by writ *coram nobis* exist in this state?

(2) Do the facts shown by the record present a proper case for the allowance of the writ?

1. The first question is one of great importance and interest, and is new in this jurisdiction. Its decision presents alluring opportunities for a display of learning and research not often offered in these practical times, but we must decline to enter the attractive field of its discussion for the reason that it is not necessary for the proper disposition of the case before the court. Two reasons for our refusal will be readily understood: First, the expenditure of time, space and labor upon a question not affecting the rights of the defendant; and, second, the authority of a decision under such circumstances would be subject to question as a precedent.

2. For the purposes of this case it may be assumed that the remedy exists, and we are now to determine whether the case presented is a proper one for its application. The purpose of the writ is to bring into the record a fact not already there and unknown to the court, which, if it had been known, would have resulted in a different judgment than the one pronounced. It would seem, therefore, that the case presented complies with the conditions above noted. It is conceded that the fact of the defendant's previous confinement in the penitentiary does not appear of record and was not known to the judge pronouncing sentence. But the cases seem to be of one accord upon the proposition that, before the writ will issue, it must appear that the failure of the record to show the fact in question

was due to no negligence of the party applying and was unknown to him. 16 C. J. 1326, sec. 3118; *Bennett v. State,* 106 Miss. 103; *Bigham v. Brewer,* 4 Sneed (Tenn.) 432. Or where the party was prevented from asserting or enjoying some right through duress, fraud, or mistake. *Wheeler v. State,* 158 Ind. 687; *State v. Stanley,* 225 Mo. 525. And *Marble v. Vanhorn,* 53 Mo. App. 361, in which it was said: "There is another important rule found in this branch of the law, viz., that where the party complaining knew the fact, or might have known it, and failed to bring it to the attention of the court, he cannot afterwards do so"—citing 3 Bacon's Abridgements, 375.

The reason for the rule is apparent. If the defendant has knowledge of a fact which, if divulged, would be for his benefit, he should not be permitted to conceal such fact, take his chance upon the issue, and, being disappointed therewith, ask the court to relieve him from the consequences of his own intentional or negligent act. To allow such procedure would countenance trifling with the courts to an extent very much greater than their tenderness for the rights of persons accused of crime already has permitted. It is presumed that defendant and his counsel knew the law, and if it was thought to be to his advantage that a determinate sentence be pronounced against him, it was his duty to advise the court of the fact which would entitle him to such sentence. He had ample opportunity so to do when inquired of by the judge, as was his duty under the statute, whether he could show any cause why the judgment of the court should not be pronounced against him. He made no showing, and the court pronounced sentence in exact conformity with the statute. This judgment was regular in form and was without error so far as appeared from the record. Had the fact now sought to be brought into the record appeared therein, the judgment would have been erroneous and subject to reversal upon appeal by defendant, but being regular upon its face, and in a case of which the court had jurisdiction of the subject-matter and the person of the defendant, it was not

void. We so held in *Hulbert v. Fenton,* 115 Neb. 818, where an indeterminate sentence had been pronounced upon a defendant who had been previously confined in a penitentiary, but which fact did not appear upon the record. That was an application for a writ of habeas corpus, but is equally applicable to the present proceedings.

It is argued by defendant: "It will hardly be presumed by this court that, unless appellee, the defendant, was asked concerning his past life or former career, he would have had an opportunity or would have known how to rise up in court and voluntarily pour into the ears of the court the details of his past life." The point is not without force, but we think there *is* a presumption that, prior to the final act of the drama, the defendant would bring to the notice of the court any facts concerning his career which would be for his benefit or advantage in the critical situation in which he was placed. He now appears to have discovered that the fact in question, if known, would have resulted in a more lenient sentence; the controlling fact was one of which he alone, apparently, had knowledge; it was his right and privilege to make it known to the court, and it is now too late to secure the benefit of it.

The judgment of the district court is reversed and proceedings dismissed.

REVERSED AND DISMISSED.

RAY A. WISNER, APPELLEE, V. MORRILL COUNTY, APPELLANT.

FILED JUNE 27, 1928. No. 26417.

1. Taxation: DELINQUENT TAX LISTS: RATES FOR PUBLICATION. Section 2407, Comp. St. 1922, providing compensation at the rate of ten cents a line for the first insertion and eight cents a line for subsequent insertions, governs the rate to be charged by newspaper proprietors for publishing the delinquent tax lists, rather than section 6052, which is a portion of the revenue law, and only provides the amount to be charged back by the county to the delinquent taxpayer.

2. ———: ———: ———. The legal rate for printing is only a maximum rate, and a county should be permitted to show that a lower rate has been agreed upon for the publication of delinquent tax notices.

3. ———: ———: FORM OF PUBLICATION. A newspaper should publish the delinquent tax list in the form submitted by the county treasurer.

APPEAL from the district court for Morrill county: EARL L. MEYER, JUDGE. *Reversed, with directions.*

C. G. Perry, for appellant.

Coulter & Atkins, contra.

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

WHEELER, District Judge.

This action involves a dispute between a newspaper proprietor and Morrill county, Nebraska, over the proper charge for printing a delinquent tax list. The appellant, Morrill county, claims that the printing charge is governed by section 6052, Comp. St. 1922. This statute is a part of the revenue law, and after providing for the publication of the delinquent tax list states: "The treasurer shall add to each description of land so advertised, other than town lots, the sum of twenty cents and for each town lot the sum of ten cents, to defray the expense of advertising, which sum shall be added to the total amount due on such land or town lot for taxes and collected in the same manner as taxes."

The county is in error in its contention that this section prescribes the legal rate to be charged for printing. This section merely provides the charge to be made by the county against the delinquent taxpayer to reimburse the county in part for the cost of printing the tax list.

Section 2407, Comp. St. 1922, provides the legal rate for the publication of notices—ten cents a line for the first insertion and eight cents a line for subsequent inser-

tions. Figured under section 2407, appellee's compensation should be $711.98, as appellee claims, instead of $326.64, as the appellant claims under section 6052.

The judgment, however, must be reversed because of the refusal of the district court to permit appellant to introduce evidence to show the agreement of the parties as to the rate to be charged. The legal rate prescribed under section 2407 is only a maximum rate, or a rate which applies in the absence of a specific agreement. The entry in the record of the county commissioners of Morrill county for the year 1926: "There being no bids on file for county printing, the different newspapers were represented in person, asking for the full statutory rate for all work done. The board designated the Bayard Transcript and the Broadwater News the official papers for the year 1926, which includes the commissioners' proceedings, treasurer's semi-annual statement, and delinquent tax list" —does not constitute a contract between the county and the newspaper proprietors. In the absence of any contract the legal rate for publication of notices, as set forth in section 2407 of the statutes applies. As was said in *Phœnix Ins. Co. v. McEvony,* 52 Neb. 566: "We know of no law which compels a printer to charge the full legal rate." The cases cited by appellee, *Kemerer v. State,* 7 Neb. 130, *State v. Roderick,* 25 Neb. 629, and *Logan County v. Doane,* 34 Neb. 104, as prohibiting any variation from the prescribed legal printing rate, do not apply to the case at bar. These cases merely hold that there can be no variance in the fees prescribed for a county clerk, county treasurer, and sheriff. There is no reason why the county by special agreement should not have its printing done as cheaply as possible; either by letting the same at a public bidding or by special contract.

It was the duty of the newspaper to publish the list exactly as submitted by the county treasurer, consequently the computation of the lines as 5,102 was correct. The published tabulation was a convenient form, and on the whole it was better to place the word "Block" at the top of

the column and the list of lots thereunder than to describe each parcel with its block as well as the lot number.

Reversed and remanded to the district court, with directions to take further evidence, to apply the rate prescribed in section 2407, if no special contract is proved, and to apply the contract rate if a contract is shown.

REVERSED.

OSCAR PETERSON, APPELLANT, V. CITIZENS BANK OF STUART, APPELLEE.

FILED JULY 2, 1928. No. 26061.

1. **Chattel Mortgages:** CONSTRUCTION. A chattel mortgage, describing cows and their increase, made during the period of gestation, creates a lien upon the calves resulting from such gestation and continues such lien while the calves are being nurtured by their mothers during a reasonable period.
2. ———: ———. Calves, running with their mothers at the time their mothers are mortgaged with other cows, and where the mortgage includes the increase from the cows so mortgaged, are not contemplated by the law as increase; and the mortgagee does not thereby obtain a lien on such calves so in existence at the time the mortgage was made.
3. ———: ———. Calves running with their mothers are cattle and are included under that description in a chattel mortgage made by one who in the mortgage expresses the intention of including therein all his cattle, branded and unbranded.

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

D. L. Jouvenat and *William M. Ely,* for appellant.

J. J. Harrington, contra.

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

GOSS, C. J.

This is an action to recover damages for the alleged conversion of chattel mortgaged property. A jury was waived

and the case was tried to the court. The court found for defendant. Plaintiff appealed from a judgment dismissing the case.

The case was tried on stipulated facts preserved in the bill of exceptions. The errors assigned and argued relate to the insufficiency of evidence to sustain the findings and judgment, and that it is contrary to law.

The controversy is over certain calves and arises out of chattel mortgages given to the respective parties by George Hytrek. The appellee's mortgage was prior in time. It was made March 23, 1925, and filed the same day. Without going into fuller details here because of later stipulated facts which will be referred to in their order, we derive from the stipulation that the mortgage covered 147 or more head of cattle, 78 of which were cows, 10 were two year old heifers, and 23 were heifers one year old. The mortgage contained this statement: "It is also intended that this mortgage shall include all the increase from the above cows and heifers."

The appellant's mortgage was made and filed July 1, 1925. It covered 55 calves born in the spring of 1925. The mortgage contained this statement: "This mortgage is given to cover the calves * * * that I own at this time."

On September 22, 1925, appellee took possession of 48 of the 55 calves and sold them. Both parties claimed a first lien on the 48. They stipulated that the 48 calves were worth $1,000 and that appellee has never paid that sum or any part of it to appellant; that the 55 calves covered by appellant's mortgage were all born to cows included in appellee's mortgage but none had been born except four or five that were two or three weeks old when that mortgage was given on March 23, 1925; that nine and a half months is the natural period of gestation; that the remainder of the 55 calves were conceived prior to the mortgage but were born between its date and August 1, 1925; that the 48 calves that were sold by appellee were continuously suckled by their mothers, ran with their mothers and were sold with them at public auction; that at the time of

the trial there was still due the plaintiff (appellant) on the debt secured by its mortgage $1,649.93, and there was still due defendant (appellee) on the debt secured by its mortgage "more than $1,600;" and "that the sole question in this case is, who has the prior lien, the plaintiff or defendant, on said calves and increase."

Appellant argues in his brief that his chattel mortgage was definite in its description and covered 55 calves then born and existing; while the mortgage of appellee was indefinite and is sought to be extended over five of the calves already born at the time of the execution of appellee's mortgage and therefore required to be definitely described; and is sought to be extended over the rest of the 48 involved, not in actual existence when the mortgage was executed and indefinitely described as "increase." This contention requires a legal definition of "increase" as applied to such a case.

Webster, New International, describes "increase" as "Multiplication by production of young;" Standard—"Increment by generation; progeny."

It was held in *Cole v. Kerr,* 19 Neb. 555, that the lien of a chattel mortgage on a crop of corn not planted will not attach to the crop even when it comes into existence unless possession is taken by the mortgagee. The reason for the rule is that the thing mortgaged has no existence. In *Battle Creek Valley Bank v. First Nat. Bank,* 62 Neb. 825, in an opinion by Sullivan, J., it was held that things which have no actual nor potential existence are not the subject of chattel mortgage; and that, within the meaning of this rule, animals which have neither been littered nor conceived are without actual or potential being. In the body of the opinion the court expressly stated that it did not decide whether a mortgage given during the period of gestation covered the increase. The mortgage in that suit covered the increase but it was given prior to the period of conception. So it appears, in the absence of any of our cases cited by the parties or found by us, that the precise

question involved is one of first impression in this jurisdiction.

The following cases serve to illuminate the question: *Holt v. Lucas*, 77 Kan. 710, holding that a chattel mortgage on domestic animals expressly covering the increase, executed during gestation, creates a lien upon the increase; *Rogers & Dewey v. Highland*, 69 Ia. 504, sucking colts of mares mortgaged before the colts are foaled are covered by the mortgage until they are weaned; *Funk v. Paul*, 64 Wis. 35, where domestic animals are mortgaged during the period of gestation the offspring when born will, as between the parties, be covered thereby; but as against a *bona fide* purchaser or incumbrancer, acquiring his title or lien without notice after the period of nurture has passed, such offspring will not be covered by the mortgage; *Darling v. Wilson*, 60 N. H. 59, the effect of a mortgage upon a mare with foal born later is to create a lien upon the foal when born but the lien does not continue beyond the period requisite for the suitable nurture of such increase; *Edmonston v. Wilson*, 49 Mo. App. 491, when the owner of a mare gave a mortgage on her and described her therein as with foal the mortgagee will, as against the mortgagor, be entitled to the colt when born; *Libert v. Unfried*, 47 Wash. 186, a mortgage, upon 1,200 head of ewe sheep and their increase and upon 300 head of wether sheep, results in a construction of the words "and their increase" as applying "merely to the increase of lambs from ewes" and not to include the clip of wool from the sheep.

It seems to us, upon consideration of the facts stipulated by the parties, of the general principles affecting them, and of the precedents in other courts, that the true rule to apply here is this: A chattel mortgage, describing cows and their increase, made during the period of gestation, creates a lien upon the calves resulting from such gestation and continues such lien while the calves are being nurtured by their mothers during a reasonable period.

This disposes of questions raised as to such of the calves

as were born after the mortgage to appellee was executed, by determining that they were increase and were covered by the lien of the mortgage. This accounts for 43 out of the 48 calves disposed of with their mothers by the appellee. But there were five calves concededly born prior to the date of the mortgage to appellee and running with their mothers at that time. Appellee contends that they were described in its mortgage and are included under the definition of "increase." They were definitely described and included in the 55 calves covered by the mortgage given to appellant. We are not disposed to decide the five calves came properly within any definition of "increase" as understood through our study and discussion of that term. These five calves had a definite existence of their own at the time the mortgage to appellee was made. We direct attention to a further description of the cattle in that mortgage not abstracted from the description in the stipulation on the first page of this opinion: "One hundred and forty-seven head of mixed cattle or more, it being my intention to include in this mortgage all of my cattle, branded and unbranded; seventy-eight head of cows," etc. Webster defines cattle: "Collectively, live animals held as property but raised for some use, now usually confined to quadrupeds of the bovine family, but sometimes including all domestic quadrupeds, as sheep, goats, horses, mules, asses and swine." Without going into detail, we refer to Words & Phrases, where there appears nothing in the definitions taken from legal cases that would limit the use of the word "cattle" to bovines of any particular age. It is a collective noun and when the mortgagor described all his cattle it was sufficient to bind the parties to the mortgage and to impart notice to all those having notice of the mortgage that the calves then running with their mothers were included in the mortgage.

For the reasons stated we are of opinion that the judgment of the district court was right and it is

AFFIRMED.

IN RE ESTATE OF JENNIE GRINNELL.
JOSEPH B. REDFIELD ET AL., APPPELLEES, V. GEORGE WIXON, APPELLANT.

FILED JULY 2, 1928. No. 26094.

1. **Adoption**: RIGHT TO INHERIT. "The right to inherit property of a deceased person is created by statute. The legislature may confer upon adopted children and adoptive parents the right to inherit, each from the other." *In re Estate of Enyart*, 116 Neb. 450.
2. ———: ———. The act of 1897 (Laws 1897, ch. 94), providing for the adoption of minor children, of which section 1572, Comp. St. 1922, is a part, preserved the adoption of children theretofore adopted and gave the right to inherit from their adoptive parents to such adopted children as were not precluded from inheritance by the terms and conditions of the proceedings by which they were adopted.

APPEAL from the district court for Sarpy county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

John P. Breen and *Magney & Magney*, for appellant.

Nickerson & Nickerson and *William R. Patrick, contra.*

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

GOSS, C. J.

George Wixon appeals from a final order of the district court decreeing that John B. Grinnell and Joseph B. Redfield are his co-heirs at law of Jennie Grinnell, deceased, affirming the judgment of the county court to the same effect in the final decree and distribution of her estate.

The appellant is a son of Jennie Grinnell by a prior marriage. She died intestate on May 19, 1925. Her husband, Adelbert Grinnell, died intestate March 9, 1924. Wixon contends that he is her only heir. John B. Grinnell and Joseph B. Redfield were adopted by Adelbert Grinnell and Jennie Grinnell by proceedings in the county court of Sarpy county, Nebraska, ending in a decree of adoption Septem-

ber 20, 1884. They are twins and were born August 23, 1882. They contend that, under their adoption and under the laws relating to inheritance, they are entitled to take as heirs of Jennie Grinnell.

John B. Grinnell, now of St. Louis, lived with his foster parents until about 1919, when he left Sarpy county. When the boys were seven or eight years old, they went to Box Butte county, where their foster parents took up a homestead and where they lived about six years. The appellant remained out there and married, but the Grinnells and the two younger boys returned to Sarpy county. When John B. Grinnell was 12 years old he heard a rumor one day in school that he and his brother were adopted children and the first real knowledge he had of it was from his mother (Mrs. Grinnell) on his return from school that day. John B. Grinnell attended the Nebraska Agricultural College for two years, and after he came home and took up the farm work in place of Joseph the latter went to the University, worked his way through and was graduated in the medical department. Until he was 25 or 26 years old he went back during the summer months and assisted with the farm work. He never knew until about the time he went to the University, when 19 or 20 years old, that he was an adopted child. He had an older brother, Willis Redfield, a physician, likewise an adopted child, who had gone by the name of Ryan but had assumed his original name. This brother invited him to go into partnership with him at North Platte and suggested that he assume his original name of Redfield, to do away with explanations, which he did, and the two practice medicine there together. We take pleasure in saying that there is no indication in the record, the briefs or in the oral argument to show other than the finest filial relations between the adopted children and the adopting parents, nor is there any suggestion of ill feeling between the adverse parties to this suit. When Adelbert Grinnell, the adoptive father, died, Jennie Grinnell, the adoptive mother, filed a petition in the county court reciting that the appellees were sons and heirs and

requested that John B. Grinnell be appointed as administrator. He acted as such and the final decree ordered their certain shares of the estate remaining to be distributed to appellees as heirs of the deceased.

The mother, Catherine Redfield, widow of Willis C. Redfield, had the lawful control of the children at the time of their adoption. The law governing adoptions in force in 1884 when these two children were adopted is found in General Statutes, 1873, ch. 57, secs. 796 to 801. Section 797 required from the mother a statement in writing before the probate judge where the parties desiring to adopt a child reside that she voluntarily relinquished all right to the custody of and control over such child and all claim and interest to the services and wages of such child "to the end that such child shall be fully adopted by the party or parties (naming them) desiring to adopt such child, which statement shall be signed and sworn to by the party making the same, before said probate judge, in the presence of at least two witnesses; and the person or persons desiring to adopt such child shall also make a statement in writing, to the effect that he, she, or they freely and voluntarily adopt such child (naming him or her) as their own, with such limitations and conditions as shall be agreed upon by the parties, which said statement shall also be signed and sworn to by the parties making the same before said probate judge, in the presence of at least two witnesses: Provided, in all cases where such child shall be of the age of fourteen years and upward, the written consent of such child shall be necessary to the validity of such proceeding: And provided further, whenever it shall be desirable, the party or parties adopting such child may, by stipulations to that effect in such statement, adopt such child, and bestow upon him or her equal rights, privileges, and immunities of children born in lawful wedlock, and such statement shall be filed with and recorded by said probate judge, in a book kept in his office for that purpose."

