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REPORTS OF CASES

IN THE

Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS, 1929.

VOLUME CXVIII

HENRY P. STODDART,
OFFICIAL REPORTER

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1929

KATRENA JOHNSON, APPELLANT, V. NELS P. JENSEN, APPELLEE.

FILED FEBRUARY 6, 1929. No. 26582.

1. **Trial:** MISCONDUCT OF ATTORNEY. From time immemorial the Anglo-Saxon race has been firmly committed to the proposition that in a law action the jury is the sole trier of disputed questions of fact. It follows therefore that it is highly improper for counsel to make extraneous remarks within the hearing of the jury, aside from the regular argument, which might tend to create a prejudice for or against either party litigant.
2. ———: ———. In a jury trial counsel should conform their conduct to the law which they have been commissioned to assist in administering. *Ashland Land & Live Stock Co. v. May*, 59 Neb. 735; *Hall v. Rice*, 117 Neb. 813.
3. **Evidence** examined, discussed in the opinion, and *held*, that the judgment must be and it hereby is reversed and remanded for a new trial.

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

Lewis C. Paulson, for appellant.

C. P. Anderbery, contra.

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

DEAN, J.

This action was begun in Kearney county by Mrs. Katrena Johnson, plaintiff, against Nels P. Jensen, defendant, to recover $1,500 for permanent injuries which she alleges she

sustained because of defendant's negligence in driving his automobile over her left foot when she was standing on a street corner in Minden. She also alleges that by the impact she was severely injured and permanently disabled "in her side and back" and that she still suffers great and intense pain in her foot. The action has been twice tried to separate juries and at the close of each trial a verdict was returned for the defendant. When the second trial was concluded the action was dismissed. May 10, 1928, the plaintiff appealed.

Plaintiff's main contention has to do with alleged misconduct on the part of defendant's counsel, in that, on the cross-examination, he propounded questions to some of the plaintiff's witnesses that are not pertinent but were clearly calculated to prejudice the jurors against her. She also contends that defendant's counsel in his argument repeatedly went outside of the record and used language that was not warranted by the evidence and could not have failed to prejudice the minds of the jurors against her.

It is alleged that reference was continuously made by defendant's counsel to a disagreement locally designated as the "Copenhagen row" which arose between residents of a certain neighborhood over the opening of a thoroughfare known as Nance street. In this behalf an effort was made by defendant's counsel, on the cross-examination of plaintiff's witness George N. Youngson, a former mayor, to show that he had considerable difficulty, as mayor, with plaintiff and her friend Mrs. Long. On his cross-examination, Mr. Youngson testified:

"Q. While you were mayor you had considerable trouble with this (these) people, didn't you, Mr. Youngson? A. Yes. Q. They pestered you pretty nearly all the time, didn't they? A. Well, there was both sides pestering us. Q. Sometimes when Mrs. Long and Mrs. Johnson came down to your store there you about dodged down into the basement to get away from them, didn't you? Mr. Paulson: We object to that as improper cross-examination. Sustained. Exception. Q. The fact is you didn't care to talk

with them? Mr. Paulson: Objected to as incompetent and improper cross-examination. Sustained. Exception. Q. The fact is that you didn't care to visit with them because of their reputation in that community—isn't that right? A. Well, I wouldn't say that. I didn't care to be bothered about the road business down there; that's all. Q. But you didn't care to be bothered with them? Mr. Paulson: Objected to as improper cross-examination. Sustained. Exception. Q. Isn't it a fact that their reputation was such in that community that you did not care to have them around your store and place of business? Mr. Paulson: Objected to as improper cross-examination. Sustained. Exception. Q. This street row down there was the creation of considerable trouble while you were mayor? A. Yes, sir. Q. And you vacated the street there at one time? A. Yes, sir. Mr. Paulson: Objected to as improper cross-examination. I didn't ask about it. The court: As I understand it, this witness is only for the purpose of proving reputation. Sustained. Mr. Anderbery: They went into the fact that he was mayor and did a mayor's work down there. The court: Objection sustained. Go ahead. Exception. Q. Isn't it a fact that the reputation of these two people and the trouble that they stirred up defeated you for renomination to the office of mayor? Mr. Paulson: Objected to as incompetent and improper cross-examination. Sustained. Exception. Q. Isn't it a fact that their reputation in this community is the only grief that you ever had during your eight years as mayor? Mr. Paulson: Objected to as incompetent and improper cross-examination. The court: I think you have gone about far enough along with that, Mr. Anderbery. Sustained. Exception."

J. P. Jurgenson testified on the part of defendant: "Q. You have been into this Copenhagen row some? A. Well, I have been, with the rest of them, trying to get Nance street open. Q. And Mrs. Long sued for forty-thousand—? Mr. Paulson: Now wait a minute. We object to that as incompetent, immaterial and a collateral issue. Sustained. Exception. Q. She didn't win her case? Mr. Paulson:

Now, wait a minute. We object to that as incompetent. The court: Yes; let's not try lawsuits that way, gentlemen. Mr. Anderbery: That is part of the Copenhagen row, your honor. Mr. Paulson: I ask now that counsel be instructed not to bring in these collateral issues for the purpose of discrediting our testimony. He is bound to get it before the jury, and I ask that the court admonish the jury not to consider this. He is doing it for a purpose. The court: Gentlemen of the jury, you want to regard only the evidence introduced before you. Statements of counsel or irrelevant questions, anything of that kind, do not constitute evidence, and you will not consider the same in arriving at your verdict."

Continuous reference was made to collateral matter that had no bearing on the issues in suit. The colloquy continued:

"Mr. Paulson: I object to the argument of counsel, saying that I represent Mr. Jurgenson in a forty-thousand dollar lawsuit. There has been no evidence of that. Counsel only has tried to get that stuff in to prejudice the jury, and I object to it as incompetent, irrelevant, immaterial and prejudicial. The court: Sustained. Now, gentlemen of the jury, you must pay no attention to anything said here outside of the record in this case and the evidence produced before you. Mr. Anderbery: What was said, was said in reply to Mr. Paulson's argument as to the reputation and standing of Mr. Jurgenson. I expected Mr. Paulson to get a little stirred up on that. The fact is, it is the truth. Mr. Paulson: Now wait, we object to that. The court: Mr. Anderbery, do not go outside of the record about what is true or what is not. The jury will determine about that."

In Iowa it has been held that, in a case where injury or prejudice follows the asking of improper questions or the making of improper statements in the presence of the jury, it is not necessary to show that objections were made to every improper question asked or statement made as an indispensable condition to the granting of a new trial. *Welch v. Union Central Life Ins. Co.*, 117 Ia. 394.

From time immemorial the Anglo-Saxon race has been firmly committed to the proposition that, when a jury is impaneled to try a law action, such jury is the sole trier of disputed questions of fact. It follows that it is highly improper for counsel to make remarks within the hearing of the jury, aside from the regular argument, which might tend to create a prejudice for or against either party litigant. The law contemplates a fair and impartial trial on the merits, and unfair conduct on the part of counsel having a tendency to prevent this invaluable right is deserving of rebuke.

The remarks of Sullivan, J., in an opinion written for the court almost thirty years ago, are in point: "In the performance of professional duties, counsel should endeavor always to conform their own conduct to the law which they have been commissioned to assist in administering." *Ashland Land & Live Stock Co. v. May,* 59 Neb. 735. In a like case, in an opinion by Redick, District Judge, this is said: "It is of greater importance that the administration of justice be regular and orderly, than that counsel be afforded an opportunity to exhibit their peculiar prowess in the use of questionable methods." *Hall v. Rice,* 117 Neb. 813.

Upon a review of the record, we conclude that, should another trial be had, the palpable errors herein pointed out will not be repeated. The judgment is therefore reversed and the cause is remanded for further proceedings in accordance with law.

REVERSED.

ROME MILLER, APPELLEE, V. M. E. SMITH BUILDING COMPANY; A. E. PETERSON ET AL., INTERVENERS, APPELLANTS.

FILED FEBRUARY 6, 1929. No. 26511.

1. **Corporations:** STOCK CERTIFICATES. A certificate of preferred stock, issued by a corporation, is evidence of the holder's title to shares of stock. The terms and provisions of such certificate and of the articles of incorporation, together with the general law and the by-laws of the corporation, in force at the time,

all enter into and together evidence the contract between the corporation and the stockholder.

2. ———: EQUALITY OF STOCKHOLDERS. It is a rule that a corporation must treat all of its shareholders of the same class alike.

3. ———: STOCKHOLDERS. While the relation of a holder of preferred stock, in some of its aspects, is similar to that of a creditor, such holder, however, is not a creditor save as to dividends after the same have been declared.

4. ———: EQUALITY OF STOCKHOLDERS. Section 4 of defendant's articles of incorporation, set out in the opinion, examined and *held* to require, in the event of dissolution or liquidation of the corporation, that the holders of outstanding preferred stock should constitute one class and be treated alike.

5. ———: PREFERRED STOCK: REDEMPTION. Section 4 of defendant's articles of incorporation, set out in the opinion, examined and *held* to contemplate the redemption and retirement of preferred stock, as it matured, only from the earnings of the corporation.

6. ———: ———: ———. Where a corporation has issued preferred stock in serial form, one series maturing and to be redeemed and retired each year from the earnings of the corporation, and where the purpose of its organization has failed and it can exist and continue to operate only at a loss, and where it has no surplus or earnings, the stockholders are entitled to have the corporation dissolved and, after payment of its debts, the assets distributed among the stockholders.

7. ———: INSOLVENCY: RECEIVERSHIP. A court of equity has power, both statutory and under the general principles of equity, to appoint a receiver for a corporation, when it appears that the purpose for which the corporation was organized has failed; that it cannot continue to operate except at a loss; that its assets are insufficient to pay its preferred stockholders in full; that some of the holders of matured preferred stock have brought suit and others are threatening so to do; that a multiplicity of suits will ensue, and the assets be greatly depleted and dissipated in litigation.

8. ———: ———: ———: NOTICE. Where a court of competent jurisdiction, at the suit of a stockholder, on notice served only on the corporation, has appointed a receiver for the corporation, and where the stockholders, after the appointment, intervene and contest the right and expediency of the appointment of such receiver and have been heard by the court thereon, and upon

such hearing the evidence adduced discloses a state of facts warranting the appointment of a receiver, the order making the appointment will not be held void for want of notice.

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

Mullen & Morrissey and *Monsky, Katleman & Grodinsky,* for appellants.

Smith, Schall, Wright & Sheehan and *Hotz & Hotz, contra.*

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

GOOD, J.

This action was brought by plaintiff, the holder of preferred stock in the defendant corporation, seeking an adjudication that all of the preferred stock issued by defendant should be held to be due and payable, and that the holders of said stock were entitled to share *pro rata* in the corporate assets, and to enjoin the defendant from redeeming and retiring its preferred stock in the order of its maturity. It appears without question that defendant issued preferred stock in 20 series designated by letters from A to T, inclusive. Series A, by its terms, became due and payable in 1923, and the other series became due and payable one series annually thereafter.

Defendant answered, admitting its corporate character, the issuance of preferred stock in serial form, and setting forth its financial condition. Thereafter, plaintiff filed what is termed an application, but which was, in fact, an amended and supplemental petition, in which he incorporated all the allegations of his original petition and supplemented them by allegations of fact occurring since the filing of the original petition.

In the amended and supplemental petition it was set forth that the object and purpose of the corporation had failed; that it was insolvent; that its income was insufficient to

any more than pay operating expenses, and was insufficient to pay any of the preferred stock as it matured, or any of the dividends on any of the preferred stock, and plaintiff prayed for the dissolution of the corporation and for the appointment of a receiver to take charge thereof, pending dissolution. The board of directors of the defendant, by resolution, authorized, and there was filed an answer consenting to, the appointment of a receiver. This was followed by an order entered by the court, appointing a receiver to take charge of the property and assets of the defendant, and requiring the receiver to report to the court. The receiver filed a report setting forth the amount and character of the assets of the corporation, its liabilities and financial condition. The court then directed notice to be given to all stockholders to file their claims with the receiver. Thereupon, holders of some of the preferred stock which, by its terms, had matured, intervened, attacking the appointment of a receiver, denying that the corporation was insolvent or that any cause existed for the appointment of a receiver, and averring that the holders of preferred stock were entitled to be paid out of the assets of the corporation, in the order of the maturity of the preferred stock. Other holders of preferred stock in later maturing series intervened on behalf of themselves and others similarly situated; alleged that the corporation was insolvent; prayed that all preferred stockholders be adjudged entitled to share ratably in the assets of the corporation, and joined in the prayer of plaintiff's petition.

On a trial of these issues the court sustained the appointment of a receiver, and found and determined that all preferred stockholders were entitled to share ratably in the corporate assets without regard to the date of maturity of preferred stock held by them. The intervening stockholders representing the earlier maturities of preferred stock have appealed.

The principal questions presented by this appeal are: (1) Were all the preferred stockholders entitled to share pro rata in the assets of the corporation? (2) Did the

court have jurisdiction to appoint a receiver? The facts are not in dispute.

M. E. Smith & Company was a mercantile corporation doing a large wholesale business in the city of Omaha. It desired buildings for storage purposes and proceeded to organize the defendant company for the purpose of constructing such a building as it needed. The articles of incorporation adopted provided for an authorized capital of $1,500,000, $500,000 of which would be common stock and $1,000,000 preferred stock; that the preferred stock should be issued in 20 series designated by letters from A to T, inclusive; that $50,000 was authorized to be issued in each series; that series A should mature on May 31, 1923, and one series thereafter should mature annually and be paid and retired; that the holders of preferred stock should be entitled to receive 7 per cent. cumulative dividends.

Section 4 of the articles of incorporation, among other things, provided: "From the net earnings or surplus of said corporation there shall first be paid to the holders of the preferred stock, dividends at the rate of seven (7) per cent. per annum from the date of issue, and no more, * * * which dividends shall be cumulative, so that if in any year dividends amounting to seven (7) per cent. shall not have been paid thereon, the deficiency shall be fully paid or set apart, but without interest, before any dividends shall be paid or set apart on the common stock. * * * In the event of the dissolution or liquidation of the corporation, whether voluntary or involuntary, the holders of the outstanding preferred stock shall be entitled to be paid the par amount of their shares and unpaid accrued dividends thereon, before any amount shall be paid to the holders of the common stock. * * * The preferred stock shall be issued in serial form, so that the par value of fifty thousand (50,000) dollars thereof, with accrued and unpaid dividends thereon, will become due and payable to the holders thereof each year, beginning May 31st, 1923, which the corporation agrees to pay and retire at maturity. * * * The preferred stock shall not be increased, and no mortgage shall

be placed upon the property of the corporation without the consenting vote of three-fourths (3/4) of the preferred stockholders outstanding, at a stockholders' meeting.

"The corporation shall have power and authority to lease to M. E. Smith & Company, a Nebraska corporation, all of lots 4, 5, 6 and the west 33 feet of lot 3, all in block 124, in the City of Omaha, Nebraska, now owned by it, and the building or buildings to be erected thereon, with the funds to be realized from the sale of said preferred stock, for a period of time up to and including May 31st, 1943, for a sum sufficient to pay all dividends upon the preferred stock outstanding when and as the same are payable, and to pay the par value of said preferred stock when and as the same become due and payable, plus sufficient to pay the taxes, insurance and upkeep of said property. * * * Each share of stock issued and outstanding as shown by the corporate records shall be entitled to one vote for each officer and on every question or proposition voted on at all annual or special stockholders' meetings, and such vote may be made by proxy.

"The terms and conditions relating to or applying to said preferred stock as contained in this amendment to the articles of incorporation of this corporation shall constitute and be a contract with the preferred stockholders which shall not be changed by the corporation without their unanimous consenting vote, cast at a stockholders' meeting."

Preferred stock was issued to the extent of something over $700,000, real estate was purchased and a nine-story brick building thereon constructed, and by defendant leased to M. E. Smith & Company at an annual rental of $120,000, which amount was sufficient to pay the taxes, insurance, repairs, operating expenses, dividends on preferred stock, and to mature and retire annually one series of the preferred stock. Rentals were paid by M. E. Smith & Company for a time, and series A of the stock was redeemed and retired when it became due. Shortly thereafter, M. E. Smith & Company became insolvent, was adjudged bankrupt, vacated the leased premises and repudiated the lease. Defendant thus

found itself in possession of a large storage building on its hands without a tenant. The officers sought diligently to find new tenants and succeeded in finding tenants for portions of the building, but were unable to secure sufficient rentals to any more than pay the taxes on and operating expenses of the building. Some of the holders of matured stock brought suit against the corporation to recover the par value of their stock and unpaid cumulative dividends, and others were threatening to bring such actions at the time trial was had.

It is disclosed by the record that at the time of the trial the value of the real estate owned by defendant did not exceed $400,000; that it had no debts other than those due to its preferred stockholders; that the par value of the outstanding preferred stock was $692,000; and it clearly appeared that, if the holders of preferred stock in the series first to mature should be paid out of the corporate property, nothing would be left for the holders of preferred stock in the later maturing series. Under these circumstances, we are required to determine: What are the rights of preferred stockholders, as between those holding stock in the early maturing series and those holding stock in the later maturing series?

Appellants contend that the certificate of preferred stock issued by defendant constitutes a contract between it and the holders of the stock, and that the rights of the parties must be determined by this contract; that, when any preferred stock has, by its terms, become due, the holder ceases to be a stockholder and at once becomes a mere creditor of the corporation. They further contend that the defendant is not insolvent, because it owes no obligation or debts save to the holders of matured stock, and that the amount of stock matured is much less than the actual value of defendant's corporate assets, and argue that the facts disclosed are insufficient to warrant a liquidation and dissolution of the corporation or the appointment of a receiver.

Of these contentions, in their order, we think the rule with reference to the first contention is that a certificate,

representing corporate stock, is evidence of the holder's title and, alone, does not necessarily constitute a contract between the certificate-holder and the corporation. The correct rule applicable, we think, is stated in 6 Fletcher, Cyclopedia Corporations, sec. 3632, in the following language: "The terms of the contract are generally set forth in the certificates of the preferred stock issued to the holders as evidence of their shares, but they are not the only evidence of the contract. They must be read in connection with the provisions of the charter or articles of association, the general law, the by-laws in force at the time the stock was issued. * * * All these enter into and form a part of the contract."

As sustaining their contention that the holder of preferred stock, which by its terms has matured, becomes merely a creditor, appellants cite and rely upon *Westerfield-Bonte Co. v. Burnett,* 176 Ky. 188; *Allen v. Northwestern Mfg. Co.,* 189 Ia. 731; *Keyes v. Blue Bell Medicine Co.,* 34 S. Dak. 297; and *Gunther Grocery Co. v. Hazel,* 179 Ky. 775. These authorities, we think, for the most part do not, when carefully analyzed, sustain the contention made.

In *Westerfield-Bonte Co. v. Burnett, supra,* it is said (p. 197): "The corporation, however, is the property of the stockholders, and if they contract in such a way as to be legally bound to appropriate a portion of the capital to redeem the share of the preferred stockholder, the contract may be enforced, if the enforcement does not affect the collection of the claims of the creditors of the corporation." In that case, all of the preferred stock was matured, and there were ample assets of the corporation to pay all of the preferred stockholders, and also to pay all general creditors of the corporation. It will be observed in that case that the articles of incorporation provided for the retirement and redemption of the preferred stock at all events, and that the corporate assets, regardless of earnings, were liable for such payment, but the rights of stockholders *inter se* were not involved.

In *Allen v. Northwestern Mfg. Co., supra,* an action by a holder of matured preferred stock, it was held that plain-

tiff was entitled to judgment and to share with other creditors of the corporation. However, in that case the so-called preferred stock had no voting power or privilege. The court took the view and decided the case on the theory that, in effect, such a preferred stockholder was merely a creditor and never was a stockholder in reality, and that the issue of stock was only evidence of a loan.

In *Keyes v. Blue Bell Medicine Co., supra,* the court awarded judgment to a preferred stockholder, and held him to be entitled to share with other creditors in the assets of the insolvent corporation. He was awarded judgment, however, not on the strength of his status as a preferred stockholder, but on a contract of guaranty issued by the corporation at the time the stock was issued to the holder.

In the case of *Gunther Grocery Co. v. Hazel, supra,* it was determined that where preferred stock of a corporation, by its terms, pursuant to the articles of incorporation, became due, payable and redeemable by the corporation at its maturity, such stock, after maturity, at least as against the corporation and the owners of the common stock, the rights of no creditors being involved, was but an indebtedness against the company which it was bound to redeem. The opinion in that case goes no further than to hold that all of the matured stock was a debt against the corporation, but there is no intimation that there was any preferred stock which was unmatured. The rights of preferred stockholders, whose stock had matured, as against others, whose stock was unmatured, were not involved.

On the other hand, we find, in *Farrish-Stafford Co. v. Charlotte Cotton Mills,* 157 N. Car. 188, the following rule announced: "A corporation as a rule must treat all shareholders of the same class alike." In the opinion it is further said that a stockholder is not a creditor of the corporation, and that a holder of preferred stock is only a preferred stockholder and must share with others of like class.

In 6 Fletcher, Cyclopedia Corporations, sec. 2630, quoting from an Ohio case, it is said: "The relation of a holder of preferred stock is, in some of its aspects, similar to that

of a creditor, but he is not a creditor save as to dividends after the same are declared. Nor does he sustain a dual relation to the corporation. He is either a stockholder or a creditor; he cannot, by virtue of the same certificate, be both. If the former, he takes a risk in the concerns of the company, not only as to dividends and a proportion of assets on the dissolution of the company, but as to the statutory liability for debts in case the corporation becomes insolvent; if the latter, he takes no interest in the company's affairs, is not concerned in its property, or profits as such, but his whole right is to receive agreed compensation for the use of money he furnishes, and the return of the principal when due." A number of authorities are cited as sustaining the text. We believe the rule above stated to be a sound and correct statement of the law on the subject.

Reverting to section 4 of the articles of incorporation, heretofore quoted, it will be observed that they contemplate that the preferred stock as it matured should be paid out of the earnings of the corporation, and do not contemplate that such stock shall be redemmed by the use of the corporation's capital or by depleting its capital stock to make such redemption, and, further, the provision in said section, relating to the liquidation of the corporation, requires the payment of all outstanding preferred stock as one class, and does not attempt to differentiate and give superior rights to the holders of the earlier maturities over the holders of later maturities of preferred stock.

Applying the rule that the articles of incorporation, as well as the certificate, form a part of the contract, we think a proper construction of those instruments requires the court to hold that the holders of earlier matured stock are entitled to preferential payment only out of the earnings and surplus of the corporation. In the instant case, there are on hand no earnings or surplus. So far as their right to share in the assets of the corporation is concerned, all of the preferred stockholders are in one class. They are co-owners, or may be termed cotenants, of the corporate property and are entitled to share therein *pro rata.*

We next come to a consideration of the question as to whether the record discloses facts sufficient to warrant the appointment of a receiver. Section 8754, Comp. St. 1922, states the causes for which a receiver may be appointed. We quote the first and fifth paragraphs of the section:

"First. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners *or others jointly owning or interested in any property or fund,* on the application of any party to the suit, when the property or fund is in danger of being lost, removed, or materially injured." (Italics ours.)

"Fifth. In all other cases where receivers have heretofore been appointed by the usage of courts of equity."

In 4 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1537, it is said: "The inherent jurisdiction of a court of equity to appoint receivers of corporations, in proper cases, independently of statutory authorization, has been frequently recognized."

In *Bowen v. Bowen-Romer Flour Mills Corporation,* 114 Kan. 95, the court said: "Courts of equity came into existence for the purpose of affording such relief as justice and good conscience required, under the peculiar circumstances of the case. In some jurisdictions, instead of keeping up with social progress, equity has set and hardened. Its potency to meet new conditions has been emasculated, and frequently the caution to be displayed and the limitations to be observed in appointing receivers loom so large that, as the Missouri court has observed, judicial hesitancy degenerates into judicial atrophy. *Cantwell v. Columbia Lead Co.,* 199 Mo. 1. In other jurisdictions a better view is taken, and the phrase, 'by the usages of courts of equity,' means according to the informing spirit of equity heretofore manifested in the appointment of receivers."

In the instant case, from the record it clearly appears that the obligations of the defendant corporation to some of its preferred stockholders have matured, and that it has not the funds with which to satisfy their demands. The only

property that the corporation has consists of the real estate, and the value of this real estate is much less than the corporation owes to its preferred stockholders, including those whose stock is yet to mature. All of the preferred stockholders cannot be paid the par value of their stock alone, much less the unpaid cumulative dividends thereon. Under such circumstances, it seems quite clear that the holders of matured stock should not be required to wait until all of the preferred stock has matured before receiving satisfaction of their demands, or such *pro rata* thereof as they may be entitled to; and, if any of those whose stock is matured were seeking the winding-up of the corporation and distribution of its assets, there could be little, if any, doubt as to their right to such relief. Instead of seeking such relief, however, they are demanding full payment of their stock, with accrued dividends, out of such assets as the corporation has. If their demands are granted, it would leave nothing for the holders of the later maturities of preferred stock. If all the holders of preferred stock are entitled to share ratably in the assets of the corporation, then we find this situation existing: That the holders of the early maturities of preferred stock are seeking by actions at law to enforce full payment of their demands. Concededly, the holders of unmatured stock are not entitled to resist these claims and continue the corporation as a going concern. They are confronted with the proposition of either submitting to the distribution of the assets among the holders of the earlier maturing stock, or consenting to and asking for the dissolution of the corporation and the distribution of its assets ratably among all of the preferred stockholders, and, when confronted with this situation, the holders of the later maturing preferred stock, in the present proceeding, are seeking the dissolution of the corporation and the distribution of its assets ratably among all of the preferred stockholders.

Under the facts disclosed and under the legal principles above announced, it is clear that a case for the application of equitable principles is presented; that the holders of later

maturing preferred stock are, under the circumstances, entitled to a dissolution of the corporation, in order that they may share in its assets, *pro rata,* according to the amount of stock held by each. We hold that sufficient grounds existed for the appointment of a receiver.

Some of the appellants contend that the order appointing a receiver was void and of no force for want of proper notice to those interested. The only notice that was given for the appointment of a receiver was served upon the corporation. No fraud or misconduct of any of the officers of the corporation is charged. The officers, under the circumstances, represented all stockholders. But, aside from this, those who are complaining appeared as interveners in the action, presented their evidence, and were heard upon the question as to the expediency of the appointment of a receiver. They have had their day in court as fully as though they had been given notice prior to the appointment. It would be an idle thing now to reverse the judgment appointing a receiver for the want of notice, when all those who are complaining have submitted their contentions fully to the trial court and have had a hearing upon the question.

We find no reversible error in the record. The judgment is therefore AFFIRMED.

UNION LOAN & SAVINGS ASSOCIATION, APPELLANT, V. WARNER D. JOHNSON ET AL., APPELLEES.

FILED FEBRUARY 6, 1929. No. 25900.

1. **Statute of Frauds.** An agreement to answer for the debt or default of another person is void, unless such agreement, or some note or memorandum thereof, be in writing and subscribed by the party to be charged therewith. Comp. St. 1922, sec. 2458.
2. ———: COLLATERAL AGREEMENT. "If the person for whose benefit the promise was made is himself liable, the promise of the defendant, although made before the services were rendered, is collateral, and within the statute of frauds." *Swigart v. Gentert,* 63 Neb. 157.

3. **Mortgages:** PRIORITIES. "The lien of an ordinary mortgage is not subordinate to mechanics' liens, merely because the money which it was given to secure was loaned for the purpose of improving the mortgaged premises, and under an express contract that it should be so used." *Henry & Coatsworth Co. v. Halter*, 58 Neb. 685.
4. **Evidence** examined, and *held* under the circumstances that the promise of plaintiff, if made, was a collateral undertaking and within the statute of frauds.

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

Stewart & Stewart and *A. A. Whitworth*, for appellant.

Burkett, Wilson, Brown & Wilson, Lloyd E. Chapman and *Harry E. Holeman, contra.*

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

PROUDFIT, District Judge.

This is an action brought by the plaintiff, Union Loan & Savings Association, to foreclose four separate mortgages given to secure four separate loans made by plaintiff to defendant Warner D. Johnson. The defendant Swift Lumber & Fuel Company furnished lumber to Johnson for the construction of residences and other improvements on the mortgaged premises, for which mechanics' liens were filed for an unpaid balance alleged to be due it. This appeal involves only matters in controversy between the plaintiff and the defendant Swift Lumber & Fuel Company, hereinafter designated as defendant company.

The petition contains the usual allegations for the foreclosure of real estate mortgages, stating a separate cause of action on each of the four mortgages, and alleging that said mortgages were first liens on the property involved. The defendant company filed an answer and cross-petition. The allegations involved in this appeal state, in substance, that defendant company furnished the defendant Johnson material for the construction of residences and other im-

provements on the mortgaged premises in reliance upon an oral promise on the part of the plaintiff to advance money sufficient to pay for the lumber and material bill up to the amount of said loans. The cross-petition contains five separate causes of action based on claims for five separate mechanics' liens for material alleged to have been furnished by the defendant company to defendant Johnson for improvements on the lots covered by said mortgages. The prayer of each cause of action of the cross-petition is as follows: "Wherefore, this answering defendant asks an accounting and determination of the amount due it, and that said amount be declared a first, best, prior, and paramount lien upon said premises; that its mechanic's lien may be foreclosed and the property sold, and that the defendants, Warner D. Johnson and Hilga O. Johnson, and the plaintiff, Union Loan & Savings Association, may be adjudged to pay any deficiency remaining due and owing after the proceeds of said sale shall be applied to said indebtedness."

The trial court found that the defendant company was entitled to a first lien on the mortgaged premises by reason of an alleged oral promise made by plaintiff to defendant company to see defendant company's claim for material paid to the extent of money arranged to be loaned upon said mortgages by the plaintiff to the defendant Johnson. The court for the same reason rendered judgment in favor of the company against plaintiff for $293.55, the unpaid balance due from defendant Johnson for material furnished on lot 9, against which the company failed to sustain its claim to a mechanic's lien. Paragraphs 6 and 7 of the decree contain the findings of the court upon the issues between plaintiff and defendant company, and are as follows:

"6. That notwithstanding the said mortgages of the plaintiff were filed before the said mechanics' liens attached, and were prior in point of time to said mechanics' liens, said lumber and building materials represented by said liens were furnished by the defendant Swift Lumber & Fuel Company, upon the oral promise made by the plaintiff to it that plaintiff would see its claim for said materials paid to the

extent of the money arranged to be loaned upon said mortgages by the plaintiff and the defendant Johnson, and that, inasmuch as said lumber and building materials went to enhance the value of the real estate and to increase the security of plaintiff, such promise upon the part of plaintiff was not void or voidable within the statute of frauds.

"7. That inasmuch as the defendant Swift Lumber & Fuel Company furnished to the defendants Warner D. Johnson and Hilga O. Johnson for the erection and completion of the building on lot 9 a quantity of building materials, upon which there remains a balance due of $271.55, and inasmuch as said material was furnished under said agreement on the part of plaintiff to see it paid, the defendant Swift Lumber & Fuel Company, not being entitled to any lien by which said payment could be had, should have judgment against plaintiff in said sum with interest thereon at the rate of 7 per cent. from the 23d day of November, 1925, amounting in all to the sum of $293.55."

From this finding and judgment the plaintiff has prosecuted an appeal to this court, alleging, first, that the court erred in rendering a decree in favor of the defendant company whereby it was given a first lien on the real estate involved, other than lot 9, and in rendering a judgment against plaintiff in favor of defendant for $293.55; second, that the alleged oral promise upon which the decree in favor of defendant company was based, if made, was void under the statute of frauds; and, third, that the finding of the court that the alleged oral promise referred to in the sixth and seventh paragraphs of the decree, as made by plaintiff to defendant company, was not supported by the evidence and is contrary thereto.

There is but one question other than the sufficiency of the evidence raised in this appeal, and that is, was the alleged oral promise upon which the decree in favor of the defendant company was based, if made, void under the statute of frauds? If it was, then the decree of the trial court is erroneous; if the promise was not void under the statute, then the decree, if supported by the evidence, is not errone-

ous. For reasons which will hereafter appear, it will not be necessary to discuss the evidence in this case except as relating to the main question: Was said promise within the statute of frauds?

The promise upon which the defendant company relied to support its claim as set forth in the petition is that plaintiff on divers occasions "always assured this answering defendant that it, the plaintiff, would furnish the money and complete the loans as agreed to be made, to the end that the houses contemplated and planned in the course of construction by the defendants Johnson should be completed, and all to the end that this answering defendant would be paid for the lumber and building materials furnished by it, and plaintiff further agreed that it would keep check on the amount of lumber and materials furnished by this answering defendant, and would always see to it that from the money which plaintiff was loaning to said defendants Johnson this answering defendant would be paid."

To support this allegation Mr. S. S. Swift, president of the defendant company, testifies in reference to a conversation had with either the president or assistant treasurer of the plaintiff: "I explained that we expected to make Johnson a very low price on the assurance that he intended to build more than one house. I don't remember now the exact number he was going to build, but it was three or four or five anyway, anyway more than three, I would say; and I had made him a special price with the idea that he was going to use a lot of material, and I wanted to know that I was going to get my money for it. And it was on Mr. Bechter's or Mr. Miller's assurance that they would advance him the money and see that we got our money provided that we kept them advised as to what our bills were that I took this business." Mr. Bechter and Mr. Miller are officers of the plaintiff association. And on cross-examination Mr. Swift testifies: "Well, I stated to Mr. Miller that Mr. Johnson had told me that he was going to build several houses and that Mr. Miller, or rather the company, was going to loan $3,500 on each of those houses, and I wanted to know whether or

not that was true. And Mr. Miller said it was. And I said that we are inquiring about this because we wanted to know something about where our money was coming from, and either Mr. Miller or Mr. Bechter assured me that, if we kept them advised as to the amount Johnson owed us from time to time, they would see that he was not paid until he paid us."

At no place in the record does it appear from the testimony of parties in behalf of the defendant company that the promise was any more definite than as herein set forth, that is, that the plaintiff association would see that the defendant company was paid, and it furthermore appears that there was no note or memorandum in writing relating to said promise signed by the association or any one in its behalf, and the record also discloses that the making of this promise, as related by the witness, Mr. Swift, was pointedly denied by both Bechter and Miller. The record further discloses that no charge was made against the plaintiff association, and no money paid by it to the defendant company on the account of Johnson, but that all payments made by the association were made directly to Johnson and such payments as were received by defendant Swift company were made directly by Johnson to the company, and the material furnished was all charged to Johnson, so far as disclosed by the record.

This court has held: "In an action to recover for services rendered to a third person the general rule is that, if the person for whose benefit the promise was made is himself liable, the promise of the defendant, although made before the services were rendered, is collateral, and within the statute of frauds." *Swigart v. Gentert*, 63 Neb. 157.

The appellee attaches considerable importance to the fact that the alleged promise was made before the material was furnished, and therefore the statute of frauds has no application; but the doctrine as established by *Swigart v. Gentert, supra,* covers that phase of the case also, and holds clearly that the promise is within the statute of frauds if the party for whom the services were rendered is liable.

There is no doubt in this case but what the defendant Johnson was and is liable for the payment for the materials furnished in carrying out his building enterprise.

Appellee contends, and the trial court apparently had the theory that, inasmuch as the material furnished to defendant Johnson went to enhance the value of the property upon which plaintiff held mortgages, therefore the mortgages would be subordinate to the mechanics' liens. That, however, is not the law. In *Henry & Coatsworth Co. v. Halter*, 58 Neb. 685, the law is said to be: "The lien of an ordinary mortgage is not subordinate to mechanics' liens, merely because the money which it was given to secure was loaned for the purpose of improving the mortgaged premises, and under an express contract that it should be so used."

The evidence clearly discloses that the mortgages were on file before the material was furnished for building on these lots, except as to lot 9, and the building on that lot had been almost completed and paid for before the mortgage was filed, and the defendant company did not file a mechanic's lien against that lot until after the time elapsed for filing same, so that the mortgage as to that lot clearly had precedence over the mechanic's lien.

The appellee has cited a large number of authorities in his brief showing apparent exceptions to the application of the statute of frauds, but the cases cited are not parallel with the case at bar and deal with actions wherein there was a direct promise to pay on the part of the person to be charged, or there was a new and independent contract based upon a sufficient consideration to support the promise. And after a partial performance, such promise has been held to be good. In the instant case there is no direct promise to pay, either alleged or proved. Neither is there evidence of a new and independent contract between the plaintiff association and the defendant company. The plaintiff association and defendant Johnson were not engaged in a joint building enterprise, but the association was merely loaning money to Johnson, and Johnson was buying material from defendant company. The mortgages were regularly

executed, filed for record, and the defendant company, as well as the rest of the world, charged with notice of the existence of these mortgages. No lien having been filed in time against lot 9, and the material for the building on the other lots having been furnished after the recording of the mortgages, the lien of the mortgages is superior. *Creigh Sons & Co. v. Jones*, 103 Neb. 706.

A thorough examination of the evidence in this case is conclusive of the fact that the promise of the plaintiff was a collateral undertaking and within the statute of frauds, and the decree of the trial court in finding for the defendant company subordinating the lien of plaintiff's mortgages to the mechanics' liens of defendant company was erroneous, should be reversed and a decree foreclosing plaintiff's mortgages and giving same priority should be entered in accordance with the views herein expressed.

REVERSED AND REMANDED, WITH DIRECTIONS.

ON REARGUMENT.

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

REDICK, District Judge.

A hearing was had in this case at a prior term at which time Proudfit, District Judge, was sitting and participating, and to whom the case was referred to write the opinion for the court. The opinion was written and submitted to the court, but, upon consultation, there appearing to be some doubt as to the correct disposition of the case, a reargument was ordered and hearing had at which Judge Proudfit was not present, and upon consultation the case was referred to the writer to prepare the opinion of the court.

At the consultation upon the first opinion, the writer presented written objections to its acceptance, but, upon further consideration of the record, briefs and authorities cited, has concluded that the Proudfit opinion should be adopted.

Under the circumstances, it will not be necessary to make a complete statement of facts, for which reference is made

to the original opinion. The only question upon which a difference of opinion existed among the judges was whether or not the promise of appellant was original or collateral. The form of the promise was collateral "that plaintiff (appellant) would see its claim for said materials paid to the extent of the money arranged to be loaned." The testimony of Mr. Swift for the claimant on this point was: "It was on Mr. Bechter's or Mr. Miller's assurance that they would advance him (Johnson) the money and see that we got our money provided that we kept them advised as to what our bills were that I took this business." Also, "There were no other conversations that I remember of that directly bore on the fact that they were going to pay Johnson's account—or rather, see that he did pay his account—other than their actions. They went right along verifying them all the time when they were asking me about this."

A brief statement of the situation of the parties will make clear the occasion giving rise to the claim of Swift Lumber & Fuel Company. The statement assumes the facts to be as claimed by Swift. Johnson owned several lots in College View and was desirous of improving them by building houses. He first applied to Swift to furnish the lumber and other materials, and then to the appellant for loans upon the lots to assist him in his undertaking. Prior to the making of the loan or the delivery of any materials, Swift and Johnson went to the place of business of appellant and had a conversation with Bechter and Miller, officers of appellant, in which Swift said they would like to furnish the lumber, but wanted to know where his money was coming from, and was informed that the appellant was making the loans to Johnson, and thereupon the oral promise upon which Swift relies, as above set out, was made. Thereafter and before any materials were furnished, as far as that question is material, mortgages were executed to appellant and recorded, the erection of the buildings commenced, and Swift furnished labor and materials for which he now claims a prior lien.

The materials furnished by Swift were charged on the books of the lumber company to Johnson and bills rendered to him, copies being sent to appellant; there was no charge on the books against appellant. The money represented by the loans was paid out as the building progressed by checks to Johnson, and the lumber company was paid by Johnson's checks, never by *appellant*. Under these circumstances, was the promise of appellant original or collateral? It seems to me the case is absolutely ruled by that of *Williams v. Auten*, 62 Neb. 832, the syllabus of which is as follows:

"Where goods, money or services are furnished to a third person, at the request and on the credit of the promisor, the undertaking is original and the promisor will be liable although the promise is not in writing. *Peyson v. Conniff*, 32 Neb. 269.

"Where, however, goods are furnished to a third party at the request of a promisor and with reliance on his credit, and the transaction is such that the third party or beneficiary is liable therefor to the promisee as an original undertaking on his part, and there being no joint contract, the promisor's liability is collateral only as guarantor, and unless in writing is void under the statute of frauds."

In that case the promise was made before any of the goods were delivered, and yet, because the party receiving the goods was liable therefor, the promise was held to be collateral. In *Williams v. Auten*, page 835, Holcomb, J., says:

"We are not dealing with a case where an agreement upon a valid consideration is entered into, whereby one obligates himself to pay for goods or services for the benefit of and furnished or rendered to a third party, such third party having no other or further interest in or connection with the transaction save that of being the recipient of the benefits thus bestowed. In the class of cases referred to, the promise, although verbal, is clearly an original undertaking in no way affected by the statute of frauds. In such cases the contract is made with, and the credit is given exclusively to, the party sought to be charged, and his obligation is that of a principal, and not a guarantor. Regarding

these cases the rule is well stated in *Peyson v. Conniff*, 32 Neb. 269, where it is held: 'Where goods, money, or services are furnished to a third person, at the request and on the credit of the promisor, the undertaking is original and the promisor will be liable although the promise is not in writing.' The rule stated is well supported by the authorities cited in the opinion. Nor is the case at bar one where two or more may become jointly obligated under an agreement entered into by all the parties thereto for goods or services, even though but one of the contracting parties or a third party may receive the thing contracted for and be the beneficiary under the contract."

These observations seem to precisely fit the situation of the present case. It is not a case where the third party is not liable, nor is it a case where the third party and appellant incurred a joint liability. There is some claim that Johnson and appellant were engaged in a joint undertaking, but the evidence will not warrant any such inference. The relations between those parties were the ordinary ones of borrower and lender, the appellant having no interest in the result of the undertaking beyond the repayment of its loan and interest. In *Williams v. Auten*, page 837, Holcomb, J., further observes:

"The object and intent of the statute, says Reed in his work on the Statute of Frauds, section 87, is to deny the imposition of a liability by parol on two persons to pay the debt of one. See, also, *Hendricks v. Robinson & Stevens*, 56 Miss. 694, 699. The authorities appear entirely harmonious in support of the rule that, if the beneficiary or person for whose use the goods are furnished is liable at all by reason thereof, any other promise by a third person to pay the same debt must be in writing, otherwise it is void by operation of the provisions of the statute of frauds."

In my judgment it would be a dangerous rule, and one calculated to permit the perpetration of the very frauds against which the statute was intended to guard, in this class of cases, to permit a party furnishing labor or materials for the erection of a building to recover upon a verbal

promise by the owner or lender, the building and loan association furnishing the money, to pay for such materials. True, where the money loaned is paid out as the building progresses it is to the interest of the lender to see that materials are paid for by the borrower, but if the materialman expects to rely upon the money loaned for payment, it is a very simple matter to make the arrangement with the lender and take a written promise for that purpose. This should be, and I think clearly is, the requirement of the statute of frauds. It is true that the lender has an interest in the completion of the building for the better security of his loan, but this is not such an interest as will convert a collateral promise into an original one. Where the owner, to secure completion of the building, promised a laborer to pay him, provided he would continue work, if the contractor did not, the promise was collateral, the benefit to the owner being too remote to furnish an independent consideration. *Morrissey v. Kinsey,* 16 Neb. 17. In that case the court distinguished *Fitzgerald v. Morrissey,* 14 Neb. 198, where the agreement was to work for the promisor, the subcontractor not being thereafter liable to the promisee. The case of *Ribock v. Canner,* 218 Mass. 5, is directly in point. There the mortgagee under a construction mortgage verbally promised that, if the contractor would go on with his work under his contract with the builder, the mortgagee would pay him the amounts that became due to him under his contract. It was further held that proof of a valuable consideration for the verbal promise or of partial payments would not remove the bar of the statute. *Birchell v. Neaster,* 36 Ohio St. 331, is to the same effect, and also holds that the fact that there was due from the promisor to the contractor at the time of the promise a sum sufficient to pay the balance due the promisee did not take the case out of the statute.

Appellee contends that an oral promise to pay a debt of another and which debt is not then in existence is not within the statute of frauds, citing 27 C. J. 130, sec. 15, which, among a large number of cases, cites *Learn v. Upstill,* 52

Neb. 271. That was a case where no person other than the promisors were liable for the debt, and the statement of the text as applied to that class of cases is correct. But in 27 C. J. 130, sec. 17, it is stated: "An oral promise to answer for the debt of another made before the debt is incurred is within the statute, where such promise is a collateral as distinguished from an original promise." The text is supported by *Wagner v. Hallack,* 3 Colo. 176, where the owners of the building said, "We will see the articles paid for," and they were shipped and charged to the contractor; *Whitehurst v. Padgett,* 157 N. Car. 424, where the third party remained liable; *McDowell, Stocker & Co. v. Sharp,* 157 Ill. App. 165; *Reelman v. Grosfend,* 140 Mich. 681; *Frohardt Bros. v. Duff,* 156 Ia. 144; *Wray v. Cox,* 86 Miss. 638; *Gidley v. Glass,* 41 N. Dak. 542, goods furnished relying upon promise that promisor would see them paid for. There seems to be no dispute that, where the promise is collateral, it is immaterial whether the debt to which it refers was contracted before or after the promise.

In 27 C. J. 132, sec. 20, is the following: "Although the words 'original' and 'collateral' as applied to promises do not occur in the English statute of frauds, they were used at an early day, and their use has been sanctioned and approved by the courts and text-writers as convenient and accurate expressions to distinguish respectively between the cases in which the direct and leading object of the promisor is to further or promote some purpose or interest of his own, although the incidental effect thereof may be the payment of the debt of another, and those cases in which such object is to become the surety or guarantor of the subsisting debt of another for which the promisor was not previously liable. The former are designated as original, the latter as collateral, promises. A collateral promise whether made before, or after, or contemporaneously with the promise of the primary or original debtor is within the statute and must be in writing, while an oral original promise is not within the statute, because, although its effect may be to extinguish the debt of another, it is not a promise to do so."

This statement is followed by over two pages of citations.

It cannot be said that the principal object of the appellant in this case was to secure the furnishing of materials for the buildings in question. The business of appellant was the loaning of money at interest, and its principal object clearly was to invest its funds at interest. It had no further interest in the undertaking.

Appellee cites *Lindsey v. Heaton,* 27 Neb. 662, to the effect that: "The promise having been made prior to the delivery of any of the property sold, and such sale and delivery having been made upon the faith of the agreement of the promisor, it was sustained by sufficient consideration and the promisor was liable thereon." This statement was made with reference to the consideration for the promise, not as to the collateral nature of the promise. It was held that the evidence sustained the finding that the promise was unconditional, and therefore original. The language of the promise was, "I will pay it and charge it to him," a direct, unconditional promise to pay. In that case, moreover, it appeared that the party furnishing the goods refused to allow them to leave his store until the defendant had made a direct promise to pay for them. However, so far as prior delivery of goods is concerned as affecting the nature of the promise, while the *Lindsey* case is not referred to, it is clearly contrary to the holding in *Williams v. Auten,* 62 Neb. 832, *supra,* and *Swigart v. Gentert,* 63 Neb. 157, if the holding as to consideration is applied to the question of the nature of the undertaking, which does not seem logical.

The following cases cited by appellee are distinguishable and are not in point for the reasons stated:

Peyson v. Conniff, 32 Neb. 269, a direct promise by which the leading object of the promisor was to promote his own interest.

Joseph v. Smith, 39 Neb. 259, a direct promise to pay the debt in consideration that the promisee would release a lien upon certain stock. This was a subsequent independent contract.

Barras v. Pomeroy Coal Co., 38 Neb. 311, a direct promise after promisee had refused to furnish any more material. In the present case appellee not only did not refuse to furnish any material, but after it had notice that appellant refused to pay, continued to furnish them to Johnson.

Barnett v. Pratt, 37 Neb. 349, a suit on a promise made to a third party for plaintiff's benefit. There was no question of the statute of frauds.

Swayne v. Hill, 59 Neb. 652, a new and independent promise to prevent levy of execution on partnership property.

Weilage v. Abbott, 3 Neb. (Unof.) 157, a promise to pay plaintiff's attorney's fees if suit were dismissed.

Stanton Nat. Bank v. Swallow, 113 Neb. 336, a new and independent consideration and, furthermore, the promise was to take up or pay the debt of the promisee, not of a third party.

We conclude that the order of reversal should be adhered to.

VICTOR E. BROQUET V. STATE OF NEBRASKA.

FILED FEBRUARY 13, 1929. No. 26533.

1. **Homicide**: INSTRUCTIONS. Where a police officer, in an attempt to arrest an intoxicated person, where it is not reasonably and apparently necessary, in all the circumstances, for an ordinarily prudent person to shoot such misdemeanant to effect his arrest, carries a loaded gun and discharges it so as to kill the misdemeanant, and testifies that he unconsciously discharged the gun without intention to shoot the misdemeanant, it is not error prejudicial to the defendant to submit to the jury the question whether the defendant is guilty of unintentional manslaughter while engaged in the commission of an unlawful act.
2. ———: QUESTION FOR JURY. A police officer, in arresting one who is guilty of a misdemeanor, may use such force as, to an ordinarily prudent person, appears reasonably necessary under the circumstances, even to the taking of life; but, if the officer slay the offender while effecting his arrest, the question as to whether he used more force than was, under the circumstances, reasonably necessary is a question for the jury to determine from the evidence.

3. ———: SENTENCE REDUCED. Record and evidence examined and judgment affirmed, but sentence modified.

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

Perry, Van Pelt & Marti and *J. F. Fults,* for plaintiff in error.

O. S. Spillman, Attorney General, and *Lester C. Dibble, contra.*

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

GOSS, C. J.

Plaintiff in error, hereinafter called defendant, was charged with first degree murder and was convicted of manslaughter. After sentence he comes here for review on errors assigned.

The homicide occurred in the village of Wilsonville August 13, 1927, at about 9 p. m. The defendant, Victor E. Broquet, was the village marshal. Bertram D. Wagner, who was killed, was a bricklayer. He was industrious, but when intoxicated was abusive. There was evidence that on previous occasions he had threatened the marshal and had used strong language against him. The marshal had never arrested him but had used restraint under provocation when Wagner was in a quarrelsome mood. On the night of the killing the marshal received a relayed telephone call to go to a house in the village where a woman had reported that a sick man was lying on the sidewalk. The marshal did not get these details, but received a call to go to that place. He went and found the man, who proved to be Wagner, intoxicated. He roused him and requested him to accompany him, but Wagner refused. The marshal entered the house and sent a telephone call to the county seat, requesting the sheriff to come. He then returned to Wagner who still refused to be arrested. Shortly the marshal left him, entered the house by a rear door, and then went to the telephone, which was near the front door, to find out whether

the sheriff had started. In the meantime a man and other women, having heard of the trouble, came to the house and the women entered the house. As the marshal was at the telephone they called that Wagner was coming in. They and the marshal at first evidently thought he was about to break into the front of the house, but he then learned the women were holding the back door and concluded Wagner was trying to enter there. The defendant thereupon went to the rear door, took his gun from his belt, left by the rear door, went around to the front of the house, and met Wagner, who was away from the house some distance, near the corner of the yard. As the marshal approached Wagner, he testified that Wagner started toward him, and, with an epithet, stated that he would cut the marshal's heart out before he would let him take him; that he had his hands up and moving "like a boxer would move his hands;" defendant "could not tell whether he had anything in his hands or not, but at that time I thought he had;" defendant never had any intention of killing Wagner, but when Wagner was at a distance of three to six feet defendant shot him in the neck, as a result of which he died. Defendant's gun was a 20 gauge, hammerless shotgun, with two barrels 10 inches long. It had a pistol grip with a conventional safety device on the top. The gun cannot be discharged unless this is "off safety." This is accomplished by pushing the slide up with the thumb of the hand that grips the stock.

Of the many errors assigned, those argued and relied on may be classified under these two points:

First. That the court erred in treating the manslaughter here involved as involuntary manslaughter.

Second. That the court erred in not allowing the defendant as an officer seeking to arrest the offender to be the judge as to the necessity of shooting.

Manslaughter is defined by our statute as follows (omitting the penalty):

"Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the

slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter." Comp. St. 1922, sec. 9546.

This degree of homicide lacks the elements of purpose, deliberation, premeditation and malice necessary to constitute murder in the first degree; and lacks the elements of purpose and malice to constitute murder in the second degree.

Manslaughter is therefore indicated when the homicide is not murder in the first or second degree and is unlawful, but is without malice and is committed on one of the two following described occasions: First, upon a sudden quarrel; or, second, unintentionally, while the slayer is in the commission of an unlawful act.

By the instructions, the court withdrew from the consideration of the jury the charges of murder in the first and second degree and submitted to the jury only the charge of manslaughter which was included in the aptly drawn complaint for murder in the first degree. In that paragraph of the instructions to the jury in which the court named the material elements the state must prove from the evidence beyond a reasonable doubt, this subparagraph is challenged by the defendant:

"That said killing was done unlawfully and either intentionally, upon a sudden quarrel; or unintentionally, while the defendant was in the commission of some unlawful act."

The verdict was a general one, finding the defendant guilty of manslaughter. The defendant assigns prejudicial error in submitting to the jury the question whether, at the time the slayer did the killing, he was in the commission of an unlawful act. This was the second or alternative point submitted to the jury in the subparagraph above quoted.

The specific withdrawal of the charges of murder in the first and second degrees, to which we have referred, was in line with our previous holdings, among which may be cited *Botsch v. State,* 43 Neb. 501; *Whitehead v. State,* 115 Neb. 143; and followed at this sitting in *Pembrook v. State,* 117 Neb. 759. The reason for the rule is that, where there is

no evidence to support a criminal charge, to submit to the jury the question of the guilt or innocence of the defendant on such a charge is calculated to confuse and mislead the jurors. It is therefore prejudicial to a party on trial on such a complaint, even though he may not have been found guilty on that particular charge but on another which may have been included in the information or indictment.

Defendant argues that the same principle is involved here because both occasions under which manslaughter may be committed were submitted to the jury; that there was no evidence that the defendant was engaged in an unlawful act when he slew the man he, as town marshal, was trying to arrest.

Ordinarily, when a police officer is tried for manslaughter while attempting an arrest, he is considered as charged only under the first phase of the manslaughter statute and the jury are instructed accordingly on the subject of intentional manslaughter only. That arises from the theory or fiction that the officer used more force than necessary and thus translated the legal act of arrest into an intentional homicide.

Seldom would an occasion arise such as here. The writer has never observed in practice or in the reports a like situation. The shooting occurred as we have described it. The record also shows that the defendant testified on his direct examination that he had no malice, did not intend to kill Wagner, and had no intention to use the gun except for the purpose of protecting himself from threatened danger; and on cross-examination he admitted that the gun was discharged, but testified that he "never noticed whether I had the gun in my hand any more than any one else or not; some one else might have had it at the same time for all I know," and that he could not say that he fired any gun at Wagner.

A defendant is entitled to have his theories and his defenses as reflected in the evidence submitted to the jury. If this one had not been submitted by the instructions, and

he had been convicted, he would have been here complaining. The learned trial judge took that view of it.

We therefore think that the court was justified in submitting to the jury the second phase of the statute on manslaughter, and that the rule may be stated in this way: Where an officer, in an attempt to arrest an intoxicated person, where it is not reasonably and apparently necessary, in all the circumstances, for an ordinarily prudent person to shoot such misdemeanant to effect his arrest, carries a loaded gun and discharges the gun without intention to shoot the misdemeanant, it is not error prejudicial to the defendant to submit to the jury the question whether the defendant is guilty of unintentional manslaughter while engaged in the commission of an unlawful act. This was the effect of the instruction given by the trial court. The defendant's rights were not prejudiced thereby.

The second proposition into which the assigned and argued errors group themselves is that the instructions of the court did not allow the defendant to be the judge of the necessity of shooting. Defendant may think this is a summary classification, but a careful comparison of the instructions requested and those given the jury shows that this is the only real and valid difference between them. The instructions given the jury by the court guarded the rights of the defendant most fairly and thoroughly, unless in this one point they failed.

Defendant quotes from 1 Michie, Homicide, 313, citing Hale:

"Where persons have a right to arrest and imprison, and, using the proper means, are resisted in so doing, they may repel force with force, and need not give back, and, if the party resisted is unavoidably killed in the struggle, this homicide is justifiable."

The state counters by continuing the quotation as follows:

"But although a peace officer in the discharge of his duty is protected while acting as an officer and within the law, he cannot take the life of a citizen unless necessity there-

for exists. Where the peace officer is in good faith attempting to arrest and the offender commits an overt act manifesting an intent to immediately resist, under such circumstances as are sufficient to create in the mind of a reasonable man a belief that the offender was about to immediately use a deadly weapon, the officer will be justified in firing first; *but a mere attitude of defiance, or preparation to resist, not amounting to an assault, especially in cases of misdemeanor, will not justify the killing.*" 1 Michie, Homicide, 313.

If a police officer were to be the sole final judge of the necessity of killing one who resisted arrest or who refused to submit to arrest, it would open the door to those officers, few they might be, who would use such a statement of the rule as a shield to homicides committed under the ægis of the law. The very statement of such a rule shocks one's consciousness of right and wrong.

That rule was expressly rejected in principle by this court in a manslaughter case, in which a deputy sheriff was convicted and the judgment was affirmed by this court, where this court quoted with approval the following from a case in another state:

"The law does not clothe an officer with the authority to judge arbitrarily of the necessity of killing a prisoner to secure him, or of killing a person to prevent the rescue of a prisoner. He cannot kill unless there is a necessity for it, and the jury must determine from the testimony the existence or absence of the necessity." *Lamma v. State,* 46 Neb. 236.

Many authorities might be cited to sustain this rule which, to make it applicable to the facts here, may be stated as follows: A police officer, in arresting one who is guilty of a misdemeanor, may use such force as, to an ordinarily prudent person, appears reasonably necessary under the circumstances, even to the taking of life; but, if the officer slay the offender while effecting his arrest, the question as to whether he used more force than was, under the

circumstances, reasonably necessary is a question for the jury to determine from the evidence.

Under the authority of section 10186, we do not think any "substantial miscarriage of justice has actually occurred," and that the judgment is for affirmance. The defendant was sentenced to three years in the penitentiary. The testimony of several good-character witnesses showed that he had always borne a good reputation. There was that in the evidence which indicated that he lacked the poise and character necessary to carry out the situation in which he was placed. He was excited and confused by the actions of the deceased on the one hand and by his duty to protect the women under his charge as an officer on the other. He did not get out his gun until he left the telephone to go to the deceased for the third and fatal time. We doubt if he knew when he took the gun from his belt and we credit his testimony that he did not know whether he or some one else did the shooting. We think that the ends of society will be served and the law vindicated by a shorter sentence than that imposed by the court and that it should be reduced to one year.

For the reasons stated in the opinion, the judgment of the trial court is affirmed in all respects save that the sentence imposed on the defendant is so modified that the defendant shall serve a term of one year.

AFFIRMED: SENTENCE MODIFIED.

MICHAEL J. MCFADDEN ET AL., APPELLEES, V. GEORGE DENTER ET AL., APPELLANTS.

FILED FEBRUARY 13, 1929. No. 26348.

Statutes: CONSTITUTIONALITY. The legislative act permitting owners and lessees of semi-arid lands in the western part of Nebraska to construct and maintain in highways combined cattle-guards and unobstructed runways for motor vehicles and also fences with gates *held* not unconstitutional as class, local or special legislation.

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

Beeler, Crosby & Baskins, for appellants.

M. M. Maupin, and *Halligan, Beatty & Halligan, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON and DAY, JJ., and ELDRED and REDICK, District Judges.

ROSE, J.

This is a suit for an injunction to prevent the county commissioners of Keith county and a road overseer from interfering with fences that plaintiffs had constructed in a public highway. Plaintiffs own and operate a cattle-ranch intersected by a section-line road running north and south between sections 14 and 15 and between sections 10 and 11 in township 14, north, range 35, Keith county. November 26, 1917, the county board declared the line between the sections described to be a public road and, January 10, 1918, plaintiffs received damages resulting from the opening thereof. The land was not fenced on either side of the road from north to south, but there were fences running east and west along the southern and northern boundaries of the ranch. The grazing of cattle on both sides of the road was the principal purpose for which the lands were used. To prevent live stock from escaping from the pasture, plaintiffs extended their fences into the road and there connected them with a combined cattle-guard and an unobstructed runway for motor vehicles. Over a pit the runway was constructed of timbers with spaces between. In each fence where it extended into the road there was also a gate for general purposes. The petition of plaintiffs contains the plea that in extending their fences into the road they complied with the legislative act containing the following provisions:

"In that territory in the State of Nebraska bounded in the Act of Congress of April 28, 1904, commonly known as the 'Kinkaid Act,' contained in the Federal Statutes Annotated, second edition, volume 8, page 611, it shall be law-

ful for the owner or legal occupant of lands in said territory inclosed and used for pasture of stock, to erect motor vehicle crossings, stock-guards and gates across public highways as hereinafter provided.

"The owner or occupant of the land shall have the right to construct and maintain at his own expense a safe crossing for automobiles and motor vehicles across public highways in said territory, by digging a pit not less than three feet deep and six feet long and nine feet wide. The top of said pit shall be covered by timbers not less than 4 by 6 placed not more than six inches apart, supported by sills and posts of sufficient strength to carry a weight of three tons; the same to be securely constructed in good workmanlike manner, of good material.

"At the point where said cattle-guard and crossing is constructed it shall be the duty of the owner or occupant of the land at the same time to erect a gate or gates not less than twelve feet wide and free from obstruction at the top." Laws, 1923, ch. 130, secs. 1, 2, 3.

Defendants removed the fences from the roadway and threatened to prevent plaintiffs from maintaining them there in the future.

The defense pleaded in the answer to the petition is that the enactments quoted are void as being inhibited by the constitutional provisions that the legislators shall not pass local or special laws "laying out, opening, altering and working roads or highways;" or "vacating roads;" or "granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever." Const., art. III, sec. 18.

Upon a trial of the cause the district court upheld the act of the state legislature and granted a permanent injunction preventing defendants from interfering with plaintiffs' fences in the highway. Defendants appealed.

Defendants concede that the question presented by the appeal is the validity of the act permitting owners or others in control of land to extend fences into roads in the region described in the "Kinkaid Act," a federal statute relating

to homestead entries in semi-arid regions of Nebraska. 8 Fed. St. Ann. 611. For the purposes of homestead entries the Kinkaid Act divides Nebraska by a zigzag line between counties extending from the southwest corner of Red Willow county on the Kansas line to the northwest corner of Knox county on the South Dakota line. The ranch of plaintiffs is in the territory west of the zigzag line described.

Defendants argue that the act under consideration is local, class and special legislation forbidden by the constitutional provisions cited. The west end of the state varies from the east end in altitude, climate, moisture and soil. The region to which the act applies is adapted generally to grazing and stock raising. For those purposes large tracts of land are controlled by individual owners or lessees. Cattle-ranches with areas of many square miles of grazing land in a body are common in the cattle country. Stock raising affects the general supply of food everywhere and calls for legislative protection. It has already been held that "protecting the sources of food supplies is a legitimate function of government." *Fisher v. Board of Regents,* 108 Neb. 666. Fencing lands on both sides of a highway through pastures in populous agricultural districts might be necessary, while such a system would be a serious and objectionable handicap in the vast semi-arid grazing regions of the west where cattle raising is the principal industry. Legislation applicable alone to the western area of the state is not forbidden by the Constitution. Laws in force in one county may be inapplicable to another owing to different conditions. Cities of different classes are governed by different charters. Avocations, enterprises, industries and individuals may be reasonably classified by the legislature for the purpose of legislation applicable alone to one class, without violating the constitutional provisions under consideration. *Fisher v. Board of Regents,* 108 Neb. 666. The following is settled law:

"The legislature may make a reasonable classification, resting on grounds of public policy, or some substantial

difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified." *Dougherty v. Kubat,* 67 Neb. 269; *State v. Farmers & Merchants Irrigation Co.,* 59 Neb. 1; *Cleland v. Anderson,* 66 Neb. 252.

The act assailed by defendants as void seems to meet the test of reasonableness. For the public welfare restraints may be imposed on individuals. In populous cities drivers of automobiles may be required to stop before passing a school building. In sparsely settled grazing regions where the highway traffic is light it does not seem unreasonable to permit a ranchman to construct and maintain in a public road a combined cattle-guard and unobstructed runway for motor vehicles and thus compel drivers of automobiles to momentarily slacken their speed—just what may be necessary at any public crossing. Cattlemen and pedestrians who maintain gates on their own premises will not be unreasonably inconvenienced by gates in highways. The legislature may confine public travel to part of a highway. This happens where there are narrow bridges, gutters, and telephone, telegraph, power wires, and other partial obstructions in streets or roads.

Where the constitutionality of a statute is attacked the courts presume that the lawmakers acted with full knowledge of the subject of legislation and that the statute is valid. In the present instance these presumptions have not been overthrown by evidence or reasons to the contrary. The invalidity of the act has not been shown.

The statutes imposing upon the county board the duty to open and repair roads have not in direct terms been repealed. Whether in performing that duty county officers may temporarily remove fences legally constructed and maintained is a question not presented or determined. Defendants refused to permit plaintiffs to exercise any right under the legislation assailed and threatened to pursue the same course in the future. The injunction, therefore, was properly granted, since the act is not invalid on any ground pleaded as a defense.

AFFIRMED.

RUDERSDORF DRAINAGE DISTRICT, APPELLEE, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 13, 1929. No. 26229.

1. **Drains**: DRAINAGE DISTRICT: APPORTIONMENT OF BENEFITS: APPEAL: WAIVER. When a party litigant in a drainage district makes objection to the levy of an assessment for alleged benefits against his lands, by prosecuting an appeal therefrom to the district court, such litigant thereby waives his right to insist in court that no apportionment of benefits had in fact been made. *Baker v. Morrill Drainage District*, 98 Neb. 791.
2. ———: ———: ASSESSMENT OF BENEFITS. The evidence supports the holding of the trial court that the railroad company is entitled to set off, against the special benefits which it has derived from the entire scheme of drainage herein, the reasonable value of that portion of such benefits as was contributed by the work which the company itself had done in producing those benefits. *Drainage District v. Chicago, B. & Q. R. Co.*, 96 Neb. 1.
3. ———: ———: ———: RAILROADS. When it is determined by competent authority that either an individual or a business enterprise, in the present case a common carrier, is the recipient of a substantial benefit from improvements installed by the public, such enterprise should bear a reasonable part of the expense of the construction.
4. ———: ———: REDUCTION OF ASSESSMENT. Record examined, and *held* that the judgment of the trial court in reducing the amount of the assessment from $1,500 to $1,000 is within the provisions of the statute applicable to the facts before us.

APPEAL from the district court for Sarpy county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Holmes, Chambers & Holland and *Nickerson & Nickerson*, for appellant.

Collins & Collins, contra.

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

DEAN, J.

From the assessment of alleged benefits to its property by the Rudersdorf Drainage District, hereinafter called

the district, the Chicago, Rock Island & Pacific Railway Company, hereinafter called the company, appealed to the district court for Sarpy county, wherein the amount of the assessment complained of by the company, namely, $1,500, was reduced to $1,000.

On the part of the company, on appeal to this court, the objections are substantially these:

(a) The district was not organized according to law, nor (b) was a lawful estimate made of the required work. (c) The proposed assessment against the company is in excess of any actual benefits and is therefore void. (d) That by reason of the construction of the proposed ditch through an existing pile trestle bridge of the railroad and the same appropriated by the district for a new waterway, the objector has suffered damages in the sum of $5,000, and is entitled to an offset. (e) That the purported levy is irregular and void because an election was not called by the district on three weeks' notice, as section 1862, Comp. St. 1922, requires for a vote on the adoption of the improvement and proceeding with the work. The estimate of the cost of the project exceeds 20 per cent. of the assessed value of the lands benefited by the improvement, which assessed value, under section 1862, is based upon one-fifth of the actual value.

Counsel for the district make this observation: "Can the appellant declare the assessment void and in the same breath declare it valid by its appeal from the apportionment?" In *Baker v. Morrill Drainage District*, 98 Neb. 791, cited by the district, we held that the appellants, having appeared and having opposed the levy of an assessment, and having made objection to the assessment of benefits against their lands by prosecuting an appeal from such assessment to the district court, waived their right to insist that no apportionment of benefits had in fact been made.