Section 800 is as follows: "All decrees entered in such

case in conformity with the provisions and requirements of this chapter, shall be conclusive upon all the persons interested in such proceedings or matter, and the child or children thus adopted shall take the surname of the person or persons adopting the same, and all relations of parent and child, agreeably to such stipulations and the decree of the probate court, shall attach, and such child or children, if so stated in such decree, shall be subject to the exclusive control and custody of such parent or parents, and shall possess and enjoy all the rights, privileges, inheritance, heirships, and immunities of children born in lawful wedlock."

Catherine Redfield executed her statement in the proper form and the Grinnells duly executed theirs, a portion of which we quote: "Now comes the said A. Grinnell and Jennie Grinnell and represent to the court that they are residents of the county of Sarpy and state of Nebraska and that they are husband and wife; that they have seen and know John B. Redfield and Joseph B. Redfield, the minor children of Catherine Redfield, and they are desirous of adopting said minor children and agree and promise the said mother of said children that, in consideration of relinquishment of any and all interest or right to said children, and their services, they will adopt said children as their own and said children will assume the name of adopting parents, and will provide for them in sickness and health, suitable food and clothing and use their endeavors to teach or cause them to be taught in the rudiments of an English education."

On a hearing a decree was entered by the county judge, from which we abstract the following: "It is ordered, adjudged and decreed by me that the rights to the custody of and possession, power and control over the persons of the said John B. Redfield and Joseph B. Redfield by Catherine Redfield, their mother, shall cease from this date, and that the said John B. Redfield and Joseph B. Redfield shall be the adopted children of the said A. Grinnell and Jennie Grinnell, according to the several

statements made herein; and it is further ordered and decreed that the name of said children from and after this date shall be John B. Grinnell and Joseph B. Grinnell and that the said children shall be instructed in the rudiments of an English education."

In 1897 the legislature passed an act to provide for the adoption of minor children and repealed sections 796 to 801, as previously existing. Laws 1897, ch. 94. Section 9 of the act is carried forward into section 1572, Comp. St. 1922, without change, except those arising by reason of minor typographical editing, in the following words: "Unless the terms and conditions in such consent and petition otherwise provide, the person or persons adopting, and the child adopted shall after adoption, sustain toward each other the usual relation and the adopted child shall have bestowed upon him or her equal rights, privileges and immunities of children born in lawful wedlock, of parent and child, and shall have all the right and be subject to all the duties of that relation, and the parents of such adopted child shall thereafter stand relieved of all parental duties toward, and all responsibility for, said minor child, and shall have no right over it."

The only controversy in this case is one of law. It depends on the proceedings and the law in effect in 1884, at the time of the adoption, and the later change of that law in 1897, prior to the death of Jennie Grinnell. The appellees contend that by the decree of adoption and by estoppel alleged against Jennie Grinnell and forwarded as against her natural son, the appellant, they had the right to take their distributive shares of her estate irrespective of the act of 1897; and that, under the latter act, the legislature gave them the right to inherit if they did not already have it. On the other hand, the appellant takes issue on both contentions. He admits that the adoption in 1884 was effective in all respects save to clothe the appellees with the right to inherit; he claims their status was fixed so that they could not inherit, and he asserts that the act of 1897 does not apply to them and

was not intended by the legislature to apply to those already adopted prior to its passage. In his briefs and in the oral argument he declared that, if the act of 1897 is operative so as to change what he regards as the fixed status of the appellees, it would end the case. So we examine that proposition first.

The effect of the act of 1897, in some of its phases, was recently before us for determination. There was involved the question whether the natural father should inherit from his son or whether the adoptive mother of the decedent should inherit to the exclusion of the natural father. The adoption of the child took place after 1897 and of course his estate devolved later. We held that, in the case of the unrestricted adoption of a minor child, section 1572, Comp. St. 1922 (the 1897 act), confers on the adopted child and the adoptive parent the right to inherit, each from the other. The first three paragraphs of the syllabus read as follows:

"The statutes of Nebraska relating to the adoption of minor children contemplate two kinds of adoption; one an unrestricted adoption; the other an adoption restricted by the terms and conditions set forth in the petition for and consent to adoption.

"If no terms or conditions are contained in the petition for or consent to the adoption of a minor child, then the adoption is unrestricted, and the rights of the adopted child and adoptive parent are governed by the provisions of section 1572, Comp. St. 1922.

"The right to inherit property of a deceased person is created by statute. The legislature may confer upon adopted children and adoptive parents the right to inherit, each from the other."

In the body of the opinion, relating to the last point of law just quoted, we said:

"The right of inheritance is created by statute. It is within the power of the legislature to determine what persons or whether any person shall inherit from one who dies intestate, and to determine what proportion of the

decedent's estate shall descend to any particular person or class of persons. The legislature creates and may take away the right to inherit. It is within the power of the legislature to confer the right of inheritance upon adopted children or adoptive parents, as well as upon natural children and parents. If there are no restrictions, limitations or conditions in the adoption, our statute of adoption creates the legal relation of parent and child and gives to the adoptive parent and the adopted child all of the rights that pertain to that relation by virtue of the statute of descent." *In re Estate of Enyart,* 116 Neb. 450.

The first item for consideration is whether the rules, as announced with reference to the right of an adopted child to inherit, apply to one who was adopted prior to the present statute but whose adoption proceedings did not contain terms and conditions against inheriting from the adopting parent. We have already shown that there was nothing in the adoption proceedings here involved which provided that the children should have the right of inheritance, nor was there anything preventing the parties interested from supplementing the proceedings at a later date by granting the right of inheritance. The adopted children were given all other rights except the right of inheritance, but they were nevertheless adopted children.

As we have seen from what has been quoted from *In re Estate of Enyart, supra,* the right of inheritance is purely a creature of statute. The legislature may give and the legislature may take it away. It was in the power of the legislature in 1897 to say that the children who had been adopted under the prior act and by that adoption had been given equal rights with natural children should be deprived of the right to inherit, had the legislature been so minded. It did provide more liberally as to inheritance than had theretofore been the rule, because it provided that, unless there was a restriction in the adoption proceedings, the adopted child should inherit; whereas, under the prior law, it was provided that he should

not inherit unless it was expressly provided in the adoption proceedings.

In other jurisdictions the rule contended for by the appellees has been sustained. In *Dodin v. Dodin,* 44 N. Y. Supp. 800, the court held: "Laws 1887, c. 703, which amends Laws 1873, c. 830, so as to confer the right of inheritance on adopted children, applies to children theretofore adopted under the act of 1873." And said, in the body of the opinion: "There can be no question about the legislative power to capacitate an adopted child for inheritance in the future, although such capacity was not derived from the act of adoption." It approved a prior holding in the case that the operation of the act is prospective and not retrospective.

The supreme court of Vermont, in *In re Estate of Hagar,* 98 Vt. 235, held that the right to take property by a devise or descent is not a natural but a statutory right and therefore subject to legislative change at any time before the death of the owner of property; citing many cases.

In *Theobald v. Smith,* 103 App. Div. (N. Y.) 200, it was held that a child, adopted in 1886 under the act denying it the right of inheritance, acquired that right under the Laws of 1887. It held in that case, as was held in the *Dodin* case, that the effect and operation of the act of 1887 is prospective and not retrospective; that it simply adds adopted children to the list of those who shall be capable of inheriting, if at the time the descent is cast they are within that description.

In *Sorenson v. Rasmussen,* 114 Minn. 324, it was held that an amendment, giving to an adopted child the right to inherit, applies to all adopted children, whether adopted prior or subsequent to the passage of such statute; and held that the statute acts prospectively upon rights accruing through the death of adoptive parents after the passage of the law.

The appellant raises the objection to the application of the 1897 law that it is not an amendment of the prior

law but is an act complete in itself. It is true that it does not in terms state that it is an amendment and it is likewise true that the title of the act shows that it is an act to provide for the adoption of minor children and to repeal the specific act previously existing in relation thereto. But it was dealing at large, under the general subject of adoption, with the subsidiary subjects of adopted children, adoptive parents, and the rights of inheritance of each class from the other. All of these subjects inhered in the prior act. A perusal of the two acts in the light of legislative experience or observation, from neither of which are we compelled to divorce ourselves merely because we are judges, will convince the reader of two things: First, that the prior act was in practical effect amended by the present one; and, second, that the mechanics of the work was simplified by calling it an act to provide for adoption and to repeal, rather than an act to amend. The legislature took the simpler but the saner way, less likely to result in complications. They provided in the new law a standard for inheritance as they had provided one in the old. They were dealing with the rights of adopted children to inherit. They were considering a large class of persons whose social value to the state and to society merited that they should be considered tenderly and that none be forgotten. If the act is capable of the interpretation that they intended to grant the same right of inheritance to those adopted prior to 1897, as to those adopted thereafter, where the conditions were equal, we think we should adopt such a view. Looking beyond the form to the fact and through the shadow to the substance, the act of 1897 was in effect an amendment. Moreover, where there is a simultaneous repeal and reenactment of a portion of a former act, it is the prevailing view that the reenactment neutralizes the repeal and those provisions which are thus reenacted continue in force without interruption so that all rights and liabilities that have accrued thereunder are preserved and may be enforced. 25 R. C. L. p. 934, and cases cited. To this rule there is slight dis-

sent in the authorities. It is by virtue of this rule that the legislature by the act of 1897 recognized and continued in force the adoption of the appellees and in the same act exercised the legislative right, heretofore discussed, to grant to appellees the prospective right to inherit from Mrs. Grinnell their distributive shares of her intestate estate of which she might die seised. She and her husband adopted the children knowing, presumptively, that the laws of inheritance might be changed. She is presumed to have known since the passage of the act of 1897 that it had been changed so that the adopted children would inherit through her. Had she desired to avoid the effect of the law, she could have made a will carrying out her wishes instead of dying intestate. From the presumptions arising from the law as well as from internal evidence in the record as to her feeling toward appellees, we infer that she had no desire to interfere with the descent cast upon them by the law of 1897.

We are of the opinion that the act of 1897, providing for the adoption of minor children, of which section 1572, Comp. St. 1922, is a part, preserved the adoption of children theretofore adopted and gave the right to inherit from their adoptive parents to such adopted children as were not precluded from inheritance by the terms and conditions of the proceedings by which they were adopted.

The conclusion to which we have already arrived makes it unnecessary to discuss other questions covered by the briefs and arguments, in able and interesting fashion, by which appellees seek to maintain, and appellant to refute, that, irrespective of the act of 1897, the appellees were entitled to inherit from their adoptive mother.

We are of the opinion that the judgment of the district court was right and it is

AFFIRMED.

FRANK W. MCROBERTS, RECEIVER, ET AL., APPELLEES, V. WILLIAM A. DWORAK ET AL., APPELLANTS.

FILED JULY 2, 1928. No. 25954.

1. **Married Women:** CONTRACTS. The common-law disability of a married woman to contract is in force in this state, except as abrogated by statute.
2. ———: ———: ACTION ON NOTE: BURDEN OF PROOF. Where coverture is pleaded by a married woman as a defense in a suit on a promissory note, which she signed as surety, the burden is upon the plaintiff to establish that it was made with reference to, and upon the credit of, her separate property and estate, and with the intent to bind herself for its payment.

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

George W. Wertz, for appellants.

W. I. Allen, contra.

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

DEAN, J.

Frank W. McRoberts, as receiver of the First National Bank of Schuyler, hereinafter called the bank, filed a motion in the district court for Colfax county wherein he sought to recover a deficiency judgment against the defendants William A. Dworak and Lucy Dworak, husband and wife, on a cause of action formerly reduced to judgment against the Dworaks. This proceeding is the outgrowth of a promissory note, dated February 1, 1923, executed by the defendants for an obligation of William A. Dworak. The note is in the usual form, except that it closes with these words:

"I or we, each of us, personally hereby charge our own separate and individual estate with the payment of this note. (Signed) William A. Dworak, Lucy Dworak."

August 10, 1926, the motion of plaintiff was sustained and pursuant thereto a deficiency judgment for $10,866.46

was rendered against both the defendants, with accrued interest. And in its decree the court found "that the separate and individual property and estate of the said Lucy Dworak is held, bound and charged with the payment of this judgment, which bears interest at the rate of 10 per cent. per annum from this day." Mrs. Dworak has appealed.

The argument of the receiver now is that Mrs. Dworak is bound by the act of signing the note in suit with her husband, and that she thereby made the debt her debt and has therefore charged her separate property and estate for its payment. So that the sole question before us is whether Mrs. Dworak signed the note with intent to bind her separate property and estate for the payment of the note and thereby became liable for the debt of her husband.

In Mrs. Dworak's answer it is pleaded that the parties to the instrument in suit at the time of its execution talked it over and agreed that in signing the note it should not be intended to bind her separate estate, and that this was the mutual understanding of the parties. The evidence of the bank officials who took the note, as well as the evidence of the defendants, supports the allegations of the answer. Mrs. Dworak's evidence stands undisputed. Under such circumstances, it would be manifestly unjust to hold her liable for a deficiency judgment.

"The common-law disability of a married woman to contract is in force in this state, except as abrogated by statute. * * * When a married woman signs a note there is no presumption that she intended thereby to fasten a liability upon her separate estate, but in an action on such note, where coverture is pleaded as a defense, and proved, the burden is upon the plaintiff to establish that it was made with reference to, and upon the credit of, her property, and with the intent to bind the same." *Grand Island Banking Co. v. Wright,* 53 Neb. 574.

Clearly, it is within the well-recognized rule for Mrs. Dworak to establish by parol testimony that she did not intend to bind her separate estate. And it is undisputed

that she did not intend to do so. It follows that no liability attaches in respect of her property.

From what has been said it follows that the judgment of the district court must be and it hereby is reversed and the cause is remanded, with directions that the plaintiff's cause of action be dismissed as to Lucy Dworak.

REVERSED.

HOWELL, J., concurring.

I concur in the results of the foregoing opinion.

The note contains the clause: "I, or we, each of us, personally hereby charge our own separate and individual estate with the payment of this note." It will be noticed the note does not contain a provision that Lucy Dworak "intends" to bind her separate estate.

It may be reasonably said the provision above quoted is ambiguous to a certain extent. Section 8851, Comp. St. 1922, provides: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." The situation is sufficient to admit of parol proof as to the understood meaning of the terms of the note, without disobeying the rule against varying written contracts by parol.

LINCOLN SAFE DEPOSIT COMPANY, APPELLEE, V. PERRY A. YEAST, APPELLANT.

FILED JULY 2, 1928. No. 25982.

1. **Pledges: FORECLOSURE.** Where, as in this action, a real estate mortgage of a third party together with the notes secured thereby are pledged by the mortgagee as collateral security for a debt owing by him to the pledgee, and the pledgee thereafter forecloses such mortgage without making the pledgor a party to the suit, and at the foreclosure sale purchases the property and takes title in his own name, he is presumed to hold, as pledgee, such real estate as collateral security for the principal debt in lieu of the mortgage foreclosed, unless it appears that it was the intent of such purchaser to acquire a fee title.

2. Record examined, and judgment found to be supported by the evidence and the law applicable.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Field, Ricketts & Ricketts, for appellant.

Stewart & Stewart and *Perry & Van Pelt, contra.*

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

THOMPSON, J.

This is an action instituted in the district court for Lancaster county by appellee, hereinafter called plaintiff, against the appellant, hereinafter called defendant, seeking to recover judgment on a promissory note, but which by the mutual consent of the parties was afterwards converted into an action in equity. Trial was had to the court and judgment entered in favor of plaintiff, to reverse which the defendant appeals.

A résumé of the pleadings in the case, as we view them, will aid us in our consideration. As above indicated, the original action was one at law to recover $9,896.70 on a promissory note dated January 1, 1924, executed by defendant to plaintiff. The defendant in his answer denied each allegation of the petition, and further pleaded that on March 1, 1922, defendant borrowed from plaintiff $52,642 evidenced by coupon bonds; that to secure the payment of such bonds he assigned to plaintiff a note and mortgage executed by one Ballinger to defendant, in the sum of $52,642, which mortgage covered 10,240 acres of land in Sheridan county; and as further collateral to such loan defendant assigned and transferred to plaintiff two $10,000 promissory notes, given to defendant by Mack Higdon, a resident of Canada; that Ballinger failed to pay the interest installments due on his note, which interest (also interest on all collateral notes) should have been collected by plaintiff and applied on defendant's indebtedness to it;

that the above $9,896.70 note purports to represent the past due and unpaid interest on the notes then held by plaintiff as security, hence was without consideration; that, while Ballinger was in possession of these mortgaged lands, a lease was by him executed to one Lowe, and defendant procured Ballinger to assign to plaintiff $2,500 of such rentals, which when by assignee collected were to be by it applied on the above indebtedness; that plaintiff foreclosed the Ballinger mortgage and the premises were sold and bid in by it, and now the plaintiff is the record owner thereof; that the land is fairly and reasonably worth $10 an acre; that an action has been commenced by plaintiff on the Higdon notes in Canada, in a court possessed of jurisdiction, and that Higdon is solvent; that defendant is entitled to, and demands, an accounting as between the plaintiff and the defendant, as to the various transactions involved; and prays: "That plaintiff's petition be dismissed; that an accounting be had between the plaintiff and defendant covering the various transactions as herein set forth, and that judgment be entered herein based on such accounting, and for such other and further relief as may be just and equitable."

On filing of this answer, by reason and in furtherance of the matters therein contained and prayed for, plaintiff asked and was granted the right to file an amended and supplemental petition in equity, which it did, and therein set forth in detail the entire transactions indicated by such answer, including all expenses connected therewith, among which allegations were, that it bid in and took the title to the Sheridan county lands in its name at the instance and request of defendant, as evidenced by oral contract and written correspondence, to be by it held and by it sold and proceeds, less expenses, applied upon the original loan from plaintiff to defendant; that defendant was interfering with the suit in Canada in a wrongful manner to plaintiff's damage, and should be enjoined; and prayed that an accounting might be had; that the amount due and owing it be ascertained and judgment entered therefor; that it

might be found to hold the Sheridan county land as pledgee and not as actual owner; that some person be authorized and directed to sell and convey the same, either at public or private sale; that the remaining securities in its hands be collected, and that out of the total of all the aforesaid proceeds the reasonable expenses involved, including court costs, be first paid, and the remainder thereof be applied to the payment of the debt as herein found due it; and if a surplus thereafter remained, the same be paid to defendant, and that report of such sale be made to the court.

To this supplemental petition the defendant answered, entering a general denial, and further alleged as in his original answer, and, in addition, that the bid of plaintiff at the Ballinger foreclosure sale was $58,734, and plaintiff is now the legal holder of the lands in question, and that defendant is entitled to credit upon any indebtedness owed by him to plaintiff for the reasonable value of the premises; that such value exceeds the amount claimed to be owed by defendant to plaintiff. Further, it is alleged that the oral request, if any (for the plaintiff to bid in the land at the foreclosure sale), is void and of no effect, for the reason that same is a contract relating to real estate not in writing, and falls within the inhibition of our statute of frauds; that the district court for Lancaster county is without jurisdiction to foreclose a mortgage on, and sell, land situate in Sheridan county, as asked for in plaintiff's supplemental, petition. He then prays that he may go hence and recover his costs.

To this answer the plaintiff in its reply interposed facts which, if proved, would amount to an estoppel on the part of the defendant to deny the force and validity of the oral agreement pleaded by plaintiff, in furtherance of which it claims it bid in, took in its name, and now holds the Sheridan county land. This was followed by a general denial of all matters in the answer, save those specifically admitted in the reply.