In respect of the merits it may be observed, on the part of the district, that Mr. Gavenman, the district engineer, testified that the drainage district ditch was installed to

carry the heavy rainfall upon an area of approximately a thousand acres of higher ground on the north side of the railroad track in the Platte river valley between Lincoln and Omaha. There is evidence which tends to show that the water formed a creek 15 feet wide and 7 or 8 feet deep on the higher ground, the land on the north side of the track being from one and one-half to five feet higher than on the south side of the track, and where very heavy rain falls, the water, at times, runs over the tracks and, if allowed to follow the old water-course, will stand along the north side of the right of way and by seepage the roadbed will be damaged thereby. The evidence fairly discloses that the district engineer took into consideration a company trestle bridge in making the assessment. He testified: "Q. Did you take into consideration, you and the board, the trestle bridge through which the ditch now passes under the Rock Island? A. I certainly did. I figured it cost the Rock Island something to put that bridge in, and I considered $1,500 on a ditch like the one that is built now, very, very low. * * * Q. You say that you took into consideration the assessed value too. Did you take into consideration the maintenance of the bridges and the right of way, and the relief from damages and injury to the right of way and so forth and the property of the Rock Island, by reason of the floods that came from the Rudersdorf drain? The court: Answer yes or no. A. Yes, sir." The district engineer also testified that he had a conversation with the engineer of the company when the district was being formed and that the company's engineer showed him where he wanted the ditch put in.

The secretary of the district board of directors testified that frequently, after a heavy rainfall, he had seen three feet of water on the north side of the right of way adjacent to the railroad tracks and that the volume of water looked like a small lake. He testified too that, at times, he heard sectionmen working on the tracks during the nighttime to overcome the flood of water and prevent damage to the company's property.

A disinterested witness testified that his land joined that of Mr. Rudersdorf's and that, during the past eight years, he was familiar with the existing conditions and had noticed the effect of the water on the railroad property. From his evidence it appears that, at times, a crew of railroad employees worked at night repairing the right of way from the damaging effects of the excessive rainfalls and that, sometimes, after a very heavy rainfall, no trains passed over the track during the night and part of the next day but were detoured over another route.

Four or five disinterested witnesses testified in respect of the heavy rainfalls and the consequent inundation of the roadbed, and also to the fact that, at some points, the flood-water came up to a foot or a foot and a half of the tracks. And some of these averred that sediment was deposited, by reason of the excessive rainfall, in the immediate vicinity, to such extent that it almost covered the top of the fence posts. From their evidence it appears that, at the time, the roadbed of the company was gradually being submerged.

The division engineer testified that the trestle bridge was constructed by the company at an expense of more than $3,200 to relieve the overflow of the flood-waters. And it may be observed that the right of way is nearly 12 feet high where it crosses the ditch. He also testified that the district engineer asked permission of him to run the ditch through the bridge, but that he had no power to give such permission and that he had never heard from higher authority granting permission. In respect of a culvert in the vicinity in question, owned by the company, this witness testified: "Q. Wasn't it (the culvert) built large enough to carry off the water that flowed there? A. No, sir."

County of Blaine v. Brewster, 32 Neb. 264, is cited in *Drainage District v. Chicago, B. & Q. R. Co.*, 96 Neb. 1, and is in point here. In that case it appears that Brewster owned a bridge across the North Loup river. The county commissioners located a public road over the bridge and it was appropriated by the public. The agreed value of the

bridge was $610, but the county board rejected the claim when it was presented. On appeal to the district court the claim was allowed and the judgment was subsequently affirmed in this court in the above cited case, opinion by Maxwell, J.

When it is determined by competent authority that either an individual or a business enterprise, in the present case a common carrier, is the recipient of a substantial benefit from improvements installed by the public, such enterprise should bear a reasonable part of the expenses of the construction. That the right of way of the company is enhanced in value by the construction of the drainage system under discussion is apparent. Only a few of these benefits need be here enumerated, and among these are relief from numerous floods extending up to the ties and rails, and decreasing the hazards of passenger and freight traffic, and lessened expense of maintaining the right of way.

So far as applicable here, we adhere to the rule announced in *Drainage District v. Chicago, B. & Q. R. Co.*, 96 Neb. 1, above cited, wherein we held that the defendant was entitled to set off, against the special benefits which it derived from the entire scheme of drainage, the reasonable value of the portion of such benefits as was caused by the work which it had itself done in producing those benefits.

From the record before us, and in view of the decisions, we conclude that the judgment of the trial court in fixing the amount of the assessment at $1,000 is reasonable and should be sustained. The judgment is therefore

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, RELATOR, V. JOHN M. PRIEST, RESPONDENT.

FILED FEBRUARY 13, 1929. No. 26159.

1. **Attorney and Client:** SUIT FOR ACCOUNTING: DECREE AS EVIDENCE IN DISBARMENT PROCEEDING. In a disbarment proceeding, where the specification alleges that an attorney was guilty of unprofessional conduct, violated his oath as an attorney and be-

trayed the trust imposed on him, to the detriment of his client, in failing to account for money collected by him for his client and entrusted to him by his client for the purpose of investment, the final judgment of the court in a suit for an accounting brought by the client against the said attorney is a final determination as to the rights of the attorney and client to the fund in question.

2. **Depositions:** USE PERMISSIBLE IN DISBARMENT PROCEEDING. A disbarment proceeding being in the nature of a civil action, the use of depositions being authorized by statute in such proceeding (Comp. St. 1922, sec. 8890), it was permissible to use depositions, and respondent's objection that he was entitled to be confronted by the witnesses against him is without merit.

Original proceeding by the state to disbar respondent. *Judgment of disbarment.*

O. S. Spillman and *C. A. Sorensen, Attorneys General, Lester C. Dibble* and *Homer M. Kyle,* for relator.

John M. Priest and *John L. Mattox,* for respondent.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., BEGLEY and RAPER, District Judges.

DAY, J.

The attorney general of the state began disbarment proceedings against the respondent, John M. Priest, by filing a complaint originally in this court, setting out two specifications. The defendant answered, and the court appointed Honorable Harry L. Norval referee to take the evidence and to report his findings of fact and conclusions of law. A hearing was had before the referee, and he has filed his report in which he finds that specification No. 2 is not supported by a preponderance of the evidence that is clear and convincing; that specification No. 1 is supported by a preponderance of the evidence that is clear and convincing; that the defendant has not faithfully discharged his duty as an attorney; that he has been guilty of gross misconduct; has acted in bad faith, to the detriment, damage and injury of his client, and in express violation of the oath administered to him by the court when he was admitted to

practice as an attorney. This matter is now before the court on a motion by the attorney general to confirm the report of the referee and to enter judgment thereon.

The facts in this case are not complicated. The respondent was employed as an attorney by one Ura L. Case and in the course of his employment collected certain money. Case also entrusted him with money for investment. Case sought to secure this money from respondent and, being unsuccessful, on April 22, 1923, instituted a suit in the district court for Lancaster county, Nebraska for an accounting of funds received by Priest as his attorney. Upon trial, the respondent in this proceeding answered that he owed Case nothing, claiming the balance unaccounted for due him as attorney fees. Trial was had upon this issue and judgment was awarded Case against respondent for $709.05, which judgment was appealed to this court and affirmed. This judgment has not been paid or satisfied.

The respondent again answered in this proceeding setting forth his employment as attorney for Case and alleging that, as a result of said employment, Case was indebted to him for attorney fees an amount in excess of the balance in his possession. The only dispute as to the facts is whether respondent has in his possession money received and entrusted to him in his capacity as an attorney at law, to which he is not entitled. The referee very properly held that this question of fact was adjudicated in the suit of Case v. Priest.

The respondent contends that the judgment above referred to was obtained by perjury and fraud. There is no evidence in this record that said judgment was so obtained. This court has held previously that, while it will take judicial notice of its own records, it will not in one case take judicial notice of the records in another case. *Fassler v. Streit*, 92 Neb. 786; *Allison v. Fidelity Mutual Fire Ins. Co.*, 74 Neb. 366. The important and controlling question in this proceeding is: Did respondent keep money belonging to his client which in good conscience he was required to turn over to said client? This was the issue in Case v.

Priest, and the respondent advanced every contention in that case which he now advances here, and while, prior to the judgment in that case, there may have been some doubt as to what portion of the fund in Priest's possession belonged to him and what part to Case, the matter was there determined. Therefore, from the date of final determination of that case, March 23, 1926, respondent has refused to account for his client's money in his possession.

If the record in that case showed that the judgment previously obtained was secured by perjury and fraud on the court, it is not properly attacked for the first time in this proceeding. However, this does not appear. The cases cited by the respondent are cases where the judgments were attacked in suits in equity to vacate said judgments. The respondent could have done likewise, but from March 23, 1926, to date he has not seen fit so to do. Even if he discovered for the first time, as he states, that the judgment was obtained by perjury and fraud when the depositions in this case were taken, he has not since January 11, 1928, more than a year, taken this action. *Morton v. Watson*, 60 Neb. 672, is another case cited in which the court said: "Nor would a verdict of either guilty or not guilty in a criminal action be binding on a court in a disbarment proceeding wherein the same act is charged." The reason is that the degree of proof is different in the disbarment proceeding from that in a criminal proceeding.

In a disbarment proceeding where the specification alleges that an attorney was guilty of unprofessional conduct, violated his oath as an attorney and betrayed the trust imposed in him, to the detriment of his client, in failing to account for money collected by him for the client and entrusted to him by his client for the purpose of investment, the final judgment of the court in a suit for an accounting brought by the client against the said attorney is a final determination as to the rights of the attorney and client to the fund in question.

The respondent objects that certain depositions received in evidence by the referee were in contravention of his con-

stitutional rights which guarantee that he shall meet the witnesses face to face and be permitted to cross-examine them. The depositions involved were taken pursuant to notice and respondent was represented by an attorney who cross-examined the witnesses. The respondent, to support his contention, cites *Matter of Eldridge*, 82 N. Y. 161, 37 Am. Rep. 559, and also *In re Simpson*, 9 N. Dak. 379, which quotes from the former case, to the effect that affidavits are not admissible and that respondent was entitled to cross-examine witnesses. Is the respondent in the proceeding guaranteed by the Constitution of the state of Nebraska or of the United States the right to meet the witnesses against him? If this is a criminal prosecution the respondent's contention is good. But this court has said that a disbarment proceeding is not a criminal prosecution. *Morton v. Watson*, 60 Neb. 672. And in *In re Newby*, 82 Neb. 235, the court holds the presumption of innocence applies, and the culpability of the respondent must be established by a clear preponderance of the evidence. While we are cognizant that the court has apparently not been clear as to the exact nature of a disbarment proceeding, we believe that a logical conclusion to be arrived at from former cases decided by this court and from the degree of proof required to sustain the revocation of an attorney's license to practice law impels us to hold that such a proceeding is in the nature of a civil action. We think the correct rule is set out in *State v. Mosher*, 128 Ia. 82, which holds that the proceeding is a civil action, the object of which is, not the punishment of the attorney, but "the protection of the court, the proper administration of justice, the dignity and purity of the profession, the public good, and the protection of clients."

Therefore, a disbarment proceeding being in the nature of a civil action, the use of depositions being authorized by statute in such proceeding (Comp. St. 1922, sec. 8890), it was permissible to use depositions, and respondent's objection that he was entitled to be confronted by the witnesses against him is without merit.

The finding of the referee in this case as to specification No. 1, which is under the consideration of the court, is as follows:

"The defendant in his capacity as attorney for his client, Ura L. Case, has collected and received numerous sums of money for which his said client has on numerous occasions during a period of several years demanded an accounting and payment. No full and complete accounting was ever made, and the client, resorting to the courts of this state for protection, brought suit for the identical items enumerated in specification No. 1, in the complaint for disbarment herein, and obtained a judgment for $709.05, with 7 per cent. interest thereon from July 20, 1923, which, on appeal, was affirmed by this court, and stands as a judicial determination that this defendant has failed and refused to account to his said client, and has in his possession belonging to his said client the sum for which judgment was rendered.

"From all the evidence submitted, in support of the charge embraced in specification No. 1, and from the admission of the defendant that he has not paid said judgment, or any part thereof, there is a preponderance of evidence which is clear and convincing that the defendant has not faithfully discharged his duty as an attorney at law; has been guilty of gross misconduct; has acted in bad faith, to the detriment, damage and injury of his client, and in express violation of the oath administered to him by this court, when he was admitted to practice as attorney at law."

From this finding of the referee, which the court confirms, it becomes necessary to enter judgment thereon. The matter of a suitable and fitting judgment to be entered has been a matter for considerable deliberation by this court. This court has the precedent of *Dysart v. Yeiser*, 110 Neb. 65. In that case the district court had suspended an attorney from practicing in the judicial district for claiming and holding as a fee a sum allowed by the court in excess of the amount provided by statute. Good, J. in the opinion in that case stated, in substance: The attorney in good

faith believed that a proper consideration of the statute would not limit his charge for service. The court upheld a suspension by the district court in the judicial district directing the attorney to refund $620 within 60 days, and upon his failure so to do that he stand suspended from the right to practice as an attorney at law in said county (Douglas) until further order of the court. In the instant case the respondent cannot be said to be acting in good faith in continuing to resist a settlement with his client. This matter was finally determined by this court when the mandate was returned to the district court for Lancaster county, Nebraska, March 23, 1926. Since that time there is no reason why he might not have gone into the office of the clerk of the district court for Lancaster county and satisfied that judgment by payment.

The respondent is delinquent in accounting to his client for money received in his professional capacity. He has raised and had the benefit, of every technical objection throughout this proceeding. He stood before the court, and complained that it had not been started in time, although the record conclusively shows that his client, though in a far distant state, has for more than six years continuously sought an accounting. Such conduct cannot be condoned. It destroys public confidence in the courts and the profession. In these particulars he has also violated his statutory duty to maintain the respect due to the courts of justice. Comp. St. 1922, sec. 264.

It is the judgment of this court that we approve and confirm the findings and conclusions of the referee herein, and it is ordered that the admission of the defendant John M. Priest to the bar of this state shall be canceled and annulled and his name stricken from the rolls of attorneys and counselors at law.

JUDGMENT OF DISBARMENT.

MIA U. GERING, COUNTY TREASURER, APPELLEE, V. FRED BUERSTETTA, RECEIVER OF FIRST NATIONAL BANK OF PLATTSMOUTH, ET AL., APPELLANTS: UNITED STATES FIDELITY & GUARANTY COMPANY ET AL., APPELLEES.

FILED FEBRUARY 16, 1929. No. 26248.

1. **Banks and Banking:** INSOLVENCY: PREFERENCES. Evidence examined, and *held* that claimants, as against the defendant receiver representing the general creditors of an insolvent national bank, have traced "trust funds" involved in this controversy, to the extent of $2,520.73 only, into assets coming into the possession and under the control of such receiver, and that they are entitled, as to such sum, to an order granting them a preference thereto.
2. **Interest.** Under the facts in this case, claimants are not entitled to interest on and after December 14, 1926.
3. **Jury.** As to defendant George O. Dovey, the issues in this case were properly triable by a jury and the court erred in overruling his application and demand therefor.

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

A. L. Tidd and *Blackburn & King,* for appellants.

Kennedy, Holland, De Lacy & McLaughlin, W. A. Robertson, D. O. Dwyer, W. G. Kieck and *Sidney W. Smith, contra.*

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

EBERLY, J.

This is an appeal separately prosecuted by the receiver of the First National Bank of Plattsmouth, an insolvent institution, and George O. Dovey, former cashier thereof, from a decree entered in a proceeding in equity in the district court for Cass county, awarding certain preferences to the county of Cass and others, all of whom will be hereafter referred to as claimants, to the extent of $10,882.19, as to certain assets of that institution, and further adjudging the defendant George O. Dovey personally liable for that amount.

In this trial *de novo* the preponderating evidence in the record fairly establishes the following facts: That on the 2d day of December, 1926, and continuously thereafter, the First National Bank of Plattsmouth, though still open and transacting business, was an insolvent institution and was known to be such by its officers in charge. The evidence indicates that this insolvency was of such degree that its general creditors will not now receive more than 35 cents on the dollar. This bank was a county depository of Cass county, properly designated as such, and had given a bond as required by the Nebraska statute in the sum of $20,000 only. That at the close of business December 1, 1926, there was a balance of public funds deposited in this institution of $17,040.67. On December 2, 1926, there was received by the First National Bank of Plattsmouth from the county treasurer of Cass county a deposit of public moneys in the sum of $25,712.34, which on said date was credited to the account of Cass county, and that the total amount of the public money on deposit in that institution, after such credit, was the sum of $42,753.01. Of this amount, $22,-753.01 was in excess of the statutory bond in force given to secure the deposits of public moneys. The conclusion follows: Such part of that deposit in excess of the $20,000 bond then in force was not only unauthorized and illegal, but was necessarily made and received in express contravention of the provisions of the statutes of Nebraska. *Dovey v. State,* 116 Neb. 533. A part of the deposit thus made by the county treasurer on the 2d day of December, 1926, was a certain check drawn by the Missouri Pacific Railroad Company for the sum of $24,663.68, payable to the county treasurer of Cass county, in satisfaction of taxes, and duly indorsed and deposited by such county treasurer as part of the deposit already referred to. This Missouri Pacific check, which forms the sole basis of the present action, after it had been deposited, was on the same date delivered by the First National Bank of Plattsmouth to, and deposited with, the Omaha National Bank, its correspondent at Omaha, Nebraska, and by the latter institution, on that date, en-

tered as a credit in favor of the First National Bank of Plattsmouth.

According to the account of the First National Bank of Plattsmouth with the Omaha National Bank, as disclosed by the ledger of the latter institution, at the time this deposit was received, there was an apparent balance to the credit of the First National Bank of Plattsmouth $1,878.82, which had been carried forward from the preceding day, and that $1,331.80 additional deposits were also made on December 2. The record further indicates that as part of the transaction, and, indeed, contemporaneous with the receipt by the Omaha National Bank of this Missouri Pacific check, $7,000 was by the direction of the First National Bank of Plattsmouth transferred by the Omaha National Bank to the Federal Reserve Bank at Omaha and placed by that institution to the credit of the First National Bank of Plattsmouth; that a corresponding charge was made by the Omaha National Bank against the First National Bank of Plattsmouth. It also appears that just prior to the reception of this transfer by the Federal Reserve Bank (Omaha) the First National Bank of Plattsmouth had with it an apparent credit balance as shown by its ledger of $410.46.

It is also a conceded principle of law that where a national bank, being insolvent, received a deposit with knowledge that it cannot pay its debts and must fail in business, the depositor may rescind for fraud and reclaim the deposit or its proceeds out of funds, if traced into specific assets of such insolvent bank, which come into the hands of the receiver. *Brennan v. Tillinghast*, 201 Fed. 609.

It is also well established that, where public funds deposited by a county treasurer without authority of law and in express violation of its inhibitions are received by a national bank with full knowledge of the facts, they constitute a trust fund and can be recovered as such. *State v. Bank of Commerce*, 54 Neb. 725; *Allen v. United States*, 285 Fed. 678; *United States Nat. Bank v. City of Centralia*, 240 Fed. 93; *Empire State Surety Co. v. Carroll County*,

194 Fed. 593; *American Surety Co. v. Jackson,* 24 Fed. (2d) 768.

It follows that the $24,663.68 check and its proceeds, when collected, because of the facts surrounding its receipt by the First National Bank of Plattsmouth, was in truth and in fact trust funds in the technical sense of that term, and that the claimants, as the parties entitled thereto, were entitled to disaffirm the transaction and recover the same from the receiver so far as capable of identification. It appears that the transaction was in fact properly disaffirmed, and the suit to recover the funds as trust funds was commenced by claimants on the 13th of December, 1926; that this bank finally "closed its doors" on the 14th of that month, and that the receiver who was thereafter appointed by the United States comptroller of currency took possession of its assets as of that date. The conclusion is: (1) That the physical facts of the transaction disclose that the trust funds were on the 2d day of December, 1926, wholly within the possession of the Omaha National Bank and the Federal Reserve Bank (Omaha) and constituted a part of the credits of the First National Bank in such institutions; that this possession of such funds on the part of the institutions last named was at all times in good faith and in ignorance of their trust character; and that at no time was any knowledge or notice of the trust character of the fund brought home to either of the same; that the making of the deposit in suit with the First National Bank of Plattsmouth was not disaffirmed in whole or in part, and no demand was made upon the defendant or his predecessors for return of the railway check or its proceeds until December 13, 1926; and that the right of preference to which the claimants are entitled must be determined, as questions of fact, solely by their ability to affirmatively establish and identify such funds either as remaining in possession of the Omaha National Bank or of the Federal Reserve Bank (Omaha); or by tracing the same therefrom into specific assets in a manner in accord with the equitable doctrine of tracing funds, as applied to insolvent national banks. *Schuyler v. Little-*

field, 232 U. S. 707; *Central Nat. Bank of Lincoln v. First Nat. Bank of Gering*, 117 Neb. 161; *Dudley v. Richards*, 18 Fed. (2d) 876; *Marvin v. Martin*, 20 Fed. (2d) 746; *People's Nat. Bank v. Moore*, 25 Fed. (2d) 599; *Farmers Nat. Bank v. Pribble*, 15 Fed. (2d) 175; *State v. Citizens State Bank*, 117 Neb. 358.

1. Prior to receipt of these trust funds by the First National Bank of Plattsmouth and their transmissal to the Omaha National Bank, on the 2d day of December, there were existing credit balances, in favor of the First National Bank of Plattsmouth, on the day it "closed its doors" as follows: Chemical National Bank of New York, $822.85; and, in the First National Bank of Chicago, $336.34. It is not shown that any of the proceeds of the county tax check heretofore referred to entered into or became a part of either of these credits. Indeed, it affirmatively appears that as to these amounts they remain wholly unaffected by the transaction. The rule is, it seems, that a credit of a banking institution with a correspondent bank is, at least so far as the present question is concerned, to be treated as a separate and distinct item of property. To sustain preferences therein and thereto, it is necessary to trace the specific trust funds involved, or their proceeds to, and identify the same as being a part of such credit. This, the record discloses, claimants wholly failed to do; in fact, the evidence sustains the inference that neither of these credits was in any manner affected or augmented by the transaction which forms the basis of this investigation. Claimants were therefore entitled to no preference as to either of these amounts. *Titlow v. McCormick*, 236 Fed. 209; *Empire State Surety Co. v. Carroll County*, 194 Fed. 593; *Board of Commissioners v. Patterson*, 149 Fed. 229; *State Bank of Winfield v. Alva Security Bank*, 232 Fed. 847.

2. On December 14, after receipt of notice of insolvency of the First National Bank of Plattsmouth, the Omaha National Bank ceased to honor the drafts of the former institution and, on the appointment of the receiver by the United States comptroller of the currency, paid over to that

officer the sum of $2,899.59, the balance of the credit remaining on its books at the time that notice of the insolvency of the First National Bank of Plattsmouth was by it received. To this sum claimants now assert a claim of preference. For the purpose of this discussion only, it will be conceded that after the deposit of the tax check on December 2, 1926, and the transfer of $7,000 to the Federal Reserve Bank (Omaha), the balance of $18,376.55 which then appeared at the close of that day's business as a credit of the First National Bank of Plattsmouth was made up wholly of trust funds, and that no funds of any other character formed any part of it. The records, however, further disclose that, in the ordinary course of business thereafter, further deposits were from time to time duly made to the credit of the First National Bank of Plattsmouth in the Omaha National Bank and there were also likewise daily withdrawals therefrom; that, as a result of these transactions at the close of business on December 13, this balance had been reduced to a credit balance of $126.94. On the next day by reason of the excess of deposits over withdrawal, which were in no way connected, by the evidence, with the trust funds under consideration, but which were received and credited by the Omaha National Bank, the net balance at the time the course of business was interrupted by notice of insolvency of the First National Bank of Plattsmouth, had increased to a credit of $2,899.59.

The situation presented is such that renders the language made use of by Lurton, Circuit Judge (afterwards associate justice of the supreme court of the United States), peculiarly applicable:

"If trust moneys be wrongfully invested in bonds, or stocks or realty, or promissory notes or bills, and the particular property into which the trust fund has been changed can be ascertained, the owner may take the property and ratify the investment. Or, if the trust funds, along with the property of the trustee or bailee, be invested in an ascertained property, equity will follow the trust fund, not by taking the entire property, for that would be unjust, but

by fastening a charge upon the property to the extent of the trust fund therein discovered. The blending of the trust money with the money of the trustee was suffered at one time to defeat the owner's title and compel him to stand as a mere unsecured creditor. This was upon the idea that money was not earmarked, and, therefore, could not be recovered in specie. But the latter cases have met this difficulty in the case of blended moneys in a bank account, from which there have been drawings from time to time, by the fiction that the sums thus drawn out were from the moneys which the tort-feasor had a right to expend in his own business, and that the balance which remained included the trust fund which he had no right to use. It was upon this fiction that *Knatchbull v. Hallett,* 13 Ch. Div. (Eng.) 696, 726, *et seq.*, was decided. That case was approved in *National Bank v. Insurance Company,* 104 U. S. 54, and has been followed in many subsequent cases when the trust fund has consisted of moneys on deposit. *Smith v. Mottley,* 150 Fed. 266. But as this is a mere presumption it will not stand against evidence. It is, therefore, a part of the rule applicable to following misappropriated moneys into a bank account that, if at any time during currency of the mingled account the drawings out had left a balance less than the trust money, the trust money must be regarded as dissipated except as to this balance, the sums subsequently added to the account from other sources not being attributed to the trust fund. * * * *Beard v. Independent District,* 88 Fed. 375; *Boone County Bank v. Latimer,* 67 Fed. 27; *Spokane County v. First Nat. Bank,* 68 Fed. 979. This side of the rule is peculiarly sound when it is sought to obtain an advantage in the distribution of the assets of an insolvent national bank." *Board of Commissioners v. Strawn,* 157 Fed. 49, 51.

This court in principle approved the rule thus announced in *State v. Bank of Commerce,* 54 Neb. 725, *Morrison v. Lincoln Savings Bank & Safe Deposit Co.,* 57 Neb. 225, and *City of Lincoln v. Morrison,* 64 Neb. 822.

It follows, therefore, that claimants as to the deposit in the Omaha National Bank are limited, so far as preference is concerned, to the sum of $126.94.

3. The next contention is one which relates to the $7,000 paid to the Federal Reserve Bank (Omaha) and alleged to be applied on a debt of the First National Bank of Plattsmouth secured by collateral, and said collateral, by reason of said payment, was increased for the benefit of said National Bank in the sum of $7,000.

The bill of exceptions contains defendant's exhibit 19, which is a copy of the ledger sheet of the Omaha National Bank containing the account of the First National Bank of Plattsmouth, which was admitted in evidence for and in lieu of the original. It discloses that at the close of business on December 1, 1926, the First National Bank of Plattsmouth had a credit balance of $1,878.82. On the following day there was credited to this account the following sums entered in the order named, viz., $331.57, $1,000.23, $25,211.18. This makes a total deposit for the day of $26,542.98, and adding thereto the credit balance on hand at the opening of the day's business would disclose a total of $28,421.80. It is to be remembered in this connection that the tax check of $24,663.68 constitutes a part of the deposit of $25,211.18 and was received by the Omaha National Bank "too late for clearing house" but was "credited subject to payment."

The first charge entered in this connection on the 2d of December was under the heading "debit amounts" and is a transfer of $7,000, which refers to the transfer to the Federal Reserve Bank (Omaha) of that amount. Following this are entries of charges covering drafts paid, etc., aggregating $2,045.15. Under this record, which together with "deposit slips," original memoranda and "cash letters" really constitute the sole evidence of the transactions, how much of the $7,000 thus transferred to the Federal Reserve Bank (Omaha) constitutes trust funds at the time of such transfer? It is to be remembered that the burden of proof in tracing these funds, by the very nature of the case, is

imposed upon claimants. The undisputed evidence in this record before us is that "the charges and credits and debits made in this account" were made "at or near the time of the transactions represented therein" and "were true and correct entries." It may also fairly be gathered from the evidence and surrounding circumstances, as reflected therein, that the transfer of the $7,000 to the Federal Reserve Bank (Omaha) was contemporaneous with the receipt of the "credits" which included the tax check by the Omaha National Bank and which was admittedly after "clearing" on that day. In view of this situation, we draw the conclusion that, at the time the transfer of the $7,000 which was credited by the Federal Reserve Bank (Omaha) on December 2d, there was an existing credit of the First National Bank of Plattsmouth with the Omaha National Bank, which aggregated $28,421.80, and of which $24,663.68 were trust funds and $3,758.12 were funds not of that character.

Assuming that, in the absence of explicit evidence to the contrary, the rule heretofore quoted, as stated by Justice Lurton, would be applicable to the situation presented, it would follow that on December 2, 1926, of the $7,410.46 then in possession of the Federal Reserve Bank (Omaha) but $3,241.11 were "trust funds."

It is to be noted in this connection that the Federal Reserve Bank is a creature of federal statutes and designed to accomplish and perform a governmental function. For this purpose it is vested with rights and on it are imposed certain duties. Upon the indorsement by its member banks, "which shall be deemed a waiver of payment, notice and protest," it may discount promissory notes, etc., possessing certain qualities. The effect of such indorsement under the act of its creation is to relieve the obligation thus indorsed of the usual conditions, so that the indorsement becomes the absolute and distinct obligation on part of the member bank rediscounting and indorsing the same to pay such note upon maturity date thereof. *Federal Reserve Bank v. First Nat. Bank*, 277 Fed. 300. Upon the maturity of such discounts they became, therefore, a proper

charge against any credit which may be in the possession of such Federal Reserve Bank. Also, under the circumstances existing in the instant case, the First National Bank of Plattsmouth was required to establish and maintain under the terms of this federal statute with the Federal Reserve Bank (Omaha) "an actual net balance" of not less than 7 per cent. of the aggregate amount of its demand deposits and 3 per cent. of its time deposits. The provisions of this federal statute permitted these balances to be checked against under the penalties prescribed therein, but only "for the purpose of meeting existing liabilities," and provided, further, that no member bank should, in event of its failure to comply with these requirements at any time, make new loans until the "total balance" required by law was fully restored. It will be noted that within the provisions of the reserve law member banks must have an "actual net balance" in the possession of their Federal Reserve Bank. "Net" in this connection means that all proper charges and reductions have been made from the account, and "actual" excludes what is merely fictitious. *Pascagoula Nat. Bank v. Federal Reserve Bank,* 3 Fed. (2d) 465.

The record discloses without dispute that at no time between the 2d day of December and the 14th day of that month, both inclusive, or thereafter, did the First National Bank of Plattsmouth possess sufficient deposit to meet these statutory requirements. It was therefore subject to the penalty prescribed by law for failure to maintain a reserve, and during the continuance of this condition, while the amount of its deposit with the Federal Reserve Bank (Omaha) could be lawfully checked against only in satisfaction of existing liabilities, it was not only wholly unauthorized but expressly denied the right to make any new loans. While the term "existing liabilities" is one of large and comprehensive significance, yet the requirements of the creation and maintenance of this lawful reserve and the statutory restrictions upon its use, it must be conceded, were intended for the benefit of the general depositors and general creditors of the member institution and evidence

an important public policy. Trust rights cannot be enforced against one who has acquired legal, that is common-law, ownership, *bona fide,* for value, and without notice of the existence of those trust rights. Whether, in view of the nature of the public duties involved and the intended beneficiaries of the same, the receipt by the Federal Reserve Bank (Omaha) of the moneys in suit, in good faith, as the property of its member bank, in the usual course of business, and without knowledge of its trust character, and as a part of the statutory "actual net balance," impressed a public trust thereon superior to the equities herein claimed, and first asserted after "insolvency" of the member bank had been discovered, query.

We will assume, however, for the purpose of this case, in view of the fact that the question suggested is essentially a federal question, and is not presented in the briefs, that "credit" in the Federal Reserve Bank (Omaha) is to be treated exactly as a credit in any other correspondent bank would be.

On this basis an examination of this account discloses the following: On December 2, $3,000 of this credit under the provisions of law embraced in the federal statute referred to was applied on a Wescott & Sons' note of that amount, leaving a credit balance of $4,407.83; on the day following, December 3, $1,300 of said credit was applied on a M. H. Peterson note, and a further charge of $600 was made which is wholly unexplained in the evidence; on December 10 at the opening of business the net credit balance shown in the account was $2,507.83. On that date $1,189.87 was deposited to the credit of the First National Bank of Plattsmouth, being the proceeds of a customer's note owned by it and discounted with the Federal Reserve Bank (Omaha), and $3,500 of this amount thus constituted was on that day applied by the Reserve Bank on the A. G. Bach note of $3,500. These notes, it is to be remembered, were customers' notes of the First National Bank of Plattsmouth which had been discounted by it with the Federal Reserve Bank (Omaha) under the terms of the statute al-

ready referred to. The transactions just chronicled with reference to the satisfaction of matured discounts by charging the same to this account were, in fact, but the exercise by the Federal Reserve Bank (Omaha) of implied and express statutory powers and involved the disposition in a manner intended by the national banking act of a fund in its lawful possession held by it as an "actual net balance" of which but $3,241.11 was actually derived from the proceeds of the railway tax check.

At the conclusion of these transactions just referred to the credit balance on hand in the Federal Reserve Bank (Omaha) was but $197.32. This, as the "low balance" which is admitted was in existence prior to the date the receiver took possession of his trust, under the rule heretofore quoted, must be deemed "trust funds" to which claimants are entitled as a specific item of property in which such funds have been affirmatively identified. This leaves of the trust funds originally forming a part of the credit of the Federal Reserve Bank (Omaha), to be yet accounted for or identified, the sum of $3,143.79. Except as it may be affirmatively traced into specific assets, it will be considered as dissipated.

However, when on December 2 the Wescott & Sons' note of $3,000 was charged to this account of the Federal Reserve Bank (Omaha) the balance then remaining was $4,407.83. The presumption, in the absence of evidence, is "that the balance which remained included the trust fund which it had no right to use." Therefore, the claimants were not entitled to preference as to this Wescott & Sons' note or the proceeds thereof.

As to the $1,300 note of M. H. Peterson also charged to this account, conceding that trust funds were traced to it, it also affirmatively appears that neither this note nor the proceeds thereof reached the possession of the receiver. It was wholly satisfied by the check of M. H. Peterson, dated "12-4-1926," drawn on and delivered to the First National Bank of Plattsmouth. This, therefore, affords no basis of preference.