Under these pleadings, and the evidence adduced in harmony therewith, the trial court entered the following

judgment, in substance: That plaintiff have and recover from the defendant the sum of $83,090.54, and in the event that defendant does not pay such amount within 30 days plaintiff may sell the Sheridan county land, either at public or private sale, and make report of the amount realized from such sale, and that such proceeds, less expenses of sale, be credited upon the above sum found due plaintiff; further, that plaintiff proceed with the collection of the Higdon notes, and whatever amount is realized from such collection, less expenses, be also credited on the amount due plaintiff, and if any surplus remain thereafter, plaintiff should pay the same to defendant.

It is claimed on the part of the defendant that certain of the findings of fact by the trial court and certain conclusions of law which formed the basis of the judgment appealed from are erroneous. It is sufficient to say that we have given consideration to each, and conclude that as to the court's findings of fact each thereof is amply sustained by the evidence; that as to the right of the trial court to hear and determine the matters involved herein as a suit in equity and after so hearing to grant full and complete relief, the defendant should not be heard to object, as he it was who initiated the change from that which was purely a law action to one purely equitable, and in so doing selected the forum and invited the procedure, and in good conscience he should not be heard to complain. Then, as the $9,896.70 note which formed the basis of the action as originally instituted was one covered by the pledge set forth in defendant's first answer, the suit in equity was germane to the action as first lodged.

Defendant urges that a Lancaster county district court is without jurisdiction to foreclose a mortgage on, and sell, Sheridan county land. The heretofore indicated record does not show this to be such an action. Therefore section 8555, Comp. St. 1922, and other sections thereof cited, are not controlling. This defendant demanded an accounting, a bringing into the court of all things pertinent thereto on the part of the plaintiff as well as on the

part of the defendant, for its consideration. This required a finding by the court as to the status of the parties in regard to the matters involved, including the lands in question and the respective claimed debits and credits, and also called for the court's direction in reference thereto. As we find, this arduous task was performed by the trial court without error, and clearly pertained to matters within its jurisdiction.

The defendant did not at any time notify the plaintiff that he had elected to treat the purchase of the lands at foreclosure sale by plaintiff as its purchase, and that he demanded credit to the amount of the bid on his indebtedness. In his first answer he says, in substance, that such sale of the property was had, the land bid in by plaintiff, and that the record title stands in its name; that the value of the lands reasonably exceed $100,000, and that such value should be accounted for by plaintiff to defendant; not that defendant demanded credit for the amount of the bid, but that the court should by reason of its far-reaching equitable powers treat these lands as of the date of trial as lands of defendant wrongfully held by plaintiff, and by decree award defendant the value thereof. Thus, at the time of trial defendant had not elected to hold plaintiff for the amount of the bid. Further, it will be noticed that in defendant's second answer the substance of his original answer was contained therein, and, in addition, that the bid of plaintiff at the foreclosure sale was $58,734, and plaintiff is now the legal holder of said premises, and that defendant is entitled to credit upon any indebtedness owing by him to plaintiff for the reasonable value of said premises, not for the purchase price at the sale. Defendant at no time asks that he be given credit for the amount of the bid.

Under the record, we are of the opinion that in denying credit to defendant of the amount of such bid, and in directing plaintiff to sell the lands, the trial court is supported by the evidence and the law applicable. The plaintiff became the purchaser of this land, not with the intent

or purpose of becoming the owner in fee thereof, but with the intent of changing the character of the pledge from a pledge of the mortgage being foreclosed and the notes secured thereby to a pledge of the lands covered by such mortgage, and so took and held, and now holds the same; and in so doing it was and is acting within its legal rights in furtherance of its duties as such pledgee.

The law applicable to the case before us is: Where a real estate mortgage of a third party together with the notes secured thereby are pledged by the mortgagee as collateral security for a debt owing by him to the pledgee, and the pledgee thereafter forecloses such mortgage without making the pledgor a party to the suit, and at the foreclosure sale purchases the property and takes title in his own name, he is presumed to hold, as pledgee, such real estate as collateral security for the principal debt in lieu of the mortgage foreclosed, unless it appears that it was the intent of such purchaser to acquire a fee title.

This conclusion is not in conflict with our holding in *Ross v. Barker*, 58 Neb. 402, wherein it was found by the the court that the pledgee bought the lands at the foreclosure sale with intent to acquire complete title thereto.

All claimed errors presented have had our consideration, some specifically and others in a more general way, and we conclude that the judgment of the trial court is right, and it is

AFFIRMED.

CHARLES E. ABBOTT V. STATE OF NEBRASKA.

FILED JULY 2, 1928. No. 25809.

1. Bail: SUFFICIENCY OF BOND. Where a defendant in a criminal case gave an appeal bond conditioned for his appearance on the first day of the next term of the district court instead of forthwith, but the first day of the next term was the first day upon which the district court sat, and was the first opportunity given defendant for such appearance, and he did appear upon said date without objection being made thereto until after seven

terms of court had intervened, *held*, upon objection made to jurisdiction of district court on the ground of invalidity of the bond, that said bond was a substantial compliance with the requirements of section 9999, Comp. St. 1922, as amended by chapter 113, Laws 1923.

2. ———: BOND FOR APPEARANCE: "FORTHWITH." The word "forthwith," as used in the statute relating to the appearance of a defendant in a criminal case in the district court, means the first opportunity offered defendant, after appeal is perfected, to appear when said court is in session.

3. Statutes: CHANGE OF PROCEDURE: APPEARANCE. The changing of the time for appearance, in the appeal of a defendant in a criminal case, from the first day of the term to forthwith, is merely a change of procedure, and as such the appeal is governed by the provisions of the law applicable thereto at the time when the judgment of the lower court was rendered.

4. Criminal Law: APPEAL: DISCHARGE. Where a person is convicted of any offense and has appealed and given bond for his appearance, and if, without his application for a continuance or want of time to try such cause, he is not brought to trial before the end of the third term of the court in which the cause is pending, he is, on motion, entitled to be discharged, as far as relates to such offense.

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

King & Bracken and *Perry & Van Pelt*, for plaintiff in error.

O. S. Spillman, Attorney General, and *J. L. McPheeley, contra.*

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

BEGLEY, District Judge.

On July 1, 1924, Charles E. Abbott was tried, convicted and fined on a charge of assault and battery, alleged to have been committed in Kearney county, May 19, 1923. He immediately executed an appeal bond with sufficient sureties, conditioned that he would "personally appear be-

fore the district court in and for said Kearney county * * * on the first day of the next jury term thereof and from time to time and from term to term as may be ordered by the said court until the final determination of the aforesaid cause, * * * and not depart the court without leave." The first day of the next term of court, and the first day upon which the court held a session after said appeal was October 14, 1924. Presumably the defendant appeared on said date and thereafter, from time to time and from term to to term, as required by the terms of his bond, until seven terms had intervened. At the April, 1926, term he filed a motion for his discharge, based on section 10046, Comp. St. 1922, relating to the discharge of an accused not brought to trial before the end of the third term of the court in which the case is pending. Upon objection by the county attorney to an immediate hearing on the motion, same was continued, and on April 20, 1926, the county attorney moved to dismiss the appeal because the appeal bond was void, in that it did not conform to the requirements of section 9999, Comp. St. 1922, as amended by chapter 113, Laws 1923.

In 1922 the law required the giving of a bond conditioned for the appearance of the defendant on the first day of the next term, but in 1923, after the alleged commission of the assault and battery by the defendant, the law was amended, providing that the bond be conditioned for appearance forthwith, and without further notice, in the district court for such county, and from day to day thereafter until the final disposition of said appeal, to answer the complaint against him, and to abide the judgment of the district court, and not depart therefrom without leave. The trial court, on a hearing, sustained the motion of the county attorney to dismiss the appeal, and overruled the motion of the defendant to be discharged from further prosecution in the case. There was no timely objection to the jurisdiction of the court over the person of the defendant in the pending action against him. On the other hand, the state treated the case as one pending. In the prosecution of a

sodomy case pending against the defendant at the same time, the defendant filed a plea in bar, alleging that said crime charged was based on the same facts, circumstances and transactions as the assault and battery charge. The state in that case filed an answer in which it alleged that in said assault and battery case the defendant had given bond, caused transcript to be filed, an that said cause was now pending in the district court for Kearney county on said appeal.

This court held in the case of *Killian v. State,* 114 Neb. 4, that, where an objection was timely made, an appeal bond which failed to require the defendant to appear forthwith before the district court, but instead directed him to appear on the first day of the term, was not a substantial compliance with the statute and failed to confer jurisdiction on the appellate court. It is contended by plaintiff in error that the bond in this case, as shown by the circumstances, is a substantial compliance with the terms of the statute. The true purpose of the recognizance is the protection of the public. *Whetstone v. State,* 109 Neb. 655. It is not absolutely necessary that the word "forthwith" be used in the bond, if under the wording used the defendant is compelled and required to appear at the same time as though the word had been so used. The word "forthwith" is defined as follows in 2 Bouvier, Law Dictionary (3d Revision) 1289: "As soon as by reasonable exertion, confined to the object, it may be accomplished." Here the first day that the trial court was in session, and the first day that the defendant could appear forthwith, was October 14, 1924, being the first day of the next term, and the day on which he did appear. Consequently the day named in his bond was the same as "forthwith" as far as facts in this case appear.

In *Holmes v. State,* 17 Neb. 73, where the recognizance required the defendant to appear before the district court on a certain day named, instead of the first day of the next term, but which day named was in fact the first day of the next term, this court held the recognizance sufficient to

confer jurisdiction on the district court, holding: "While the law requires the defendant to be required to appear and answer to the charge on the first day of the next ensuing term, yet we know of no law requiring the exact language of the statute to be followed in a recognizance. If he is required to appear upon a day which in fact is the first day of the term it is sufficient."

In view of the constitutional guaranty of the right of appeal in criminal cases, where the date in the recognizance on which defendant is required to appear before the district court is the first opportunity given defendant for such appearance, the state is not substantially prejudiced, trial on appeal is not delayed, and same is a substantial compliance with the statute.

The state in this case asserted a position in the sodomy case that a valid appeal was pending in this case and accepted the benefit of the appeal as though the recognizance had been within the statute, in order to sustain the bringing of the other action, and it thus seems to have placed the same construction on the bond as we have determined above.

Defendant contends that, as the crime was committed before the amendment of the statute, requiring his appearance forthwith before the district court, said amendment is *ex post facto* and does not apply to this case, and he has the right of appeal under the previous provision. This is not an amendment changing the punishment for the crime charged, nor does it alter the situation of the defendant to his disadvantage. It is merely a change of procedure in the right of appeal, and as such the appeal is governed by the provisions of the law applicable thereto at the time when the judgment was rendered. *Marion v. State,* 16 Neb. 349; 17 C. J. 25, sec. 3283.

For the foregoing reasons, the trial court erred in dismissing the appeal and overruling the motion of defendant for discharge. The judgment is therefore reversed and the cause remanded, with direction to the trial court to overrule the motion of the state for dismissal as to lack of

jurisdiction, and to sustain the motion of the defendant for a discharge from this case on the ground that more than three terms of court have intervened since the filing of the appeal.

REVERSED

J. P. THORNTON, APPELLEE, V. FARMERS & MERCHANTS NATIONAL BANK, OF FAIRBURY, ET AL., APPELLEES: H. L. CLARK, APPELLANT.

FILED JULY 2, 1928. No. 26112.

Mortgages: FORECLOSURE: DEFICIENCY. Where a person is the holder of a negotiable promissory note secured by a mortgage made to him personally, and thereafter sells and assigns same, for value, in his own name, without disclosing on the instrument that he is acting as agent or in a fiduciary capacity, such person, when sued by the purchaser for a deficiency judgment in foreclosure proceedings based on said mortgage, is liable for such deficiency.

APPEAL from the district court for Jefferson county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Hartigan & Fouts, for appellant.

Heasty, Barnes & Rain, Denny & Denny and *E. A. Wunder, contra.*

Heard before ROSE, GOOD, THOMPSON and HOWELL, JJ., and BEGLEY and BROADY, District Judges.

BEGLEY, District Judge.

This is an action of foreclosure wherein, after mortgaged property had been sold, application was made for a deficiency judgment against the maker and indorsers of the note. The evidence discloses that previous to July 19, 1922, the Farmers & Merchants National Bank of Fairbury, Nebraska, held some unsecured obligations of the then owner of the land in question, and in order to satisfy

same it caused a sale to be made from said owner to one George C. Light, for a consideration of $12,000. Light received a deed to the premises and raised the purchase price by giving a $6,000 mortgage to a loan company, a $3,000 mortgage to H. L. Clark, being the note and mortgage in controversy here, and executed a $3,000 note to the bank for the remainder. Before maturity of the note and mortgage Clark, being the president of the bank at the time, through the activities of the bank officials, sold and assigned the note and mortgage to Thornton, the plaintiff, for the sum of $3,000, which was paid to the bank and applied upon the indebtedness of one Dawson who was the former owner of the land in question. Thornton, however, did not purchase the note until it was first indorsed with the signatures of H. E. Fairchild, A. L. Newell, and A. R. Nichols, all these parties being officers or stockholders of the bank. The note was not paid when due and plaintiff brought foreclosure and, the sale having resulted in a deficiency, this action was maintained to recover the balance from Clark and the other indorsers. Before the bringing of the foreclosure suit, the Farmers & Merchants National Bank of Fairbury was placed in the hands of a receiver, and the receiver thereafter took a deed to said property from Light in settlement of certain indebtedness Light owed the bank, and the bank was the owner of said land at the time of bringing the foreclosure and was made a party defendant as such.

The defendant H. L. Clark filed an answer and cross-petition in which he set up that the Farmers & Merchants National Bank was actually the owner of said $3,000 note and mortgage at the time of its assignment by him; that he was at said time president of said bank and merely took the note in his name as such officer and as agent; that he had no interest therein, all of which was known to the plaintiff and the bank through its officers, and asked that any deficiency be decreed against the bank and he be relieved therefrom. The receiver of the bank answered denying that it had any interest in said note and mortgage

except as owner of the land acquired after the note and mortgage were given.

The court found against the contention of Clark and decreed a deficiency judgment against him and the other indorsers on the note, and relieved the bank and all other parties from liability for the deficiency, from which decree defendant H. L. Clark has appealed.

The plaintiff Thornton bought the note and mortgage for full value, relying upon the signers of the note. In fact, the names of the indorsers were placed thereon at his request, to give him better security, and he did not rely on any title in the bank. Light testified that he was the owner of the land at said time by purchase, and Nichols, the bank cashier, testified that the bank had no interest in the land at the time the note and mortgage were given, but by this method they held a lien for part of the purchase price from Light, and by the sale and transfer they were able to apply the money in cleaning up some obligations of Dawson, which were unsecured while he was the owner of the land. There was no obligation or other evidence of debt securing this note and mortgage given by the bank that would render it liable for the deficiency as provided by statute. Comp. St. 1922, sec. 9211.

Where a person signs a negotiable instrument in his own name, without disclosing on the face of the instrument that he is acting as agent, or in a fiduciary capacity, and also the name of his principal, such person, when sued for a deficiency judgment in foreclosure proceedings, is liable for deficiency judgment. *Farrell v. Reed,* 46 Neb. 258; *Reeves v. Wilcox,* 35 Neb. 779.

The district court was therefore right in not decreeing a deficiency judgment against the Farmers & Merchants National Bank, and the decree is

AFFIRMED.

STATE, EX REL., O. S. SPILLMAN, ATTORNEY GENERAL, V. CITIZENS STATE BANK OF POTTER: OMAHA NATIONAL BANK, CLAIMANT, APPELLANT: VAN E. PETERSON, RECEIVER, APPELLEE.

FILED JULY 2, 1928. No. 25056.

1. **Banks and Banking:** GUARANTY FUND: DEPOSITS. A certificate of deposit which represents money obtained by a stockholder of a failed bank for the purpose of effecting a loan to said bank will not be allowed as a claim against the depositors' guaranty fund.
2. ———: ———: ———. Funds collected by a bank for a customer and deposited to his credit with his consent form a legal basis for the issuance of a certificate of deposit, and will be allowed against the depositors' guaranty fund, notwithstanding the fact that such customer was an officer and director of the bank; it not appearing that a loan to the bank was intended.
3. ———: ———: ———. A certificate of deposit within the protection of the depositors' guaranty fund, issued to an officer of the bank and in the hands of a third party as collateral security, was renewed in the following manner: The holder sent the certificate when due to the bank, and the officer sent his check on the holder for the face value thereof to the issuing bank, which thereupon remitted the amount by draft to the holder who collected it and paid the proceeds to the officer; the bank renewed the certificate and sent it to the officer who deposited it with the holder as security in lieu of the renewed certificate. *Held*, that the transaction did not effect a loan to the bank, and that the renewal was a deposit within the protection of the fund.
4. ———: INSOLVENCY: TRUST FUNDS. Where one bank sends to another, for collection and remittance, notes of third parties, the latter bank holds the same and their proceeds as trustee for the former, which, upon failure of the collecting bank, is entitled to a prior lien therefor upon the assets of the failed bank to the extent that they have been augmented by the trust funds, provided such augmented assets are traced into the possession of the receiver, and into some existing asset of such bank.
5. **Trusts:** INSOLVENT BANK: TRACING FUNDS. Where the trust fund consisted of money, and upon failure of the trustee no money was found in his assets, it sufficiently appears, *prima*

facie, that the trust fund had been dissipated, and unless the *cestui que trust* is able to trace such funds into some particular existing asset, or to some mass of such assets, particular or general, the trust fails for want of a subject.

6. **Banks and Banking:** DEPOSITOR. The relation of banker and depositor can only be created by contract express or implied.

7. ———: GUARANTY FUND: TRUST FUNDS. Trust funds in the hands of a bank will not be changed into a deposit by implication, by reason of the conversion thereof by the trustee, and thus be made a charge upon the depositors' guaranty fund.

APPEAL from the district court for Cheyenne county: J. LEONARD TEWELL, JUDGE. *Affirmed in part, and reversed in part.*

Smith, Schall, Howell & Sheehan, Warren H. Howard and *Gaines, Van Orsdell & Gaines,* for appellant, Omaha National Bank.

O. S. Spillman, Attorney General, C. M. Skiles and *Roland V. Rodman, contra.*

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

REDICK, District Judge.

This is an appeal growing out of the failure of the Citizens State Bank of Potter, Nebraska, a receiver for which was appointed February 13, 1924, the Omaha National Bank presenting claims against the depositors' guaranty fund, arising out of three certificates of deposit stated as three separate causes of action. The district court allowed the claims on the first two causes of action as charges against the general assets of the bank, but disallowed them as claims against the guaranty fund, and the bank appeals. The district court allowed the claim of the bank on the third cause of action against the general assets and also against the guaranty fund, and the receiver appeals. The facts (many of which are stipulated and none in serious dispute) of each transaction will be stated

and considered as the first, second and third cause of action, respectively.

First cause of action. November 5, 1923, certificate of deposit No. 1823 was issued by the bank to George A. Roberts in due form, bearing interest at the rate of 5 per cent. for the sum of $3,600. This certificate was the final renewal of No. 1171 issued to Roberts November 15, 1921, for the same amount, and which was based upon the following transactions:

(a) October 25, 1921, the Potter bank was overdrawn at the Merchants National Bank in the sum of $2,050.27, and that bank called Roberts, who was president of the Potter bank and living in the city of Omaha, and Roberts thereupon sent his check for that amount to the Merchants Bank in order that the checks of the Potter bank held by them would not be protested.

(b) At the time No. 1171 was issued the Potter bank was owing Roberts for interest items collected by it upon notes and mortgages belonging to Roberts in their hands the sum of $974.08, for which they had issued to Roberts a deposit slip.

(c) Sometime prior to the issuance of No. 1171 Roberts had paid to the Omaha National Bank for account of the Potter bank the sum of $5,000, all of which had been repaid except the sum of $575.65.

These three items total $3,600, the amount of said certificate.

As to transactions (a) and (c), the letters of Roberts to the Potter bank do not sustain the claim that they were deposits. The following excerpts from the letters clearly stamp the transactions as loans:

October 25, 1921.

"The Merchants National Bank just called me up and said that your bank was overdrawn down there tonight, $2,050.27, and in order to fix the matter so that they would not let the checks go to protest, I am sending them down a check for the above amount. I certainly hope that in some way the bank can get itself in shape so these fellows

don't keep calling me up all the time and asking me to take care of obligations, as above.

"The Citizens State Bank at Potter, confidentially, is getting a bad name here in Omaha on account of these overdrafts and drafts that is made on the bank, and laying around for a week without being paid.

"As you know I am mighty hard up myself and I would like to be one of the first to be reimbursed on this $2,050.27."

November 3, 1921.

"You are well aware of the load I am carrying for the two banks, and I cannot afford to have these Omaha banks continually writing and calling me up in regard to the way the banks at Potter and Dix are being handled. They must be handled in a business-like way if they are going to be handled at all. * * * Just a few days ago I sent down to the Merchant National Bank $2,050.27. Just last night Mr. Eastman called me up and said there was another overdraft. Now, I am all through sending down checks to these banks, * * * and we might as well have an understanding first as last, as to where we stand."

November 8, 1921.

"Also at one time when I paid the Merchants National Bank $5,000 there was to have been notes sent me covering this payment, but there was a shortage on this account of $575, and after deducting $200 difference on your notes yesterday, still leaves $375 in paper due us. Also on October 25th, I gave the Merchants National Bank a check for $2,050.27 to take up an overdraft that they were kicking about.

"Now I think the way to square this thing up if you haven't got the money is to give me a certificate of deposit for the following amounts: $2,050.27 with interest at 8% up to October 25 until you make out the certificate; $1,174.08 plus debit memorandum, $7.81, which is due me on interest paid and deposited in the bank; and for $375 balance due me on deficit to cover $5,000 which I paid the

Omaha National Bank. This would make a total certificate of deposit of a little over $3,600."

With reference to (a) and (c) claimant argues that the Potter bank received full consideration for this certificate; but the question is whether they were loans or deposits. It cannot be said that they were deposits in the ordinary course of the banking business. At the time the payments were made neither party considered them deposits, and the letters above quoted show beyond dispute that the bank was in financial difficulty and the money was paid by Roberts to aid the bank, he protesting the while. The money was not a voluntary deposit in the bank for the benefit of Roberts, but was apparently forced from him by reason of his interest in the bank as a stockholder and officer. By paying a debt of the bank and taking a certificate of deposit for the amount, a stockholder may not change the debt into a deposit and thus charge the guaranty fund; if so, ordinary debts would be placed upon the same plane as deposits. True, had Roberts in good faith deposited money in the bank and the latter had paid its debt with it, that result might apparently have been accomplished; but if it appeared that such was the purpose of the transaction, it would be considered a loan. Section 8033, Comp. St. 1922, provides:

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

We think it clearly appears that the purpose of these payments was to assist the bank, and in fact they were loans by an officer and stockholder.

As to transaction (b) the certificate represented money in the bank which had been collected for Roberts on other transactions, was placed to his credit, and instead of drawing it out he accepted a time certificate. This merely

changed the form of the deposit. The facts fulfil all the requisites of a deposit and the amount is payable from the guaranty fund.

Second cause of action. This is based upon certificate No. 1763 issued August 15, 1923, for $3,500, to George A. Roberts, and is the last renewal of No. 1230, dated January 13, 1922, for the same amount, the history of which is as follows: On January 5, 1921, A. R. Roberts, brother of George A., sold to the Potter bank two notes aggregating the full value of $7,000 and received certificate No. 882 for the sum of $7,000. Subsequently this certificate was renewed for the same amount, and later, January 13, 1922, was split into two certificates, Nos. 1229 and 1230, each for $3,500. These were subsequently renewed, one of them by certificate No. 1418, and the other one not being in controversy herein. No. 1418, prior to its maturity, October 13, 1922, was purchased for full value by George A. Roberts and delivered to the Omaha National Bank as collateral security to George's debt to said bank in the sum of about $20,000. When No. 1418 became due the Omaha National Bank sent it to the Potter bank. About the same date George A. Roberts sent to the Potter bank his check on the Omaha bank for $3,500, payable to the Potter bank, and on the same day, October 11, 1922, the Potter bank issued its draft payable to the Omaha National for the full amount of said certificate and interest. On the same date certificate of deposit No. 1487 was issued by the Potter bank to Roberts for $3,500, due January 15, 1923, drawing 5 per cent. interest, which being received by Roberts, he turned the same over to the Omaha National Bank as collateral security in lieu of the previous certificate, No. 1418, and upon the return of the draft, above referred to, the Omaha National Bank turned the money over to Roberts. Certificate No. 1487 was renewed by No. 1585, and that by No. 1763, the same procedure being followed as with No. 1487, No. 1763 being the one upon which claim is made. Upon this state of facts it must be conceded that the original certificate, No. 882, to A. R. Roberts

for $7,000 represented a deposit within the protection of the guaranty fund (*State v. Farmers State Bank*, 113 Neb. 82); that the renewals thereof down to and including 1418 also represented deposits. It is stipulated that prior to October 11, 1922, "A. R. Roberts sold for the full value, plus interest, for cash, to George A. Roberts, certificate No. 1418," and that George delivered the same to Omaha National Bank as security for his debt. Up to this point, then, No. 1418 was within the protection of the act, and if the Potter bank had failed while the Omaha bank held No. 1418, no question could be made as to the priority of its claim.

The receiver contends that the process by which 1418 was renewed by 1487 converted the deposit into a loan; that when Roberts gave his check upon the Omaha bank to enable (let it be assumed) the Potter bank to take up 1418, he thereby made a loan to the Potter bank, for which claimant is now seeking priority. We can not adopt this view. While the procedure was unusual, it must be remembered that the $3,500 represented by Robert's check simply went around in a circle returning to him; it is not this $3,500 which is the basis of 1418, but one-half the $7,000 covered by 882. No. 1487 was in effect a renewal of 1418; as the cashier of the Potter bank testified, "One took the place of the other." Suppose Roberts had taken the cash to the Potter bank and laid it on the counter with 1418, requesting a renewal, and upon receipt of 1487 had taken the money and departed, had he made a loan to the bank? Whatever may have been the purpose of the circuitous method adopted, it did not result in a loan. The result is the same as if the bank had sent the renewal direct to the holder without the intervention of the check and draft. The transaction simply amounted to a renewal; the situation of the parties was not changed, the debt remained the same except as to maturity; the liability of the guaranty fund was not increased. We think the claim is properly chargeable to the fund, and the district court erred in not so holding.

Third cause of action. The Omaha National Bank, prior to October 25, 1923, had loaned certain sums of money to the Potter bank and had taken certain securities as collateral, which included three notes, namely, Emil Cords $2,000, due May 27, 1923, C. F. Prehm $1,400, due November 17, 1923, and George A. Colter $650, due November 6, 1923, total $4,050. These notes were sent to the Potter bank for collection and were collected, but remittance therefor was never made to the Omaha National, the proceeds being placed with the other cash of the bank. It appears that, at the time the guaranty fund commission took charge of the Potter bank, the same had an overdraft of $2,185, but that the general assets of the bank which came into the hands of the receiver were in excess of $50,000. It is stipulated that the assets of the bank were increased by the amount of these collections. There is no attempt to trace these funds into any specific property or specific fund other than the general assets before the closing of the bank; nor is there any direct evidence that the trust property was included in those assets which came into the hands of the receiver.

The sole question then is: Where trust funds have contributed to the general assets of a failed bank in such manner that such assets have been augmented thereby to the extent of such funds, will the latter be declared a prior lien upon the assets of such failed bank in the hands of a receiver subsequently appointed, without a showing that the trust funds or their product were a part of a such last-named assets? The history and development of the principles governing the priority of lien of trust funds in the distribution of insolvent estates has been so fully discussed in a number of cases by this court that we will not enter upon a restatement of them at this time, but refer the student to *City of Lincoln v. Morrison*, 64 Neb. 822, and the very recent case of *Central Nat. Bank v. First Nat. Bank*, 115 Neb. 444, concurring opinion of Eberly, J., 115 Neb. 457, also dissenting opinion of Rose, J., 115 Neb. 451, and opinion on rehearing 115 Neb. 472, and dissenting opinion

115 Neb. 478. The facts in this last case were as follows: The insolvent bank received from plaintiff bank for collection and remittance two notes, the makers of which were depositors of the insolvent bank with sufficient funds respectively to pay the notes in question. The insolvent bank charged their accounts with the amounts due upon the notes and, instead of remitting to plaintiff bank, without consent or knowledge of the latter, credited the amount so charged to its account. The cash which came into the hands of the receiver was insufficient to pay plaintiff's claim and was paid out on other preferred claims, but the general assets of the insolvent bank were sufficient to pay plaintiff's claim and about 40 per cent. of all claims. The questions upon which the court divided were (1) whether or not the general assets of the insolvent bank had been augmented by the transaction above detailed, one division taking the view that the reduction of liabilities, by charging the depositor's accounts, automatically produced a corresponding increase of assets, and the other maintaining that the actual assets for distribution to creditors remained stationary; and (2) whether it was necessary to trace the trust fund into some specific fund or property, or whether it was sufficient to trace it into the general mass of assets. In the instant case the stipulation of the parties and the facts themselves show that the estate of the insolvent was augmented by the trust property at the time the collection was made, and that the assets taken over by the receiver were in excess of $50,000. It should, however, be noted that it is not stipulated that the assets taken over by the receiver were increased by the amount of the trust fund, or any other amount; and the evidence fails to show that to be the fact. The most the evidence shows is that the fund went into the general assets of the bank, was commingled therewith and used in the conduct of the banking business, in the course of which all the cash was dissipated and an overdraft existed of $2,185. The bank was closed December 15, 1923, and the evidence does not disclose that the particular assets of the bank at the time these collections were

made were the same as those taken by the banking department or the receiver. The fact seems to be that they were changing from day to day while the bank remained open.

It has been held that, where the trust consists of money which has been commingled with the money of the trustee so that it cannot be identified, the trust fund is a charge upon the mass so long as it remains, and may be followed and claimed. *City of Lincoln v. Morrison,* 64 Neb. 822. 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. In that case a portion of the trust money was traced into certain warrants which came into the hands of the receiver, and a preference was allowed as to the proceeds and profits upon their sale, to the extent that the trust fund had been used in their purchase, but denied as to the other assets.

A similar result was reached in *State v. Bank of Commerce,* 54 Neb. 725, where priority was declared as to the cash but not the general assets.

The claimant cites *Capital Nat. Bank v. Coldwater Nat. Bank,* 49 Neb. 786; *State v. Midland State Bank,* 52 Neb. 1, and *State v. State Bank of Wahoo,* 42 Neb. 896, as sustaining the view that priority may be declared upon the general assets of the trustee when it is shown that they have been augmented by the trust funds. In the *Capital National Bank* case, however, the cash taken over by the receiver exceeded the trust fund, and the presumption was that the latter was included in the cash. The same condition existed in the *Midland State Bank* case as shown by the record (*State v. State Bank of Commerce,* 54 Neb. 725, at page 732) though not by the opinion. These two cases go no further than to declare a preference upon a particular fund in the hands of the receiver, to which the trust funds were traced. *State v. State Bank of Wahoo,* 42 Neb. 896, is authority for claimant, but with reference to this case Ragan, C., who wrote the opinion,

and who also wrote the opinion in *State v. Bank of Commerce, supra,* has this to say on page 732:

"The opinion does not disclose whether the cash in the vaults at the time of its failure was equal to or exceeded the amount of the trust fund; * * * but it was never the writer's intention to hold that the beneficiary of a trust fund, simply because of the character of that fund, was entitled to a preference out of the estate of the insolvent trustee, and the case is not to be regarded as an authority for that doctrine."

The three cases just referred to were disapproved in *City of Lincoln v. Morrison,* 64 Neb. 822, *supra,* the court saying (page 825): "We think it expedient to state plainly that this court no longer adheres to the extreme view as to the right of *cestui que trust* to be preferred on insolvency of the trustee, expressed in the cases of (naming them), but adheres to the position taken in *State v. Bank of Commerce,* 54 Neb. 725, and *Morrison v. Lincoln Savings Bank & Safe Deposit Co.,* 57 Neb. 225." This last case involved the conversion by trustee of some warrants, but the evidence failed to show "that anything of value derived from the conversion of the warrants ever went into, or formed part of, the assets of the bank, and thus, directly or indirectly, increased the fund in the hands of the receiver for distribution."

It seems clear from a study of the decisions in this state subsequent to *State v. Midland State Bank,* 52 Neb. 1, that, before priority could be declared against the general assets of the trustee, it must be shown that assets of the particular character of the trust property, *e. g.* cash, are included in the general assets, or that specific property therein had been purchased with the trust funds, and priority was restricted to the cash or property so identified. This is in accord with the weight of the recent decisions.

To summarize the facts of this case relating to this particular question: The Potter bank collected the notes in question in cash and mingled it with the general assets; the bank continued transacting business until December

15, 1923, when it was taken over by the state banking department; at that time its cash was overdrawn $2,185; February 13, 1924, a receiver was appointed; no cash was turned over to the receiver, but other assets in excess of $50,000 came to his hands; none of such assets are shown to have been produced by the trust funds; the trust fund, as cash, had been dissipated before the bank closed; the assets in hands of receiver are no greater than they would have been had the Potter bank paid claimant the amount collected on the notes.

If this is the true position, the claim in question is not entitled to priority, under *State v. Bank of Commerce, supra, City of Lincoln v. Morrison, supra,* and *Morrison v. Lincoln Savings Bank & Safe Deposit Co., supra.* The notes were collected in cash, the bank continued in business until taken over, and no cash came into the receiver's hands, and the cash is not traced into any other property. No other conclusion is logically possible than that the trust fund has been dissipated.

Claimant offered in evidence two letters from the guaranty fund commission as admissions that it had a preferred claim against the fund. These were properly excluded by the district court. Claims against the fund cannot be established by admissions of officers in charge thereof, but only by bringing them within the conditions of the statute.

We have not overlooked the fact that the answer of the receiver is a general denial that any sum is due from the guaranty fund, which latter is a mere conclusion, but we are not thereby precluded from declaring the law applicable to the facts of record, evidence of which was received without objection and by stipulation of the parties.

The district court allowed the claim under the third cause of action as a preferred claim payable from the guaranty fund, upon the theory that it was a deposit. This was error. The relation of banker and depositor can only be created by contract, express or implied. The Omaha National Bank never consented that the proceeds of

the note be deposited in the Potter bank, and it does not appear that they were ever so treated by the latter.

We conclude from the above: (1) That the judgment of the district court disallowing the claim under the first cause of action as a charge against the depositors' guaranty fund be reversed and cause remanded, with instructions to allow the same in the sum of $974.08, with interest at 5 per cent. from November 5, 1923, to February 13, 1924; (2) that said judgment as to the second cause of action be reversed in so far as it denies priority to said claim and cause remanded, with instructions to allow the same against the depositors' guaranty fund in the sum of $3,500 with interest at 5 per cent. from August 13, 1923, to February 13, 1924; (3) that said judgment be reversed as to the third cause of action in so far as it allows said claim as a charge against the depositors' guaranty fund; (4) in all other respects said judgment is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

GOSS, C. J., and DEAN, J., dissent as to the third cause of action.

ROSE, J., dissents.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. FIRST STATE BANK OF RICHFIELD: R. O. BROWNELL, RECEIVER, APPELLEE: SAMUEL A. SNIDER, INTERVENER, APPELLANT.

FILED JULY 2, 1928. No. 26076.

1. **Banks and Banking**: GUARANTY FUND: DRAFTS. A bank draft drawn upon another bank in which the drawer has sufficient funds to cover may be the equivalent of money sufficient to bring the draft of the payee bank issued in reliance thereon within the protection of the depositors' guaranty fund.

2. ———: ———: LIABILITY. In determining the question whether the depositors' guaranty fund is chargeable with the amount of an alleged deposit or bill of exchange, the transaction will be considered as it appeared to the parties at the

time, and not as subsequent events may have changed the situation.

3. ———: ———: ———. The mere fact that a transaction resulted in a loss to the bank will not relieve the depositors' guaranty fund from payment of a deposit or bill of exchange which was under its protection at the time the transaction was entered into.

4. ———: ———: ———. The fact that the president of one bank, in drawing its draft, intended to defraud the bank will not deprive the holder of a draft issued by the payee of the fraudulent draft in reliance thereon, and without notice of the fraud, of the protection of the depositors' guaranty fund, the holder being also without notice of the fraud.

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

William Baird & Sons, for appellant.

Crossman, Munger & Barton, contra.

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

REDICK, District Judge.

This is a proceeding by the claimant, Samuel A. Snider, seeking the allowance against and payment from the depositors' guaranty fund of his claim as a holder of exchange issued by the First State Bank of Richfield, an insolvent. The Richfield bank was taken over by the department of trade and commerce September 1, 1926, and a receiver therefor appointed September 30 following. Intervener filed the claim in usual course, and same was allowed as a general claim against the bank, but refused payment from the guaranty fund by the district court, and claimant appeals.

The objections of the receiver to the allowance of the claim against the guaranty fund may be summarized as follows: That the Richfield bank received neither money nor its equivalent, nor was any fund or thing of value placed on deposit in, or at the command of, said bank in

consideration for the bill of exchange in question; that the intervener and the First National Bank of Osceola, through which he claims, negligently paid a certain check for $4,750, referred to later; and that the depositors' guaranty fund did not profit or benefit in any way by the transaction resulting in the issuance of the exchange in question.

Most of the facts are stipulated and the remainder are not in dispute. One E. C. Goerke and Charles Marshall were owners of the majority of the stock in the Richfield bank of which Goerke was president, and also of the State Bank of Papillion of which Goerke was president and Marshall cashier. June 26, 1926, Goerke drew his check for $5,000 on the Richfield bank (in which he had to his credit only $3.14), payable to Samuel A. Snider, president of the First National Bank of Osceola, Nebraska, who indorsed and deposited it in the Osceola bank to the credit of Goerke on June 28, 1926, and the same day it was sent for collection to the United States National Bank at Omaha, and by it to the Federal Reserve Bank, Omaha branch, which presented it for payment, together with two small items aggregating $68.80, not in controversy herein, to the Richfield bank by a cash letter July 1. The Richfield bank in payment, on July 1, issued its draft payable to the Federal Reserve Bank upon the Union State Bank of Omaha for $5,068.80, which is the bill of exchange involved in this proceeding. Prior to the presentation of this bill to the Union State Bank on July 3, payment was stopped by the Richfield bank by notification from Graham, its cashier. Thereupon the amount of said draft was charged back by the Federal Reserve Bank to the United States National Bank and by the United States National to the First National Bank of Osceola, which charged the same to the account of claimant, Snider, and it was paid by him, and he is now the holder of said draft.