The A. G. Bach note of $3,500 presents a different situation. The evidence fairly discloses that from December 3 to December 10 the credit balance in this account was $2,507.83. On December 10 the proceeds of a note discounted by the First National Bank with the Federal Reserve Bank in the sum of $1,189.87 was entered as a credit in this account, and on the same day the A. G. Bach note of $3,500 was entered as a charge against the credit thus created. The Bach note was renewed on December 11 by execution of a renewal note of $1,000 and also of a renewal note of $2,500. The note of $1,000, the defendant receiver admits, was sold by the First National Bank of Plattsmouth on December 13, and that the proceeds of such sale entered into and formed a part of the cash of the First National Bank of Plattsmouth which came into his possession on the day following. The receiver concedes that the amount of this cash on hand when the bank closed its doors, $1,181.47, constitutes "trust funds." The $2,500 renewal note, however, was by the First National Bank of Plattsmouth transmitted to the Federal Reserve Bank (Omaha) as collateral security for a loan of $4,000 evidenced by its promissory note. This collateral note was wholly satisfied and paid as follows: In part by offsetting it against Bach's checking account in the First National Bank of Plattsmouth to the extent of $1,485, and also in part by the payment by Bach of the sum of $1,015, which was made to the agent of the Federal Reserve Bank of Kansas City, at a date subsequent to the appointment and qualification of the receiver of the Plattsmouth bank, and after such receiver had taken possession of his trust, and entered upon the performance of his duties. Under the circumstances thus disclosed by the record we are inclined to the belief that, for this sum of $1,015, the claimants are also entitled to a preference.

4. The claimants also assert a preference in certain collateral held by the State Bank of Plattsmouth. The evidence discloses that on November 22 the First National Bank of Plattsmouth borrowed $12,000 of the State Bank of Plattsmouth. It executed and delivered its promissory

note for that amount to the State Bank. It also delivered therewith 33 of its bills receivable aggregating approximately $16,000 as security for the same. Ten days later the First National Bank of Plattsmouth redeemed five of these collateral notes aggregating $2,200 by use of draft No. 129415 for $2,000 drawn by it on the Omaha National Bank.

Conceding, for the purpose of this discussion only, that the $2,000 draft was ultimately paid by trust funds when it arrived at the Omaha National Bank, the effect of the evidence concerning the transaction is to trace the $2,000 draft into and identify the same in the five collateral notes thus redeemed. But it also appears that these five collateral notes were used by the First National Bank of Plattsmouth exclusively through the medium of its depositors' checks to satisfy and pay the lawful demands of its depositors, in the usual course of business while it was still a going, though insolvent, concern. But no specific asset or property of the insolvent bank which came into possession of the receiver was thereby in any manner augmented or its value increased. These transactions, therefore, can afford no grounds for preference.

5. The claimants also assert a right of preference based on $1,750 in cash received by the First National Bank of Plattsmouth from the local postmaster in payment of certain drafts which it is claimed were satisfied by trust funds in the possession of the Omaha National Bank.

The facts in these transactions, as disclosed by the record, appear to be as follows: On December 4 a draft, No. 129423, for $350 drawn on the Omaha National Bank was issued for cash. It is disclosed, however, that draft No. 129423 was paid by the Omaha National Bank December 6. On that date the credit balance of the First National Bank of Plattsmouth with that institution carried forward from the preceding day was $6,710.93. On that day four items of deposit were credited to this account aggregating $2,376.63. Nine items, including the $350 draft in question, appear as charges therein. The remaining new credit

balance at the close of the day's business in favor of the First National Bank of Plattsmouth was $6,120.16.

No evidence appears in the record as to the relative order in which the business represented by several items shown in the account was on this day transacted by the Omaha National Bank.

On December 7 the local postmaster again purchased draft No. 129447 for $550, as before drawn on the Omaha National Bank, paying therefor in cash. The record discloses that draft No. 129447 was paid by the Omaha National Bank on December 8 following, and it also appears that at the commencement of business on the 8th the credit balance in that institution in this account was $4,716.05; that during the day two items of deposit were credited to this account as cash, aggregating $1,286.57. The withdrawals charged against the same, including draft No. 129447 aggregated $4,240.10, and no information appears with reference to the relative order in which the transactions recorded occurred.

On December 11 in a similar manner the local postmaster purchased draft No. 129464 for $350 which was paid by the drawee bank and properly charged on December 13. At the commencement of business on the 13th the credit balance of this account was $3,402.04. Eight items aggregating $5,997.40 were during said day received and appeared as credits in said account. The charges entered therein, including draft No. 129464, aggregated $9,272.50, with a credit balance at the close of the business day of $126.94. Again, the record affords no information as to the relative order in which the transactions recorded occurred.

As the last of this series of four, we have a transaction of the same character in which draft No. 129469 issued by the First National Bank of Plattsmouth on the Omaha National Bank is involved. As to this, claimants in their brief suggest "this draft of $500 is dated December 13 but apparently paid on December 11, 1926."

The only evidence we find in the record sustaining this inference is the stamp of the Omaha branch of the Federal Reserve Bank of Kansas City, acknowledging receipt of payment thereon "December 11, 1926," which appears on the back of this instrument. However, the previous indorsement on the same instrument by this same institution bears date of December 14, 1926. The ledger of the Omaha National Bank discloses that no charge of $500 was made on this account on either the 11th or 13th of December (the 12th was Sunday) and a charge of that amount does appear under date of December 14, 1926.

We are therefore forced to the conclusion that the draft correctly states the date of its issuance, and that it was in fact paid by the Omaha National Bank on the 14th. On the 14th at opening of business the credit balance in favor of the First National Bank of Plattsmouth was $126.94. During the day's business seven items of cash credits were received by the Omaha National Bank and entered in said account aggregating $4,185.03. During the same time nine cash withdrawals including draft No. 129469 of $500, it appears, were charged against the same, the credit balance at the close of the day being $529.85.

The burden of proof in the instant case imposes on claimants the duty to establish that a part of the trust fund was employed by the Omaha National Bank in payment of one or more of the four drafts now under investigation. Thus, four transactions are before us and the controlling fact in each is the "previous low balance" in such account. If the immediate result of any payment made by the Omaha National Bank upon any one or more of these drafts was to reduce the immediate ensuing credit balance in this account below the amount of the "previous low balance," trust money has been employed. If, however, the ensuing balance resulting from the payment alone in connection with the amount previously on hand equals or exceeds such previous low balance, trust funds were not employed.

The evidence before us considered in the light most favorable to claimants wholly fails to establish this deter-

minative fact as to the previous low balance in any one of the four transactions. At the most, it may be said trust funds may, or may not, have been employed. Each of these payments, it thus appears, was not made with moneys or credit that is identified as belonging to or being a part of the trust funds in possession of drawee bank.

The conclusion is that with reference to the four items in question the claimants have failed to establish their case and are not entitled to any preference based thereon. *Peters v. Bain,* 133 U. S. 670; *Farmers Nat. Bank v. Pribble,* 15 Fed. (2d) 175; *Emigh v. Earling,* 134 Wis. 565. Last case approved in *Rankin v. Emigh,* 218 U. S. 27.

The judgment that was entered in the district court allowed claimants the recovery of interest at 7 per cent. per annum from December 13, 1926. This was error. Claimants are not entitled to interest under the facts in this case in this proceeding. *White v. Knox,* 111 U. S. 784; *Butler v. Western German Bank,* 159 Fed. 116; *Richardson v. Louisville Banking Co.,* 94 Fed. 442; *Hallett v. Fish,* 123 Fed. 201; *People's Nat. Bank v. Moore,* 25 Fed. (2d) 599; *Merrill v. National Bank of Jacksonville,* 173 U. S. 131.

George O. Dovey, appellant, as his separate appeal, among other questions, presents the contention that the cause of action stated against him in the pleadings was essentially an action at law, in the trial of which he was entitled to a jury, and that the district court erred in overruling his several demands for that relief. With reference to the facts upon which that liability as against Dovey is based, all appellees in their brief in substance state that "George O. Dovey, the cashier of the First National Bank of Plattsmouth solicited of Mia U. Gering, the treasurer of Cass county, Nebraska, the deposit of this tax check of $24,663.68, both knowing that the then depository bond of the bank was insufficient under the law for such a deposit as this check would have made; that he promised to furnish a sufficient bond; that, when he called at her office to take the check to the bank to deposit, he said he had such a bond, and said, 'If I had known I was coming down, I would have

brought the bond with it. It is at the bank;' that he also told her the bank was in sound financial condition; that she trusted to his statements that there was a sufficient bond and the bank was sound, believed his statements, and made the deposit relying thereon;" and their several pleadings contained prayers for a money judgment only against Dovey.

It is obvious from an examination of the pleadings that Dovey was not a necessary party to the determination of the trust nature of the funds in controversy and identifying them with assets in the receiver's possession. The only relief which any of the parties to this action sought as against Dovey was a personal judgment for the sum of money certain. The facts recited entitle the appellees herein to an action at common law for deceit, and it may be said *arguendo* that this was the form of action which was followed under somewhat similar circumstances in the cases growing out of the failure of the Capital National Bank of the city of Lincoln. At all events, the rule appears to be established in this controversy that—"An action by a private individual against directors of a national bank for making false reports must be maintained, if at all, as an action at common law for deceit." 23 R. C. L. 641 sec. 40; *Gerner v. Mosher,* 58 Neb. 135. This form of action at common law was triable by jury, and this right section 6, art. I of the Constitution of Nebraska, perpetuates. *Yager v. Exchange Nat. Bank,* 52 Neb. 321; *Kuhl v. State,* 44 Neb. 584. It thus fairly appears that the trial court erred in overruling the application of defendant Dovey, for a jury trial.

It follows, therefore, that the decree heretofore entered by the district court for Cass county in the above entitled action is reversed and remanded, with directions to enter a decree awarding preferences to the claimants in the sum of $2,520.73 only, viz., $126.94 of the balance in the Omaha National Bank, $197.32 of the balance in the Federal Reserve Bank (Omaha), $1,181.47 being the cash on hand in the said bank at the time of its suspension. This sum

includes $1,000 and also the sum of $1,015 paid by Bach on the $2,500 renewal note after the appointment of the receiver in this case. That all additional sums due from said receiver to said claimants be allowed to said claimants as general creditors of said bank, and that the proceedings as to George O. Dovey be dismissed without prejudice to the institution of a proper action at law.

REVERSED.

GOSS, C. J., and ROSE, J., dissent.

CLARA ALGERMISSEN, APPELLANT, V. CRETE MILLS, APPELLEE.

FILED FEBRUARY 16, 1929. No. 26299.

1. **Appeal:** TRANSCRIPT: TIME FOR FILING. Where a party to an equity action in the district court files a motion for a new trial alleging errors of law occurring at the trial, he has three months after the overruling of said motion within which to file a transcript on appeal to this court.
2. **Landlord and Tenant:** LEASE: RESERVATION. Where the owner of lands, upon which is located a mill-pond, by written lease grants unto a second party the exclusive right to cut ice from such pond for a term of 99 years, with permission to erect an ice-house upon said lands for storage purposes, and then provides that said grant does not exclude the grantor from cutting ice upon said mill-pond, if he so desires, *held*, that this last provision is a mere personal privilege retained by grantor to cut ice for his personal use, and does not run with the land so as to pass such right to a purchaser of said land by deed from the owner.

APPEAL from the district court for Saline county: ROBERT M. PROUDFIT, JUDGE. *Reversed, with directions.*

Bartos, Bartos & Placek, for appellant.

Stewart, Stewart & Whitworth, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and BEGLEY and RAPER, District Judges.

BEGLEY, District Judge.

This action, as originally instituted, was one for an injunction to restrain defendant's interference with plaintiff's enjoyment of rights acquired under a certain lease of ice-cutting privileges. Subsequently, however, by stipulation of the parties, it was submitted to the court simply as an action to construe a lease. The lease in controversy is as follows:

"This indenture, made this 18th day of November, in the year one thousand eight hundred ninety-two, between Charles C. White and Olive A. White, husband and wife, of the first part, and Catherine Muff, widow of Joseph L. Muff, unmarried, of the second part:

"Witnesseth, that the said parties of the first part in consideration of the sum of one hundred dollars, to them duly paid, the receipt whereof is hereby acknowledged, have remised, released and quitclaimed, and by these presents do, for themselves and their heirs, executors and administrators, remise, release and forever quitclaim and convey unto the said party of the second part, and to her heirs and assigns forever, all our right, title and interest, estate and claim and demand, both at law and in equity, of, in, and to all the right and privilege to cut ice upon the mill-pond and waters of the Big Blue river from the mill-pond of the mill, known as the one built by Charles Seeley, known as the Upper Mill at Crete, or the City Roller Mills, and the waters supplying the said mill-pond, as far as these grantors have any interest in the same. And the grantors hereby agree to provide a sight for the erection of an ice-house if the grantee so desires, for her own use, for the purpose of the grantee, having sufficient room within which to store such ice as she may cut from said pond. This ice privilege, and the right to erect an ice-house, to continue for the term of ninety-nine years from this date, the party of the second part agreeing that no inconvenience or damage shall be caused the parties of the first part by reason of cutting such ice and the hauling and loading of the same upon the railroad, or in placing in such ice-house as party

of the second part may erect, or taking from said ice-house and loading upon the railroad. This, however, does not exclude the parties of the first part from cutting ice upon said mill-pond, if they so desire. Together with all and singular the hereditaments and appurtenances thereunto belonging. To have and to hold the above described privileges unto the said Catherine Muff, her heirs and assigns, so that neither they, the said Charles C. White or Olive A. White, or any person in their name and behalf, shall or will hereafter claim or demand any right or title to the said premises, or any part thereof, except as above mentioned; but they and every one of them shall by these presents be excluded and forever barred.

"In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

"In presence of W. A. Bridges.

"Charles C. White
"Olive A. White."

This lease was acknowledged by the grantors, and duly recorded.

The plaintiff became the owner of said lease through the will of her mother, Catherine Muff, and the defendant acquired the land upon which the pond is situated by a deed from Olive A. White, the widow of Charles C. White, deceased.

The trial court construed the lease as reserving in the Whites and their grantees the concurrent right with the lessee, and her heirs and assigns, to cut and harvest ice upon said pond, and dismissed the plaintiff's action.

The appellee, before filing of briefs in this court, moved to dismiss the appeal on the ground that it was not filed within 90 days from the entry of the decree, although it was filed within 90 days from the date of the overruling of a motion for a new trial. This motion was overruled without prejudice to the further consideration of same on the final hearing. Appellee again urges the motion. Section 9138, Comp. St. 1922, provides for appeals from the

district court to this court within three months from the overruling of a motion for a new trial, in equity as well as law cases, and said section was so construed in the case of *Bowers v. Raitt,* 96 Neb. 460. Appellee's motion was therefore properly overruled.

The court in construing the terms of the lease will endeavor to ascertain the intent of the parties from the whole instrument. This lease is a grant of the exclusive right to Catherine Muff, her heirs and assigns, to cut and harvest the ice upon the pond in question for a period of 99 years, with a reservation of the privilege to the Whites to cut ice upon the pond, if they so desired, and further provides that neither they, nor any person in their behalf, should thereafter claim or demand any right or title to said premises, or any part thereof, except as above mentioned. This was merely a personal privilege given the Whites to cut ice, if they so desired, and was not a covenant or restriction running with the land. When the appellee purchased the land, it acquired no ice-cutting rights in the pond, and therefore it has no legal right to interfere with plaintiff's enjoyment of the rights acquired under said lease.

The trial court erred in construing the lease as giving the appellee a concurrent right to cut ice upon the pond in question. The cause is therefore reversed and remanded to the trial court, with directions to enter an injunction enjoining the defendant from cutting ice upon said pond without plaintiff's consent, or from interfering with plaintiff's enjoyment of the rights acquired under said lease; said decree, however, to be without prejudice to the right of the plaintiff to institute a law action for the recovery of damages, if any, sustained by reason of the previous unlawful interference with the said rights of plaintiff, as provided by stipulation.

REVERSED.

R. O. BROWNELL, RECEIVER, APPELLEE, V. HELEN SVOBODA ET AL., APPELLANTS.

FILED FEBRUARY 16, 1929. No. 26794.

1. **Judgment:** LIEN. As a general rule, a judgment at law is not a lien upon property which cannot be taken on execution for its satisfaction.
2. **Banks and Banking:** INSOLVENCY: JUDGMENT: LIEN. A judgment against a state bank rendered while the same is in the hands of the department of trade and commerce, the guaranty fund commission, or the receiver appointed to liquidate the bank under the statutes of the state, creates no lien upon the real estate of the bank, as against those in possession.

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

Courtright, Sidner, Lee & Gunderson, for appellants.

C. M. Skiles, Dolezal, Mapes & Johnson and *I. D. Beynon, contra.*

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

REDICK, District Judge.

This action is brought by R. O. Brownell, receiver of the Snyder State Bank, plaintiff, to quiet the title to certain lots in the village of Snyder, as against the liens of two judgments of Helen and Emma Svoboda, respectively, against the bank. The defendants answered setting up their judgments and admitting all the allegations of fact of the petition; a reply was filed, and the case was tried upon facts stipulated at the trial, preserved by bill of exceptions. Decree was rendered for the plaintiff, and defendants appeal.

The facts are not in dispute. The Snyder State Bank had been in existence for many years. On March 18, 1925, the department of trade and commerce took possession of the bank and turned it over to the guaranty fund commission, which operated the same as a going concern from March 20, 1925, until January 19, 1928, when the bank

was declared insolvent and proceedings taken resulting in the appointment of R. O. Brownell as receiver for the purpose of liquidating its affairs. April 29, 1926, each of the defendants deposited in the bank $500, and received time certificates of deposit due April 29, 1927. The certificates were refused payment when due, and in September following separate suits were brought by the defendants against the bank and judgments recovered in favor of Emma Svoboda, October 15, 1927, for $535, and Helen Svoboda, January 7, 1928, for $547. Upon appeal to this court the validity of the judgment in favor of Helen Svoboda was affirmed. *Svoboda v. Snyder State Bank,* 117 Neb. 431, The certificates of deposit were presented to the receiver and allowed as claims against the depositors' guaranty fund. In the process of liquidation the lots in question have been sold, but the receiver is unable to make title because of the apparent liens thereon of defendants' judgments, which furnishes the occasion for the present action.

The question for determination is whether or not the judgments of defendants became liens upon the real estate of the bank, said judgments having been rendered at a time when all of the assets of the bank had been sequestered in the hands of the guaranty fund commission; if not, the action is well brought and the judgment of the district court correct.

The question is novel in this jurisdiction. It was not decided in *Svoboda v. Snyder State Bank, supra,* which involved only the right of the plaintiff to bring the action. It was mooted, but not decided in *McBride v. Taylor,* 117 Neb. 381, the action being for an injunction to prevent the levy of an execution, and having been determined upon the proposition that the defendant had failed to prove that the guaranty fund commission had retained possession of the bank an unreasonable time for the purpose of determining whether or not it might continue in business or should be liquidated.

The rights of the parties are to be determined by the proper interpretation of chapter 191, Laws 1923, as amend-

ed by chapter 30, Laws 1925, providing control by the state of insolvent banks, or banks whose capital has been impaired, and providing for the taking possession of such banks for the purpose of determining whether they should be permitted to continue in business or should be liquidated and their assets distributed.

The banks of this state are under the control and supervision of the department of trade and commerce to whom reports of condition are required to be made. By section 3, ch. 191, Laws 1923, a guaranty fund commission was provided for and its organization and duties prescribed in later sections.

By section 1, ch. 30, Laws 1925, section 11, ch. 191, Laws 1923, was amended to provide that, whenever it shall appear to the department of trade and commerce that the capital of any bank is impaired, or that it is transacting business in an unsafe or unauthorized manner, or that for other reasons stated the department shall have reason to conclude that such bank is in an unsafe and unsound condition, "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 the money, rights, credits, assets and property of every description belonging to such bank, as against any mesne or final process issued by any court against such bank or corporation whose property has been taken, and may retain such possession for a sufficient time to make an examination of its affairs, and dispose thereof as provided by law. Any attachment lien against such property, acquired within thirty days next preceding the taking of such possession, shall be thereby released and dissolved."

By section 4, ch. 30, Laws 1925, section 18, ch. 191, Laws 1923, was amended to read as follows:

"Upon taking possession of the property and business of any bank, the guaranty fund commission may take charge and control of the property and business of such bank and open it and manage it as a going concern, with-

out regard to its solvency, and through employees perform all duties and acts of the officers and directors of such bank while managing the same, and all salaries and expenses in connection therewith shall be paid by the bank. The operation of the bank by the guaranty fund commission shall in no manner relieve or diminish the obligations of the stockholders under the laws of this state, or in any manner absolve the owners of such stock or the officers or directors of any liability under the civil or criminal laws of the state. If the guaranty fund commission shall determine that it is impossible to preserve such institution as a going concern, then the commission shall proceed to liquidate such bank as by law provided: Provided, the district court of the district in which such bank is located may, upon application of any judgment creditor after a period of three months from the taking over of said bank by the guaranty fund commission, order the commission to close said bank, and liquidate the same, as provided by law."

By section 5, ch. 30, Laws 1925, section 20, ch. 191, Laws 1923, was amended to provide that, upon the determination by the commission that it is impossible to preserve the institution as a going concern, it shall communicate the facts to the attorney general, whose duty it shall be to cause an application to be made to the district court of the county where such bank is maintained for an order directing the commission to take charge of the business, assets and property of every kind of said corporation, and to wind up its affairs, through a receiver to be named and appointed by such commission.

By section 6, ch. 30, Laws 1925, section 32, ch. 191, Laws 1923, was amended to provide that the commission be authorized to sell all or any part of the assets of said bank upon receiving an order to that effect from the court.

By section 12, ch. 30, Laws 1925, section 24, ch. 191, Laws 1923, was amended to read as follows: "The claims of depositors, for deposits, not otherwise secured, and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal

taxes, and, subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership, * * * and, upon proof thereof, they shall be paid immediately out of the available cash in the hands of the receiver." In case of insufficiency of cash to pay the prior claims, provision is made for their payment out of the depositors' guaranty fund, which fund, by other provisions of the law, is given a first lien on all the assets of the bank for reimbursement.

By these provisions the evident intent of the legislature was to secure the payment of all declared prior claims before any of the assets of the bank were applied in settlement of the claims of general creditors. In the accomplishment of this purpose the initial step was the sequestration of all the assets of the bank by the department of trade and commerce and the transfer thereof to the guaranty fund commission. And to secure the complete accomplishment of that purpose, it was provided that the commission should retain possession of such assets as against any mesne or final process issued by any court against such bank or corporation.

It seems perfectly clear that, defendants' judgments having been rendered after the commission had taken possession of the bank's assets, by the positive language of the statute no execution thereon could be issued. But the defendants claim that, inasmuch as by section 8986, Comp. St. 1922, as amended by chapter 59, Laws 1927, it is provided that the lands of the debtor shall be bound for the satisfaction thereof from the date such judgments are rendered, a lien is created thereon which is not dissolved by the subsequent appointment of a receiver.

In 15 R. C. L. 794, sec. 249, it is said:

"The general rule founded on the origin of the lien of judgments is that whatever real property has been made subject to execution is considered subject to the lien of the judgment on which the execution is issued, and conversely a judgment on which a seizure and sale of land is not

authorized is not a lien on the real estate of the defendant. A corollary of this principle is the rule that a judgment lien on realty extends no further than the debtor has power voluntarily to transfer or alienate his lands in satisfaction of his debt. Certain classes of judgments do not carry with them the right to issue execution. For the same reason such judgments cannot be said to have created any lien. Such are judgments against a sovereign state and judgments against municipal corporations." The rule thus stated seems reasonable, and applicable to the present situation where the lien is sought to be asserted against a department of the state exercising its statutory authority over banks. In *Baird v. Strobeck*, 54 N. Dak. 268, it was held that, under a statute providing "Every banking association in this state shall be exempt from the legal process of attachment and excution," a judgment against the bank did not become a lien upon its lands, applying the rule above quoted from R. C. L.; and this notwithstanding a general statute, as in this state, declaring judgments liens upon the real property of the debtor. True, the statute there applied to all banks, solvent or insolvent, but the withholding of process was said to be equivalent to a denial of the lien. But whether or not a technical lien resulted from the rendition of the judgment, it could only attach to the interest of the debtor. *Norfolk State Bank v. Murphy*, 40 Neb. 735; *Roberts v. Robinson*, 49 Neb. 717. If the interest of the debtor is subject to be defeated by a condition subsequent, the lien falls with the happening of the condition. *Hunter v. Citizens Savings & Trust Co.*, 157 Ia. 168. A judgment lien subject to a mortgage is extinguished by a sale on foreclosure. The interest of the bank, at the time defendants recovered their judgments, was subject to the prior claims of taxes, depositors and holders of exchange; and when the property was sold, her lien, if any, was wiped out.

In *Svoboda v. Snyder State Bank*, 117 Neb. 431, we held that the bank in the hands of the commission was subject to suit upon its contracts, with the qualification, "that by

such suits it is not sought to interfere with the possession of the assets of the bank or the distribution thereof." Now, if the defendants are permitted to retain a lien upon the bank's assets and thereby prevent the completion of a sale thereof in the process of liquidation, it would constitute an interference with the functions of the commission in the performance of its statutory duties. We think this should not be permitted. The evident purpose of the legislation under review was to preserve the assets of the bank *in statu quo* at the time the department of trade and commerce takes possession. It must follow that, as against the department and its successors, no creditor can acquire any right or lien upon the assets so impounded. It is explicitly provided that any attachment levied within 30 days prior to the taking possession by the department shall be discharged; but after possession taken it shall be retained as against any mesne or final process. Process is but a means of enforcing collection of the judgment; but, if the lien is allowed to interfere with the orderly process of liquidation, this amounts to an enforcement and is contrary to the spirit and intent of the law. If defendants acquired any rights under their judgment, they may be fully protected in the subsequent proceedings of the receiver by a transfer of his lien, if any, to the proceeds of the sale of the property, when, after all prior claims are satisfied, the rights of general creditors may be adjusted. Defendants' claims, as represented by the certificates of deposit, have been allowed against the guaranty fund, and the contest is over the difference between the interest allowed on the claims and the interest upon the judgments. If they are entitled to this difference as against other general creditors, it may be the subject of allowance in the receivership proceedings. This question, however, will not arise unless there is a surplus after all prior claims are paid. Also, a different question would be presented if the commission had determined that the bank was solvent, and had turned it back to the stockholders to be carried on by them.

Defendants cite *Arnold v. Weimer*, 40 Neb. 216, holding

that—"The property of an insolvent bank, prior to the appointment of a receiver therefor or putting the sheriff in possession thereof by order of a court or judge, is not exempt from seizure by attachment or other legal process at the suit of its creditors." But, as was pointed out in *Andrews v. Steele City Bank,* 57 Neb. 173, that decision was rendered prior to the enactment of section 24, ch. 8, Laws 1895, granting authority to the bank examiner, when ordered by the board, to take possession of the bank, and "to hold and retain possession of all money, rights, credits, assets, and property of any description belonging to such bank, as against any mesne or final process issued by any court against such bank," and stated that, in the case under review, "The property was in fact in the possession of the examiner and under the protection of the statute. Although perhaps that possession ought to have terminated, it had not in fact done so. It could not be disregarded." Furthermore, in the *Arnold* case, the exemption was declared only "prior to the appointment of a receiver" or "putting the sheriff in possession," which was the procedure at that time. Here the statute puts the department in possession.

McBride v. Taylor, 117 Neb. 381, was a case in which a creditor of the bank had obtained judgment against a bank taken possession of by the guaranty fund commission, and had issued execution on said judgment against the real estate of the bank. The action was brought to enjoin the levy of such execution, and the judgment of the district court enjoining the same was affirmed. It was there held that, in the absence of pleading and proof that the commission had held possession of the bank for an unreasonable length of time for the purpose of determining its solvency, the execution was unauthorized. The existence of a lien was not determined, it being unnecessary in that proceeding. The question of reasonableness of time is not presented by the pleadings in this case and, therefore, need not be discussed, although the commission has retained possession for nearly three years. This was a question of

fact, and as was said in the *McBride* case by Good, J.; "For aught that appears, they (the assets) 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." The statute provides that, after the commission has been in possession for three months, any judgment creditor may compel the liquidation of the bank by application to the district court. The time thus fixed would seem to be a period which could not be held unreasonable, but the reasonableness of a longer period would depend upon all the circumstances of the case. It would further seem probable that the remedy provided by the act was exclusive. *Baird v. Strobeck*, 54 N. Dak. 268.

We conclude that, at least as against the department of trade and commerce, the guaranty fund commission, and the receiver of the Snyder State Bank, defendants' judgments are not liens upon the real estate of the bank, are clouds upon the title, and the judgment of the district court is correct.

AFFIRMED.

HENRY SHERMAN V. STATE OF NEBRASKA.

FILED FEBRUARY 18, 1929. No. 26742.

1. **Criminal Law:** TEST OF INSANITY. "The test of insanity, urged as a defense to a charge of crime, is the capacity of the accused to understand the nature of the act committed and his ability to distinguish between right and wrong with respect to it." *Kraus v. State*, 108 Neb. 331.
2. **Syllabus Criticized.** The first point of the syllabus in *Carter v. State*, 115 Neb. 320, criticized, for the inadvertent omission of the words "with respect to it," which should have been added

at the end thereof to make complete its quotation of the first point of the syllabus in *Kraus v. State*, 108 Neb. 331.

3. **Homicide:** SENTENCE. Evidence examined, and *held* not sufficient to justify judicial leniency by a reduction of the sentence of death as authorized under section 10186, Comp. St. 1922.

ERROR to the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

E. M. White, for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and ELDRED and REDICK, District Judges.

GOSS, C. J.

Henry Sherman was tried and convicted of murder in the first degree. The jury fixed the penalty of death. From a judgment on the verdict the defendant prosecutes error.

The case as now briefed and argued orally presents unusual features in this: While counsel for the defendant tried the case well and preserved his record of objections to evidence, incorporated all legal exceptions in the motion for a new trial, set them forth in his petition in error and duly grouped them in his assignment of errors in his brief, yet none of these are authoritatively invoked save that the judgment is excessive because it exacts the death penalty against a defendant as to whose sanity there is asserted at least a grave doubt. We quote a part of the conclusion of the brief:

"In conclusion let me repeat: I would not have this defendant turned free if I could do so. Neither do I argue that the case be reversed and sent back for another trial. I believe the defendant to be a dangerous person and that he would always be a menace to those with whom he might associate. But with a firm conviction in mind that this poor wretch is a maniac, and that it would be a judicial wrong to kill him, I ask that the evidence be carefully con-

sidered by this court; much of it I have been unable to call special attention to in this brief. And if, after full consideration of the same, there is a doubt in the minds of the court that defendant was mentally responsible, that you will resolve that doubt in his favor, and in the spirit of the law of our state, as well as of that Supreme and Divine law, not exact his life as the penalty, but direct that he be confined during the remainder of his life where he can be restrained from further violence to others, and the law be fully satisfied."

We commend the ethical and professional attitude of defendant's counsel maintained throughout the trial and review of this case. It was reciprocated by counsel for the state. All connected with the case seemed to unite in a desire to discover the truth and to apply the law. In the same spirit we approach our own duty and exercise our own responsibility.

Before complying with defendant's request to review the evidence, we deem it proper to record that we have considered the errors assigned and are convinced that, even if they were argued and insisted upon, they are not such as to predicate a reversal. The rulings on evidence and the instructions of the court show no prejudicial or reversible error. The legal rights of the defendant were carefully guarded by the trial court.

The information was drawn in the old-fashioned and involved way much in vogue prior to *Nichols v. State,* 109 Neb. 335, in which a brief form of information for murder in the first degree was set out. We commend its adaptation and use. The information in the instant case charged, in effect, that in Sheridan county, Nebraska, on May 18, 1928, the defendant, Henry Sherman, feloniously, purposely and of his deliberate and premeditated malice, shot Hattie Pochon with a shotgun, and as a result thereof Hattie Pochon died on said day; and that defendant thus committed murder in the first degree.

Roger Pochon and his wife, Hattie Pochon, both about 36 years of age, resided in Sheridan county, on a farm

about 17 miles south of Rushville, the county seat. They had seven children, all living with them, the eldest a daughter born January 1, 1914, and the youngest a baby six weeks old. Roger Pochon's mother, Eugenie Pochon, age 56, also made her home with them. On the morning when the killing occurred all the family were there. They lived in a two-story house. There were four rooms, besides a bathroom and pantry, downstairs, and four bedrooms, a storeroom and a hall upstairs. The grandmother slept in a bedroom downstairs and the rest of the family slept upstairs. The defendant was continuously employed by Roger Pochon during his lifetime from the 26th of February, 1928, as a farm hand, and lived with the family during the period of his employment. He had previously worked for Mr. De Poorter, a neighbor, about four miles nearer to Rushville.

At the time of the trial the oldest surviving member of the Pochon family was the eldest daughter. She was a witness for the state and her statement of the facts is not in any way impeached. On the night of May 17, 1928, she had accompanied Felix and Clementine De Poorter, son and daughter of their neighbor, heretofore mentioned, to a dance at the schoolhouse some miles away. They brought her home late at night, and she went to bed in her room, which was also occupied by two of the younger children. About 6 o'clock in the morning she was awakened by a shot downstairs. It was followed by two or three other shots. She heard her mother cry, "Don't shoot, don't shoot," and then her mother screamed. Then she heard the baby cry. She was frightened and ran to the head of the stairs. She saw her father lying face downward at the foot of the stairs; she could not see her mother, grandmother or the baby. Thereupon the defendant came up the stairs, ordered her to her room, pointed the shotgun, which belonged to her father, at her and said he would kill her if she did not go into her bedroom. She entered her room. He went downstairs, but came back right away. While he was gone she heard a sound as if "he

hit the baby on the floor." He entered the room and ordered her little brother and sister from the room and drove them to the room where the other children were and shut the door on them. He returned, having the gun with him at all times, took off his shoes and overalls and forcibly raped her. He then stated he was going to kill her and himself, but he yielded to her persuasion not to kill her because she wanted to help take care of the children. He put on his clothes, had her dress herself, and he threw a dress over her head, saying he did not want her to see the bodies downstairs. Thus clothed, she followed him downstairs, out of a door near the foot of the stairs, and when she got out-of-doors she removed the dress from her head and obeyed his command to go out and get into her father's sedan automobile which was in the garage. She backed it out and then he drove it. He said he was going to town to give himself up. They went first to the home of Clifford Davis, about a mile and a half away. Defendant drove into the yard, honked the horn, and when Mr. Davis came out informed him that he had killed the family and the children were upstairs in a bedroom. Defendant then drove her to Felix De Poorter's, telling her on the way that he was crazy, and informing her also that on the night before he had intercourse with a girl at Rushville. At De Poorter's, Felix came out to the car, she got out and went into the house and defendant and Felix drove away toward Rushville in the sedan. She was taken home in the De Poorter car.