The Richfield bank and Papillion bank were located about five miles apart. On June 30, 1926, Paul N. Graham, cashier of the Richfield bank, called at the Papillion bank

and was notified by Goerke that an item of $5,000 would appear against him that day in the Richfield bank, and Goerke as president thereupon drew a draft of Papillion bank on the Union State Bank of Omaha payable to the Richfield bank for $5,000, dated July 1, and delivered the same to Graham for the purpose of taking care of Goerke's check, Graham returned to Richfield, and on the following morning the Goerke check was presented, as above stated, and the bill in controversy issued. This draft of the Papillion bank was not credited to Goerke by the Richfield bank as a deposit, but was substituted for the Goerke check to Snider upon payment thereof. Late in the afternoon of July 2 Graham again called at the Papillion bank and found the same in the hands of the department of trade and commerce with bank examiners auditing the books. Goerke had disappeared the evening before and is now a fugitive from justice. At this time Graham was informed by the agent of the department of trade and commerce that the $5,000 draft which Goerke had given to the Richfield bank was fraudulent and without consideration, and that payment thereon had been stopped, and advised Graham to stop payment on the draft of the Richfield bank issued in payment of Goerke's check, which was done by Graham that evening by telegraph to the Union State Bank. Payment was stopped on the Goerke draft July 2, and the same has never been paid.

June 29, 1926, Goerke drew his check in favor of C. E. Marshall on the First National Bank of Osceola for $4,750 upon his credit set up by his previous check on the Richfield bank. This check was indorsed by Marshall and sent to the Union State Bank for the account of the Papillion bank, which was credited therewith. Thereupon the Union State Bank forwarded said check for collection to the First National Bank of Omaha which in turn cleared to the Federal Reserve Bank in Omaha, and it later mailed the same to the Osceola bank. The latter received the check, charged Goerke's account with the same, and remitted the amount thereof to the Federal Reserve Bank by draft on

the United States National, which paid the same and charged the bank. The claimant received assignments of the bill of exchange in controversy from the Federal Reserve Bank and the Osceola bank and is now the holder of the same.

The $4,750 item credited to the Papillion bank by the Union State Bank was paid and remained there, never having been withdrawn. On June 29, 1926, the Papillion bank had to its credit in Union State Bank $10,770.59; on June 30, $13,608.76; July 1, $9,288.59; and on July 2, $8,288.71. On July 3 the Union State Bank applied the sum of $8,288.71, which included the item of $4,750, upon bills payable to the Union State Bank from the Papillion bank.

The Papillion bank was taken over by the department of trade and commerce on July 3, 1926, and receiver appointed therefor July 6. It has never been determined as a fact whether the $5,000 draft drawn by Goerke in favor of the Richfield bank was fraudulent as against the Papillion bank or not; but it appears that the receiver of the latter is unable to discover from an examination of the books of the bank any consideration therefor. The fact remains, however, that out of these transactions the Papillion bank received credit with the Union State Bank to the extent of $4,750, which was applied in reduction of its indebtedness to that bank. Whether or not Goerke's draft was a fraud upon the Papillion bank, which seems quite probable, it is not claimed that Graham, cashier of the Richfield bank, the claimant, or the Osceola bank, was a party thereto or had any notice thereof; neither is it claimed that they had any knowledge of the failing condition or insolvency of the Papillion bank.

The crucial question for determination in this case is whether or not the Richfield bank, in consideration for the bill of exchange in controversy, "received money or its equivalent, or any fund or thing of value placed on deposit in, or at the command of, said bank in intention or effect," thereby entitling said bill to payment from the

guaranty fund. It has been held time and again in this state that these conditions must be present in the case of a deposit in order that the same may be properly charged against the guaranty fund; and holders of exchange are subject to the same conditions. As was said in *State v. Farmers Bank of Halsey*, 111 Neb. 117: "The term 'holders of exchange' as used in this section relates to those transactions where money or its equivalent has been deposited in the bank and a bill of exchange upon some other bank has been issued in lieu thereof."

The claimant contends that the draft of the Papillion bank signed by Goerke, president, and drawn upon the Union State Bank, in which the Papillion bank had sufficient funds to meet the draft, was the equivalent of money, within the meaning of the statute; while the receiver insists that because it does not appear that the Papillion bank received any consideration for the draft, and because the transaction was an attempt on the part of Goerke to defraud the Papillion bank, the whole transaction was tainted, and to allow the claim would be fraud upon the guaranty fund.

It was said by Letton, J., in *State v. American State Bank*, 112 Neb. 182, at page 186: "The transaction must be considered as it appeared to the parties at that time, and not as subsequent events may have changed the situation. That which would be good judgment under normal circumstances may prove to have been unwise in the light of extraordinary or unusual subsequent events, such as periods of unlooked-for financial depression." We think this is a correct statement of the law, and that in determining the problem before us we must consider the facts and circumstances as they existed on July 1, 1926, the date when the draft in question was issued, unaffected by what may have occurred subsequently. We have held that a check, equivalent to money for banking purposes, if accepted by a bank as the consideration for a time certificate of deposit, may amount to a deposit within the meaning of the bank guaranty law. *State v. South Fork State*

Bank, 112 Neb. 623. We find little difficulty in holding that the draft of the Papillion bank drawn by its president upon the Union State Bank, which had in its hands sufficient funds for payment, constituted, on July 1, an equivalent of money deposited in or received by the Richfield bank, in consideration for the issuance of its draft in payment of Goerke's check to Snider. But for the failure of the Papillion bank on July 2, an occurrence entirely beyond the control of any of the other parties to the transaction, the draft of the Papillion bank would, in all human probability, have been paid; but whether it would have been paid or not, at the time of its issuance the Papillion bank was a going concern and had to its credit in Union State Bank sufficient funds to cover. We fail to perceive how the failure of the Papillion bank, taking it over by the department of trade and commerce, and stopping payment of the draft could affect the rights of the holder of the draft which were fixed at the date of its issuance. None of the parties to this proceeding were connected with or had any knowledge of the fraud of Goerke, if one was attempted, and the transaction upon its face had all the appearance of a legitimate banking transaction. The fact that in the end, because of matters beyond its control, the Richfield bank never received the proceeds of the draft is not determinative of the question. It may easily happen that, through mistake of judgment or as the result of unforseen circumstances or unavoidable casualty, a transaction entered upon in good faith and for full value may result in a loss; but this would not ordinarily affect the rights of innocent third parties. It frequently happens that a note which is considered perfectly good at the time, discounted by a bank, is not paid when due and results in a loss; but this would not prevent the depositor of the proceeds of the discount from being protected by the guaranty fund. If, at the time the draft in question was issued, the holder was under the protection of the bank's guaranty fund, the subsequent acts of third parties resulting in loss would not release the fund from liability.

We think the receiver places too much stress upon the fact of the intention of Goerke to commit a fraud. It may be that the Papillion bank, by reason of such fraud, might escape liability upon its draft, but third persons, without notice of fraud, stand in a different position.

It is further contended by claimant that the guaranty fund received the benefit of the fund credited to the Papillion bank by the Union State Bank in the sum of $4,750, and that therefore it should not be heard to deny claimant's right. It is not possible from the record before us to determine the correctness of this contention. Before the guaranty fund could be said to be benefited, it would have to appear that the fund in the Union State Bank would have been available to the receiver of the Papillion bank for the payment of *depositors, exchange or other claims upon the fund.* It is argued that by the application of the fund to the bills payable of the Papillion bank, the guaranty fund was relieved *pro tanto;* but such bills payable were not claims upon the guaranty fund, and it is probable that the Union State Bank had the right to apply the fund as it did. But this question need not be further discussed in view of our holding as above indicated on the other proposition.

We conclude the bill of exchange is a proper charge against the guaranty fund, and that the district court erred in the contrary holding.

It follows that the judgment of the district court must be reversed and the proceedings remanded, with instructions to allow the claim as against the guaranty fund and order the same paid therefrom, if the assets of the bank are insufficient for that purpose.

REVERSED.

LEWIS PURVIS V. STATE OF NEBRASKA.

FILED JULY 6, 1928. No. 26322.

1. **Criminal Law:** INCEST: QUESTION FOR JURY. When a brother is charged, under section 9762, Comp. St. 1922, relating to

incest, with having had sexual intercourse with his own sister, 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.

2. **Incest:** INFORMATION. When a defendant is charged with incest under section 9762, Comp. St. 1922, and the language of the information charges him with having "feloniously, rudely, and licentiously" committed the offense, such language is a substantial compliance with the statute.

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

J. E. Willits, for plaintiff in error.

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

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

DEAN, J.

Lewis Purvis, aged 19, defendant, was informed against, tried, and convicted in Adams county, under section 9762, Comp. St. 1922, of having "feloniously, rudely, and licentiously" cohabited with Irene Purvis, his sister, some time in January, 1927. The jury recommended leniency. Upon the motion for a new trial being overruled, the defendant was sentenced to serve a term of five years in the state reformatory. From the sentence so imposed the defendant prosecutes error.

The prosecutrix testified that when the trial was on she was 16 and was then living at Hastings with her father and her brother Lewis. Her mother had been dead about a year. On the day that the offense was committed she was attending the public school at Hastings. From her evidence in respect of the facts it appears that a week or two after the holidays, in January, 1927, she returned from school in the evening and went upstairs to her bedroom, and thence to her father's bedroom, where, she testified: "I had intercourse with him (the defendant) * * * on the

bed. Q. Kindly tell the jury what you mean when you say that you had intercourse with him. * * * A. I told you once." At this point a colloquy followed between the cross-examiner and the prosecutrix, which was doubtless intended by defendant's counsel to develop palliating facts, if possible, in behalf of the accused. We do not however, for obvious reasons, find it necessary to insert here for publication more of the details of Miss Purvis' evidence in respect of the offense charged against the defendant. We deem it sufficient to say that, in view of the evidence before us and the law applicable thereto, this motherless girl of 16 found sufficient language with which to tell the jury just what happened to her in that upper bedroom of her father's home on that afternoon in January, 1927, upon her return from school. When repeatedly interrogated in respect of the offense, she repeatedly answered, "I told you once," or she used other words of like import. But counsel makes much of the fact that this immature girl, who was debauched by an unnatural brother, as the jury found, said that she did not "know now what the meaning of sexual intercourse is." In brief, the defense insists that the prosecutrix' failure to use the statutory term, "sexual," when testifying, was insufficient with the requirements of the statute, and that the state did not therefore prove the offense. We do not agree with counsel. We conclude that before the case was ended the offense was abundantly established, and of this the record leaves no doubt. Her language satisfied both the statute and the jury.

The chief of police was night captain at Hastings when the arrest was made. He testified that, when arrested, the defendant said "he had intercourse with his sister," and that he made the statement "of his own free will." He further testified: "Q. At that same time and place did Irene Purvis make any statements? A. Yes, sir. Q. And was Lewis Purvis present when she made those statements? A. Yes, sir. Q. What, if anything, did she say? * * * A. Miss Purvis stated she had intercourse with her brother

at 144 East 5th street, Hastings, Nebraska." On the state's rebuttal this witness testified that the defendant said that he used precautionary or preventive measures with his sister at the time, and that he admitted the fact of his guilt more than once when he talked to him. There is competent evidence to establish the fact that no offer of leniency was made as an inducement to the defendant to make the incriminating statements attributed to him at any time, and that he was not placed in fear, and that whatever statements he made were voluntary "and of his own free will." It also appears from the evidence of another witness that the defendant, when asked if this had ever happened before, answered: "Yes; once in August."

The defendant testified in his own behalf and denied the charge. He admitted that he talked with the chief of police when he was arrested, and said: "I did'nt deny it at first. * * * I didn't exactly tell them I done it." In his evidence he averred that the county attorney "read the law to me and told me what I would get out of this." When interrogated by the county attorney as to whether he was guilty, he answered: "I didn't own up to it then. * * * I didn't answer that right out." There is more evidence of like tenor that we do not find it necessary to repeat here. See 31 C. J. 384.

The defendant contends that he is not charged with the offense in the language of the statute, in that the information charges him with having "feloniously, rudely, and licentiously" committed the offense, whereas the statute reads "shall lewdly and lasciviously cohabit." This assignment is without merit. An accepted authority holds that the words "lascivious" and "licentious" are synonymous. Webster's New International Dictionary. Other exceptions are taken by counsel to the introduction of certain of the evidence, but we do not find that they are prejudicial to the substantial rights of the defendant. Counsel also contends that the jury were not properly instructed as to the law applicable to the facts, and in support of his contention cites *Kraus v. State,* 102 Neb. 690. We do not

think the citation is in point. And upon an examination of the instructions complained of we conclude that reversible error cannot be predicated upon the instructions submitted by the court. Nor did the court err in its refusal to give the four instructions requested by the defendant, from the fact that the substance of the instructions so tendered is incorporated in the language of those submitted to the jury of the court's own motion. Where a brother is charged, under section 9762, Comp. St. 1922, relating to incest, with having had sexual intercourse with his own sister, 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.

An examination of the record convinces us that the refusal of the court to set aside the verdict and grant a new trial is clearly without error. The plea of defendant's counsel for leniency was apparently granted, in that the court imposed the minimum statutory sentence of five years, whereas the maximum sentence provided for by the act is fifteen years. In view of the facts and the law, the judgment of the district court is

AFFIRMED.

JAMES MCBRIDE ET AL., APPELLEES, V. WAYNE TAYLOR ET AL., APPELLANTS.

FILED JULY 6, 1928. No. 26557.

1. **Appeal:** CONSTITUTIONALITY OF STATUTE. Where a litigant claims a statute is invalid because violative of some constitutional provision, such invalidity must be presented by the pleadings or in some other form in the trial court to be of any avail in this court, and such objections cannot, ordinarily, be raised for the first time in the appellate court.
2. **Banks and Banking:** GUARANTY FUND COMMISSION: EXECUTION. Where, under the provisions of section 1, ch. 30, Laws 1925, a state bank is in charge of the state guaranty fund commission, it is entitled to a reasonable time in which to determine whether the bank may be turned back to its officers and operated as a going concern, or shall be closed and its affairs wound up,

and during such time the assets of the bank are immune from seizure on execution.

3. ———: ———: "REASONABLE TIME." What is a reasonable time in which to make such determination, ordinarily, is not a question of law but one of fact, to be determined from the facts and conditions existing in the particular case.

4. ———: ———: EXECUTION. Where a judgment creditor of a state bank in the hands of the guaranty fund commission, pursuant to the provisions of section 1, ch. 30, Laws 1925, seeks to levy an execution upon the assets of the bank, on the theory that the assets of the bank are no longer immune to seizure on execution, because the commission has retained possession of the bank and its assets for an unreasonable time, it is incumbent upon such creditor to allege and prove that the commission has been in charge for more than a reasonable time in which to make such determination.

APPEAL from the district court for Dundy county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

J. F. Ratcliffe, for appellants.

Butler & James and *Perry & Van Pelt, contra.*

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

GOOD, J.

This is an action to enjoin the levy of an execution issued to enforce collection of a judgment, recovered against a state bank while it was in the charge and under the control of the guaranty fund commission "for the purpose of making an investigation and examination of its affairs to determine whether solvency might be restored and to dispose thereof as provided by law." Defendants, who are the sheriff and judgment creditor, to the petition interposed a general demurrer, which was overruled. They refused to further plead, and the court entered judgment for the plaintiffs, enjoining the enforcement of, or attempt to enforce, the judgment, and execution issued thereon, "as long as the guaranty fund commission of the state of

Nebraska lawfully retains possession of the assets of the Citizens State Bank of Benkelman, Nebraska, pursuant to the provisions of section 1, chapter 30, Laws of Nebraska for 1925." The defendants have appealed.

The following salient facts are set forth in the petition: March 1, 1928, the department of trade and commerce of the state of Nebraska (hereinafter referred to as the department) took possession of the Citizens State Bank of Benkelman, a banking institution, organized under the laws of the state of Nebraska, and which will be hereinafter referred to as the bank. On March 20, 1928, the department transferred possession of the bank and all of its assets to the guaranty fund commission of the state of Nebraska (hereinafter referred to as the commission). Since March 20, 1928, the commission, through one of its special agents, has been in possession of the bank and its assets, under the provisions of section 1, ch. 30, Laws 1925, for the purpose of making an investigation and examination of the affairs of the bank to determine whether solvency might be restored and to dispose thereof, as provided by law. Attached to and made a part of the petition is a copy of instructions, issued by the secretary of the commission to the special agent in charge, which will be later referred to. On April 12, 1928, defendant Taylor recovered a judgment in the county court against the bank for merchandise sold and delivered, and on the same day filed a transcript of the judgment in the district court for Dundy county, and caused an execution to be issued thereon and placed in the hands of defendant Davis, sheriff of said county, for the purpose of levying upon the assets of the bank. The bank has numerous tracts of real estate situate in Dundy county.

The questions we are requested to determine are: (1) Under the facts, were the assets of the bank in the hands of the commission immune from seizure on execution, issued on the judgment in favor of defendant Taylor? (2) Was the judgment of defendant Taylor a lien upon real estate, standing in the name of the bank in Dundy

county? (3) Had a first and prior lien attached to the assets of the bank in favor of the depositors, as provided by section 8033, Comp. St. 1922, as amended by section 12, ch. 30, Laws 1925?

Section 1, ch. 30, Laws 1925, provides: "Whenever it shall appear to the department of trade and commerce, from any examination or report provided for by this article, that the capital of any corporation transacting a banking business under this article is impaired, that such corporation is conducting its business in an unsafe or unauthorized manner, or is endangering the interests of its depositors, or upon the failure of such corporation to make any of the reports or statements required by the provisions of this article, or if the officers or employees of any bank shall refuse to submit its books, papers, and affairs to the inspection of any examiner, or if any officer thereof shall refuse to be examined on oath touching the affairs of any such bank, or if from any examination or report provided for by law, the department of trade and commerce shall have reason to conclude that such bank is in an unsafe or unsound condition to transact the business for which it is organized, or that it is unsafe and inexpedient for it to continue business, or if any such bank shall neglect or refuse to observe any order of the department of trade and commerce, such department may forthwith take possession of the property and business of such bank, and place it in charge of the guaranty fund commission, who shall thereafter conduct the affairs of said bank, and who shall retain possession of all money, rights, credits, assets, and property of every description belonging to such bank, as against any mesne or final process issued by any court against such bank or corporation whose property has been taken, and may retain such possession for a sufficient time to make an examination of its affairs, and dispose thereof as provided by law."

The foregoing section clearly authorizes the commission to retain possession for a sufficient time in which to make an examination of the affairs of the bank and dispose

thereof as provided by law. Section 5 of said chapter 30 provides that if the commission, from its examination, shall determine that it is impossible to preserve the bank as a going concern, it shall communicate the facts to the attorney general who shall cause an application to be made to the district court for an order directing the commission to take charge of the business, assets and property of the bank and to wind up its affairs.

The defendants argue that the liquidation of an insolvent bank is a function of the judicial branch of the state government, and that any statute, which directly or in effect authorizes the liquidation of an insolvent bank by the guaranty fund commission, is unconstitutional, and that a statute, which authorizes the guaranty fund commission to retain possession of an insolvent bank for a period of three months, during which time the property of the bank is immune from seizure on execution, as provided by section 4, ch. 30, Laws 1925, is in conflict with both the federal and state Constitutions.

Whether the statutes involved are in conflict with the Constitution is not a question presented by the record. Defendants demurred to the petition on the ground that the facts stated were insufficient to constitute a cause of action in favor of the plaintiff. It is a rule that where a statute is, for any reason, claimed to be violative of the Constitution such invalidity must be presented by the pleadings or in some form to the trial court, and that such objection cannot ordinarily, be raised for the first time in the appellate court. *Clearwater Bank v. Kurkonski,* 45 Neb. 1; *Farmers State Bank v. Nelson,* 116 Neb. 541. The demurrer does not challenge the constitutionality of the statutes involved; nor is there anything in the record from which it appears that such question was ever submitted to or determined by the trial court. Under the circumstances, we decline to consider or pass upon the constitutionality of the statutory provisions involved in this action.