Prior to May 18 defendant had on several occasions made improper proposals to her and she had always rejected them. He had tried to take liberties with her and she had repelled him. Twice she had told her mother. The last attempt was two or three days before the 18th of May. She had told her mother about it and her mother had told the father right away.

Clifford Davis testified that when the defendant drove up to his house he called to witness and said: "I have had a crazy streak and killed the Pochon family and I want

you to take care of the kids. I am going to Rushville and give myself up." Davis left with his hired man, Dave Rodgers, and was at the Pochon home within 15 minutes after defendant had notified him. He saw Roger Pochon lying face downward at the foot of the stairway in the dining room, saw Eugenie Pochon, his mother, lying right by the table, flat on her back with her arms up over her head, saw Hattie Pochon, his wife, in the northwest corner of the dining room "just slumped up, like she had fell in the corner there, laying on her face," and saw the baby lying by a chair by the west window. Witness at once went to the telephone in the dining room and called the sheriff. While he was calling he was informed by Rodgers that Roger Pochon was still alive, and so witness telephoned the doctor. As soon as he was through talking, he rolled Roger over, loosened his belt, and tried to help him as best he could. Roger's right arm had been half shot away; he had a bad wound in the chin, and a large hole between the shoulder blades. Eugenie Pochon was dead. She was shot through the face. Her chin was still there, but the shot "seemed to strike about the lower ear and went straight through." Hattie Pochon was shot in front of the ear and the back part of her head was blown away. Part of the brain was gone. The baby was wrapped in a blanket and was alive and crying. There were no chairs tipped over. The room was clean, with the exception there was a good deal of blood over the room. There are facts from which the jury might have concluded that Roger was shot first, that his wife was shot while trying to sound the alarm over the telephone, and that his mother was killed while trying to interfere with the killer's acts.

Felix De Poorter was ordered by defendant to "Get in the car" from which the Pochon daughter had just alighted at the De Poorter home, and he did so when she nervously said: "You had better get in." Witness thought Roger Pochon or somebody at the ranch was hurt and so he entered the car and defendant drove it toward Rushville, saying he was going to town to give himself up. He had

a shotgun next to him in the car and said: "Don't touch that gun or I will kill you deader than hell, for I have got another gun in my pocket." After driving about two miles witness threw the gun out, defendant not objecting. On the way, the defendant "started singing. I don't know what he sung and he hadn't more than got started when he said, 'Oh hell, I have got the two mixed together,' so he quit." Shortly thereafter they met the deputy sheriff in a car and defendant recognized who it was but kept on driving. The defendant said he could get away if he wanted to but was going to give himself up. The deputy turned his car around, overtook and stopped the sedan, ordered defendant into the other car and took him to town.

Dr. W. H. Crawford, physician and surgeon, of Rushville, testified that he went out to the ranch, arriving about 8 o'clock, the morning of May 18. Roger Pochon had died of his gunshot wounds just before he arrived, Roger Pochon's mother was dead, Hattie Pochon had been dead about two hours. She had a slight wound, but not fatal, through the right breast; "the second shot was evidently through the right eye and the brain, taking about half the brain out, and the eye, and tearing the ear some; it was a mortal wound instantly fatal." The baby was in a semi-conscious state. She had no external and visible wounds, but the doctor on examination discovered a depression at the base of the skull. He took the eldest daughter back to town with him and examined her, with the result, without details, that he discovered complete evidence of recent penetration and rupture, supporting her testimony relating to her criminal assault by the defendant.

Lawrence Lulow had driven over to the Pochon ranch about sundown May 17, 1928. There the defendant asked him to go to Rushville and offered to pay the expenses. They went, attended graduation exercises a while, visited a pool hall, ate at a restaurant, were entertained by two girls at their place, got his tank filled with gasoline and went home. While in town defendant inquired if the hardware store was open, but it was not.

The state introduced in evidence a written admission made on May 18 in the presence of several witnesses. It was typed in the presence of defendant and witnesses, in narrative form each statement in it being the result of questions and answers, but put in type after the narrative conclusion on each point was made satisfactory to defendant. The entire statement was considered and approved by defendant at the time of signing. In this the defendant narrated the time and manner of shooting the three members of the Pochon family; he intended to kill them at 1 o'clock the night before when he returned from Rushville, but finally weakened and went to bed instead; before going to bed he loaded the gun with six shells and put three shells in his pocket; got up about 5 o'clock in the morning and at breakfast time shot the three and then took the baby by the body and beat its head over a chair in the diningroom because it was crying and he thought it might have been shot; the defendant then admits his conduct with relation to the daughter as testified to by her; he says his motive for committing the crimes of murder in killing Roger, Eugenie and Hattie Pochon was for the purpose of having sexual intercourse with the daughter, and for the further reasons that he liked her and thought if something happened to her people she would get their property and he might be able to enjoy it with her; and because her parents would not permit him to court her, objecting on the ground of her age.

Defendant's brother testified that defendant was born October 6, 1906. If that be the correct date of his birth, he was between 21 and 22 years old when the crime was committed. His father lives in Burwell. His mother died when defendant was 10 or 11 years old. There were eight children living. For about a year after his mother's death the defendant lived with a brother eight or ten miles from Burwell, and from that period has lived at different places, frequently with others than relatives. The testimony would indicate that he was a good worker. He never went to school very much, as he did not like it. Some years ago

he was sent to the industrial school for some minor infraction. The indications are that he desired to go. His father, a laborer, was a hard drinker in the defendant's own early childhood, but for the last ten years, since the beginning of the prohibition era, he has not been so. Defendant drank some, but the evidence does not show that he was a slave to the habit. His general conduct seems to have been that of the average youth during the time he lived in the neighborhood where he committed the crime with which he was charged.

Defendant's brother and brother's wife testified that, when a boy 10 or 11 years old, he would go in the dark among the hills and pretend that he had been pursued by imaginary enemies, and that this argues insanity. Those who have been fortunate enough to have children, those who have taught children, those who understand children, all know that a belief in fairies, sprites and hobgoblins is inherent in many children and does not have to be inculcated. To those who do not comprehend them, such children are rivals of Munchausen; to those who understand child life their stories are but normal manifestations of the creative literary instincts of rational childlike minds. But romancing or lying in childhood does not connote insanity in maturity. Nothing strange or queer in the defendant has appeared in his own personal history that would condone his homicidal act and deprive it of guilty intent. Mere atrocity does not, of itself, prove a disordered mind.

Various witnesses introduced on behalf of the defendant testify to eccentricities on the part of uncles of the defendant. One incident relating to defendant's mother was told wherein she is depicted as losing her temper without good cause and threatening a prospective daughter-in-law with a pair of scissors. Thus the defendant sought to present to the jury a history of insanity in the family. Physicians testified both on behalf of the state and of the defendant on the subject of defendant's mental condition. The asserted hereditary taint was presented to them in

hypothetical questions. To detail the evidence as to the facts and the conclusions of the experts would serve no useful purpose. All of these matters were submitted to the jury, to whom the ultimate fact of the criminal responsibility of the defendant is committed under the law.

"The test of insanity, urged as a defense to a charge of crime, is the capacity of the accused to understand the nature of the act committed and his ability to distinguish between right and wrong with respect to it." *Kraus v. State,* 108 Neb. 331.

In *Carter v. State,* 115 Neb. 320, the rule was correctly stated on page 324, but in the first point of the syllabus, where the opinion quoted from the first point of the syllabus in *Kraus v. State,* 108 Neb. 331, it inadvertently omitted the last four words, "with respect to it." It is clear that the test of the capacity of one to commit a criminal act must be applied to the particular act as of the time when it was committed.

The appeal to us to reduce the penalty from death to life imprisonment is based on the authority to do that under section 10186, Comp. St. 1922. The defendant cites cases in which such a sentence has been so reduced by the court. Neither he nor the state cites the many instances where such action has been denied. The state declines to discuss the question on the theory that the responsibility is for the court. There can be no criticism of either the defendant or the state for their respective positions. We accept the responsibility, realizing that precedents are not of value and that in every instance the matter of judicial leniency is to be resolved on the facts and circumstances of the individual case.

To us it seems as if the jury arrived at a proper conclusion under the facts and under their oaths. No suspicion of error attaches to their verdict or to the judgment of the trial court. Under the law the test is that of criminal responsibility. This was correctly submitted to the jury. The case was taken to Dawes county on a change of venue. The jurors had no local prejudice. They found

that the defendant planned the killing, knew what he was doing when he committed the act and knew that the act was wrong. We find no sufficient circumstances in the life of defendant nor in his family history to impeach his sanity. There was ample evidence to show that he planned the crime and that it was in furtherance of his motives of pride and anger at the obstruction of his suit, of passion toward the object of his affections, and of acquisitiveness of property, a share in the possession of which he hoped to enjoy. That such results as he hoped for would not be likely to flow from his acts does not mean that he lacked sanity, as observation proves that sexual passion such as ruled him defies the rules of law and logic. The atrocity of his crime is no reason for thinking he was insane when he committed four major crimes, destroying three members of a household and violating another, and making a bloody shamble of a peaceful home. If the extreme penalty is ever justified, it seems to us that the facts here warrant it. We see no reason for interfering with the judgment of the district court and it is therefore affirmed. Friday, May 31, 1929, between the hours of six a. m. and six p. m. is fixed as the date for carrying out the judgment of the court.

AFFIRMED.

HATTIE HAASE, APPELLANT, V. EMIL HAASE, APPELLEE.

FILED FEBRUARY 21, 1929. No. 26402.

Divorce: ALIMONY. When a divorce is granted to a wife and she is charged with the support of an infant child less than a year old, and the property of the husband is worth from $16,000 to $20,000, *held*, that, in view of the facts and of the defendant's financial worth, permanent alimony in the sum of $1,000, and $10 a month for the support of the child is wholly inadequate, and that the permanent alimony should be increased to the sum of $3,000, and, in respect of the allowance for the support of the child, it is ordered that the sum be increased to $15 a month until the further order of the court.

APPEAL from the district court for Madison county: DEWITT C. CHASE, JUDGE. *Affirmed in part, and reversed in part and remanded, with directions.*

F. M. Deutsch, for appellant.

Hugh J. Boyle, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and ELDRED and REDICK, District Judges.

DEAN, J.

November 14, 1927, Hattie Haase obtained a divorce from Emil Haase in Madison county on the ground of extreme cruelty. She was also awarded the custody of their infant son, who was less than a year old. The decree requires the defendant to pay $10 a month for the support of the child, and $1,000 as permanent alimony, and attorney's fees. It is conceded by the parties hereto that the only question presented for review here is whether the money decreed by the court to be paid over by the defendant for the support of the infant child and the plaintiff is adequate for the purpose for which it is intended.

In respect of the defendant's financial standing, it is undisputed that he is the owner of a quarter section of Madison county land and some other valuable property.

The statute applicable to the facts before us follows:

"Upon every divorce from the bonds of matrimony for any cause excepting that of adultery committed by the wife, and also upon every divorce from bed and board, from any cause, if the estate and effects restored or awarded to the wife shall be insufficient for the suitable support and maintenance of herself and such children of the marriage as shall be committed to her care and custody, the court may further decree to her such part of the personal estate of the husband and such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case." Comp. St. 1922, sec. 1533.

The record shows that, as is so often the rule in a domestic tragedy of this character, some fault may be found on both sides of the controversy. The present case is no exception to the rule. Nevertheless, under the laws of God and man, one of the most sacred duties of a normal man is to support his wife and his offspring. It appears from the evidence that defendant's property is reasonably worth from $16,000 to $20,000, and a very large part of this he tried to conceal by a conveyance, without consideration, to his father. Clearly, it is only right and proper that the defendant should be compelled to respond in a substantial amount for those who are lawfully dependent upon him for their support. From the record we conclude that the learned trial court fixed the permanent alimony at a sum that is disproportionate to defendant's means and is wholly inadequate to supply the reasonable requirements of those whose right it is to rely upon him for daily bread and for the common necessaries of life. In view of the evidence, we conclude that the plaintiff should recover $3,000 from the defendant as permanent alimony, and also $15 a month for the support of the child until the further order of the court.

The judgment of divorce is affirmed, and the judgment for alimony is reversed and the cause is remanded, with directions to the trial court to render a decree for plaintiff for $3,000 as permanent alimony and for $15 a month for the support of the infant child until the further order of the court.

AFFIRMED IN PART, AND REVERSED IN PART AND REMANDED, WITH DIRECTIONS.

W. F. PARKER, RECEIVER, APPELLEE, V. FIRST NATIONAL BANK OF OMAHA, APPELLANT.

FILED FEBRUARY 21, 1929. No. 26506.

1. **Pledges.** Where the owner of promissory notes pledges them as collateral security to another for a specified debt and for any other obligation of the pledgor to the pledgee, the latter may

retain and hold the pledged collateral for such obligations only as are held by the pledgee and on which the pledgor is liable.

2. ———: SUIT TO RECOVER: TENDER. The pledgor of collateral securities may not maintain an action for the recovery of the pledged collateral until he has first paid the debt for which they were pledged as security, or until he has made a lawful tender of the amount of such debt; and, in the event he makes a tender of the amount, such tender must be kept good, and he must, on bringing his action to recover the collaterals, tender to the pledgee in court the amount due.

3. ———: RIGHT TO POSSESSION. The pledgee of collaterals is entitled to retain possession of all the collaterals until the debt for which they were pledged has been paid in full, or tender of the full amount has been made.

4. **Limitation of Actions**: PLEDGES. Where a pledgor of collaterals has discharged the debt for which they were pledged, but the pledgee asserts a right to hold the collaterals for other debts for which pledgor denies liability, and the pledgor and pledgee enter into an agreement that pledgee shall hold the collaterals pending a determination of such liability by proceedings in court, the statute of limitations will not run against an action by pledgor to recover the collaterals, or their proceeds, until such liability has been determined, or until the pledgee repudiates the trust.

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

Congdon, Finlayson & Burke, for appellant.

Swarr, May & Royce, contra.

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

GOOD, J.

This is an action to compel the defendant to account for trust funds and property. Defendant denied possession of any trust funds or property and, as a further defense, pleaded the statute of limitations. The guaranty fund commission intervened and asserted a right to the trust property by assignment from the plaintiff, but joined with

plaintiff and averred that a judgment or decree for plaintiff would inure to the benefit of the intervener. A trial of the issues resulted in a decree for the plaintiff. Defendant appeals.

In April, 1921, the Brown County Bank of Long Pine, then a going concern, was indebted to the defendant in a sum slightly in excess of $40,000 upon three promissory notes, and, to secure the payment of such notes, the Brown County Bank deposited with defendant, as collateral, notes of its customers aggregating in amount nearly $100,000. The Brown County Bank became insolvent, and Parker, the plaintiff, was appointed and qualified as its receiver. A large part of the indebtedness of the Brown County Bank was soon paid by collection of collaterals pledged as security. In September, 1921, the receiver offered to pay defendant the amount still due on the three promissory notes and demanded return of the uncollected collateral then in the possession of defendant. Defendant refused to comply with the request and, under a clause of the agreement pledging the collateral, to the effect that after the payment of the three promissory notes the collateral might be held and applied to any other liability of the Brown County Bank which the defendant might then hold, asserted a right to hold the collateral and the proceeds as security for the payment of other notes. The receiver denied that the other notes were liabilities of the Brown County Bank and, without tendering the amount due upon the notes of the Brown County Bank, brought an action in replevin. No order of replevin was issued, but defendant appeared and filed a demurrer to the petition in that action. In July, 1922, after the filing of the replevin action, the balance due the defendant upon the three notes of the Brown County Bank was paid in full from collections out of the collateral. In September, 1922, an agreement was entered into between plaintiff and defendant that the remaining collateral notes, then in the possession of defendant, should be turned over to the receiver, and that he should make collections on said collateral notes and turn the proceeds of such collections

over to defendant, to be held by it until it should be determined in the then pending replevin action to whom the collateral and the funds derived from the collection thereof should belong. In December, 1922, there was a supplemental agreement entered into between the parties that, if the proceeds from the collateral notes should be found to be the property of the receiver, the defendant would pay interest thereon at the rate of 4 per cent. per annum. The receiver made collections on the collateral notes and, pursuant to the agreement made in September, remitted the proceeds of such collections to the defendant. The collections so received and remitted between September, 1922, and February 17, 1924, aggregated $17,942.19. As defendant received each remittance, it issued for the amount a cashier's check and placed it in a separate file. In 1924 the replevin action, which had been begun in the district court for Douglas county, was, on the court's own motion, dismissed, without prejudice, for want of prosecution. In June, 1926, the said sum of $17,942.19, which had been collected from the collaterals and remitted by plaintiff to defendant and by it kept in the form of cashier's checks, was, without notice to the receiver, applied to the payment of five notes held by defendant. Duffy, Kernan, and Palmer, respectively, were the makers of three of these notes and Bucklin and Wilson were the payees therein named. The payees indorsed these notes and sent them to the defendant, requesting that it discount them and place the proceeds to the credit of the Brown County Bank. W. A. Bucklin and Howard O. Wilson, respectively, were the makers of the other two notes. In each of these two notes defendant was named as payee. The makers of these two notes sent them to defendant, requesting it to carry them and place the proceeds to the credit of the Brown County Bank. Defendant complied with each request and placed to the credit of the Brown County Bank the proceeds of the five notes. There was no attempt to attach to any of them the indorsement or guaranty of the Brown County Bank. At the time Bucklin and Wilson were, respectively,

president and cashier of the Brown County Bank, and defendant kept these last named notes in a file of Brown County Bank items listed as such, but the record discloses no agreement, or guaranty, on the part of the Brown County Bank, to indorse or otherwise become liable thereon. No fraud, accident or mistake is shown in connection with the execution, indorsement and delivery of said notes, or any of them. In each instance the proceeds of these notes were credited to the account of the Brown County Bank and by it withdrawn.

This statement of fact is substantially taken from the findings made by the district court, and the findings are supported by the record. The trial court determined that the Brown County Bank was not liable on or for the last five notes and that defendant was not authorized to apply the collections from the collateral to the payment of said notes. The court further determined that the agreement made in September, 1922, for the collection of collateral and holding of the proceeds until the liability of the Brown County Bank on these five notes could be determined, and the supplemental agreement, made in December of the same year for the payment of interest on funds arising from the collateral, were a distinct recognition of the obligations of defendant to account for the collateral; that the dismissal of the replevin action without prejudice gave rise to a right of plaintiff to bring this or some other action to secure the determination of the rights between the parties, and against which right the statute of limitations would begin to run only when notice of repudiation of such obligation on defendant's part should be given the receiver, or the fact of such repudiation otherwise brought to his knowledge, and that the plea of the statue of limitations was unavailing. It further appears from the record that, in addition to the $17,942.19, which had been collected from the collateral by the plaintiff and remitted to the defendant, plaintiff had collected the further sum of $1,271.75, which remained in his possession, and that he still held in his possession the remaining uncollected collateral notes. The trial court

awarded the plaintiff judgment for $17,942.19, with interest at the rate of 4 per cent. to the date of the entry of judgment, and also held that plaintiff was entitled to retain the $1,271.75 and the balance of the uncollected collateral, which was then in his possession.

Counsel for defendant allege that the trial court erred in its ruling that defendant was not entitled to hold and apply the proceeds arising from the collection of the collateral notes to the payment of the five notes, to which reference has hereinfore been made.

Defendant contends that where one bank deposits money to the credit of another bank, and the latter receives and retains the benefits, even if the transaction is in the nature of an excess loan, a liability arises on an implied contract to return or make compensation for the benefits received, and, further, that, although in the ordinary case a bank whose name does not appear on a promissory note may not be sued thereon, yet if the bank receives and retains the benefits of the transaction it may be estopped to deny its liability and required to account for the benefits which it receives.

For the sake of argument, the proposition may be admitted as sound; but in the instant case there is nothing to show that the Brown County Bank received and retained the benefits of the deposits to its credit. For aught that appears, the persons who sent the notes to defendant for discount may have drawn and received from the Brown County Bank the amounts placed to its credit; nor is there anything in the record to disclose that the transactions were, in any sense, those of the Brown County Bank. Nowhere does it appear that any of the five notes were at any time the property of the Brown County Bank, nor that it assumed or incurred any liability to defendant for any of the five notes for which defendant claims to hold the collateral as security.

Defendant also advances the proposition that if, for the purpose of enabling a bank to borrow money without giving its own note, another bank credits the sum to the borrower's account and takes an individual guaranty from the

borrower's officers or directors, amounts drawn on the credit constitute a loan to the bank and not to its officers or directors, and cites in support of this proposition *American Exchange Nat. Bank v. First Nat. Bank,* 82 Fed. 961. The facts in the instant case, however, do not bring it within the rule announced. The record does not disclose that the discounting of the five notes was for the purpose of enabling the Brown County Bank to borrow money without giving its own note.

In *Norfolk Nat. Bank v. First Nat. Bank,* 114 Neb. 560, it was held: "One whose name nowhere appears on a negotiable promissory note is not generally chargeable as indorser." The same rule would apply to a contract of guaranty, unless a separate contract of guaranty was shown to exist. No liability of the Brown County Bank, as maker, indorser, guarantor, or otherwise, on any of these notes is shown. It necessarily follows that the defendant could not lawfully hold the collateral notes, or the proceeds thereof, for the payment of any of the five notes in question.

It is argued that plaintiff's cause of action is barred by the statute of limitations. It is insisted that a cause of action arose in favor of plaintiff at the time he offered to pay the balance due upon the three promissory notes, for the security of which the collaterals were pledged, and that at any rate it began to run from the time the action in replevin was instituted.

It is a well-recognized rule that the statute of limitations will not run against a cause of action until the party asserting it has the right to bring and maintain such action. It is also a well-recognized rule that the pledgor of collateral securities may not institute and maintain an action for the recovery of the pledged collateral until he has first paid the debt for which they were pledged as security, or until he has made a lawful tender of the amount of such debt. In the event of tender, he must keep the tender good, and, when bringing his action, he must bring or tender the amount into court. Jones, Collateral Securities (3d ed.) sec. 570.

The record in this case discloses that at the time plaintiff offered to pay defendant the balance due and demanded possession of the collateral no tender of any amount was made; that there was still a balance due upon the principal notes for which the collaterals were pledged, and it also appears that at the time the action in replevin was brought there was still a balance due, and in that action it is not disclosed that any tender was kept good by bringing the same into court. The defendant had a lawful right to retain possession of all the collaterals until the full debt for which they were pledged had been discharged. It appears that the debt was not fully discharged until July, 1922, and was then paid by the defendant's collection of the collaterals and applying the proceeds to the payment. There are authorities which hold that, when the pledgor has fully paid and discharged the obligation for which collaterals have been pledged, a cause of action for the return of the collaterals then arises in his favor, and the statute of limitations will begin to run from that time. There are other authorities holding that the statute of limitations will not begin to run against an action for the recovery by the pledgor of collaterals until the obligation for which they have been pledged has been fully paid and discharged and a demand made by the pledgor for the return of the collaterals and a refusal by the pledgee, or until it is brought to the knowledge of the pledgor that the pledgee has converted the collaterals to his own use and has repudiated the trust.

In view of the facts disclosed, it is unnecessary to determine which of these conflicting views is the better. After the replevin action was begun, the parties entered into an agreement, the effect of which was that the defendant should continue to hold and control the collaterals until the question whether the collaterals were holden for other obligations than the three original notes for which they were pledged should be determined in an action in court. It is true that both parties at that time no doubt contemplated that that question would be determined in the then

pending replevin action. It certainly was not the intention of the parties that another action might not be instituted for that purpose, if for any reason the rights of the parties were not determined in that action. To so assume would be to impute a want of integrity to the officials of the defendant bank. We assume that they were acting honestly and with good motives and desired that the rights of the respective parties as to the collateral, or, rather, as to whether the collateral was holden for the notes discounted by Bucklin and Wilson, who were officers of the Brown County Bank, should be determined by an action in court. With this in view, the new agreement was made, and under this new arrangement the defendant was then holding the collaterals in trust, with the understanding that they, or their proceeds, should, when the rights of the parties were determined, be surrendered or turned over to the ones determined to be lawfully entitled thereto. The defendant recognized the trust as continuing, and in December, 1922, entered into a supplemental agreement, providing for the payment of interest, under certain contingencies, upon the proceeds of collected collaterals. This was still a recognition of the trust. Thereafter nothing is disclosed to indicate a repudiation of the trust until the application of the proceeds of the collaterals collected to the payment of the five notes discounted by Bucklin and Wilson. This did not occur until June, 1926.

In *Holmes v. Doll,* 101 Neb. 156, this court held: "The statute of limitations does not commence to run against an action by the administrator of the estate of a beneficiary, to recover from the trustee the value of notes and mortgages which he has refused to transfer to plaintiff, until the trustee has repudiated his trust and refused to transfer the property." In *Hanson v. Hanson,* 78 Neb. 584, it was held that the statute "does not begin to run in favor of the trustee of a resulting trust until such trustee, by some act or declaration, clearly repudiates his trust." And this ruling was affirmed in *Johnson v. Petersen,* 100 Neb. 255.

Applying the principles of the foregoing authorities to the facts in the instant case, we deduce the following rule: Where a pledgor of collaterals has discharged the debt for which they were pledged, but the pledgee asserts a right to hold the collaterals for other debts for which pledgor denies liability, and the pledgor and pledgee enter into an agreement that pledgee should hold the collaterals pending a determination of such liability by proceedings in court, the statute of limitations will not run against an action by pledgor to recover the collaterals, or their proceeds, until such liability has been determined, or until the pledgee repudiates the trust.

It necessarily follows that the defense of the statute of limitations is not available to defendant. No error has been disclosed.

JUDGMENT AFFIRMED.

Note—See Pledges, 43 A. L. R. 1069; 21 R. C. L. 653; 4 R. C. L. Supp. 1425; 5 R. C. L. Supp. 1167; 6 R. C. L. Supp. 1278; 7 R. C. L. Supp. 715.

KNUTE C. ENGEN, APPELLEE AND CROSS-APPELLEE, V. UNION STATE BANK OF HARVARD ET AL., APPELLEES AND CROSS-APPELLEES: VAN E. PETERSON, RECEIVER, ET AL., APPELLEES AND CROSS-APPELLANTS: FIRST TRUST COMPANY OF LINCOLN, APPELLANT AND CROSS-APPELLEE.

FILED FEBRUARY 21, 1929. No. 26236.*

1. **Descent and Distribution:** TREATIES: CONSTRUCTION. The French words "*fonds et biens*," translated as "goods and effects," include realty, as they appear in the following terms of the existing treaty between the United States and Norway: "The subjects of the contracting parties in the respective states may freely dispose of their goods and effects, either by testament, donation, or otherwise, in favor of such persons as they think proper; and their heirs, in whatever place they shall reside, shall

* Note—Nos. 26673, 26713, 26719, reported in vol. 117, pp. 804, 805, 809; opinions by Thompson, J., filed February 21, 1929.

receive the succession even *ab intestato*, either in person or by their attorney." *Erickson v. Carlson*, 95 Neb 182, approved and followed.

2. **Treaty rights** of aliens must be enforced by state courts without regard to conflicting statutory provisions.

3. **Treaties**: HOMESTEAD ACT: REPUGNANCY. The provisions of the homestead act (Comp. St. 1922, secs. 2816-2832) operating as restraints on alienation are, to that extent, repugnant to, and inconsistent with, the rights guaranteed by terms of this treaty stipulating that "the subjects of the contracting parties in the respective states may freely dispose of their goods and effects ("*fonds et biens*") either by testament, donation, or otherwise, in favor of such persons as they think proper"

4. ———: ———: ———: As to conveyances of real estate authorized by such treaty, even though consisting of the dwelling house in which the grantor resides and its appurtenances, and the land on which it is situated, the restraints on alienation imposed by such homestead act are to that extent inoperative.

APPEAL from the district court for Hamilton county: LOVEL S. HASTINGS, JUDGE. *Reversed, with directions.*

Hall, Cline & Williams, for appellant.

Hainer, Craft, Edgerton & Fraizer, H. G. Wellensiek, J. H. Grosvenor, Butler & James and *Brown, Baxter, Van Dusen & Ryan, contra.*

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

EBERLY, J.

This is primarily a suit to cancel deeds made by Christian Knudson in his lifetime conveying to his two nieces, Anna S. Brown and Bertha M. Megrue and husbands, respectively, eighty-acre tracts in Hamilton county, Nebraska.

The pleadings embrace other issues, however, but the finding of the trial court was such as rendered the validity of the deeds, above referred to, the controlling question.

The undisputed facts in the record appear to be that Christian Knudson, a son of Norwegian subjects, was born in Norway, January 10, 1845, and married Mari Tollefsen

Todok, also a subject of Norway, at a church wedding in that country; that thereafter they lived together in Norway until the spring of 1868. Knudson and his brother, Eric Engen, left their home in Norway, May 16, 1868, and arrived in Wisconsin, June 22, 1868. Knudson came to Nebraska in 1878. His wife, Mari Tollefsen Todok, and his child remained at their home in Norway. The wife never came to the United States and at all times has continued a resident and subject of Norway. There is no evidence in the record that the naturalization of Christian Knudson as a citizen of the United States was ever completed. The plaintiff in this action, Knute C. Engen, the son of Christian Knudson and Mari Tollefsen Todok, left the Norway home and came to Nebraska in 1893, when he was 23 years old. He then worked for his father about one year on the father's place after his arrival and then permanently left his father's residence. The mother of Knudson was born June 16, 1818, and his father was born February 3, 1819. His mother came to Nebraska in 1886 and the father in 1887 and joined Knudson who was then living on the 160 acres in controversy. Knudson took care of the old folks and supplied the provisions for them. Knudson's father died in this home January 31, 1900, being 81 years old; the mother died April 8, 1906, being 88 years old.

There is no evidence in the record that either the father or mother of Knudson was a naturalized citizen of the United States. On July 17, 1923, Christian Knudson in consideration of the care that his niece and her husband rendered to him, deeded the north half of the southwest quarter of section 35, township 9, range 7, Hamilton county, to Bertha M. Megrue and Leroy A. Megrue. On October 2, 1923, the Megrues deeded this land to the Union State Bank of Harvard for a consideration of $9,600, and the Union State Bank conveyed in turn to Theodore Griess, its president, who on September 22, 1924, borrowed from the First Trust Company of Lincoln $4,500, and executed a mortgage upon this land to secure the same to that organization. On July 17, 1923, Christian Knudson, in consid-

eration of the care rendered by his niece and her husband also deeded the south half of the northwest quarter of section 35, township 9, range 7, Hamilton county, to Anna S. Brown and Robert E. Brown. On September 17, 1923, the Browns deeded the premises thus received to the Union State Bank of Harvard for a consideration of $8,000. This bank in turn deeded to Theodore Griess, who borrowed from the First Trust Company of Lincoln $5,000, and executed a mortgage to secure the same on September 22, 1924, to such trust company.

The district court by special findings determined, in addition to certain other facts, that Christian Knudson, sometimes known as Christian Engen, was at all times an alien and a subject of Norway, having never completed his naturalization in the United States, and that the defendant and cross-petitioner, Mari Tollefsen Todok, was his legal wife and was living in Norway at the time of his death; that Christian Knudson settled in Nebraska in 1878 and established a homestead which embraced the premises in controversy, and continued to reside upon said real estate as his homestead until his death, August 6, 1923; that the warranty deeds to the Megrues and the Browns referred to were each void and without force and effect for the sole reason that the lands purporting to be conveyed thereby were a part of the homestead of said Christian Knudson, and these deeds were not signed and acknowledged by his wife, the defendant, Mari Tollefsen Todok, and were therefore void. The court further determined that the conveyances made by the Megrues and Browns of the title thus received by them to the Union State Bank of Harvard were likewise null and void and of no force and effect for the sole reason that none of the grantors, due to the invalidity of the deeds as determined, had title to said real estate, and that the title thereof remained and continued to be vested in Christian Knudson, and that on August 6, 1923, when he died intestate leaving as his sole and only heirs at law his wife, the defendant, Mari Tollefsen Todok, and his son, the plaintiff, Knute C. Engen, the fee title to such real

estate descended and vested in them, half and half, share and share alike; and the court further found expressly that there was no fraud, conspiracy, or undue influence exercised by the defendants, or their agents, on said Christian Knudson, as alleged in plaintiff's petition. The decree was entered accordingly. Van E. Peterson, receiver of the Union State Bank of Harvard, Nebraska State Bank of Harvard, and First Trust Company of Lincoln appeal.

A careful consideration of the evidence contained in the record inclines us to the belief, consistent with the findings of the trial court who heard the evidence and observed the witnesses who testified in person before him, that there was no fraud, conspiracy, or undue influence exercised by the defendants, or their agents, on Christian Knudson concerning, or in connection with, the conveyances of the premises involved in this litigation to the defendants Browns and the defendants Megrues. We further agree with the district court that the evidence sustains the conclusion that Knudson, the deceased, was at all times a subject of Norway and not a citizen of the United States.

"Foreigners by birth are presumed to be aliens. The status of a person as to alienage, when once established, is presumed to continue until the contrary is proved." 2 C. J. 1045, sec. 4; *Hauenstein v. Lynham,* 100 U. S. 483.

The mere fact of long residence in this country is insufficient to overcome this presumption. *Ehrlich v. Weber,* 114 Tenn. 711.

In addition, the evidence of the record before us, though somewhat meager on this point, tends to support the same conclusion. We have before us for determination, therefore, the question of rights wholly derived from a subject of Norway, and who was an alien both at the time of the execution of the conveyances questioned and at the time of his death.

As to the situation thus presented, this court is committed to the view that the sixth article of the treaty of 1783 with Sweden incorporated by reference in the treaty of 1827 with Sweden and Norway, and which as to Norway

still is in force, is controlling. The doctrine announced by this court in *Erickson v. Carlson* 95 Neb. 182, is as follows:

"The French words '*fonds et biens*,' translated as 'goods and effects,' include reality, as they appear in the following terms of a treaty between the United States and Sweden: 'The subjects of the contracting parties in the respective states may freely dispose of their goods and effects, either by testament, donation, or otherwise, in favor of such persons as they think proper; and their heirs, in whatever place they shall reside, shall receive the succession even *ab intestato*, either in person or by their attorney.' 8 U. S. St. at Large, p. 64, art. VI.