Defendants concede that under the provisions of section

1, ch. 30, Laws 1925, the commission is entitled to a reasonable time in which to determine whether it is impossible to preserve the bank as a going concern, and that during such time the assets of the bank in the hands of the commission are immune from seizure on execution of judgment against the bank. But they further urge that, since the commission has been in charge for 23 days, such period was more than a reasonable time in which to make an examination to determine whether the bank should be closed and liquidated or could be operated as a going concern, and further contend that the instructions, issued to the special agent of the commission in charge of the bank, show that it had already been determined that the bank was insolvent and should be liquidated, and that the commission could not, therefore, operate the bank as a going concern and hold the bank's assets immune from seizure on execution.

In the instant case we are not called upon to determine whether the three months, allowed to the commission by section 4, ch. 30, Laws 1925, is more than a reasonable time in which to determine whether the bank shall be turned back to its officers as a going concern, or closed and liquidated by means of receivership, because that question involves the validity of the statute which, as heretofore pointed out, is not raised and presented by the record. In the instant case the commission had been in charge but 23 days. The record does not disclose the character, extent, location or condition of the bank's assets. For aught that appears, they might include properties, widely separated in distance and of such a doubtful or peculiar nature or character that considerable time might be required to determine their value. Furthermore, it might appear that the capital was to some extent impaired, and the stockholders of the bank were desirous of restoring the impaired capital, and what would be a reasonable time in which to restore the impaired capital could only be determined when all the facts and circumstances were known.

In their brief defendants admit that when a state bank is in the hands of the commission, pursuant to the provisions of section 1, ch. 30, Laws 1925, the assets of the bank are immune from seizure on execution during a reasonable time, for the commission to ascertain and determine whether the bank may be continued as a going concern or be closed and its affairs wound up. Under this admission, defendants would be required to show that an unreasonable time in which to make such decision had elapsed. This they have failed to do.

Defendants argue that the insolvency of the bank and the necessity for winding up its affairs had been previously determined by the commission, and that such fact is disclosed by the instruction issued by the secretary of the commission to the agent in charge, a copy of which instruction is attached to and made a part of the petition.

An examination of the instruction discloses that it is a form letter, or general form of instruction, issued to agents of the commission who are placed in charge of state banks. Nowhere in this instruction is any particular bank referred to. The instruction will apply both to the period of preliminary examination to determine whether the bank could be operated or should be closed, and to the period after such determination has been made. The specific allegation of the petition, that the commission is in charge of the bank for the purpose of making the examination, is admitted by the demurrer. We must therefore assume that when this action was brought the commission had not determined whether the bank could be turned back to its officers and operated as a going concern, or whether it should be closed and its affairs wound up.

The conclusions reached render it unnecessary to consider other questions argued in the briefs. The judgment of the trial court is right and is

AFFIRMED.

DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. BANKERS AUTOMOBILE INSURANCE COMPANY, CROSS-APPELLEE: GEORGE M. CHRISTIAN ET AL., INTERVENERS AND CLAIMANTS, APPELLEES AND CROSS-APPELLANTS.

FILED JULY 6, 1928. No. 26274.

1. **Corporations:** NOTICE OF BY-LAWS. Under the terms of section 469, Comp. St. 1922, constructive notice of the provisions of corporate by-laws will be imputed to third parties only "if a copy thereof, with the names of the officers appended thereto, is posted in some conspicuous place at the places of doing business of such corporation, subject to public inspection."
2. **Principal and Agent:** NOTICE TO AGENT. A principal is only chargeable with notice communicated to, or knowledge acquired by, his agent in another transaction at another time, and when he was acting for another principal, when sufficient proof is made that such knowledge or notice was actually present in the mind of the agent at the time of the transaction in question.
3. ———: ———: BURDEN OF PROOF. The burden of proof to show that an agent, in a transaction for his principal, had in mind knowledge gained by him on a former occasion, and in a different transaction, with which his present principal had no interest or connection, is upon the party who seeks to charge the principal with notice by reason of such knowledge.
4. **Corporations:** STOCK AS COLLATERAL: PRIORITY OF LIEN. The lien of a holder of corporate stock as collateral security for the debt of the stockholder is superior to the lien of the corporation itself on said stock for a debt due to the corporation from the stockholder, when the corporate lien arises under a by-law which has never been posted, as required by law, and as to which the collateral holder had no notice, express or implied.
5. ———: ———: NOTICE. Notice to a corporation that the corporate stock of such corporation is held as collateral security for a debt of the stockholder is timely when given before an adversely interested party has changed his position because of the want of such notice.
6. ———: INTEREST ON DIVIDENDS. Under the facts of this record, the allowance of interest as made by the trial court, approved.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Marcus L. Poteet and *Hall, Cline & Williams,* for appellant.

C. M. Skiles, A. S. Johnston, Allen & Requartte, Charles E. Matson and *Foster & Anderson, contra.*

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

EBERLY, J.

Upon petition of the department of trade and commerce a receiver was appointed by the district court for Lancaster county, Nebraska, for the Bankers Automobile Insurance Company, a Nebraska corporation, and thereafter on April 10, 1921, an order was made liquidating that company. A controversy arising as to who was entitled to liquidating dividends on certificates of stock No. 1 for 480 shares and No. 5 for 320 shares of the capital stock issued by the insurance company to one Charles Maixner, issues were framed and a trial had.

So far as concerns the parties now active in the litigation before this court, and as to questions now being insisted upon, it may be said that the district court for Lancaster county, Nebraska, found in favor of (1) American State Bank; (2) George M. Christian and Charles A. Herman; (3) E. G. Maggi; with "right of priority in order named," and found generally against all other claimants, including the receiver of the Bankers Automobile Insurance Company. From this the last named appeals, and the defendants Christian and Herman have also filed a cross-appeal.

The evidence in the record supports the finding of fact of the district court which, for the purpose of this case, may be summarized briefly as follows: That Charles Maixner on or about October 1, 1917, being the owner of 800 shares of stock in the Bankers Automobile Insurance Company, represented by the certificates last referred to, secured a loan from the American State Bank;

as part of that transaction he executed and delivered to that bank his promissory note in the sum of $20,000, and also as collateral security therefor assigned, delivered and pledged the 800 shares of stock, then and there expressly stipulating, by the terms of the note executed, that such stock should be held by that bank "as collateral security to any indebtedness that he then or thereafter might owe the American State Bank while the stock was held by it as collateral;" that of this indebtedness thus secured there remained unpaid to the receiver of the American State Bank, at the time of trial herein, the sum of $9,365.61.

It is fairly established by the evidence that the entire proceeds of this loan thus made to Maixner, entered into, was represented by and formed the sole consideration of two certificates of deposit, aggregating $20,000, on that day issued by the American State Bank. While the record before us does not disclose the payee named in these certificates, yet the inference is amply sustained that, substantially contemporaneous with their issuance, they were delivered to the Bankers Automobile Insurance Company either as the payee named therein or as indorsee of Maixner and were received by it in substitution of other assets previously owned and held by that company. The assets thus taken out of the treasury of the insurance company had been received by it from Maixner, and at the time of their return to him may be inferred to have been of very doubtful value, and probably of no value whatsoever.

At the time of this transaction it is to be remembered that Dwiggins, who was the sole person to act for, and in behalf of, the bank in making the loan, and who was then a director, its president, and the managing officer, was also a director of the insurance company, and the owner of 20 shares of its capital stock. The result of the transaction, considered as an entirety, was to increase the value of all the stock of the insurance company, including the 20 shares of stock then owned by Dwiggins to the extent of the loan. It was, therefore, a transaction which

operated unquestionably for Dwiggins' private benefit as well as for the benefit of the insurance company.

It may be said in passing that the record sustains the conclusion that the relations between Maixner and Dwiggins at this time was of a close and confidential nature; that Dwiggins personally transacted all business between his bank and the former.

The record also discloses that on December 22, 1920, as security for a loan from the defendants George M. Christian and Charles A. Herman to said Charles Maixner, the latter assigned in writing any "equity which he might have in the stock referred to as collateral security for the amount of such loan." A similar assignment was made to E. G. Maggi subject to the rights of the American State Bank and Christian and Herman.

While the right to recover at all is challenged, there is no complaint as to the amounts adjudged due to the respective parties above named save and except as to the allowance of interest. The receiver of the Bankers Automobile Insurance Company insists that he is entitled to the liquidating dividends, and that his rights are prior to the prevailing parties in the district court because of the fact that the by-laws, alleged to have been adopted by the board of directors of the Bankers Automoboile Insurance Company, contain a provision as follows: "The company reserves a first and paramount lien upon the shares of stock and the certificates representing the same to secure the payment of any debt or obligation of the owner thereof in tort or in express or implied contract, to the company."

The claim of the receiver of the insurance company is based wholly upon the alleged fact that Dwiggins had actual knowledge of the adoption of a by-law by the insurance company at the time of the first meeting of its board of directors on August 10, 1917, reserving a first and paramount lien on all the stock of the insurance company to secure the payment of any debt or obligation of the owner thereof in tort or in express contract, and that,

therefore, his knowledge was imputable to his bank at the time the loan was first made and that institution parted with its money. The only evidence in the record tending to sustain this contention is a copy of the minutes of the first meeting of the board of directors. Dwiggins was, according to the secretary's minutes, one of the ten directors-elect present. At this meeting the officers of the insurance company were elected; its articles of incorporation were amended; arrangements were made and entered into for the sale of $250,000 worth of its common and preferred stock, and one of the items of business transacted is referred to in the record as "Mr. Charles Maixner moved the adoption of the following by-laws for the Bankers Automobile Insurance Company," which included more than seven typewritten pages. This motion was seconded by Mr. Kenyon and unanimously adopted.

The record does not, however, disclose that the by-laws adopted were at any time read to, or in the presence of, the assembled directors. There is no affirmative evidence in the record save and except that Dwiggins was present at the meeting during which he voted for the Maixner motion to adopt the by-laws.

It may be said in passing that the by-law quoted and which is the foundation of appellant's contention was not "posted" as required by section 469, Comp. St. 1922. It appears that this section was adopted from Iowa by the territorial legislature of 1866, and since that date has remained on the statutes of both states unmodified. While it has not as yet been construed by this court, it has been repeatedly before the supreme court of Iowa. The rule announced and adhered to by that tribunal is: "Constructive notice of the provisions of the by-laws will be imputed to third parties only if a copy thereof is posted in the principal place of business of the corporation, so as to be subject to public inspection; and, unless the statute is complied with in respect to posting, a stranger will not be bound thereby." *Iowa-Missouri Grain Co. v. Powers*, 198 Ia. 208.

It is obvious, therefore, that the by-law relied upon by the appellant can be given no force and effect in this proceeding in the absence of actual notice to the American State Bank.

The insurance company, however, insists that knowledge of the existence of the terms of its by-law "reserving a lien" is imputable to the bank because Dwiggins, as president and director, represented the bank in the making of the original loan of $20,000 on October 1, 1917; that the same Dwiggins, as a stockholder of the insurance company, was present at the organization meeting of that corporation that convened August 10, 1917, at 11 a. m., and was at that time elected a director; that by Dwiggins as such director, in company with the nine other directors then elected, a set of by-laws containing the provision reserving a lien upon stock was duly adopted; that, therefore, what Dwiggins knew as a director of the insurance company on August 10, 1917, he must be deemed to know, as president of the bank and director on October 1 following, when he made the original loan and accepted the stock as collateral security thereto.

This court has long declared the rule that—"It is the duty of an agent to make known to his principal all facts concerning the service in which he is engaged that come to his knowledge in course of his employment, and this duty he is, in a subsequent action between his principal and a third person, conclusively presumed to have performed." *Modern Woodmen of America v. Colman,* 68 Neb. 660. See, also, *Pringle v. Modern Woodmen of America,* 76 Neb. 384.

It is to be noted, however, in the present case, that whatever information Dwiggins actually acquired at the organization meeting of the insurance company was not acquired by him in the course of his employment as a bank officer, and was obtained in a transaction in which the bank at the time had no interest whatever.

The distinction involved in this case, in principle, is well stated in one of the old cases in another connection in the

following words: "Though notice to a man's counsel be notice to the party; yet where the counsel comes to have notice of the title in another affair, which it may be, he has forgot, when his client comes to advise with him in a case with other circumstances; that shall not be such a notice, as to bind the party." *Preston v. Tubbin,* 1 Vern. (Eng.) 286.

It is obvious that to hold a principal chargeable in a present transaction with what his agent may have casually read or heard a half century prior thereto, when he was not acting in behalf of such principal or engaged in a transaction in which such principal had any interest whatever and which may have been by him wholly forgotten, would not only be unjust but would amount to a manifest absurdity. On the other hand, cases could well be imagined where the nature of the facts were such that the prior transaction would be indelibly impressed on the mind of such agent, and such knowledge in a present transaction should be justly chargeable to his present principal.

Without an extended discussion of the authorities or the reasoning upon which they are based, it may be said that the controlling rule, applicable to the facts above suggested, appears to be: "A principal is only chargeable with notice communicated to or knowledge acquired by his agent in another transaction at another time and when he was acting for another principal, when clear proof is made that the knowledge or notice was present in the mind of the agent at the time of the transaction in question." *Constant v. University of Rochester,* 111 N. Y. 604. See, also, *Distilled Spirits,* 11 Wall. 356; 3 Thompson, Corporations (3d ed.) sec. 1763; 4 Fletcher, Cyclopedia Corporations, secs. 2221, 2222; 2 Mechem, Agency (2d ed.) sec. 1809.

The question, therefore, in its essentials, is not what the man who is now acting as an agent formerly heard or saw, but what he now actually remembers. Concededly, the facts involved and to which his knowledge relates may be of such a nature as to necessitate as a presumption of fact that they were remembered when the subsequent

transaction in which he officiated as agent occurred. Such, indeed, was the case in *Henry v. Omaha Packing Co.*, 81 Neb. 237.

But the facts disclosed by the record in the present case are not of such a character. Here, from nothing shown but attendance at a corporate meeting, it is sought to impute actual knowledge at a subsequent time of a single provision of a corporate by-law there adopted. No reading of these by-laws of which this provision formed a part by, to, or in the presence of, Dwiggins either prior to, at the time of, or after their adoption, is disclosed. No evidence appears of any discussion of their provisions. A mass of business transactions and details transacted at the same meeting, pertaining to the commencement of the business for which the insurance company was organized, is shown by the secretary's record, covering 12 typewritten pages.

Considering the record as an entirety, we cannot judicially say that it establishes as a fact that knowledge of the provisions of the by-law pertaining to the reservation of a lien on stock was in Dwiggins' mind at the time he first made the loan which forms the foundation of this litigation. Indeed, it may be said that no business man, acting with good faith, exercising reasonable care, with such knowledge in his mind, would have carried out the transaction of making the original loan by the bank in the manner presented by this record. Under the circumstances established it could have occurred in the manner disclosed by the record only if actual knowledge of the existence of the by-law in question was wholly absent from the mind of the representative of the bank.

In this connection it is also to be remembered that the well established rule is, that the burden of proof to show that an agent, in a transaction for his principal, had in mind knowledge gained by him on a former occasion and in a different transaction, is upon the party who seeks to charge the principal with notice by reason of such knowl-

edge. *Constant v. University of Rochester*, 111 N. Y. 604, 2 L. R. A. 734.

The form of the issues in the present case imposes this burden upon appellant, and this he has failed to sustain. It follows that the rights of the bank, at the time of making the loan, were in no manner affected by the provisions of the by-law hereinbefore quoted.

Neither can we sustain the contention that the rights of the bank, under the facts in this record, were subsequently impaired by failure to give notice of the pledge to the insurance company.

At the annual election of the corporate officers following the 10th day of August, 1917, Dwiggins was not only selected director but, for the first time, was duly elected secretary of this institution. The pledged stock was then in his actual custody and control as the managing officer of the bank. It was daily before him; it was subject to regular examination by the board of directors; was checked, examined and reported on by them in the ordinary course of business of the bank. The facts of the transaction were not therefore a mere matter of doubtful memory or of knowledge casually acquired. As a presumption of fact, fairly deducible from the evidence, Dwiggins, when he became secretary of the insurance company, actually had the knowledge of the existence of the pledge of the stock as an individual which, transmitted to him in his capacity as secretary by the bank, would have fully conformed to the contentions of appellant. It would seem that his knowledge then in his mind would thus be imputable to the insurance company. This presents, however, a question unnecessary to determine in the present case.

It further appears that actual knowledge of the pledge of stock was given to the representative of the insurance company on December 13, 1922. There is neither statute nor by-law in the record which fixes the time or manner when notice of pledge of stock is required to be given, and in any event, so far as the evidence shows, the delay which actually occurred was without prejudice to the appellant.

There was no extension of credit by the insurance company to Maixner on the basis of the record ownership of the pledged stock. Neither the situation nor relation of the parties was in any manner changed in the meantime.

It follows that, under the circumstances thus narrated, no rights can be predicated by the insurance company on the failure to register the stock at the time of the pledge. *Iowa-Missouri Grain Co. v. Powers, supra.*

The trial court, in its decree, allowed interest on the dividends accumulated on the 800 shares of stock which had been withheld from those entitled thereto. This action is challenged. It would seem that the principle enunciated in *Armstrong v. American Exchange Nat. Bank,* 133 U. S. 433, and in *Chemical Nat. Bank v. Armstrong,* 59 Fed. 372, and 23 R. C. L. 104, sec. 115, is applicable to the present situation, and that no error was committed by the district court in its disposition of this question.

We have not overlooked the other questions presented and argued in the briefs of the parties in this case. It is thought that the determinations made in this opinion are decisive and controlling.

It follows, therefore, that the judgment of the district court is correct, and the same is AFFIRMED.

STATE, EX REL. OTOE COUNTY AGRICULTURAL ASSOCIATION, APPELLEE, V. J. ED. WALLEN ET AL., APPELLANTS.

FILED JULY 6, 1928. No. 26592.

1. Agriculture: COUNTY AGRICULTURAL SOCIETIES: CONSTITUTION AND BY-LAWS. Chapter 13, Laws 1927, construed, and *held* to limit and restrict the power of adoption of constitution and by-laws in the organization of county agricultural societies, as therein provided, to such whose terms and provisions are in substantial conformity with "rules and regulations" adopted, or to be adopted, by the state board of agriculture, and for this purpose furnished by and through its "usual and proper officers."

2. ———: ———: ORGANIZATION: RULES AND REGULATIONS.

That the right, duty and power of the state board of agriculture to prepare and adopt reasonable rules and regulations pertaining to the organization of county agricultural societies, and covering the subject of the constitution and by-laws to be adopted thereby, were not in any manner affected by the enactment of chapter 2, Laws 1905, or any subsequent amendments thereto; and are and remain full, ample and complet

3. ———: ———: RULES AND REGULATIONS. That substantial compliance with such rules and regulations, so adopted and furnished, is essential to entitle a subordinate society, upon its organization, to recognition and to the financial support from the county board provided for by this act.

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

George H. Heinke, for appellants.

D. W. Livingston, contra.

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

EBERLY, J.

This, an action in mandamus, was brought by an organization styling itself the Otoe County Agricultural Association against the members of the board of commissioners of Otoe county, Nebraska, to require the latter "to include in the annual estimate for taxes for the year 1928, as a proposed levy, such part of one-fourth mill as will raise $2,000 for the use and benefit of relator as a society existing under section 6, ch. 13, Laws 1927, and thereafter at the time fixed by law, and in the manner provided by law, to include said amount for said purpose in the annual levy for taxes made for the year 1928."

In the pleading which constitutes the basis of the application it is alleged on behalf of the relator in substance that it was duly formed and organized under section 6, ch. 13, Laws 1927, and has, in all things, conformed to the requirements thereof, and "had adopted a constitution and by-laws for the government of said organization in conformity with law."

In addition to another defense pleaded, but the consideration of which is not necessary for our present purposes, the allegations of this pleading were denied by the respondent. On this issue there was a trial to the court who found in favor of the relator, and directed the writ to issue as prayed. Respondent appeals.

The real controversy between the parties turns on the proper construction of the following language of section 6, ch. 13, Laws 1927: "Whenever twenty (20) or more persons * * * shall have adopted a constitution and by-laws agreeable to the rules and regulations furnished by the usual and proper officers."

It is apparently conceded by the parties that a substantial compliance with this section, including the provision quoted, is a prerequisite to a valid organization, and to the right of relator to maintain the present action. The respondent insists that the statutory words, "furnished by the usual and proper officers," lawfully designate the state board of agriculture acting by and through their usual and proper officers. If this construction is correct, the appellant must prevail. The evidence in the record fails to establish that the constitution and by-laws in the instant case were not so adopted. The undisputed testimony of Mr. Severe, president of the relator, on this subject, is: "Q. Now you were present when the constitution and by-laws were adopted? A. Yes, sir. Q. Was the constitution and by-laws furnished you by the state board of agriculture? A. No, sir. Q. Was it ever submitted to the state board of agriculture for their approval? A. I couldn't tell you. It was the Cass county rules that we went by. Q. Had you ever submitted them to the state board of agriculture? A. No, sir. Q. And they were not furnished to you by the state board of agriculture? A. No, sir."

The form of the issues on which the case was submitted in the court below imposed the burden of proof upon the relator to establish a substantial compliance with the terms of the statute providing for its organization. In reference to Mr. Severe's evidence in the organization of relator,

"It was the Cass county rules that we went by," it may be said that a "Cass county agriculturel society was organized under a special act of the territorial legislature, approved January 25, 1856." If this is the society referred to by Mr. Severe, in view of the terms of the statute of its creation, obviously a compliance with its rules affords no basis for an inference that in so doing the requirements of the present law were met.

We, therefore, address ourselves to ascertaining the proper construction of the words, "shall have adopted a constitution and by-laws agreeable to the rules and regulations furnished by the usual and proper officers," as this is the real question involved in the appeal before us.

As preliminary to this consideration, it may be observed that there are few guides to construction more useful than that which directs attention to the prior condition of the law to aid in determining the full legislative meaning of the statutory change thereof. The legislative department is supposed to have a consistent design and policy and to intend nothing inconsistent or incongruous. *Cummings v. Everett*, 82 Me. 260.

Then, too, it is to be remembered that—"Agricultural societies are not corporations within the ordinary meaning of the term, but rather agencies adopted by the state for the purpose of promoting the interests of agriculture and manufacturing." *State v. Robinson*, 35 Neb. 401. See, also, *State v. Miller*, 104 Neb. 838.

Our first general legislation on this subject in this jurisdiction was "An act to encourage agricultural pursuits in the territory of Nebraska, approved January 12, 1860." It appropriated $300 to be awarded by the territorial board of agriculture as premiums in various branches of agriculture.

In 1866 (Rev. St. 1866, p. 3) there was adopted by the council and house of representatives "An act for revising, amending, consolidating and reenacting * * * laws of a general nature." Part 1 of chapter 1 of this act was devoted to the subject of agriculture. In section 1 there-

of appears the following: "Whenever twenty or more persons, residents of any county of the territory, shall organize themselves into a society for the improvement of agriculture within said county, and shall have adopted a constitution and by-laws agreeably to the rules and regulations to be furnished by the Nebraska territorial board of agriculture hereafter created, and shall have appointed the usual and proper officers; and when the said society shall have raised and paid to the treasurer * * * fifty dollars,"—it shall be entitled to receive financial support from the county as in said act set forth. Sections 2, 3, 4, 5 and 7 of this act provided, among other things, that societies thus organized were corporations; enumerated their powers and provided the manner, extent and purpose of the exercise thereof. Sections 8 to 11, following and inclusive, created the Nebraska territorial board of agriculture, referred to in the above quotation, defined its powers, duties and purposes.

It is plain from a reading of this act that sections 1 to 11, inclusive, constituted a complete plan for the promotion of agriculture, and together distinctly evidence a definite legislative policy on that subject. The county society, provided for in article 1 heretofore quoted, is expressly constituted a "subordinate society" to the territorial board. The chief officer of such "subordinate" society was, in terms, made an *ex officio* member of the latter. Annual meetings were provided for to be participated in not only by the members of the territorial board, but by the members thus *ex officio* created for the purpose of deliberating and consulting as to the wants, prospects and conditions of the agricultural interests throughout the territory. At these annual meetings the subordinate county societies were required to make reports in the manner prescribed.

In 1879 a further act was passed entitled, "For the government, support, and maintenance of the state board of agriculture," etc. (Laws 1879, p. 396), which, while retaining the fundamental plan on which the previous legis-

lation proceeded, amended, extended and amplified and made more definite the legislative intention embraced in the act of 1866 referred to. Under its terms the name "state board of agriculture" was substituted for the designation "Nebraska territorial board of agriculture," and the rights, powers and duties of county agricultural societies were more definitely enumerated, and the making of more complete and extended reports by the latter to the state board of agriculture was enjoined. Sections 2 to 11, inclusive, of this act of 1866, were repealed by the act of 1879, but section 1 of the territorial act of 1866 was retained. Excluding from consideration section 1 for the present, it may be said of this act of 1879 that, though the legislation in question has been subsequently amended in minor particulars and important additions made thereto, its provisions, so far as the general plan and policy are evidenced thereby, remain substantially unchanged.

The state board of agriculture still remains the ultimate, controlling agency which, in addition to supervising the holding of the state fair, gathers information, makes reports, and functions as contemplated by that act, and the county agricultural societies still retain the descriptive designation, "subordinate society," and are required to make their stated reports and carry on in the same subordinate capacity that was contemplated by the original act of 1879.

Section 1 of the territorial act of 1866 hereinbefore quoted though amended from time to time, was never repealed but has, at all times, constituted an essential part of this legislative plan. Indeed, the general policy of the state, controlling the manner and method of organization of "subordinate" societies, as evidenced by the territorial act of 1866, has been continued through all amendments and remains substantially unchanged in chapter 13, Laws 1927. Summarized, these organization requirements, thus continued in the statutes, are: (1) Twenty residents of any county; (2) organized into a society for the improvement of agriculture within said county; (3) adoption by

such persons so organizing of "a constitution and by-laws," the terms of which shall conform to the requirements imposed upon them from without the subordinate society; (4) the raising of $50 by the membership for society purposes annually.

In 1881 (Laws 1881, ch. 1) section 1 of the act of 1866 was amended by substituting for the words, "Nebraska territorial board of agriculture," the words, "state board of agriculture."

It is also to be noted that, from the time of its first enactment in 1866 continuously down to the adoption of the amendment of 1905, the language of the portion of this section pertinent to the question presented for decision in this case (excepting as to change of name in 1881) was: "Shall have adopted a constitution and by-laws agreeable to the rules and regulations furnished by the state board of agriculture, and shall have appointed the usual and proper officers."

It is quite obvious that this provision just quoted had a definite and important place in the legislative scheme before us. Through it there was available valuable information to those organizing subordinate societies. It was also, in fact, a statutory safeguard provided for the benefit of the taxpayer. Under its terms public moneys, devoted to this public purpose, were required to be expended, "agreeable to rules and regulations" prescribed by a disinterested public agency, the state board.

Then, too, the annual and stated reports required of the county society, after organization, not only provided a public source of information to those interested in the subject to which they related, but the provisions of the act of 1879 now carried as section 8, Comp. St. 1922, assured the submission of such reports of such a nature and in such form as afforded ample opportunity to the state board to check the compliance of the subordinate societies with the rules and regulations it had previously prescribed for their government.

It will thus be seen that the provision quoted not only

answered a definite public purpose but, indeed, was essential in carrying out a well considered public policy.

In 1905 this section was amended by chapter 2, Session Laws of that year. The subject of the amendment was expressed in the bill as "county aid," and its apparent object was to change the basis for the computation of the amounts due to county agricultural societies from their respective county boards as the public contribution to their support. But in the opening sentence of the body of this amendatory act, while the verbiage of the law theretofore existing was retained, the words, "by the state board of agriculture," and "shall have appointed," appear to have been omitted. The sentence which, in the old law, included the words last quoted, in this amendatory act of 1905 as passed read: "Whenever twenty or more persons * * * shall organize themselves into a society for the improvement of agriculture within said county, and shall have adopted a constitution and by-laws * * * furnished by the usual and proper officers," etc. The words last above quoted were carried through all subsequent amendments to this section unchanged and, as such, appear in chapter 13, Laws 1927.

What was the effect of this omission? The status of existing county agricultural societies thereafter remained unchanged. They are still "subordinate governmental agencies" reporting to their superior, the state board of agriculture. The latter is still authorized to adopt rules and regulations to which other provisions of the governing statute still require obedience and compliance on the part of the "subordinate" societies. Comp. St. 1922, sec. 8. Nor was the status of county agricultural societies, in process of organization, changed. They possessed the same, no greater or other rights, and were subject to the same limitations that had theretofore existed, under this amendment. Even their right to adopt a constitution and by-laws still remains limited and restricted to the same extent by the legislative requirement that the constitution and by-laws so adopted must be "agreeable to the rules and regulations furnished" from a source outside the subordinate

society. The exercise of this power to limit and restrict the action of the powers of the subordinate society necessarily involves the exercise of power by a superior. The statute of this state in express terms makes the county agricultural societies "subordinate" to but one governmental agency, viz., the state board of agriculture.

Indeed, the question here reduced to its elements is: Has the omission of the words referred to changed the source of the statutory restrictions involved? There can be no question but what the statutory restrictions theretofore existing still exist in their entirety. Conceding that the designation "usual and proper officers" as used in the act of 1905, and subsequent amendments thereto, considered in and of itself might be ambiguous, it is not necessarily so. This designation in that act is used solely wth reference to the "rules and regulations" to be furnished, and the sources that had usually furnished them. The only officers who ever furnished, or could have furnished, these "rules and regulations" prior to the adoption of the amendment of 1905 were the officers of the state board of agriculture. The moment the amendment of 1905 became a law, the designation employed therein, "usual and proper officers," could apply solely to the officers of the state board of agriculture.

As before the adoption of that amendment, so thereafter this state board continued the sole superior agency of the state to which the statute, in express terms, makes county agricultural societies subordinate. We do no violence to the language employed in construing the word "usual" in the connection in which it here appears, and especially in view of its close association with "rules and regulations" as referring to the course of proceedings pertaining to these matters as the same was established and carried on prior to the adoption of the amendment of 1905, which the latter evidences no intent to change.

This conclusion is strictly in harmony with, and in advancement of, the public policy evidenced by all of the statutory provisions relating to this subject when construed

as an entirety. Indeed, when the amendment of 1905 is analyzed and construed in the light of the circumstances then existing, and as part of the legislation then in force, keeping in view the manifest principles of its enactment, as evidenced by the other provisions therein contained, the conclusion seems inevitable that the omission of the words "state board of agriculture," and "shall have appointed the," was an omission due wholly to inadvertence, and, due to the fact that the attention of subsequent legislators has not been challenged to the situation, has been unwittingly carried through subsequent amendments and compilations. On this basis the well-established rule applicable to the situation is: "Where it appears from the context that certain words have been inadvertently omitted from a statute, the court may supply such words as are necessary to complete the sense and to express the legislative intent." 36 Cyc. 1127. See, also, *Orvil v. Woodcliff*, 64 N. J. Law, 286; *Jones v. Mail & Express Pub. Co.*, 30 N. Y. Supp. 335; *Morris v. People*, 4 Colo. App. 136; *Peoria & Pekin Union R. Co. v. People*, 144 Ill. 458; *Loverin v. McLaughlin*, 161 Ill. 417; *Clark & Co. v. Kent*, 80 Ill. App. 128; *Gustavel v. State*, 153 Ind. 613; *Landrum v. Flannigan*, 60 Kan. 436; *Commonwealth v. Barney*, 24 Ky. Law Rep. 2352; *Loper v. State*, 82 Minn. 71; *Earhart v. State*, 67 Miss. 325; *People v. Wells*, 65 N. Y. Supp. 319; *Territory v. Clark*, 2 Okla. 82; *Hutchings v. Commercial Bank*, 91 Va. 68; *United States v. Burr*, 159 U. S. 78.

At all events it follows, therefore, that the duty of the county agricultural society to adopt a constitution and by-laws agreeable to the rules and regulations furnished by the board of agriculture remains unaffected by the change of the wording first made in 1905, and which is continued in the act of 1927. It also follows that the duty of the state board of agriculture to provide, through its usual and proper officers, and furnish rules and regulations agreeable to which the constitution and by-laws of the subordinate society must be framed, still continues; and that substantial compliance with the rules and regulations thus fur-

nished is essential to the proper organization of subordinate county societies; that the relator has wholly failed to establish that the constitution and by-laws adopted by it are agreeable to such rules and regulations because of such failure was not entitled to the relief for which he prayed.

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

REVERSED.

R. O. BROWNELL, RECEIVER, APPELLEE, V. HERMAN C. RUWE, APPELLANT.

FILED JULY 6, 1928. No. 26136.

Banks and Banking: PURCHASE OF NOTES: NOTICE. Where a bank cashier, being the sole managing officer of the bank, purchases notes from himself for the bank and the bank ratifies the act and brings suit upon the notes, it is chargeable with his knowledge of defects in the notes.

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

Gray, Brumbaugh & McNeil, C. H. Kubat and *J. L. Kaley,* for appellant.

Courtright, Sidner, Lee & Gunderson, C. M. Skiles and *I. D. Beynon, contra.*

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

BEGLEY, District Judge.

Action to recover upon two promissory notes for $2,500 each. The defense was lack of consideration and fraud in the inception of notes.

At close of testimony the trial court directed a verdict for plaintiff for the full amount, and from the overruling

of the motion for a new trial and judgment thereon, the defendant appeals.

The pleadings and evidence disclose that on March 19, 1918, the Lion Bonding & Surety Company duly increased its capital stock from $252,000 to $1,000,000, and gave an option to E. R. Gurney and W. O. Van Wyck for the purchase of the authorized addition at a price of $145 a share, net to the company. Gurney and Van Wyck organized the Bankers Sales Agency, a partnership, to sell the stock at $200 a share. Gurney and Van Wyck were officers of the Lion Bonding & Surety Company, and Gurney was also president of the First Bank of Nickerson, and also interested financially in some fourteen other banks. On July 18, 1918, one C. E. Negus appeared at defendant's farm home, representing himself as cashier of the First Bank of Nickerson, and that he was acting for the Bankers Sales Agency in selling stock of the Lion Bonding & Surety Company, and that the sales were being made through the banks of the state of Nebraska by said agency, without commission. He further represented that the stock was worth $200 a share and that the Lion Bonding & Surety Company paid 6 per cent. dividends quarterly thereon; that the company was protected by the state guaranty fund, the same as state banks; that the stock cost the Bankers Sales Agency $200 a share and was being sold without commission through the banks of the state; that all money invested in stock would be refunded to purchasers on 30 days' notice; that said statements were false, and in reliance upon the same defendant purchased 50 shares of said stock and gave four notes in payment in the sum of $2,500 each, due six months after date, payable to C. E. Negus. Two notes were sold to a bank at Arlington, and subsequently paid by defendant, and the other two were renewed from time to time in the name of C. E. Negus and are the two involved in this suit.

Plaintiff receiver contends that the First Bank of Nickerson purchased the original notes in question from C. E. Negus on July 19, 1918, for value, in the regular course

of business, and without notice of defenses or infirmities therein, and has always been the owner of the renewals, including the ones here in suit; and further contends that defendant is estopped to make a defense in this action by reason of having previously elected to bring an action in damages against the Bankers Sales Agency, C. E. Negus and W. A. Taylor, in the district court for Douglas county, Nebraska, which suit is still pending.

Fraud in the inception of the notes was proved, and the only question for determination is whether there was sufficient evidence to go to the jury as to whether or not plaintiff bank was a holder in due course. The question to be determined is: Was the knowledge of Negus, the cashier, imputed to the bank when he sold his own notes to the bank, thus acting for himself as seller and also for the bank as purchaser?

The original notes were not indorsed to the bank by Negus on Juy 19, 1918. A certificate of deposit was made out stating that "Herman C. Ruwe has deposited in this bank twenty-five hundred dollars, payable to the order of Bankers Sales Agency." Negus' name nowhere appears in the transaction on the banks books. When the notes come due Negus each time personally secured renewals in his own name, and defendant had no knowledge that the bank was claiming any interest in the notes, or that the representations of its cashier were false, until after the last renewal was given.

The rule is well established that knowledge of an officer of a bank, acquired while acting beyond the scope of his authority, is not imputed to the bank, and this is especially true when the agent is engaged in an independent fraudulent scheme. But we have a different situation in the present case. Here the bank is seeking to enforce a contract made by its cashier, who was its sole managing officer, and which was later purchased from said officer by the bank. As cashier it was the duty of Negus to pass upon all paper and the discounting of all notes. When he dealt with himself there was none other to communicate with,

nor any one from whom knowledge could be concealed. What he knew as an individual he was also bound to know as cashier. Where an officer is acting both for himself as an individual and as manager of a banking corporation, in the purchase of a note from himself by the bank, and his action in that behalf is adopted by the bank, his knowledge as a man is equally his knowledge as cashier. *First Nat. Bank v. Erickson,* 20 Neb. 580; *State v. American State Bank,* 108 Neb. 92; Id. 108 Neb. 111; Id. 108 Neb. 119; Id. 108 Neb. 129; *First Nat. Bank v. Burns,* 88 Ohio St. 434; 49 L. R. A. n. s. 764; *Farmers & Merchants State Bank v. Kohler,* 159 Minn. 35; *Louisa County Nat. Bank v. Burr,* 198 Ia. 4; *Emerado Farmers Elevator Co. v. Farmers Bank,* 20 N. Dak. 270.

Claim is made by appellee herein that Anderson, assistant cashier, transacted the business in the purchase of the notes and Negus only acted for himself as seller. We do not think this position is tenable. Negus was the superior officer, whose duty it was to discount paper or purchase notes. In transactions where he was present, he cannot be superseded in authority by an inferior officer. What Anderson did was merely under the direction of Negus. *State v. American State Bank,* 108 Neb. 129. To say that Negus stepped aside in his duties as cashier while the notes were being purchased would be to create sufficient suspicion to put the assistant cashier on inquiry as to any defenses which might be raised against the notes.

The filing of a suit against other parties by the defendant to recover damages caused by their deceit in selling the stock in question is not such an election of remedies as will prevent the defendant herein from setting up a defense of want of consideration and fraud when sued upon the notes thus secured. The actions are between different parties and the defendant had paid two of the notes which are not involved in this action. The positions are not inconsistent. 20 C. J. 8; *Zimmern v. Blount,* 238 Fed. 740.

The case should have been submitted to the jury and the

court erred in directing a verdict for the plaintiff. The judgment is

REVERSED.