"Treaty rights of nonresident aliens must be enforced by state courts without regard to conflicting statutory provisions." *Erickson v. Carlson*, 95 Neb. 182. See *Butschkowski v. Brecks*, 94 Neb. 532.

In other words, the accepted doctrine of the court is:

"Under section 2, art. VI, Constitution of the United States, 'all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby; anything in the Constitution or laws of any state to the contrary, notwithstanding.'

"State courts will take judicial notice of the existence of a treaty, and if its provisions are self-executing it is unnecessary to plead its existence." *Butschkowski v. Brecks*, 94 Neb. 532. See, also, *Goos v. Brocks*, 117 Neb. 750.

To what extent, if any, is the claim of homestead in the property in controversy made on behalf of Mari Tollefsen Todok sustained and supported by the words quoted. These treaty provisions, referred to, date from 1783.

Homestead laws are strictly of American origin. The earliest statute of this kind was that enacted by the Republic of Texas, January 26, 1839. The first constitutional guaranty of homestead exemption was that of the Constitution of Texas in 1845. This was followed in turn by Vermont in 1849. All other states of the American Union

adopted this policy at a date subsequent to 1849. In view of the history of the development and adoption of this public policy, it can hardly be inferred that the question of homestead rights were in contemplation of the makers of the treaty of 1783. True, the thirteen American states which then formed the Confederacy had each substantially adopted, for the benefit of the wife, the English doctrine of dower as defined at common law. Even so, it is, and was, an established doctrine of the common law that "dower rights are cast upon the widow by operation of law, and it is a well-settled common-law rule that an alien cannot cast any dower rights upon his wife, nor can an alien widow of a citizen take by dower any interest in her husband's lands." 2 C. J. 1066, sec. 32.

An examination of the terms of the treaty before us discloses no intention to extend the benefits of common-law dower to the wife of the alien; in fact no provision therein contained discloses any purpose to create or provide for her benefit any special rights or privileges whatever because of, or based upon, a marital relation sustained to an alien owner of property. On the contrary, this instrument expressly stipulates for conferring upon the "subjects of the contracting parties in the respective states" the unlimited, unrestricted, and unqualified right to "freely dispose of their goods and effects *("fonds et biens")*, either by testament, donation, or otherwise (which necessarily includes the right to convey by deed), in favor of such persons as they think proper." This, in legal effect, is wholly inconsistent with the right of dower, and, in like manner, inconsistent with the existence of statutory right of homestead, in real estate to which the treaty applies.

For, if we consider the provisions of section 2819 and section 2832, Comp. St. 1922, as applicable to the subject of the present action, it necessarily follows that certain property within the purview of the treaty before us "cannot be conveyed * * * unless the instrument by which it is conveyed * * * is executed and acknowledged by both husband and wife;" and also that such property (home-

stead) "vests on the death of the person from whose property it was selected, in the survivor, for life, and afterwards in the decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will."

The statutory provisions referred to thus assume the nature of limitations, qualifications, or modifications of the treaty itself, and, if valid, would necessarily change its true construction. Each of these provisions of the legislative enactment must therefore be considered to be *pro tanto* inconsistent with the terms of the controlling treaty properly construed. The conclusion follows that, to the extent inconsistent with the terms of the treaty, the statutory provisions are inoperative. The unquestioned rule of construction requires that the provisions of the treaty must be liberally construed and given full force and effect "anything in the Constitution or laws of any state to the contrary, notwithstanding." Therefore, the legal effect of the conveyances executed by Christian Knudson must be determined wholly by the powers conferred on him by treaty, and not by the inconsistent limitations and restrictions prescribed in the Nebraska homestead act. So considered, the validity of these conveyances cannot be questioned and they were each effective in vesting the titles to the lands described therein to the grantees therein named. These instruments being valid, it also follows that the subsequent deeds and mortgages affecting the titles, which were, in the district court, decreed to be void, are likewise valid and effective.

The judgment is therefore reversed and the cause remanded, with instructions to the district court to enter a decree dismissing the petition of plaintiff and the cross-petition of the defendant, Mari Tollefsen Todok, and adjudging each and all of the mortgages and conveyances in suit valid and enforceable.

REVERSED.

THOMPSON, J., dissents.

JAMES I. GRAEME ET AL. V. STATE OF NEBRASKA.

FILED FEBRUARY 28, 1929. No. 26664.

1. **Criminal Law**: ADMISSION OF INCOMPETENT EVIDENCE. "Unless it can be said, with reasonable certainty, that irrelevant and incompetent evidence received upon the trial of a criminal case is not so prejudicial as to deprive the defendant of a fair trial, a conviction secured by such evidence will be set aside." *Kleinschmidt v. State*, 116 Neb. 577.
2. ———: EVIDENCE OF OTHER CRIMES. In a prosecution for grand larceny of a stove and bed, it is reversible error to permit the state to introduce evidence showing, or tending to show, that the defendants were guilty of the crime of illegal possession and operation of a still.

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

Glebe & Elliott, for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON and DAY, JJ., and ELDRED and REDICK, District Judges.

THOMPSON, J.

An information was filed charging plaintiffs in error (hereinafter called Graeme and Hamilton) with grand larceny. Trial was had, verdict of guilty returned, and judgment entered sentencing each to serve a term of not less than one year and not more than seven years in the state reformatory, to reverse which they respectively prosecute error. While there are many reasons for reversal urged, they may be condensed into two: First, that the judgment as to each is without support in the evidence; second, errors of law occurring at the trial.

As to Graeme: The state in its brief and at the oral argument urged that the proof clearly shows that the articles (a stove and bed) had been stolen, and that the same were found in Graeme's possession, which latter he did not satisfactorily explain. If we concede that the property

had been stolen, which we do for the sake of argument, then we have the potent question: Does the proof show Graeme in posession? The evidence reveals that Hamilton had rented the dwelling in which the stolen property was found, had moved in and was occupying it, and had the stove and bed in question therein some time before Graeme went to live with him. Of these facts there is no convincing evidence to the contrary. That Graeme was living with Hamilton, and thus an occupant of the house, was not sufficient to make Hamilton's possession of the articles in question that of Graeme to the extent of holding the latter accountable in law for possession of stolen property. Hence, as Graeme was not in possession of the stolen stove and bed, and neither had he control thereof, the rule contended for by the state, as announced by us in *Palmer v. State,* 70 Neb. 136, that "the unexplained possession of stolen property, shortly after the theft of it, is a fact which may justify the jury in inferring that the person so in possession is the thief," might apply to Hamilton, but is without application as to Graeme.

Giving consideration to the second challenge as it affects both Hamilton and Graeme: Among the numerous errors presented which we have grouped under the head of "errors of law occurring at the trial," and which it is claimed prejudicially affected the rights of both defendants to the extent of denying to them a fair trial, was the misconduct on the part of the county attorney in eliciting testimony, by and through diverse witnesses appearing for the state, showing, or tending to show, that Hamilton and Graeme were guilty of a crime separate and distinct from that of the larceny charged, to wit, the illegal possession and operation of a "still."

Such challenge is not without merit. The evidence at the trial should be restricted to the issues raised by the pleadings. The question of a still or its possession, ownership, or operation, was in no manner involved. This the parties, their respective attorneys, and the court, well knew. Notwithstanding such fact, numerous witnesses for the

state were asked questions which could not have had any other incentive in the mind of the questioner than to reveal the illegal possession of a still, and its operation in violation of law, situate on the Hamilton premises. The witnesses seemed to understand the purpose and responded in a way so as to mention the still and its location. The attorneys for the defendants seemed to sense the design of the questioner and interposed the proper objections, which were usually, but not always, overruled, owing to the manner in which the questions had been framed. Then motions to strike the answers were interposed and usually, but not always, sustained. The same course was pursued in the cross-examination of Graeme. The competent evidence received did not so preponderate in favor of the state as to warrant this court in concluding that the verdict returned, either as to Graeme or Hamilton, was the only one that could, or should, have been rendered. Under this condition of the record it would be presumptuous on our part to hold that the minds of the jurors were not prejudicially affected by the heretofore indicated misconduct on the part of the prosecuting attorney and witnesses for the state. The question of the still, and its operation, was so foreign to the issues and so injurious to the rights of the defendants as to deny to them a fair trial. *Dunlap v. State,* 116 Neb. 313; *Kleinschmidt v. State,* 116 Neb. 577; *Johnson v. Jensen, ante,* p. 1.

The judgment of the trial court is reversed as to both Graeme and Hamilton and the cause remanded for further proceedings.

REVERSED.

ROSE, J. I adhere to the dissent in *Dunlap v. State* 116 Neb. 313.

GOOD, J. I concur in the reversal of the judgment, but do not concur in adhering to the rule as announced in *Kleinschmidt v. State,* 116 Neb. 577.

FARMERS MUTUAL HAIL INSURANCE ASSOCIATION, APPELLEE AND CROSS-APPELLANT, V. EUGENE J. HAINER, APPELLANT AND CROSS-APPELLEE.

FILED FEBRUARY 28, 1929. No. 26181.

1. Insurance: POLICY: ACCEPTANCE. Under the facts in this record, the defendant's application for insurance is not to be limited and determined alone by the wording of the written application signed by him, but also by what terms he verbally requested of the plaintiff's agent, and the defendant had the right, on communicating such request to the company, to refuse to accept any policy from the company which did not conform to such request.
2. ———: ———: ———. Where the policy delivered is substantially different from the policy applied for, the person contracting may refuse to accept it. The tender of a policy substantially different from that ordered will not, unless accepted by the insured, entitle the insurer to recover premiums for the same.
3. ———: CONTRACT: REQUISITES. In order that there may be a valid contract of insurance, there must be a definite understanding and the minds of the parties must meet as to the company in which the insurance is to be placed, as to the amount of the insurance, as to the duration of the risk, and as to the premium to be paid, which must be agreed upon and actually paid or exist as a legal charge against the party insured.

APPEAL from the district court for Lancaster county: MASON WHEELER, JUDGE. *Reversed and dismissed as to first cause of action, and affirmed as to second cause of action.*

Hainer, Flansburg & Lee, for appellant.

Clark Jeary and *Clarence G. Miles, contra.*

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

EBERLY, J.

This is an action at law by the Farmers Mutual Hail Insurance Association of Iowa, hereinafter designated as the plaintiff, against Eugene J. Hainer, the defendant,

to recover premium assessments on two policies of hail insurance. The plaintiff is a mutual assessment company and its two causes of action are for assessments on policies No. 9600 and No. 9601, which plaintiff alleges it "executed and delivered" to the defendant. The amount of the claim in the first cause of action is $1,462.23 on one policy, and on the second cause of action the amount claimed is $650.19 on the other policy.

The defense tendered by the defendant was (1) a general denial; and also (2) that, as to each of the causes of action declared on by the plaintiff, the defendant denies that he ever made or entered into any contract of insurance with the plaintiff, and especially denies that he ever made or entered into any contract of insurance declared upon by said plaintiff in its petition.

Trial to jury: Verdict for plaintiff on the first cause of action, and for defendant on the second cause of action. Judgment upon verdict. By appeal and cross-appeal each of these parties now seeks a reversal of this action of the trial court.

It is quite apparent that the controlling question in both controversies now before us is: "Was a valid contract of insurance actually entered into between the parties?" So far as origin is concerned, the facts as to both causes of action are essentially identical.

The undisputed evidence is that, at the time the preliminary negotiations in question were had between the parties, defendant was the owner of an interest in 2,192 acres of growing corn in Nebraska. He desired to insure his interest in this corn against hail at $10 an acre. He wanted a five-year insurance contract covering his interest in such corn as might be grown on these lands during the four succeeding years at $10 an acre. He also, prior to this time, had transferred titles of certain Nebraska land to certain relatives. He desired in a similar manner to secure insurance on the shares of such relatives in the growing crop to the extent of 249 acres situated on the lands by him conveyed to them and to the extent of

$10 an acre. On the subject of the nature, amount, and extent of the insurance actually applied for by the defendant, the following evidence was adduced by the plaintiff as part of its case in chief; the plaintiff's agent who actually transacted the business for plaintiff with the defendant testifying as follows: "Q. State whether or not he (E. J. Hainer) told you as to the amount of insurance that he wanted on each acre? A. He did. Q. And what did he say? A. He said that he wanted $10 an acre on his undivided interest in each acre. * * * I said all right." On cross-examination: "Q. And there is not anything in those applications anywhere to show how much land was actually cultivated and sown to corn for that year (1925)? A. There is not in any of our applications. No, sir. Q. Therefore there is not anything in this application that shows how many acres of corn were actually to be insured, is there, Mr. Arnold? A. Not in the application. Q. Neither do these applications set forth the interest or amount of interest that Judge Hainer had in the acres of corn that were actually sown in corn crop, do they? A. I think not. Q. Now, in this conversation with Judge Hainer, he stated to you that he wished to insure his interest in the acres actually sown in corn crop and at the rate of $10 per acre? A. Yes, sir. Q. And Mr. Hainer told you that the amount of corn that he would have growing on these lands would vary from year to year, did he not? A. I don't know whether he told me, but then I supposed it would. Q. You knew that it would? A. Yes. Q. Now, the way this application is written, application, say exhibit 2, says $12,768. It don't show the number of acres in corn. Now, what would be the insurance provided by this application for a policy issued on it, if the corn crop the following year was only half of what it was the year this application was signed? A. Twice as much per acre as it is now. Q. Your insurance would increase twice as much per acre? A. Yes, sir. Q. Had Mr. Hainer asked that the insurance the second year increase twice as much per acre? A. No."

In summing up, it may be fairly said that the testimony preserved in the bill of exceptions discloses that the oral evidence of both plaintiff and defendant is in substantial accord; that the defendant at the time of submitting his application for insurance actually stipulated for and was entitled to receive hail insurance on his interest in each acre of corn grown on the lands described in 1925, as well as on corn grown on said lands during subsequent years at the rate of $10 an acre for each acre of corn annually grown thereon during the term of five years from date of application. This in effect concedes that the written application in the evidence wholly failed to conform to these undisputed facts. An examination discloses that these instruments appeared in the record as having been drafted upon blanks furnished by plaintiff for that purpose in the handwriting of plaintiff's agent, each of them containing the following provisions:

"I, E. J. Hainer, of 426 Terminal Bldg., Lincoln, postoffice, Lancaster county, Nebraska, hereby make application to the Farmers Mutual Hail Insurance Association of Iowa for membership and indemnity for damage or loss by hail to growing crops enumerated as follows: Corn. For the purpose of obtaining this insurance and securing a basis upon which all adjustments of loss shall be made, it is agreed that the full value of each acre of crop insured under this policy shall be the amount of insurance carried on each acre; such amount to be determined by dividing the amount of insurance represented by the policy by the number of acres of crop covered by such policy. This insurance is for the term of five years from noon of the 6th day of June, 1925, on the following described premises, or on any other premises to which the assured shall remove, if in the same zone, but does not cover in other zones unless transferred in writing, and does not cover any loss occuring after noon on the 20th day of September in any year."

On one of these, however, following the language above quoted are these words: "$14,770.00 on the Qr. Sec. Twp.

of County of Hall, Nebraska. For description of land see exhibit A hereto attached and made a part hereof."

On the other application following the words first quoted appear the following: "$12,768.00 on the Qr. Sec. Twp. of County of Nebraska. For description of land see exhibit B hereto attached and made a part hereof. Also see said exhibit B for ownership of lands and interest in crop insured."

It will be noted, however, as set forth in the evidence to plaintiff's witness heretofore quoted, nowhere in either application, nor in exhibits A and B forming a part thereof as set forth in the bill of exceptions, does any statement of the acreage in corn crop at the time of the application for insurance appear, nor does anything appear therein as to the number of acres of corn actually insured, nor that the insurance upon each acre of growing corn each year during the continuance of the policy should be $10 an acre. The undisputed evidence is that the acreage of actual growing corn in 1925 intended to be insured by these applications was 2,441 acres, and that it was contemplated by both parties that these 2,441 acres should be insured in 1925, and that the acreage of growing corn would thereafter vary from year to year.

It is important on the question of "actual meeting of minds" to apply the quoted words to the subject-matter of these applications for insurance in the manner which the oral evidence establishes, without dispute, was contemplated by the parties who were actually present and drafted them. If we start with the fact that it is orally conceded that the full value of defendant's interest in each acre of crop insured under these policies shall be annually no more and no less than $10 an acre, it follows that, in 1925, 2,756.6 acres were intended to be covered, but the facts are that there were but 2,441 acres of corn in existence to which the insurance could possibly apply, and that is all for which insurance was desired. On the other hand, if we divide the amount of insurance set forth in the application by the actual number of acres of growing crop covered by the

same, we are forced to the conclusion that the amount of insurance on defendant's interest on each acre was, instead of $10 an acre, as actually agreed on, approximately $11.30 an acre. The conclusion also is inevitable that succeeding years would in all probability disclose a still greater variation. And if because of necessary rotation of crops or for other reasons the acreage of corn was reduced 50 per cent., applying the provisions of the printed form, it would follow that instead of $10 an acre, as was undisputedly intended by the parties who actually drew the "applications," the insurance would be approximately $22.60 an acre. The district court, in view of the undisputed evidence introduced without objection, instructed the jury as follows:

"You are instructed that the defendant's application for insurance in this case is not to be limited and determined alone by the wording of the written application signed by him, but also by what terms he verbally requested of the plaintiff's agent, and the defendant had the right, on communicating such request to the company, to refuse to accept any policy from the company which did not conform to such request."

It is deemed that this instruction properly states the law of this case, and the applications now under consideration must be deemed to be each partly oral and partly in writing. It follows that, in order that a contract of insurance be entered into by these parties, it is essential that the plaintiff shall have accepted these applications as embracing both the written and the oral provisions thereof. In this connection it would seem that the "binding receipts" which plaintiff alleges were delivered by its agent to the defendant, in view of the terms expressed therein, cannot of themselves be construed as a recognition or acceptance of the oral provisions of the applications.

This view is strengthened by the undisputed fact that the policies of hail insurance which the plaintiff caused to be signed and forwarded to the defendant in no way recognized or complied with the stipulations orally entered

into, which, together with the written provisions of the applications for insurance, constitute the real proposition submitted to plaintiff by the defendant.

The policies thus forwarded by the plaintiff were by the defendant promptly rejected and returned to the plaintiff with a letter of transmission in which the defendant stated:

"I have received from your agent, Mr. M. J. Arnold, of this city, your policies numbers 9600 and 9601. On examination I conclude these policies are each indefinite and unsatisfactory in the following particulars:

"(1) There is no statement in the body of either policy giving the amount of insurance provided for and carried.

"(2) There is no statement in the body of either policy, either general or specific, from which the acreage of corn covered can be determined. * * *

"I suggest the amount of insurance be stated in the body of each policy, and after the word 'corn,' in the body of each policy, there be inserted the words: 'grown on the lands described in the typewritten list, marked exhibit A for identification, attached to this policy and made a part hereof.'

"I called the attention of Mr. Arnold (plaintiff's agent) to these discrepancies, but he refused to do anything therewith and I am obliged to appeal to you for the purpose. As I explained to Mr. Arnold, I do not wish to have any question made on the amount of insurance carried. I understand each policy runs for five years, and the amount of corn may vary with the several years."

The plaintiff again sent the same policies to the defendant before making any of the changes requested in the quoted letter. The defendant refused to accept them and again returned them to the plaintiff with a second letter of transmission which expressly referred to his previous letter from which the above was quoted. It is claimed on behalf of the plaintiff that these policies were again returned to the defendant for a third time, but without making the change suggested, and without causing their terms to express, as the agreement of the parties, that the insurance

on each acre of corn grown each year during the five-year term was to be insured at $10. However, there is no competent evidence sustaining this fact, and the defendant unconditionally denies ever having accepted the policies, and indeed denies having received them after twice returning them to the plaintiff.

It would seem that the refusal of the defendant to accept these policies is amply justified under the facts in this case. The policy tendered failed to conform to the terms of the application when considered as containing both written and oral provisions and no policies were ever tendered that did. Such a tender on part of plaintiff was necessary in order that a valid, binding obligation could be created as against the defendant. Such acceptance of the offer as actually made by defendant, the evidence as to both causes of action affirmatively discloses never was made on behalf of the insurance company.

Where the policy delivered is substantially different from the policy applied for, the person contracting may refuse to take it. The tender of a policy substantially different from that ordered will not, unless accepted by the assured, entitle the insurer to recover premiums for the same. *Jones v. Gilbert*, 93 Ga. 604; *Stephens v. Capital Ins. Co.*, 87 Ia. 283; *Mutual Life Ins. Co. v. Gorman*, 19 Ky. Law Rep. 295; *Blunt v. Fidelity & Casualty Co.*, 145 Cal. 268; *Empire Mutual Annuity & Life Ins. Co. v. Avery*, 3 Ga. App. 97.

It appears that no policy conforming to the actual terms of the application in this case was ever delivered by the plaintiff to and accepted by the defendant.

In order that there may be a valid contract of insurance, there must be a definite understanding and the minds of the parties must meet, as to the company in which the insurance is to be placed, as to the amount of the insurance, as to the duration of the risk, and as to the premium to be paid, which must be agreed upon and actually paid or exist as a legal charge against the party insured. *Kor v. American Eagle Fire Ins. Co.*, 104 Neb. 610; *Cleveland Oil Co.*

v. Norwich Ins. Society, 34 Or. 228; *Todd v. German-American Ins. Co.*, 2 Ga. App. 789.

The evidence discloses without question that, save and except the identity of the company in which the insurance was to be placed and the duration of the term thereof, the minds of the parties have never met, so far as the terms above enumerated are concerned. It follows that the allegations of plaintiff's petition on this subject were not sustained by the evidence, and that the plaintiff has therefore wholly failed to sustain his case.

Nor is this conclusion in any manner affected by the settlement of damages occasioned by hail which occurred on July 25, 1925. This settlement was made on the basis of $175. This amount the plaintiff, without direction or authorization of the defendant, credited upon the assessment sued for in the instant case. The record discloses that the settlement was made on the basis of a claim for damages to corn grown on the southwest quarter of section 32, township 11, range 7, owned by Laura H. Hurtz, Hamilton county, Nebraska; that the number of acres damaged were 70 and the total amount of insurance on each acre was $10 and the damages agreed on were 25 per cent. of the full value of each acre.

It is to be noted that, as just stated, the property involved was owned by Laura H. Hurtz, who alone was vested with an insurable interest therein; that the facts as to the ownership of this property were actually communicated to the plaintiff at the time application for insurance thereon was made.

It is true the plaintiff asserts that the defendant agreed to pay the premium for the insurance in question, but there is nothing in the evidence disclosing any claim on his part that he would be entitled to the insurance money in event of loss, save and except as the representative agent, or trustee, of the owner of the property. This settlement or agreement for settlement in behalf of Laura H. Hurtz was made before information had been given defendant that his contention with reference to the actual

terms of his application for insurance had been finally rejected by the plaintiff, and while, so far as the defendant was advised or knew, the negotiations to secure an agreement as to the disputed facts therein were as yet undetermined. Then, too, the terms of the settlement actually made were entirely consistent with defendant's claims as to the real proposition embraced in his application for insurance made to plaintiff, and wholly inconsistent with plaintiff's present contention. As the result of the settlement, neither he nor Laura H. Hurtz received anything of actual value as a result thereof. True, $175, the amount of the loss, as determined by the settlement, was credited upon an apparent claim for premium against the defendant, but which, because of the failure of the insurance company to accept the proposition for insurance as defendant made it, was, in fact, wholly unenforceable and void.

It follows, therefore, that the action of the trial court in entering judgment against the defendant herein for the sum of $1,630.88 upon the first cause of action is reversed and said first cause of action dismissed, and that the action of the district court, its finding and judgment for and in behalf of the defendant upon the second cause of action is in all things approved and confirmed.

JUDGMENT ACCORDINGLY.

Note—See Insurance, 41 L. R. A. n. s. 1135; 14 R. C. L. 901.

KATHLEEN GIVEEN, APPELLEE, V. WILLIAM R. MATTHEWS, APPELLANT.

FILED FEBRUARY 28, 1929. No. 26359.

1. **Libel and Slander:** PROOF. In an action for damages for slander, since the basis of said action is the damage to the reputation in the opinion of others, there must be proof that the slanderous words were spoken in the presence of, and heard and understood by, a third person.
2. **Trial:** INSTRUCTIONS. Where a case is submitted to a jury upon two causes of action, it is error not to instruct the jury clearly and definitely upon each cause of action.

APPEAL from the district court for Douglas county: JAMES E. RAIT, JUDGE. *Reversed.*

D. M. Vinsonhaler, for appellant.

Thomas J. O'Brien, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, and DAY, JJ., and ELDRED and REDICK, District Judges.

DAY, J.

The plaintiff entered the store of the defendant, William R. Matthews, as a customer and purchased two books. At the conclusion of this transaction, while the plaintiff was in the act of leaving the store, something happened between the plaintiff and Mrs. W. R. Matthews, an employee of the defendant, concerning the details of which there is dispute. As a result of this occurrence the plaintiff brought suit to recover damages, alleging two causes of action: First. Slander, charged to have been uttered and published by Mrs. Matthews as an employee of the defendant. Second. Assault, charged to have been committed by Mrs. Matthews as an employee of the defendant.

This case was tried before a jury and resulted in a verdict of $400 on the first cause of action and for $100 on the second cause of action, upon which verdict judgment was entered by the district court for $500.

The plaintiff testified relative to the occurrence with Mrs. W. R. Matthews as follows: "She said, 'Where did you get these books?' and I said, 'I bought them and paid for them in your store, Mrs. Matthews,' and she said, 'You stole them. If you had bought them and paid for them they would have been wrapped, because we do not allow books to go out of here without being wrapped.' "

It is the universal rule in a suit for damages as a result of slander that the words relied upon as slanderous must be spoken of the plaintiff by the defendant in the presence of a third person. It is elementary that there must be a publication of the slander. We have carefully examined the evidence in this case and there is no evidence of such

publication to sustain a verdict. The evidence is that there was some commotion in the store when Mrs. Matthews followed the plaintiff as she was leaving the store and had a conversation with her, but there is no proof that any one heard the words charged as slanderous. In fact, the testimony of the witnesses called by the plaintiff is that they did not hear the alleged slanderous words.

There are several errors complained of relative to the instructions given. The first is that the trial court erred in failing to properly instruct the jury relative to the separate causes of action pleaded by the plaintiff, and upon which the jury returned a verdict.

Instruction No. 4 given by the court is specifically complained of, and is as follows:

"You are instructed that the burden of proof is upon the plaintiff to establish the following propositions:

"(1) That, at the time and place alleged, Mrs. Matthews as the agent of the defendant, William R. Matthews, in the presence and hearing of one or more persons other than the plaintiff and defendant, falsely and maliciously charged the plaintiff with having stolen books from the store of the defendant, substantially as alleged in said petition.

"(2) That, after or while making said charge, the defendant, through his agent, Mrs. Matthews, in the presence of one or more persons other than the plaintiff and the defendant and against plaintiff's will and consent, wrongfully and unlawfully assaulted plaintiff by forcefully seizing the plaintiff and taking said books from her, substantially as alleged in said petition.

"(3) That such accusations were false; and,

"(4) That plaintiff has sustained damages by reason of said false accusations or said wrongful assault and seizure of said books, and the extent and amount of said damages.

"Should you find that the plaintiff has established any and all of the foregoing propositions, or the first, third and fourth, or the second, third and fourth of said propositions, by a preponderance of evidence, then plaintiff

would be entitled to recover, and your verdict should be for the plaintiff accordingly.

"Should you believe, however, that the plaintiff has failed to so establish either the first or the second, or either the third or the fourth of said propositions, then plaintiff will not be entitled to recover, and in that event your verdict should be for the defendant."

This instruction is certainly ambiguous and did not clearly set out the issues upon each of the two causes of action. This court has held that it is the duty of the trial judge to instruct the jury upon the law of the case. *Aultman & Co. v. Martin,* 37 Neb. 826; *Sandwich Mfg. Co. v. Shiley,* 15 Neb. 109. The instruction should be definite and certain, free from obscurity, involvement, and doubt. *Lombard v. Mayberry,* 24 Neb. 674. By this instruction the court attempted to inform the jury that it was necessary for the plaintiff to assume the burden of proof to establish the material allegations of her petition as to each of her two causes of action. The two causes of action were based upon slander and assault. This error becomes more apparent when you read the instruction, first, with reference to the cause of action based on slander and then with reference to the cause based upon assault. This instruction is so combined that separation is impossible and inevitably leads to confusion. Where there are two causes of action, it is error not to instruct the jury clearly and definitely upon each cause of action.

Specific complaint is also made of instruction No. 9. This instruction deals with the elements and measure of damages. The two causes of action are confused, and if we read this instruction with reference only to the second cause of action we quickly discover that the jury were erroneously instructed that in assessing recovery for an assault they should consider the "circumstances under which the assault was made and the extent to which it became known in the community." The court also erroneously failed to inform the jury in this instruction that in assessing damages for assault they should ascertain the extent

of the injury, if any, resulting therefrom. The errors in this instruction, no doubt, arose from the confusion of the two causes of action.

There are complaints made of other instructions, but since we are of the opinion that the instructions with reference to the two causes of action are not clearly and definitely stated, but are intermingled and confused and do not contain certain material elements of the causes of action involved, we will not discuss them here. The instructions in this case, taken separately or as a whole, do not clearly inform the jury as to the law applicable to this case, particularly with respect to the second cause of action.

For the reasons given herein, the judgment is reversed and the cause remanded.

REVERSED.

HENRY HAWKINS, APPELLEE, V. W. E. MULLEN ET AL., APPELLANTS: WILFRID J. FLEMING, CROSS-APPELLANT.

FILED FEBRUARY 28, 1929. No. 26310.

1. **Mechanics' Liens**: CONTRACT: RATIFICATION. Where an owner places his son-in-law in possession of his farm and said son-in-law, with the knowledge of said owner, claims to be the owner thereof by contract of purchase, and with the consent and acquiescence of the owner purchases material and makes necessary and needed repairs and improvements upon buildings on said farm, and said owner during the progress of said improvements takes active charge thereof, ordering the work stopped and thereafter ordering same resumed and completed under the same contract, and thereafter said owner excludes said son-in-law from the premises, denies any contract of purchase and declares no forfeiture thereof, and accepts the benefits of said repairs and improvements and appropriates same to his own use, *held* that said owner acquiesced in the acts of his son-in-law in making such improvements and has ratified the same and made the contract his own, and thereby subjects his premises so improved to liability under a mechanic's lien for the value of material furnished under said contract.
2. **Vendor and Purchaser**: CONTRACT OF SALE: RESCISSION. In the absence of some specific provision in the contract of sale, the

vendor, in order to rescind, must restore or tender the purchaser what he had received thereunder, as a condition precedent to his right to rescind.

3. ———: QUITCLAIM DEED: CANCELATION. In a suit in equity for cancelation of a quitclaim deed, representing the interest of a vendee under an oral contract of sale of real estate, as a cloud upon the vendor's title, the vendor, who has been in possession of said premises during all of such time, may upon default of vendee have the quitclaim deed canceled of record and declared null and void, upon returning to the vendee or her assigns all amounts paid to the vendor by virtue of the contract.

4. Equity: PETITIONER MUST DO EQUITY. A plaintiff in a court of equity comes into a court of conscience, and will not be allowed unconscionable relief, nor relief otherwise than under condition that he does equity upon his part. This rule will aid a defendant even though he could not have secured equitable relief had he been plaintiff.

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

Hollister & Cunningham, for appellant Fleming and others.

Fay H. Pollock, for appellant Farmers Union Cooperative Association.

Adolph E. Wenke and *Zacek & Nicholson,* for appellee Hawkins.

Heard before GOSS, C. J., ROSE, DEAN and DAY, JJ., and BEGLEY and RAPER, District Judges.

BEGLEY, District Judge.

This is an action to quiet title to a certain 440 acres of land in Stanton county, Nebraska, brought by the appellee against the two appellants and others. In his petition appellee claimed to be the owner of the land in question, and alleged that the appellant Farmers Union Cooperative Association had filed a mechanic's lien upon the same for an indebtedness for which the appellee was not liable, and alleged that the grantor of the appellant, Wilfrid J. Flem-

ing, had caused to be made and filed for record a deed purporting to convey the title to said premises, and alleged that the several acts of the appellants cast clouds upon the title of appellee, and he prayed that his title be quieted.

To the petition, appellant Farmers Union Cooperative Association filed an answer and cross-petition, alleging that one John A. Parsons, a son-in-law of appellee, had entered into an oral agreement with appellee for the purchase of said land; that said Parsons went into possession of the property as such vendee and began to improve and repair same, with the knowledge of appellee, and that appellee had ratified and approved the acts of said Parsons and was estopped to deny the validity of said lien, and prayed that the amount due be decreed to be a lien upon said premises, and for the foreclosure thereof. To this answer and cross-petition appellee filed a general denial.

Appellant Wilfrid J. Fleming answered, and alleged by way of cross-petition that in the year 1923 his mother, Margaret Fleming, had entered into an oral contract for the purchase of the land, with the appellee, and had paid appellee thereon the sum of $9,500, and by virtue of conveyances from said Margaret Fleming, appellant had become possessed of all her right, title and interest in said premises, and prayed for specific performance of said oral contract. To this answer and cross-petition appellee filed a reply, admitting the oral contract, but alleging that appellant had failed to fulfill or complete same, and because of such failure to perform the appellee had duly declared forfeited the payments made.

The trial court found for the appellee and against the appellants, dismissing their cross-petitions and quieting title to the premises in appellee as prayed. Appellants have appealed.