HATTIE REID, APPELLEE, V. JOSEPH J. BRECHET ET AL., APPELLANTS.

FILED JULY 6, 1928. No. 26142.

1. **Appeal:** INSTRUCTIONS: MATTERS NOT IN ISSUE. "Generally, it is error for the trial court, by its instructions, to submit to the jury an issue not raised by the pleadings, if the submission of such issue is likely to prejudice the rights of one of the litigants." *Citizens Nat. Bank v. Sporn*, 115 Neb. 875.
2. **Pleading and Proof.** The record discloses no evidence supporting the allegations of the petition indicating a conspiracy to defraud.
3. **Trial:** DIRECTION OF VERDICT. In a law action to recover damages growing out of a conspiracy to defraud, and such being the only issue tendered by the pleadings, the evidence of such conspiracy being insufficient to justify the trial court in submitting the case to the jury, it is error to submit the case to the jury on the theory of liability growing out of partnership relation.
4. ——: ———. In an action to recover damages based upon a conspiracy to defraud, there being no evidence of such conspiracy, and upon motion therefor, it is the duty of the trial court to direct a verdict for the defendants, and a refusal to do so constitutes error.

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

William Baird & Sons, for appellants.

John A. McKenzie, contra.

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

CHASE, District Judge.

This is an action brought by Hattie Reid against Joseph J. Brechet, C. Dean Glover and W. Gayle Spain, as individ-

uals, to recover damages growing out of an alleged conspiracy to defraud the plaintiff in the exchanging of lot 1, block 7, Hanscom Park Place, an addition to the city of Omaha, Douglas county, Nebraska, for property of the plaintiff located in Minneapolis, Minnesota. Joseph J. Brechet, who appears to be a resident of Minnesota, was not served with process and the trial court dismissed the action as to him. At the close of plaintiff's testimony the defendants and each of them moved for a directed verdict in their favor, which was denied by the trial court. The case then proceeded to further trial, was submitted to the jury, and the jury returned a verdict for the plaintiff, assessing her recovery in the sum of $3,700, whereupon appellants filed a motion for new trial, alleging numerous errors occurring at the trial, which motion was overruled.

The appellants in their brief rely upon nine separate assignments of error for reversal of the case. There is substantially the same principle involved in the first three assignments of error and they may be considered in conjunction in the disposition of the case.

The appellants' contention in this regard is that there was a fatal variance between the pleadings and the proof, in that the pleadings and the theory upon which the plaintiff relied for her recovery is based upon an alleged conspiracy to defraud her in the exchange of property, while the proof is wholly lacking as to any conspiracy having existed; but, if sufficient to support a verdict, must be upon the theory that W. Gayle Spain and C. Dean Glover were partners in the general real estate business located in the city of Omaha, Nebraska, and that Bayles Spain, the party with whom the plaintiff had practically all the negotiations in the transaction complained of, was the agent of the copartnership and represented it in the transaction had with the plaintiff.

In order to determine this question, it is first necessary to resort to the pleadings to ascertain the nature and theory of the action under which plaintiff seeks recovery. The first paragraph of plaintiff's petition is as follows:

"That on or about the 1st day of August, 1926, the defendants, and each of them, entered into a plan, scheme and conspiracy to cheat and defraud the plaintiff out of a large sum of money; that pursuant to said plan, scheme and conspiracy, the defendants, and each of them, sought to sell, convey and turn over to the plaintiff the property known as lot one (1), block seven (7), Hanscom Place, an addition to the city of Omaha, Nebraska, at a valuation greatly in excess of its real and true value."

The remainder of the petition sets forth elaborately and in detail a long list of alleged misrepresentations of fact concerning the quality of the property sought to be exchanged, its repair and general condition, upon which the plaintiff relied in closing the transaction. Nowhere in said petition does it appear, nor is there an allegation of a partnership relation existing between these two defendants, nor is it alleged in the petition that the said Bayles Spain ever made any representations whatever, but all of the misrepresentations complained of in the petition are alleged to have been committed by the two defendants C. Dean Glover and W. Gayle Spain.

The defendants' answer to the petition for all practical purposes may be considered a general denial in that it denies the alleged conspiracy and does not admit any partnership relation or agency existing between these defendants and Bayles Spain.

The reply is a general denial of all statements in the answer except such as are admitting the facts in the petition.

From the pleadings this action must be considered one in tort growing out of a conspiracy. So far as the evidence of fraud is concerned, reflected by the record, we are unable to find a syllable of testimony substantiating the allegations of the petition concerning the existence of any conspiracy. By the testimony of the plaintiff it appears that she never had any conversation whatever with the defendant W. Gayle Spain concerning the transaction, neither did she have any conversation whatever with the defendant C.

Dean Glover concerning the transaction, until after the contract of purchase had been entered into by her; that all of her negotiations up to the time of the execution of said contract had been with one Bayles Spain, who was not a member of the real estate firm.

In the testimony of Bayles Spain he states that he is a brother of W. Gayle Spain and that the defendants are partners in the real estate business, and by the testimony of the defendant Glover, by way of preliminary explanation of his relationship to the case, he testifies that he is a partner in the real estate business with W. Gayle Spain. The case was submitted to the jury on the theory of a partnership relation existing between these defendants, and not on the theory of a conspiracy. At the close of the evidence, which, if it established anything, established a partnership relation existing between the defendants and that Bayles Spain was the agent of the partners, the plaintiff did not move the court to permit her to amend the pleadings to conform to the proof, but depended upon the record as it stood to support her recovery in the action.

In order to dispose of this question logically, it will be necessary to analyze the distinction which exists between actions based upon conspiracy and actions upon liability growing out of partnership relations. "'Civil conspiracy' is a combination of two or more persons to accomplish, by concerted action, an unlawful or oppressive object, or a lawful object by unlawful or oppressive means." *National Fireproofing Co. v. Mason Builders Ass'n*, 169 Fed. 259, 26 L. R. A. n. s. 148. While it is not necessary for a recovery in an action based upon a conspiracy to join all of the conspirators, the theory of the law is that they are joint tortfeasors, and that any one or all are liable for any injury resulting from such conspiracy; so that in the present action it was not necessary for the plaintiff to join Bayles Spain with the defendants upon the theory of conspiracy, but it was necessary to support the allegations of the petition by facts amounting to a conspiracy resulting therefrom in

order to have the case submitted to the jury upon the theory of the pleadings.

An action of conspiracy sounds essentially in tort. An action against copartners for fraud committed by their agent, while in tort, yet the general liability grows out of a contractual relationship existing between the copartners. The principle element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury. Without the scienter persons cannot conspire. On the other hand, copartners may become jointly and severally liable to an injured party for fraud committed by their agent, even though they may have no knowledge whatever of the misrepresentations or the transactions, if done by their duly authorized agent while acting within the scope of his authority. The liability grows out of the contractual relationship of the parties, and for that reason the misconduct of the agent is legally imputable to his principals. In other words, if the members of the firm set in motion the agency that perpetrates the fraud, they are liable to the injured party, notwithstanding they were without knowledge that a wrong was inflicted, while actions for conspiracy, in theory of law, proceed upon a very different principle. This court in the recent case of *Citizens Nat. Bank v. Sporn,* 115 Neb. 875, laid down this rule: "Generally, it is error for the trial court, by its instructions, to submit to the jury an issue not raised by the pleadings, if the submission of such issue is likely to prejudice the rights of one of the litigants."

The trial court in giving instruction No. 1 stated in part as follows:

"So that the only persons whose liability you have to consider is that of the defendant Glover and the defendant W. Gayle Spain, who, it is admitted, were partners in the real estate business when the exchange of the plaintiff's property for the Omaha property was effected."

Instruction No. 5, given by the trial court, is as follows:

"As already stated, this action is based upon alleged false and fraudulent representations made by the defendants, or by Bayles Spain who was in the employ of the other defendants, and whose representations, if any were made by him, would be binding upon the defendants."

Instruction No. 7, given by the trial court, is as follows:

"If you find that the defendants, or their agent, or employee, made any representations to the plaintiff during the negotiations which finally resulted in her purchase of the property in the first days of October, 1926, and that the plaintiff relied upon such representations, and that by any statement or act of the defendants she was influenced or dissuaded or in any way prevented from inspecting the premises prior to her purchase, in October, you are instructed that in such case she would be justified in relying upon any such representations, and in purchasing the property without actually inspecting it; and if under these circumstances you find any such representations to have been false, the defendants would be liable for any damages resulting from any such false representations."

An interpretation of these instructions convinced us that this case was submitted to the jury upon the theory of a partnership relation existing between these two defendants, and upon the theory that their liability, if any, grew out of the fact that Bayles Spain was their agent. We find no case where conspirators can commit acts by agents, as a conspiracy, in itself, is an unlawful arrangement, and, being such, it is very doubtful whether it, or any member of it, could employ an agent to carry out and perpetrate its unlawful design. There can be no doubt that a partnership, or each individual member, may be liable for fraud committed by any one of its members or by its agents, but in order to recover upon the theory of partnership relation it is necessary to allege such partner-

ship relation to base a recovery thereon. The function of the pleadings is to state the issues involved and the facts upon which the parties rely for their success in the action. Certainly the defendants in this case would have a right to know upon what theory the plaintiff was going to proceed and a right to rely upon plaintiff's statement of the case in order that the defendants might meet the plaintiff's evidence. The evidence must support the allegations in the petition or judgment in plaintiff's favor cannot be sustained. *Traver v. Shaefle,* 33 Neb. 531; *Elliott v. Carter White-Lead Co.,* 53 Neb. 458. Certainly the defendants were misled by proof of a relationship upon which a liability was sought different from that set forth in the pleadings, and, being misled, the action of the trial court in submitting the case to the jury on a different state of facts than those disclosed by the pleadings was prejudicial to the rights of the defendants. The whole case seems to have been tried below on the theory of liability growing out of partnership relation, while the pleadings allege an action in conspiracy. We are unable to find where this particular proposition is discussed by the appellee in her brief and we find no cases cited asserting a contrary doctrine. From an examination of the record, we reach the conclusion that the trial court, not only committed error in refusing to sustain a motion to direct a verdict for the defendants, but also in the submission of the case to the jury upon its merits on the theory of partnership liability.

It would serve no purpose to discuss further the other propositions relied upon for reversal in this case as the one herein discussed fully disposes of the whole matter.

REVERSED AND REMANDED.

The following opinion on motion for rehearing was filed September 19, 1928. *Rehearing denied.*

PER CURIAM.

The opinion in this case was adopted on the 6th day of July, 1928, and is reported, *ante,* p. 411. The attorney

for appellee was furnished with the record in the case by the clerk of this court on the 13th day of July, 1928. The motion for a rehearing was filed on the 7th day of August, 1928, but up until the present time, to wit, September 11, 1928, the record has not been returned by appellee's attorney. It is provided by rule 17 (c) of this court, as follows: "If the party filing the motion for rehearing withholds the record for a period of five days from the filing of the motion, the motion will be denied as of course." The foregoing rule becomes a material part of a proceeding in this court to which it applies.

REHEARING DENIED.

WILLIAM H. EMEL, ADMINISTRATOR, APPELLEE, V. STANDARD OIL COMPANY, APPELLANT.

FILED JULY 6, 1928. No. 26332.

1. **Limitation of Actions:** PLEADING: AMENDMENT. The amendment to the petition set forth in the opinion *held* to introduce a new cause of action, barred by the statute of limitations, and the allowance of such amendment is erroneous.
2. **Negligence:** INSTRUCTIONS. An instruction on the law of comparative negligence that informs the jury that, "if you find from the evidence that each was guilty of an equal degree of negligence, or that the negligence of the deceased was greater than that of the defendant, then you should in either event return a verdict for the defendant," *held,* under the facts and circumstances, not erroneous, but criticized as not being as full a statement of the law of comparative negligence as the defendant was entitled to have submitted to the jury.
3. **Damages:** INSTRUCTIONS. An instruction informing the jury that, in arriving at the measure of damages in a personal injury suit, they may take into consideration the need of assistance on the part of the person or persons to be benefited by a favorable verdict, *held* to be erroneous.
4. **Evidence** examined, and *held* insufficient to support a verdict for the plaintiff.

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

W. H. Herdman and *C. P. Anderbery,* for appellant.

E. B. Perry and *King & Bracken, contra.*

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

PROUDFIT, District Judge.

This is an action brought by the administrator of a decedent, who sues to recover damages alleged to have been sustained by the death of plaintiff's intestate, and is its second appearance in this court. At the former hearing the case was argued before division No. 2 of the supreme court commission, a judgment of reversal resulting therefrom. After the filing of the opinion by the commission, the plaintiff sought leave to amend his petition in this court and leave so to do was denied. The case was remanded to the district court for further proceedings. Upon the second trial of the action in the district court leave was obtained to amend paragraph 4 of the petition over the objection of the defendant. Paragraph 4 of the original petition alleged:

"That on the 28th day of August, 1922, said Robert Blackburn, while so in the employ of defendant, and while driving said oil truck loaded with oil and gas, again carelessly, negligently and wrongfully invited and permitted the said Johnson A. Emel to enter upon said truck, as had been his custom, for the purpose of accompanying him on a trip distributing oil and gas; that at said time the said Johnson A. Emel, without fault or negligence on his part, fell from said truck to the ground and the wheels of said truck passed over his body, and on account thereof he sustained an injury from the effects of which he died on said same day."

Said paragraph 4 as amended alleges: "That on said 28th day of August, 1922, said Robert Blackburn, while so in the employ of defendant, and while driving said oil truck loaded with oil and gas, again carelessly, negligently and wrongfully invited and permitted said Johnson A.

Emel to enter and ride upon said truck, as had been his custom, for the purpose of accompanying him on a trip distributing oil and gas; that defendant, by its employees and servants, after having invited plaintiff's decedent to ride on defendant's said truck, and while well knowing that said child intended to and was about to take hold of and mount said moving truck, thus having ample time, failed to bring said truck to a stop and failed to warn deceased not to attempt to mount said truck, although there was ample time to do so after defendant discovered, or in the exercise of reasonable care should and would have discovered, the presence of said child and his intentions in regard to mounting said truck, but defendant in fact, suddenly, without warning to said child, and while said child still believed his presence was desired by the defendant on said truck, suddenly, wantonly, wilfully and negligently turned and swerved said truck to the north and away from said child and thereby said child missed his hold on said truck and his footing thereon, fell under said moving truck so negligently driven and managed as hereinbefore alleged, and thereby as a result of defendant's negligence said child received injuries of which he died."

The injury of which plaintiff complains occurred on the 28th day of August, 1922. The original petition was filed June 27, 1924, and the amended petition was filed April 15, 1927, and when the amendment was permitted, the defendant objected thereto for the reason that said amended petition stated a new cause of action and was a departure from the original cause of action as pleaded in the original petition, and at the time the amendment was permitted was barred by the statute of limitations. This objection was overruled and the amendment permitted. The second trial of the case resulted in a verdict and judgment for the plaintiff, and a motion for new trial was filed by defendant and overruled.

From the overruling of said motion the defendant prosecutes an appeal to this court, alleging numerous errors in the proceedings had in the trial court. The errors com-

plained of and argued in brief by counsel are: (1) The court erred in overruling defendant's motion for an instructed verdict; (2) the court erred in giving instruction No. 6 to the jury; (3) the court erred in giving instruction No. 12 to the jury; and (4) the court erred in permitting plaintiff to amend his petition, in that said amendment introduced a new cause of action, which was barred by the statute of limitations.

The errors complained of will be discussed in inverse order. Did the court err in permitting plaintiff to amend his petition? If the amendment introduced a new cause of action, then it should not have been permitted, as the statute provides: "Every such action shall be commenced within two years after the death of such person." Comp. St. 1922, sec. 1383. A cause of action must be distinguished from the subject of the action. It is the right claimed or wrong suffered by the plaintiff on the one hand, and the duty or delict of the defendant on the other. It embraces all the facts which, taken together, are necessary to fix the responsibility. It does not consist in either a duty or obligation, or a failure to discharge that duty, or injury standing alone, but all three of these elements must be combined to give rise to a cause of action. *Westover v. Hoover*, 94 Neb. 596. In *Johnson v. American Smelting & Refining Co.*, 80 Neb. 256, it is held: "A cause of action alleged in an amended petition, although founded upon the same injury as that described in the original, is a different cause of action, if it is dependent entirely upon different reasons for holding the defendant responsible for the wrong alleged." And in the discussion of the *Johnson* case, at page 258, it is said: "A cause of action in any case embraces, not only the injury which the complaining party has received, but it includes more. All the facts which, taken together, are necessary to fix responsibility, are parts of the cause of action." Such being the rule established in this jurisdiction, it would appear that error was committed in permitting the petition to be amended.

Instruction No. 6 informs the jury: "If you find from

the evidence that the defendant was guilty of negligence, you will then determine from the evidence whether the deceased was guilty of negligence. If you find that both were negligent, then it is your duty to fix the degree of the deceased's negligence as compared with that of the defendant. If you find from the evidence that each was guilty of an equal degree of negligence, or that the negligence of the deceased was greater than that of the defendant, then you should in either event return a verdict for the defendant. If, however, you find from the evidence that the defendant's negligence was gross and the deceased's negligence was slight, then the slight negligence of the deceased would not defeat his recovery in this action, but in making up your verdict you should consider such contributory negligence of the deceased in mitigation of the damages in proportion to the amount of the contributory negligence attributable to the deceased when compared to the combined negligence of the deceased and defendant."

This instruction, taken as a whole, cannot be said to be a misstatement of the law of comparative negligence. However, it may be criticized as not being as full a statement of the law as the defendant was entitled to have submitted to the jury. It cannot be questioned that, if the negligence of the decedent was equal to or greater than that of the defendant, the plaintiff would not be permitted to recover, but the instruction may justly be challenged as to this portion, in that it apparently leaves the question of negligence in such condition that the jury would be justified in concluding that, if the negligence of the decedent did not equal or exceed that of the defendant, then the plaintiff would be entitled to recover; whereas, the rule is that if, in comparing the negligence of the parties, the contributory negligence of the plaintiff (decedent in this case) is found to exceed in any degree that which, under the circumstances, amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, the contributory neg-

ligence of plaintiff (decedent in this case), however slight, will defeat a recovery. *Morrison v. Scotts Bluff County,* 104 Neb. 254. And the defendant was therefore entitled to have the instruction on comparative negligence submitted in this form. Instruction Number 6, therefore, while it cannot be said to be a misstatement of the law, may properly be criticized as not being a full and accurate statement of the law of comparative negligence as heretofore laid down by this court. It may well be said in passing that the opinion of this court in *Morrison v. Scotts Bluff County, supra,* affords trial courts a safe guide for instructing on the rule of comparative negligence.

Counsel for defendant complains of instruction No. 12 as being contradictory and in conflict with instruction No. 6. The conflict between these two instructions, if any, need not be considered, for the reason that there is a more serious error than that in instruction No. 12. In this instruction the jury are informed that, if they find that the plaintiff is entitled to recover, their attention must then be turned to the measure of damages, "and, in arriving at such amount, you should take into consideration the expectancy of life of each of the parents and their probable need of assistance in the future." The writer knows of no case in the books that permits the need of assistance to be a measure of damages, and the presumption is that the need of the parents in this case might have been a powerful factor in influencing the jury to arrive at the verdict they did. This instruction in itself would be sufficient to call for a reversal of the case.

A careful review of the evidence in this case convinces the court that no actionable negligence was proved against the defendant, and, as negligence can never be presumed, but must always be proved, it necessarily follows that a verdict should have been directed for the defendant. The judgment of the trial court herein is reversed and the action dismissed.

REVERSED AND DISMISSED.