As to the claim of appellant Farmers Union Cooperative Association, the evidence discloses that John A. Parsons married the daughter of Henry Hawkins, appellee, on October 25, 1925. Henry Hawkins then lived at Peetz, Colorado, and owned the farm in question, which was then

being operated by his son, Sidney Hawkins, as tenant. Parsons claimed to be the beneficiary under a will for a large sum of money. He conceived the idea of purchasing the Hawkins land near Pilger and went to the place and discussed the need of repairs thereon with the son, Sidney. He then consulted a contractor as to costs, and then visited his father-in-law at Peetz, where Parsons claims to have entered into an oral agreement for the purchase of the premises from Hawkins for the sum of $47,000, Parsons to pay $35,000 cash and assume a mortgage of $12,000. No definite time for the payment of the money was fixed, but it was assumed that Parsons would get his inheritance on or about July 1. Parsons also discussed the matter of the repairs and improvements he contemplated making upon the premises with Hawkins, who admitted they were necessary and directed him to go ahead with the work. Parsons thereupon wired the contractor at Pilger to proceed with the improvements and wrote the son to the same effect. Parsons and wife then returned to the farm, took active charge of the place as owners, ordered material from the appellant, which was furnished in the sum of $3,035.35. He was assisted in securing the material and its delivery, and in the farming, by Sidney Hawkins, who boarded with him and his wife. A notice appeared in the Pilger paper, to which Henry Hawkins was a subscriber, stating that Parsons had purchased the place and was making the repairs and improvements thereon. Mrs. Parsons wrote her parents at Peetz, informing them of the progress of the improvements. On or about June 8, 1926, Parsons was arrested by federal authorities on some charge relating to his claim to the estate, and upon reading of it in the newspapers Hawkins wired Rogers, the contractor in charge of improvements, to stop work until he arrived. Work was stopped and Hawkins arrived the next day. After a conference with Parsons, he instructed Rogers that he believed that Parsons was all right and that he would get his money, and instructed him to go ahead and finish up the work he had started. The work was resumed and

completed. Thereafter Hawkins lost confidence in Parsons and excluded him from the farm. Appellants filed a mechanic's lien in due season for the amount of the materials furnished.

Parsons' agreement with Hawkins was not such as he could enforce by specific performance. In fact, Hawkins denies any such agreement, and never recognized Parsons as owner of the premises, and there was no forfeiture declared. For the purpose of this case, it is immaterial whether Parsons was the vendee in possession or a tenant. Hawkins put him in possession of his farm. He had knowledge of the improvements. He cooperated with Parsons in making them. He acquiesced in and authorized the same to be done. He exercised authority over the work by stopping the same and then ordering it continued. He has received the benefit of same and is now estopped to deny liability. To hold that he could accept the benefits and deny liability therefor under the circumstances in this case would be to open an easy door to collusion or fraud at the expense of dealers in building materials. *Home Lumber Co. v. Gunderson,* 110 Neb. 31; *Harte v. Shukert,* 94 Neb. 210; *Guiou v. Ryckman,* 77 Neb. 833; *Bohn Mfg. Co. v. Kountze,* 30 Neb. 719.

As to the claim of appellant Wilfrid J. Fleming, the evidence discloses that Margaret Fleming, formerly owned the premises, and Henry Hawkins held a mortgage lien thereon which was foreclosed, and Hawkins purchased the premises at foreclosure sale for $42,612.66, being the amount of liens and costs against it. Hawkins then orally agreed with Margaret Fleming that he would deed her the premises if she would pay him the amount of his bid, payable $2,000 cash and balance in 30 days. The $2,000 was paid and the balance of the money was not forthcoming at the end of 30 days. The parties then agreed that if Mrs. Fleming would pay Hawkins an additional $7,500 she would be given additional time to raise the balance. The $7,500 was paid and Mrs. Fleming did not complete arrangements for the payment of the balance until after Hawkins had noti-

fied her that he elected to declare the contract at an end and her payments forfeited. She then arranged to finance the transaction and presented a letter from the Wisner State Bank with directions to draw the balance due, plus taxes paid, less reasonable rental value for the time Hawkins was in possession. Hawkins did not draw for said amount, but kept the amount paid, and thereafter Mrs. Fleming, by quitclaim deed, conveyed the property to a third person, and he to her son, Wilfrid J. Fleming, said quitclaim deed being recorded after the filing of the mechanic's lien above mentioned. At the close of the appellant's testimony, the trial court dismissed the appellant's cross-petition and entered a decree in favor of appellee on this branch of the case.

Under the evidence the appellant made a *prima facie* case, showing that his grantor had paid $9,500 on said contract to the appellee. The appellant Fleming is not entitled to a decree of specific performance of the contract because of his failure to complete the payments within a reasonable time after notice of forfeiture. The question to be determined, then, is whether said appellant is entitled to a return of the purchase money paid where the appellee has declared a forfeiture of the contract, and, if so, can he obtain such relief in this action. The cases relied upon by appellee to prevent a return of the purchase money paid are cases where the contract itself provides the methods of fixing the rights of the parties, or where there is an abandonment, or declaration of forfeiture by the purchaser, or where time is made the essence of the contract, or where the parties have mutually agreed to a forfeiture, none of which conditions appear in the present case. The present contract was the result of a generous impulse of Hawkins to give a failing debtor an opportunity to redeem his home. Neither party intended that Mrs. Fleming should become more deeply involved, or that she would lose her deposits by way of forfeiture. The contract was oral and informal, with no conditions attached. The rule is that, under such conditions, the appellant was entitled to

return of the purchase money paid, upon the recission of the contract by the appellee. It would be inequitable and unreasonable to permit the appellee to retain the property and the fruits of his occupation thereof, and also the money paid by the Flemings. *Lowry v. Robinson,* 3 Neb. (Unof.) 145; 39 Cyc. 1378; *Frederick v. Davis,* 133 Ia. 362; *Waters v. Pearson,* 163 Ia. 391; *Loff v. Gibbert,* 39 N. Dak. 181.

The appellee contends that, even though the appellant might be entitled to a return of the purchase money paid, it cannot be recovered in this action, but that he is relegated to his remedy at law, and this was the holding of the trial court. In this case the appellee prayed to have the quitclaim deed canceled, and appellant claimed the deed was in fact an equitable mortgage representing the amount of money advanced toward the purchase price of the property. The court having taken jurisdiction on this issue could retain it to do full justice between the parties. There is another axiom in equity that he who seeks equity must do equity. The appellee has brought an action to quiet title by having a quitclaim deed canceled as a cloud upon his title. He comes into a court of conscience, and will not be allowed unconscionable relief, nor relief otherwise than under condition that he do equity upon his part. This rule will aid a defendant, even if he could not have secured equitable relief had he been the plaintiff seeking such relief. 1 Pomeroy, Equity Jurisprudence (4th ed.) secs. 386-388; *Taylor v. Rawlins,* 86 Fla. 279, also reported in 35 A. L. R. 271, with note. The court therefore erred in not decreeing that appellant was entitled to a return of the amount of the purchase price paid, as a condition of appellee's having the deed canceled. As the forfeiture is admitted, there is no further proof necessary on appellee's reply.

The judgment is reversed and cause remanded, with directions to the trial court to ascertain the amount due on the Farmers Union Cooperative Association mechanic's lien, and to decree the same to be a first lien upon the premises, and award foreclosure thereof; and to enter a finding that

the appellant Fleming is entitled to the repayment of the sum of $9,500 paid on the purchase price under the oral contract, together with interest thereon at the rate of 7 per cent. per annum from the date of the forfeiture of said contract by appellee, as a condition for the cancelation of the quitclaim deed, and that, in default of such payment by appellee, the said deed stand as a second lien on said lands for the payment of said amount, and that said appellant have foreclosure thereof.

REVERSED.

RADIUM HOSPITAL, APPELLANT, V. SAM K. GREENLEAF ET AL., APPELLEES.

FILED FEBRUARY 28, 1929. No. 26306.

1. **Constitutional Law**: TAXATION: ASSESSMENT: OMITTED PROPERTY: NOTICE. Subdivision 5, sec. 5972, Comp. St. 1922, is not unconstitutional because it fails to provide that the county board of equalization shall give notice to the owner before placing on the assessment rolls for taxation real estate that has been omitted, or is not included in the assessments returned to such board by the assessor.
2. **Taxation**: ASSESSMENT: OMITTED PROPERTY. Where the statute provides that the county board of equalization at its annual meeting, as fixed by law, shall assess real estate that has been omitted or is not included in the return of the assessor, an owner of real property that was not assessed by the assessor cannot avoid payment of taxes on the land which has been assessed by the board of equalization, in the absence of a showing that such land was exempt, or some other valid reason.
3. ———: ———: ———. The revenue laws provide sufficient opportunity to one who claims his land is, without notice, wrongfully assessed as omitted property by the county board of equalization at its annual meeting to appear and have a hearing before said board or to appeal therefrom, and one who neglects to avail himself of such opportunity to appear and be heard on any complaint, or to appeal therefrom, cannot avoid payment of just taxes on the real estate so assessed.

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

R. M. Switzler for appellant.

Henry J. Beal and *W. W. Slabaugh, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and BEGLEY and RAPER, District Judges.

RAPER, District Judge.

On the 23d day of July, 1927, the plaintiff, appellant, filed its petition in the district court for Douglas county against Sam K. Greenleaf, county assessor, and the other members of the county board of equalization, alleging that on the second Monday in June, 1927, the county assessor completed his assessment of property for taxation for the year 1927, and filed same with the county clerk, and in said assessment he valued the real estate of plaintiff, together with improvements thereon, at the sum of $ 00, and said assessment became the only basis of assessment of said property for the year 1927; in other words, said property was exempt from taxation by said assessor and must remain so unless and until lawfully changed by the county board of equalization; that said board held its first session on June 14, 1927, and remained in session until July 8, 1927, when it adjourned; that on July 5, 1927, one Cameron filed written complaint with the board asking that plaintiff be notified to appear and show why said property should not be included on the assessment list for the year 1927; that the said board on July 8, 1927, did change the assessment of plaintiff's property by including it in the list of taxable property and increasing the valuation returned by the assessor from $ 00 to $79,850, and placed and added said property to the assessment rolls in accordance with said assessed valuation and said board adjourned on July 8; that said action of said board was done without any notice whatever to plaintiff, and by reason thereof said board did not have jurisdiction of the matter, and its pretended action is void; that subdivision 5, sec. 5972, Comp. St. 1922, is unconstitutional in regard to assessment of real property, because it fails to provide for notice and hearing

before any change can be made in the assessment as made by the county assessor, and plaintiff prays that the act of said board in attempting to include the property of plaintiff as omitted property and in attempting to change the assessment as made by the county assessor be set aside, that the collection of taxes on said property be enjoined, and that defendants be ordered and decreed to correct said unlawful and erroneous assessment.

To this petition the defendants demurred, which was sustained by the learned trial judge, and plaintiff's action was dismissed.

The petition does not allege that plaintiff was a resident of Douglas county. It does not state when plaintiff first knew of the action of the board. There is no claim in the petition that the property was exempt from taxation, nor that the assessment was too high. Nor does the petition state that plaintiff had been informed by the assessor that he had exempted the lots from taxation.

The petition states that the assessment was made by the board on July 8 and plaintiff's petition was filed July 23 which was within the 20 days' period for appeal. Comp. St. 1922, sec. 5975; *Somerville v. Board of County Commissioners,* 117 Neb. 507. Plaintiff could at that time have taken an appeal, which would have afforded plain and direct remedy at law, so there was no occasion to resort to its action for injunction.

Appellant pleads that subdivision 5, sec. 5972, which permits the county board of equalization to add to the assessment rolls any real property not included therein and assessing the same without notice to the owners violates the due process of law provisions of the state and federal Constitutions and is therefore invalid. That section of our statute provides in the fourth subdivision that the board adjust assessments for the county by raising or lowering the assessment of any person to secure listing of its property at its actual value and assessment of property at its taxable value, but in no case shall the assessment of any person be raised by the board until such person or his agent

be previously notified if they be found in the county. The fifth subdivision provides that the board shall "also add to the assessment rolls any taxable property not included therein, assessing the same * * * as the assessor should have done, but no personal property shall be so added unless the owner thereof is previously notified, if he be found in the county."

It is insisted by the appellant that, when the assessor returned his rolls with the plaintiff's property listed at $00, the action of the board was in fact raising the assessment, and therefore the statute required previous notice to the owner, and in the absence of such notice the assessment is void.

When this assessment was made, the revenue law provided that all real estate should be assessed on April first of the year 1926 and every fourth year thereafter, and the value then assessed to be the basis for taxation for the succeeding four years. The law also provides that all property in the state not expressly exempt therefrom shall be subject to taxation and shall be valued and assessed at its actual value. There is no claim in the petition that the lots were not assessed in 1926, at the proper time, in the same or greater amount assessed against them by the board in 1927.

The values placed on real estate for assessment by the precinct or ward assessors is not a final adjudication. The county board of equalization is expressly given the power to equalize and raise or lower such values, and to add omitted or unassessed property. In *Hacker v. Howe*, 72 Neb. 385, this court held: "An assessment is an official listing of persons and property, with an estimate of the value of the property of each for the purposes of taxation."

The method of assessing real estate under our statute requires the county clerk to make up in books a list of the taxable lands and lots in the county and deliver such books to the assessor on or before April 1 of each year. It is presumed the county clerk placed on the assessor's book for assessment the lots of plaintiff, and it then became the

duty of the assessor upon actual view to list, value and return all real property subject to taxation in his precinct, but it was not incumbent on the assessor to notify the owner of the assessed valuation, unless the owner demanded it, and no such demand is disclosed in the petition. Instead of placing a value on the lots of plaintiff, the assessor without just cause fixed no value, but, according to the language of the petition: "In other words, said property was exempted from taxation by the assessor." It is evident that the placing of $00 in the assessment roll was to indicate that the property was not assessed nor valued for taxation, and whether it is called an omitted assessment or "taxable property not included" in the assessment roll is no distinction; it means and is the same. The assessment was not "raised" within the meaning of the statute. It is no reason for escaping taxation that an assessor purposely omitted or failed to assess the lots. If it was not assessed by the assessor (and it was not), it then became the duty of the board to assess the lots "as the assessor should have done." The values placed against the lands or the failure to assess them by the precinct or ward assessor is not a final adjudication. The board of equalization is expressly empowered and required to equalize and raise or lower and add omitted or unassessed property.

The board was in session 20 days, and after it concluded its work on July 8 plaintiff had 20 days to appeal. The provisions of the revenue law it was bound to take notice of and gave it sufficient opportunity to present its grievance, if it had just cause, and obtain a hearing and judicial determination. In the absence of a law requiring notice to be given, the statute giving the opportunity to be heard is sufficient in such cases to authorize the county board of equalization to assess omitted or unassessed real property without previous notice to the owner of real estate. *Central of Georgia R. Co. v. Wright*, 207 U. S. 127; *Lewis v. State* 69 Ohio St. 473; *Inland Lumber & Timber Co. v. Thompson* 11 Idaho, 508, 7 Ann. Cas. 862; 37 Cyc.

1098, 1099; 26 R. C. L. 351; *Reed v. Reed,* 70 Neb. 779, 784; *Oregon & Washington Mortgage Savings Bank v. Jordan,* 16 Or. 113; *Ramp v. Marion County,* 24 Or. 461; *Billinghurst v. Spink County,* 5 S. Dak. 84; *Hacker v. Howe,* 72 Neb. 385; *State v. Several Parcels of Land,* 83 Neb. 13. Most of the cases cited by appellant from the Nebraska decisions refer to increasing personal property assessments, and in these cases the statute required notice. Some of the cases concern the raising of real estate assessments, and such cases require notice under the statute.

Another section of the revenue law (Comp. St. 1922, sec. 5968) makes it the duty of the county clerk to assess lands which have not been assessed or have escaped taxation. This has been upheld by this court. *Elkhorn Land & Town Lot Co. v. Dixon County,* 35 Neb. 426. But if it be conceded that the board did exceed its power, section 6018, Comp. St. 1922, gave plaintiff adequate relief, if the property was not liable for taxation.

There is no equity in plaintiff's claims, the statute under which the board acted is valid, the board properly assessed plaintiff's property, and plaintiff had adequate remedy at law.

It may be well to state that the legislature by chapter 179, Laws 1927, requires the assessor in the years in which real estate is assessed for taxation, before returning his assessment rolls, to notify by postal card the record owner of real estate which has been assessed at a higher figure than at the last previous assessment and give date of convening of board of equalization. This act did not take effect until after the assessment complained of had been made. But, as before stated, there is nothing in the petition to indicate that the lots were not properly assessed in the year 1926, nor that the assessment made in 1927 was greater than the amount assessed in 1926.

In the case of *Lewis v. State, supra,* the Ohio court say: "It was his (the owner's) duty to have listed the structure himself, and the board was undertaking to perform an omitted duty."

There are many courts that take the view as stated in *Gallup v. Schmidt,* 154 Ind. 196, that although omitted property is assessed without notice, yet if his rights are not thereby prejudiced the owner cannot successfully resist collection. While our own court has not expressly announced that principle, a review of the cases where a party has successfully resisted the action of the board in raising individual valuations or adding unassessed property shows that the rulings are upon some valid claim that the property was not taxable or was assessed too high, and in some cases of personal property that the person to whom it was assessed did not own it.

This case does not present a valid or equitable reason why the assessment should not stand as made by the board. The judgment of the district court is

AFFIRMED.

FIRST NATIONAL BANK OF WALTHILL, APPELLEE, V. EUNICE WOODHULL STABLER, APPELLANT.

FILED MARCH 8, 1929. No. 26205.

1. **Attachment:** LEVY. The levy of an attachment on a life estate in land to pay the remainderman's debt for which the life tenant is not liable is erroneous.
2. **Indians:** WILLS. The act of congress authorizing an Omaha Indian allottee of land, before expiration of the trust period under which the United States retained the title thereto and before the issuance of a fee simple patent, to dispose of the allotment by will, the allottee's duly executed will, the authorized approval of the will by the interior department, and a decree probating the will after the death of testator, may have the effect of terminating the trust period and of passing the title to the devisee.

APPEAL from the district court for Thurston county: MARK J. RYAN, JUDGE. *Reversed.*

James C. Kinsler, A. C. Epperson, George A. Keyser, William J. Froelich and *Philip M. Aitken,* for appellant.

Roy B. Carlberg, contra.

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

ROSE, J.

This is an action on a promissory note for $829.70, dated February 6, 1926, payable six months hence, and bearing interest at the rate of 10 per cent. per annum. The payee is the First National Bank of Walthill, plaintiff, and the maker is Eunice Woodhull Stabler, defendant. There was no personal or substituted service of summons on defendant in Nebraska, but a summons was served upon her in Kansas. She was a nonresident of the state, and on that ground plaintiff attached as her property 80 acres of land in Thurston county, described as the south half of the southwest quarter of section 2, township 24 north, range 8 east of the sixth principal meridian. The value of the land attached was fixed by appraisers at $8,000.

Defendant asked the court to dissolve the attachment for want of jurisdiction and for the further reason that she had no attachable interest in the land. Her objections to jurisdiction may be summarized as follows: She is an incompetent Omaha Indian, and a ward of the United States. The only source of jurisdiction is the attachment which is void. Defendant has never been in possession of the attached land and has only an equitable interest which is not marketable or attachable. The government holds the title subject to the equitable rights of defendant. May 23, 1900, the United States issued to Lucy Woodhull, an incompetent Omaha Indian and ward of the government, a restricted patent under the act of congress of March 3, 1893. 27 U. S. St. at Large, 612. The patent contains the following provisions:

"That this patent shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his

heirs, according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

The following facts, briefly stated, were also alleged in support of the objections to jurisdiction: By executive order issued January 28, 1925, pursuant to law the trust period of 25 years was extended 10 years. Ever since May 23, 1900, the land has been held by the government in trust for Lucy Woodhull and her successors in interest. Lucy Woodhull died May 18, 1911, leaving a will, since probated, devising to her husband Spafford Woodhull a life interest in the land. The will devised the estate in remainder to four children of testatrix, one of them being defendant, who, November 2, 1916, acquired by deed the interests of the three other children. The children of testatrix were Indian wards of the United States and the land has never been subjected to any indebtedness of defendant and is exempt from attachment. Spafford Woodhull now owns a life estate in the land. The objections to jurisdiction and the motion to dissolve the attachment were based on the facts outlined. The will was approved by the department of the interior.

For the purposes of the hearing upon the objections to jurisdiction and upon the motion to quash the attachment, the parties stipulated in effect: May 23, 1900, Lucy Woodhull was an incompetent Omaha Indian residing upon the Omaha Indian reservation. She received a restricted trust patent of allotment for the land in controversy. She died May 18, 1911, leaving a will in which she devised a life estate in the land to her husband and the remainder to her four children, one of them being Eunice Woodhull Stabler, defendant. Under a deed dated November 2, 1916,

and approved by the secretary of the interior May 16, 1917, defendant acquired the interests of the other children of testatrix, subject to the husband's life estate which has not been extinguished.

To sustain the attachment plaintiff insists that the fee simple title passed from the United States under the approved will of Lucy Woodhull and vested in her devisees, and that the deed to defendant from the other devisees passed the fee simple title to her. In this connection plaintiff argues that the will and the deed upon their approval by the secretary of the interior, pursuant to acts of congress, terminated the trust period and passed the title from the United States to her.

The trial court adopted plaintiff's view of the case, overruled the motion to dissolve the attachment and the objections to jurisdiction, entered judgment on the note against defendant for $829.70 and interest, and ordered the sale of the land to satisfy the debt, interest and costs. Defendant appealed.

Error is apparent in the proceedings. According to the stipulation of the parties Spafford Woodhull owns a life estate in the land. He is not a party to the suit. A cause of action against him is not stated. There is nothing in the record to show that he is indebted to plaintiff. His life estate is included in the attachment and the judgment orders the sheriff to sell it for the debt of defendant to plaintiff. There is therefore error in the judgment and to that extent it cannot be permitted to stand. This is conceded by plaintiff, and the only matter in controversy between the parties to the action is the proposition that the United States, through the interior department's approval of the will and the deed, pursuant to acts of congress, passed the legal title, temporarily held in trust for an incompetent Indian, to the beneficial owner or owners of the land. This is a federal question. A ruling of the United States supreme court on the precise point has not been cited or found, but *La Motte v. United States,* 254 U. S. 570, indicates the view that federal courts will take when

a controversy like the present one is properly presented for determination. In that case the following provision of an act of congress was construed:

"Any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will, in accordance with the law of the state of Oklahoma: Provided, that no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the secretary of the interior." 37 U. S. St. at Large, ch. 83, sec. 8, p. 88; *La Motte v. United States,* 254 U. S. 570.

Referring to this legislation the supreme court of the United States said:

"This provision is broadly written, is in terms applicable to restricted lands and funds, and enables the Indian to dispose of all or any part of his estate by will, in accordance with the state law, if his will be approved by the secretary. True, it does not say that a disposal by an approved will shall put an end to existing restrictions, but that is an admissable, if not the necessary, conclusion from its words. After its enactment the secretary of the interior construed it as having that meaning, and it was administered accordingly in that department up to the time of this suit. And that congress intended it should have that meaning is at least inferable from a general act of the next session respecting wills by Indian allottees and their approval by the secretary (37 St. at Large, ch. 55, p. 678); for that act, while providing that 'the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period,' expressly excepted the Osages from its reach. These matters apparently were not brought to the attention of the court below. We regard them as of sufficient weight to put the question at rest. In one of the wills the testator attempted to impose an indefinite restraint on the devisee's right to alienate the land; but, whether the attempt be tested by the

common law or by the local statutes, it plainly was of no effect." *La Motte v. United States*, 254 U. S. 570, 579.

In the present case plaintiff relies upon the congressional act of June 25, 1910, which provides:

"Any Indian of the age of twenty-one years, or over, to whom an allotment of land has been or may hereafter be made, shall have the right, prior to the expiration of the trust period and before the issue of a fee simple patent, to dispose of such allotment by will, in accordance with rules and regulations to be prescribed by the secretary of the interior: Provided, however, that no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the commissioner of Indian affairs and the secretary of the interior: Provided further, that sections one and two of this act shall not apply to the state of Oklahoma." 36 St. at Large, ch. 431, sec. 2, p. 856.

While this latter act was in full force, Lucy Woodhull died May 18, 1911, leaving a will in which she devised a life estate in the land attached herein to her husband and the estate in remainder to her four children. This will was approved by the department of the interior and subsequently probated. Reasoning by analogy from the opinion in the case cited, the act of congress, the will, the approval of the department of the interior and the decree of the probate court had the effect of terminating the trust period and of transferring to defendant an interest in the real estate described, an interest subject to attachment for the debt of defendant. The attachment, however, was erroneous as already stated, and is therefore dissolved as to the life estate. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Attachment, 6 C. J. 193 n. 69—Wills, 40 Cyc. 999 n. 53.

ROSALIE STATE BANK, APPELLEE, V. EUNICE WOODHULL STABLER, APPELLANT.

FILED MARCH 8, 1929. No. 26206.

Rulings in *First Nat. Bank of Walthill v. Stabler, ante*, p. 142, followed.

APPEAL from the district court for Thurston county: MARK J. RYAN, JUDGE. *Reversed.*

James C. Kinsler, A. C. Epperson, George A. Keyser, William J. Froelich and *Philip M. Aitken*, for appellant.

Roy B. Carlberg, contra.

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

ROSE, J.

This is an action to recover $802.90, the amount due on two promissory notes dated April 10, 1926, payable on demand and bearing interest at 8 per cent. per annum before due and at 10 per cent. per annum thereafter until paid, one note for $698.30 and the other for $104.60. The payee is the Rosalie State Bank, plaintiff, and the maker is Eunice Woodhull Stabler, defendant. There was no personal or substituted service of summons on defendant in Nebraska, but a summons was served upon her in Kansas. She was a nonresident of the state and on that ground plaintiff attached as her property 80 acres of land in Thurston county, described as the south half of the southwest quarter of section 2, township 24 north, range 8 east of the sixth principal meridian. The value of the land attached was fixed by appraisers at $8,000.

Defendant asked the court to dissolve the attachment for want of jurisdiction, and for the further reasons that she is an incompetent Omaha Indian, that the title to the land is retained by the United States in trust for her and is not subject to attachment.

Upon a hearing of the objections and motion, the trial court entered a judgment against defendant for the amount

of both notes and interest, sustained the attachment and ordered the sheriff to sell the land to pay the debt, interest and costs. Defendant appealed.

The decision is controlled by the similar case of *First Nat. Bank of Walthill v. Stabler, ante,* p. 142, and, following the opinion therein, the attachment is dissolved as to the life estate, the judgment of the district court reversed and the cause remanded for further proceedings.

REVERSED.

IRVING M. BLANCHARD V. STATE OF NEBRASKA.

FILED MARCH 8, 1929. No. 26767.

1. **Evidence** considered and found to sustain the judgment of the trial court.
2. **Record** examined and found free from error.

ERROR to the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

G. T. H. Babcock, Robert G. Easley and *Allen G. Fisher,* for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before ROSE, GOOD, THOMPSON, EBERLY, and DAY, JJ., and REDICK and SHEPHERD, District Judges.

THOMPSON, J.

The plaintiff in error was charged with the commission of what has been designated as "statutory rape" on his fourteen year old step-daughter, in Dawes county, on the 3d day of June, 1928; was found guilty, and on the 30th day of that month was sentenced to imprisonment in the state penitentiary for ten years. To reverse this judgment he prosecutes error, and bases his right to such reversal on two grounds: That the verdict is not sustained by the evidence; further, that the verdict is contrary to law. Under the record these challenges limit the scope of our inquiry to the evidence, and the sufficiency of the

information, as neither challenge invokes a review of the instructions, or what is recognized under our practice as "errors of law occurring at the trial." The information is in the usual form, and correctly charges the intended felony.

The evidence on the part of the state and that on the part of the defense, on the issue raised by such information and the plea of not guilty entered by the defendant (plaintiff in error), is acutely conflicting, and consists largely of oral testimony given at the trial. The credibility of these witnesses and the weight to be given the testimony of each are for the jury's consideration. The rule is that such determination by the jury will not be by us disturbed "unless clearly wrong," or, as stated in other holdings of this court, "is without support in the evidence." To quote the evidence would in no manner benefit either of the litigants, neither would it prove instructive in a future contest of this nature. Hence, we deem it sufficient to say that there is ample proof to sustain the verdict and to warrant the judgment complained of.

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

AFFIRMED.

STATE, EX REL. ROSS E. HALL, RELATOR, V. EARL CLINE ET AL., RESPONDENTS.

FILED MARCH 8, 1929. No. 26901.

1. **Constitution:** AMENDMENT. "The self-imposed limitations on the power of the people to amend their fundamental law should not be so construed as to defeat the will of the people, plainly expressed, on account of a slight and unimportant failure to comply literally with such limitations, if the requirements are substantially observed." *State v. Winnett*, 78 Neb. 379.
2. ———: ———. Nevertheless, where the Constitution itself prescribes certain procedure relative to an important element, as the giving and publication of notice, in the submission to the electors of a proposed amendment, there must be a substantial

compliance with such requirements in order to effect either a valid submission or adoption of the proposal.

3. ———: ———. Record examined, and *held*, that in the instant case there was not a substantial compliance with the requirements of section 1, art. XVI, of the Constitution, relative to the giving and publication of notice, and the proposed amendment did not become part of the Constitution.

Original proceeding in mandamus by the State, on the relation of Ross E. Hall, to compel respondents, members of the Board of Regents of the University of Nebraska, to take over the management of the School for the Blind and the School for the Deaf. *Writ denied.*

Swarr, May & Royce, for relator.

John J. Ledwith and *Henry H. Foster,* for respondents.

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

BLACKLEDGE, District Judge.

In this, an original action in this court, the relator seeks the granting of a peremptory writ of mandamus against the respondents, who constitute the board of regents of the university of Nebraska, requiring them to take over the management and control of two state institutions, the school for the deaf at Omaha and the school for the blind at Nebraska City, which management and control is, and has heretofore been, vested in the board of control of the state.

Relator grounds his action upon the proposition that there was adopted by the legislature of 1927, and approved, a joint and concurrent resolution (Laws 1927, ch. 48) to amend section 19, art. IV, of the Constitution. The essential feature of the proposed amendment purports to exclude said schools for the deaf and blind from the jurisdiction of the board of control and to transfer such jurisdiction to the board of regents of the university. Relator alleges that said proposed amendment was duly sub-

mitted to the electors at the general election of 1928, that it received more than a constitutional majority of the votes cast, and became a part of the fundamental law; yet the respondents fail and refuse to take over the management and control of said institutions pursuant to the terms thereof.

The respondents answer, alleging that the proposed amendment was not legally submitted or adopted, for that no notice thereof conforming to the provisions of section 1, art. XVI, of the Constitution, was given nor was there in the actual giving or publication of notice a substantial compliance therewith, whereby the proposed amendment, although having received a constitutional majority of the votes cast, failed of adoption.

Counsel for the respective parties have, by their pleadings and a stipulation of facts, so presented and narrowed the issues for determination by the court that the one question submitted as determinative of the case is, as stated by one side: Is the amendment a nullity because the proposed amendment was not published literally as provided by section 1, art. XVI, of the Constitution? and, by the other, whether unofficial publications not conforming to the provisions of said section can satisfy the requirements thereof?

There is no controversy as to what was actually done. The secretary of state in May, 1928, applied to the attorney general with reference to the manner of submission of the proposed amendment and was advised by that office that publication should be made in conformity with section 2285, Comp. St. 1922, and chapter 113, Laws 1925, amendatory thereof. This provision is, in substance, that not later than the first Monday of the third month next before the election, the proposed amendment shall be published in all newspapers in the state, and that the secretary of state may delegate the duty of transmittal of the notices to the Nebraska press association. Such delegation was made and the notices transmitted, not by the time

so fixed, but about the middle of August, and publication made between that date and September 1 in 422 papers.

It is this publication, together with certain publicity by means of the usual election notices, newspaper editorials and items, handbills, circulars and addresses from civic societies and private sources, which, coupled with the fact that a large number of electors voted on the proposition and it received a substantial majority, the relator contends should satisfy the legal requirements of the situation.

Upon the other hand, it is to be considered that the Constitution itself (article XVI, sec. 1) provides for the proposal of amendments by the legislature as this one was proposed, and that such proposed amendments shall be "published once each week for four weeks, in at least one newspaper in each county, where a newspaper is published, immediately preceding the next election."

In addition thereto, and evidently enacted for the purpose of supplementing and carrying into effect the constitutional provision, chapter 112, Laws 1925, amends the previously existing sections 3086, 3087, 3088, and 3090, Comp. St. 1922, authorizes amendments to be proposed by joint resolution in the legislature, provides for the giving of the notice designated by such constitutional provision in substantially the same terms, and, in addition, provides that the newspapers in which the publication is to be so made shall be designated by the governor.

It is further to be observed that this constitutional provision and chapter 112, Laws 1925, specify amendments to the Constitution proposed by joint resolution of the legislature, while section 2285, Comp. St. 1922, and chapter 113, Laws 1925, to which the secretary of state was referred, are found in, and by their titles and terms relate to, laws and amendments to be considered and submitted under the statutory provisions governing the method of "Initiative and Referendum" and covered by sections 2276 to 2290, inclusive, Comp. St. 1922.

It is elemental that legislation which clearly contravenes the express terms of the Constitution is not valid. It seems perfectly obvious that the provisions of section 2285, Comp. St. 1922, and chapter 113, Laws 1925, undertaken to be followed in the matter of notice in this instance, by reason of the essential conflict of the terms thereof with those of the Constitution itself, cannot be held to have, or to be intended to have, reference to the submission of proposed amendments originating as this one did.

The question then is resolved into the inquiry whether the acts done and notice given can, by any reasonable construction or interpretation, be held to be a substantial compliance with the constitutional requirements. We are reminded in argument that it will not do to require a too rigid adherence to mere details of procedure, that the large vote cast on the proposition demonstrates the actuality of notice to the electors, and that the people should not be hindered in receiving the benefits of an amendment which they have approved by a substantial majority.

To this, it seems to the writer hereof, there are several sufficient answers. The urgency for the amendment is not so great that we need to run counter to the provisions of our fundamental law in order to accomplish it. The institutions are in good hands, the same as control all other charitable institutions of the state. They will not suffer to remain there until the people decide, in a lawful way and upon lawful notice, that they wish a change. The same authority urged upon us in this regard, the people, have already prescribed in their fundamental law how a change thereof may be accomplished. That mandate is of as high an order and as binding upon both the government and the governed as any other that can come from the same source. It is poor argument to say that, rather than rectify an oversight, we must violate existing provisions of our Constitution in order to engraft upon it a new provision which has not received the notice the people have prescribed as necessary to an adoption thereof.

We should consider the seriousness of the business in

which we are engaged. A legislative act may be amended or repealed at any succeeding session of the legislature. A constitutional provision is intended to be a much more fixed and permanent thing.

Indeed, while counsel on both sides of the case seem to concede that the question, by reason of former decisions of this court, in this state is not whether the constitutional provisions under consideration have been *literally* complied with, but whether they have been *substantially* complied with, it is the rule in most other states that there must be an exact and literal compliance with such requirements.

In 12 C. J. 740, sec. 145, the prevailing American rule is said to be: "It is an established general rule that constitutional provisions are to be construed as mandatory unless, by express provision or necessary implication, a different intention is manifest."

Cooley, the very eminent jurist and author, in his treatise on Constitutional Limitations says that the courts tread upon dangerous ground when they venture to apply statutory rules of construction as between what may be "directory" and what may be "mandatory" to the provisions of a Constitution. He says it is the province of an instrument of this solemn and permanent character to establish those fundamental maxims and fix those unvarying rules by which all departments of the government must at all times shape their conduct.

"And it also seems to us that there are few evils which can be inflicted by a strict adherence to the law, so great as that which is done by the habitual disregard, by any department of the government, of a plain requirement of that instrument from which it derives its authority, and which ought, therefore, to be scrupulously observed and obeyed." 1 Cooley, Constitutional Limitations (8th ed.) p. 312.

Counsel for both relator and respondent herein cite us to the case in this court of *State v. Winnett*, 78 Neb. 379. That case, in which the opinion was written by the late

Justice Sedgwick, has been considered and approved by many other courts as embodying the rule of reason whereby a too rigid adherence to nonessential provisions is done away and the sufficiency of an act is made to rest upon a substantial compliance with existing provisions. We are content to follow the rule expressed in that case and have adopted it as the first paragraph of the syllabus in this case. It states that the will of the people should not be defeated on account of a slight and unimportant failure to comply with the constitutional limitations, and that, where there was a substantial compliance with the provisions as to published notice, the fact that the publication was made for one week less than the required time in one county of the state will not invalidate the amendment.

In the instant case, we find a far different situation. Here there was no attempt to follow the governing constitutional or statutory provisions as to publication of notice. There was not merely a failure to publish for one week in one county, there was no publication for any of the four weeks in any county during the required time. There was no publication during the specified week under the inapplicable statutory provision that was undertaken to be followed. There was no designation by the governor of any paper for the publication. There was no official publicity given to the matter during the four weeks immediately preceding the election. No one can say what the result upon the vote or upon the information and wishes of the people would have been had this been done by consecutive publications when the election was imminent, as the Constitution provided. A single publication in any number of papers more than two months prior to the election cannot suffice as a substantial compliance with the requirements. The people have a right to have the proper submission of any amendment they desire. They have both the right and the duty to see that it is lawfully done, and it is the duty of the court to look respectively to the preservation of the right and performance of the duty.

It is the unanimous opinion of the members of the court who heard the case that, in the submission of the proposed amendment, there was not a substantial compliance with the constitutional requirements, and that the amendment was not adopted.

Upon consideration of the case, we find so serious a defect in the joint resolution itself (Laws 1927, ch. 48) as to make at least doubtful the validity of the amendment, even if regularly published and adopted.

Section 19, art. IV, of the Constitution, provides: "The board of control shall have full power to manage, control and govern, subject only to such limitations as may be established by law" [all state, charitable, reformatory and penal institutions that now are or may hereafter be established], (except the Nebraska school for the deaf and the Nebraska school for the blind, which shall be under the jurisdiction of the board of regents of the university of Nebraska.)

The amendment proposed by the joint resolution omits all the foregoing which is inclosed in brackets and adds all that inclosed in parentheses. It would remove all jurisdiction from the board of control of every sort of institution, and place it nowhere else except as to the two institutions committed to the board of regents. It is certain that such a proposition was neither intended by the legislature nor submitted to the people.

This situation was not presented to us in the briefs or argument of the case and we have disposed of it upon the propositions submitted.

WRIT DENIED.

ARABELLA E. WOOKEY ET AL., APPELLANTS, V. CITY OF ALMA ET AL., APPELLEES.

FILED MARCH 8, 1929. No. 26779.

1. **Municipal Corporations:** IMPROVEMENT OF STREETS. The special provision embodied in the charter of cities of the second class having a population of less than 5,000, authorizing the city council to pave a street by assent and vote of three-fourths of its members, is not amended or repealed by the provisions of section 8336, Comp. St. 1922, as amended by section 1, ch. 158, Laws 1925, and *held*, further, that such paving is not a work of internal improvement within the meaning of section 2, art. XIII of the Constitution, requiring a proposition therefor to be submitted to the qualified electors.
2. ———:———: ASSESSMENTS: ESTOPPEL. Where taxpayers of an improvement district stand by while work on a paving project is being prosecuted in good faith and see acts done involving risk and expense to others, with knowledge, actual or constructive, that some of the proceedings preliminary to letting the contract have not been in strict accord with statutory provisions, and make no effort to prevent the prosecution of the work, nor any protest before and do not appeal from the action of the mayor and city council sitting as a board of equalization, *held*, that they are estopped from maintaining a suit in equity to enjoin the collection of special assessments levied to pay cost of improvements.

APPEAL from the district court for Harlan county: J. W. JAMES, JUDGE. *Affirmed.*

Tibbets, Lambe & Hewitt and *John W. Starr*, for appellants.

O. E. Shelburn and *J. F. Miller, contra.*

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

ELDRED, District Judge.

In this case the appellants are seeking to enjoin the appellees from levying certain special assessments on lands owned by them, and from issuing and disposing of certain paving bonds, for an indebtedness incurred in paving district No. 17 of the city of Alma. On trial in district court,

decree was entered in favor of defendants. Plaintiff and intervener appealed.

Seventh street of the city of Alma, upon which the paving in question was constructed, runs east and west and is a mile long. The south half of said street and one-fourth of the north half thereof is within the corporate limits of said city, and the remaining portion is without such corporate limits. Prior to the making of the improvements Seventh street had been designated as a rural post road by the federal authorities and was established and still remains a part of a state highway system.

On December 8, 1925, the city of Alma, by resolution, asked Harlan county to obtain federal aid for paving such street, agreeing to pay one-half the cost, on condition that federal aid be obtained for the other half. The county board of Harlan county on the same day asked for such federal aid up to $16,500, which was secured.

At the time the foregoing proceedings were had no paving or improvement district including Seventh street and the property of the appellants had been created, and no levy of special assessments on property benefited by the proposed improvement had been authorized by ordinance or otherwise. No appropriation of money for that purpose had been made, and the city did not have any funds available therefor; and no request had been made by the taxpayers for such improvements.

On February 2, 1926, ordinance No. 66 was adopted creating paving district No. 17, including Seventh street and the property of the appellants, and authorizing a levy of special assessments and the issuing of intersection and district paving bonds. After the passage of the ordinance the engineers' plans, specifications and estimates of cost of grading and paving were approved by the city council. The estimate of costs of construction which was filed with the city clerk prior to February 2, 1926, estimates the cost at $38,845.60. The advertisement for bids did not contain the engineers' estimate of costs, but its sufficiency is not otherwise challenged. The plaintiff and intervener had

knowledge and notice that the improvements were being made, and took no steps, legal or otherwise, to prohibit or restrain the making of the same. The actual cost of construction under the contract let was $35,384.05. Federal aid was secured to the extent of $16,500. The work of construction was accepted by the defendant city. Notice was duly given and the council met as a board of equalization February 14, 1927. The plaintiff was present in person and by her counsel, but neither plaintiff nor intervener filed any objection to the proposed assessment, and took no appeal or error proceedings from the action of the board levying the assessment complained of; the assessment against the plaintiff's land being $500, and against the intervener's land $340. The total assessment to all property adjoining Seventh street in district No. 17 was $2,710.

The first question of law urged by appellants in their brief is: "Were the defendants, the mayor and city council of the city of Alma, authorized by law to enter into a contract and appropriate money for the purpose of grading and paving Seventh street without a vote of the people authorizing such action?"

Chapter 138, Laws 1923, in force at that time, provides: "But unless three-fifths of the resident owners of the property subject to the assessment for such improvements petition the council * * * to make the same, such improvements shall not be made until three-fourths of the members of such council * * * shall by vote assent to the making of the same."

There is no contention that ordinance No. 66, creating the paving district and providing for the assessment of the property benefited thereby was not passed by a vote of three-fourths of all members of the council. That was sufficient. *City of Superior v. Simpson,* 114 Neb. 698; *Fitzgerald v. Sattler,* 102 Neb. 665.

In this connection it is urged that the duty of maintaining the street in question did not rest upon the city, it having a population of less than 1,400; but that Seventh

street being a part of the state highway system, under section 8336, Comp. St. 1922, as amended by section 1, ch. 158, Laws 1925, it was the duty of the department of public works of the state to maintain such street. This act does purport to place a duty in the particulars claimed upon the department of public works; but it does not purport to amend or repeal the provisions of the statute authorizing such a city to pave and maintain all its streets. The act is not independent legislation, complete in itself. Amendments and repeals by implication are not favored. In our view the act cited did not amend the provisions of the city charter relative to paving, or affect the jurisdiction of a municipality of less than 1,400 population over its streets.

It is further contended in this connection that such a municipality could not contract for the improvements without submitting a proposition therefor to the qualified electors thereof, on the theory that in so doing it is making a donation to a work of internal improvement within the prohibition of section 2, art. XIII of the Constitution. This contention cannot be sustained. *State v. Bone Creek Township,* 109 Neb. 202.

"Could the city of Alma, without any previous appropriation therefor and without an ordinance, create an improvement district, and provide for the levying of special assessments to meet the cost of such improvements, lawfully contract and agree to pay one-half of the cost of improving Seventh street?"

While the city had asked for assistance of the federal authorities in constructing the paving in question prior to the adoption of ordinance No. 66, yet plans and specifications were not adopted, contract was not let for the improvements, nor, so far as it appears from the record, was any expense incurred until after the passage of such ordinance. The fact that ordinance No. 66, creating a paving district, was not adopted until after the federal authorities had been requested to assist in the expense of paving is in no manner material and cannot be considered an

irregularity. That was not a contract creating an indebtedness against the city and was no part of the proceedings required as a condition precedent to the assessment of the costs of the improvement to property benefited thereby.

"Did the failure of the defendant to insert and include the estimate of the engineers of the cost of construction in the notice to bidders render the whole proceedings null and void?"

Prior to advertising for bids the plans and specifications and engineers' estimate of cost were filed with the city clerk and approved by the council. The advertisement for bids stated that the plans and specifications might be seen at the office of the city clerk of Alma, the office of the county clerk of Harlan county at Alma, and the office of the state department of public works at Lincoln, but did not state the amount of the engineers' estimate, as required by chapter 51, Laws 1925. The amount of the bid and the total cost of the construction was less than the engineers' estimate. The failure in the notice to state the amount of the engineers' estimate was a matter disclosed by the notice as published, to be observed by all who might be interested. The contract for construction work was let under the notice for an amount less than the estimated cost, and has been fully performed. The plaintiff and intervener had notice that the work was being prosecuted. There is no contention that the cost exceeded the fair and reasonable value of the improvements. Notice of the meeting for assessment and equalization was duly given. From the record it appears that the board had jurisdiction to make the improvements. The mere irregularity in failing to state the amount of the engineers' estimate, under the circumstances, ought not to be held to vitiate the entire proceedings in this, a collateral attack.

The fourth and last proposition of law presented by the appellants in their brief submits the question that, if the proceedings are erroneous, are the appellants estopped by an act or ommission on their part from urging such irregularity?

We conclude that this question must be answered in the affirmative. The rule announced in *Meyer v. City of Alma*, 117 Neb. 511, and *Kister v. City of Hastings*, 108 Neb. 476, must be followed. The litigation in the instant case appears to have arisen out of the same improvement work involved in the case of *Meyer v. City of Alma, supra.* Every element of estoppel that existed in that case is present in the case at bar. It follows that the decree appealed from is right, and it is

AFFIRMED.

ED ZVACEK, APPELLEE, V. FRANK W. POSVAR, APPELLANT.

FILED MARCH 8, 1929. No. 26290.

1. **Specific Performance.** A party to a written contract for the sale of his real estate, not a homestead, will not be excused from performance because the wife did not sign the agreement and refused to join in the deed, if the other party is willing to accept conveyance by the vendor without the wife joining in the deed.
2. ———: DECREE. In such case, the court may decree specific performance of the agreement against the vendor alone, if the other party consents thereto; the wife's marital rights in such real estate not being affected by such decree.

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

Cecil R. Boughn and *Bartos, Bartos & Placek,* for appellant.

Robert G. Fuhrman, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and BEGLEY and RAPER, District Judges.

RAPER, District Judge.

Action by plaintiff against defendant for specific performance of a written contract between the parties for exchange of lands. Plaintiff was awarded decree as prayed and defendant appeals.

Plaintiff owned 120 acres of land in Thurston county, Nebraska, and defendant owned the west half of the northwest quarter of section 26, township 25, range 7 east, in Thurston county. In the agreement it is stipulated that plaintiff convey to defendant the 120 acres, subject to mortgages of $15,000, and defendant convey the 80 acres, subject to a mortgage of $5,000. Both parties were married, but the agreement was not signed by the wife of either. At the proper time plaintiff tendered a warranty deed, signed by himself and wife, to defendant, for the 120 acres, as agreed in the contract, and demanded a deed from defendant for the 80 acres, but defendant refused to convey his 80 acres because his wife refused to sign the deed. The plaintiff informed defendant that he would accept a deed signed by defendant alone and waived the wife's signing and acknowledgment.

In plaintiff's petition he expressly waives the signature and acknowledgment of defendant's wife, and agrees and consents to accept a deed of defendant alone. Defendant, in his answer, sets up the refusal of his wife to join in the conveyance, and alleges that the 80 acres was his homestead.

Two matters only are here involved the claim of homestead, and the right of the court to decree performance where the wife refuses to join in the conveyance, with the consent of the plaintiff to accept performance without the wife joining.

As to the homestead claim, it is undisputed that defendant and wife lived with his parents on a farm some distance from his 80 acres, but defendant farmed his 80. He had owned it eight years, had no improvements upon it except it was inclosed with a fence. The house, which at one time had stood on the land, had been removed and its former location had been farmed over. A well which had once been near the site of the house had been filled up or covered.

Defendant testified that it was and had been his intention ever since he acquired the land to occupy it as his

home at some future time, when he could earn money to build a house thereon, but he had never taken any step or done any act whatsoever to evince or disclose that intention. Bare intention, unaccompanied by any acts of preparation or occupancy indicating such intention, is not sufficient. This principle was ably discussed in the case of *Davis v. Kelly,* 62 Neb. 642, in an opinion by Commissioner Pound, is applicable to facts herein, and needs no elucidation or further comment. The district court rightfully held that defendant had no homestead right in the land.

Appellant urges that the interest of a wife, where parties live in this state, is such that a husband cannot alienate his own estate in lands not a homestead, to which he holds title, nor can a court divest the husband of his interest by decree of specific performance, although the signature or joining of the wife to the conveyance is expressly waived by the other party.

Section 1220, Comp. St. 1922, provides: "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seised of an estate of inheritance at any time during the marriage, or in which the deceased was possessed of an interest either legal or equitable at the time of his or her death, which has not been lawfully conveyed by the husband and wife while residents of this state * * * and which has not been lawfully devised, shall descend subject to his or her debts, and the rights of homestead, in the manner following." Then follows, in five items or paragraphs, the particular estate the surviving consort shall have, depending upon the number of children, if any, and other kindred of the deceased.

Section 1221 provides: "When any person leaving no husband or wife surviving shall die, seised of any real estate, or any right thereto, or entitled to any interest therein in fee simple, or for the life of another, not having lawfully devised the same, it shall descend subject to his debts," in the manner set forth by law, which need not here be re-

peated, but names heirs and the order in which they inherit.

Section 1224 provides in what manner a married man or woman may be barred from inheriting a part or all of the real estate of which his or her spouse was seised of an estate of inheritance at any time during the marriage.

The wife's interest or title does not depend for its inception upon the death of the husband as an inheritance would, but comes into existence by operation of law upon a concurrence of seising and the marriage relation. Our statutes on descent of real property abolish dower and curtesy. In the opinion in *McCullough v. St. Edward Electric Co.*, 101 Neb. 802, the rights of a wife in her husband's real estate are stated aptly as follows: "This right of the wife is a peculiar one under the statute. She takes by descent, but is not technically an heir in the sense that a conveyance by her husband would defeat her right. She takes the property of her husband whenever the conditions are such that an heir would take, and the husband cannot defeat her claim by his voluntary conveyance. The right is substituted for the right of dower and is in many respects analogous to that right." The wife in this case has not been barred from her statutory rights, and if she survive her husband she will take the share which the statute awards her, and the decree of the trial court expressly reserves to her that right if she survives.

It will be apparent from the reading of sections 1220 and 1221 that no such contingent right as provided for the wife is granted to the heirs. By section 1221 and the fifth paragraph of section 1220 the heirs can only inherit or take by devise the lands of which the deceased died seised. The owner of real property, not a homestead, may lease or convey or devise his property and bar his heirs. If he has conveyed the property during his life, his heirs take no part of it, although the wife, unless she has barred herself, will take her statutory share.

The right of a vendee to have specific performance in like cases has been several times recognized in the state.

In *Davis v. Merson,* 103 Neb. 397, the contract, which was not signed by the vendor's wife, included a homestead of 160 acres out of a tract of 640 acres. The court decreed specific performance of the remainder of the tract, excluding homestead, with consent of the vendee, and in that case the opinion recites that, since the wife did not sign the contract, her marital rights, if any, were not affected thereby. Other Nebraska authorities are cited in that opinion.

There is no provision of the law that prohibits the owner from conveying his real estate, not a homestead, without the wife joining in the deed, and such deed will convey all the interest in the estate except the marital rights of the wife, if she survive him.

The defendant had no valid excuse for not complying with his agreement and, under the facts disclosed by the pleadings and evidence, the district court rightly decreed specific performance, expressly reserving the statutory rights of the wife, so that all persons who may hereafter take title to the property will know the exact status and right of the wife, if she survive him.

The decree of the district court is

AFFIRMED.

Note—See Specific Performance, 36 Cyc. 746 n. 90, 794 n. 73; 24 L. R. A. 763; 25 R. C. L. 317-319.

FEDERAL TRUST COMPANY, APPELLEE, V. JESSE L. OVERLANDER, APPELLANT.

FILED MARCH 8, 1929. No. 26463.

Limitation of Actions: FORCIBLE ENTRY AND DETENTION. Where a tenancy at sufferance is terminated by a statutory notice of three days to quit, the cause of action for forcible entry and detention accrues and the statute of limitations begins to run at the date of the service of such notice.

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

John S. Bishop, for appellant.

John J. Ledwith, contra.

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

REDICK, District Judge.

Action in forcible detention. Appellant, Overlander, was the owner of an undivided one-half of the land in dispute, title to which was acquired by appellee by foreclosure sale April 28, 1925. The other undivided one-half was owned by appellant's daughter. Appellee acquired the full title February 19, 1926. February 7, 1927, appellee served on appellant a three days' notice to quit, and commenced this action February 24, 1927. Prior to foreclosure sale, appellant was in rightful possession of the premises and has remained in possession ever since. Appellee had judgment in court below, and appellant appeals.

The only question presented is the statute of limitations of one year. Appellant claims that the cause of action accrued February 19, 1926, when appellee acquired full title, and that therefore the action is barred. Appellant by remaining in possession under the above circumstances was a tenant in sufferance, and the case is controlled by *Clark v. Tukey Land Co.*, 75 Neb. 326, holding that such a tenancy may be terminated by the statutory notice of three days to quit, and that the statute of limitations begins to run from the time of such termination, and distinguishing *Weatherford v. Union P. R. Co.*, 74 Neb. 229, upon which appellant relies. We have not overlooked the case of *Krull v. Rose*, 88 Neb. 655, syllabus 2 of which says that the notice to quit is not for the purpose of terminating the tenancy. The language of the opinion, however, is that such notice "is not required for the purpose of terminating the lease," and in that case there was a lease for a determinate period of three years, which the court held ended the lease by its own terms.

The judgment of the lower court will be affirmed on the authority of *Clark v. Tukey Land Co., supra.*

AFFIRMED.

HARLEY H. FETTY V. STATE OF NEBRASKA.

FILED MARCH 12, 1929. No. 26589.

Evidence: EXPERT WITNESSES: COMPENSATION. An expert witness may be interrogated as to the amount of fees paid or promised to be paid him in excess of the legal fees provided by statute for ordinary witnesses.

ERROR to the district court for Webster county: J. W. JAMES, JUDGE. *Reversed.*

J. E. Willits, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

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

GOSS, C. J.

Defendant was convicted of an intent to extort money by means of written communication threatening the life of Ralph E. Hunter. From a judgment sentencing defendant to the penitentiary for an indeterminate period of not less than 18 months nor more than three years, the defendant brings error proceedings.

The defendant assigns many errors. Without stating them in full here, each assignment that seems to us to merit discussion will be mentioned as it is reached.

The court refused to quash the information, which was moved by the defendant on these grounds: Because the written communication shows on its face that (1) there was no place named for Hunter to leave the money; (2) that it is without meaning and too indefinite to extort money from any one; that (3) it was not verified nor its author disclosed; and (4) that the defendant is not mentioned or disclosed or connected with the communication. The unsigned communication is set forth in the information in these words:

"Mr. R. E. Hunter:

"You get two thousand dollars in small bills place in

small tin can with tight lid. in a few days you will be told wher to leave it. Burn this when you read it dont mention this to one one We mean what we say if you fail your life will be the penalty think it over. We will notify you in a few days wher to leave the money Burn this at once Remember you will be wached. You will be perfectly safe if you. Do as we have said"

The information alleges that the letter was mailed to Ralph E. Hunter, Inavale, Nebraska, in an envelope thus addressed, and was so sent by said Harley H. Fetty with the intent, etc.

It is perfectly apparent that the information charges the sending of the letter by the defendant, that the letter threatens death unless Hunter comply with its request to get and place $2,000 in small bills in a tin can with a tight lid, that he will be watched and will be told where to leave the can. The statute denounces a threat, "either verbally or by written or printed communication, * * * to do any injury to the person or property of another, with intent to extort money." Comp. St. 1922, sec. 9579. The information meets every call of the statute and answers almost categorically the objections contained in the motion to quash.

The defendant moved to quash the regular panel of jurors because not selected at least 15 days before the opening of the term, as required by section 9073, Comp. St. 1922. The county board selected the persons for the jury on April 3, 1928. The April term began April 16, 1928; so, only 13 days intervened between the time the persons were selected by the county board to serve as jurors and the first day of the term. Section 9073 provides: "The county board of the county shall, at least fifteen days before the first day of the session of the court, meet, and select sixty persons possessing the qualifications prescribed," etc. Defendant claims this is mandatory as to the elapsed time between the time of selection and the first session of the term. He cites *Kronberg v. State,* 114 Neb. 393, *Nelson v. State,* 115 Neb. 26, and *Davis v. State,* 31 Neb. 247, in

support of this proposition. The *Kronberg* case held that it was mandatory to draw by lot 24 names promiscuously from the box containing the 60 names rather than to draw 24 names out of the 60 by precincts consciously and intentionally as the sheriff and clerk did. The *Nelson* case held that officers who are interested as prosecuting witnesses or are interested in the results of litigation are disqualified from participating in the selection of the list of 60 names from which the jury panel is to be drawn. In the *Kronberg* case it was said: "It is not every irregularity in drawing names that will prejudice the rights of defendant in a criminal prosecution, but in a material respect a radical departure from a mandatory statute should not be sanctioned." *Kronberg v. State,* 114 Neb. 393, 396.

We do not wish to be understood as deciding that section 9073 is not in any case mandatory as to the time when the 60 names of persons to be called as jurors should be selected and certified to the district court, but we think the circumstances in this case do not show that the defendant was prejudiced by the delay of the county board to convene and to select the list 13 days instead of 15 days before the first session of the term of court. The evident purpose of fixing that time is that the 24 names for the panel may be drawn by the proper officers and that those drawn for the jury panel may have timely notice of their call to jury service. The law does not concern itself in favor of litigants and their counsel who may desire to know in advance of trial the personnel of juries. Indeed, the modern trend is against such a disclosure. This is indicated by the act providing for a jury commissioner and the selection of jurors in counties of 100,000 population or more. Comp. St. 1922, secs. 9095-9110. Section 9105 provides a severe penalty, ranging from a fine of $100 up to three years in the penitentiary, for disclosure of the names of jurors called unless authorized by an order of court.

Defendant complains that his application for inspection and a copy of the photograph of the letter on which the

information was based was overruled and inspection delayed to his prejudice. On April 17 defendant asked a delay of three to ten days to prepare to attack the information. He had had notice ever since his preliminary hearing to employ counsel and prepare and the court, remarking his delay, gave him until April 19 to prepare for trial. His counsel seems to think, and so expressed himself to the trial court, that there could be no case set for trial until after "the issues were made up." After the motions attacking the information were disposed of, the court put the defendant upon trial some time on April 19, 1928. Defendant asked for the letter and photographic copies of it or to be allowed to photograph it. There was some delay in securing these, but defendant had and used an expert as a witness who expressed his "honest conclusion and opinion" that the letter was not written by the same hand that wrote other exhibits conceded to be written by defendant. Rulings on continuances and delays in furnishing papers for inspection in a trial are largely within the control and discretion of the trial court. We do not find that there was such abuse of that discretion that, in the circumstances shown by the record, the rights of the defendant have been prejudiced.

In instructing the jury on the elements necessary to be proved beyond a reasonable doubt, the court, in instruction No. 3, when referring to the letter which the information charged the defendant sent by mail, said: "That the defendant, on or about the 29th day of January, sent or caused to be sent the letter set out in the information." The words "or caused to be sent" are claimed to be erroneous. The information charged, and the proofs showed, that the letter was sent by United States mail. The defendant cites *Bundy v. State*, 114 Neb. 121, where, in a kidnapping case, the instructions by the court added the word "conceal" to the word "detain," which was the only one of the two words charged in the information. This was held to be error.

The same instruction described the guilty intent as "with

the intent and for the purpose of extorting or obtaining money or other valuable consideration from the said Hunter," whereas the information charges the intent to extort $2,000 and does not mention the "other valuable consideration." It would have been better had the court confined the language of the instruction to that of the information in both instances complained of.

Error is predicated upon the refusal of the court to allow Wallace O. Shane, expert handwriting witness for the state, to be cross-examined as to his fees for his expert testimony. We think the court should have allowed this question to be answered by the witness for what effect it would have, if any, on the jury, and to allow the jury to know his pecuniary interest in the case and to weigh his credibility as to his other testimony in the light of that influence. It may be said, however, that the witness had already answered that he had one charge that he made to all and had had for a number of years. In *Olive v. State,* 11 Neb. 1, Judge Lake held that the court erred in refusing to allow a witness on cross-examination to be examined as to his interest in a damage suit brought by survivors of the deceased whose murder was the subject of the case on trial. In *Blenkiron v. State,* 40 Neb. 11, it was held: "In the cross-examination of a witness it is competent to interrogate him in regard to any interest, pecuniary or otherwise, and the extent of such interest he may have in the result of the case in which he is testifying, as affecting his credibility." 40 Cyc. 2671, citing numerous cases, that—"A witness may be interrogated as to payments to him by one of the parties, in excess of his legal fees, or offers or promises of such payment." The testimony of Mr. Shane was a very material element in connecting the defendant with the handwriting in the letter set out in the information. The jury should not have been prevented from knowing what fees and expenses he was to receive. The answer may not have affected them at all in favor of defendant, but that is not a matter upon which the trial court, or we as a reviewing court, have a right to speculate. In ex-

cluding the evidence we think the court erred. In another trial the things defendant has assigned as errors, and we have commented on, are not likely to occur again.

For the reasons stated in this opinion, the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

WILLIAM H. MILLER, JR., APPELLEE, V. H. J. MCLAUGHLIN ET AL., APPELLANTS.

FILED MARCH 12, 1929. No. 26612.

1. **States**: SOVEREIGNTY. The admission of Nebraska into the Union established her state sovereignty over the entire area within her boundaries, except as restricted by treaty, by act of congress, or by the federal Constitution.
2. ———: BOUNDARY. The eastern boundary of Nebraska is the middle of the channel of the Missouri river. 13 U. S. St. at Large, ch 59, sec. 2, p. 47.
3. **Criminal Law**: JURISDICTION. The acts of congress granting to Iowa and Nebraska concurrent jurisdiction "on" the Missouri river do not prevent Nebraska, without the concurrence of Iowa, from exercising criminal and civil jurisdiction west of the boundary line in the middle of the channel, nor prevent Nebraska from enacting and enforcing a law that forbids the use of fishing nets, traps and seines in that part of the river.
4. **Treaties.** Treaty-making power has been committed to the federal government and not to individual states of the Union.
5. **States**: COMMON BOUNDARIES: CRIMINAL JURISDICTION. If Iowa and Nebraska, with a common boundary line in the middle of the channel of the Missouri river, do not agree on public policy or on methods of exercising concurrent jurisdiction granted by congress, the Missouri river is not for that reason a zone without police protection, where the offenses known to the criminal law may be committed with impunity.
6. **Criminal Law.** The soveriegn power to define crimes and to authorize penalties therefor is inherent in state government.
7. **Fish.** The exercise of police power to protect food at the source of supply within state boundaries is a legitimate function of sovereignty and may extend to the protection of fish in a river

where the boundary line between two states is the middle of the channel.

8. **Criminal Law:** JURISDICTION. To prevent conflict of authority and double punishment in the exercise of concurrent jurisdiction granted by congress to two states, where there is doubt about the exact situs of a crime committed on or near the boundary line in a river, the state first acquiring jurisdiction may retain it to the exclusion of the other.

9. **Constitutional Law.** A valid exercise of police power may affect or destroy property values, where the use of the property for its original purpose has become unlawful by a change in public policy as disclosed by a new statute. *Mugler v. Kansas*, 123 U. S. 623.

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

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

Seymour L. Smith, contra.

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

ROSE, J.

This is a suit in equity for an injunction to prevent the secretary of the department of agriculture and the chief game warden of Nebraska from enforcing the legislative act containing the following provisions in so far as they relate to the waters of the Missouri river:

"No person shall take or attempt to take any fish except minnows from the waters within the state of Nebraska with nets, traps or seines. Carp, suckers, gars and buffalow fish may be taken with a spear during the months of March to November inclusive. The possession of any and all seines, except minnow seines, as provided in section 7356, Compiled Statutes of Nebraska for 1922, as amended, nets or traps, except as authorized by the department of agriculture, shall be unlawful." Laws 1927, ch. 126, sec. 10.

Plaintiff is a resident of Nebraska and owns valuable fishing nets, traps and seines. He insists that he uses them exclusively in taking fish from the Missouri river. His petition for an injunction contains pleas that the act of the Nebraska legislature is unconstitutional as applied to the Missouri river; that defendants are threatening to enforce it and to prevent plaintiff, by the use of his nets, traps and seines, from taking fish from the waters west of the middle of the channel; that congress granted to Iowa and Nebraska concurrent jurisdiction over the Missouri river; that Iowa permits fish to be taken therefrom in the manner forbidden by the act of the Nebraska legislature; that those states have not taken concurrent or united action making effective their concurrent jurisdiction; that, in absence of such action or of an effective compact, Nebraska was without power to enact legislation preventing plaintiff from using his property to take fish from any part of the Missouri river; that the act, if enforced, will interfere with his personal and property rights and his lawful means of livelihood and result in the illegal confiscation of his nets, traps and seines in violation of the state and the federal Constitutions.

Defendants denied the invalidity of the legislative act and pleaded authority to enforce it.

Upon a trial of the cause the district court found the issues of law and fact in favor of plaintiff and granted his prayer for a permanent injunction. Defendants appealed.

The question presented by the appeal is the validity of the act as applied to Missouri river waters in Nebraska between the middle of the main channel and the Nebraska bank. The act applies alone to waters within the boundaries of Nebraska and defendants confine their jurisdiction thereto.

The admission of Nebraska into the Union on an equality with the original states established her state sovereignty over the entire area within her boundaries, except as restricted by treaty, by act of congress or by the federal Constitution. The eastern boundary of Nebraska is

the "middle of the channel" of the Missouri river. 13 U. S. St. at Large, ch. 59, sec. 2, p. 47; Comp. St. Neb. 1922, p. 28. The western boundary of Iowa east of Nebraska is the same. An act of congress provides:

"The said state of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said state of Iowa, so far as the said rivers shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same; such rivers to be common to both." 5 U. S. St. at Large, ch. 48, sec. 3, p. 743; 9 U. S. St. at Large, ch. 82, p. 52.

The jurisdiction of Nebraska is not limited to the western bank of the river, unless the restriction is imposed by the words "shall have concurrent jurisdiction" as they appear in the provision quoted. The meaning of the expression has been the subject of judicial discussion and of some diversity of opinion. The better view seems to be that those words do not prevent one state from exercising generally civil and criminal jurisdiction over that part of the river within her own boundaries. The power to make treaties has been committed to the federal government and not to individual states. One state cannot require another to unite in treaties, laws, contracts or compacts. If Iowa and Nebraska, with a common boundary in the Missouri river, do not agree on public policy or on methods of exercising concurrent jurisdiction granted by congress, the river is not for that reason a zone without police protection, where the offenses known to criminal law may be committed with impunity. The exigency of preserving order along the border does not necessarily await the concurrent action of two states. Their interests may conflict and they may never agree. The concurrent jurisdiction authorized by congress is not "over" or "in" the river, but "on" the river. Each state, as to river waters within her own boundaries, has rights and powers not committed to the adjoining state. The supreme court of the United States once took occasion to say:

"To avoid misunderstanding it may be well to add that the concurrent jurisdiction given is jurisdiction 'on' the river, and does not extend to permanent structures attached to the river bed and within the boundary of one or the other state." *Wedding v. Meyler,* 192 U. S. 573, 585.

It is clear, therefore, that concurrent jurisdiction is not all-inclusive as applied to the Missouri river. The sovereign power to define crimes and to authorize penalties therefor is inherent in state government. The exercise of police power to protect food at the source of supply within state boundaries is a legitimate function of sovereignty. *Fisher v. Board of Regents,* 108 Neb. 666; *McFadden v. Denter, ante,* p. 38. The natural run of fish from the Missouri river into Nebraska rivers and creeks affects the food supply of the state. Concurrent jurisdiction of Nebraska and Iowa "on" the Missouri river does not prevent the legislature of Nebraska, without the consent of Iowa, from passing laws to prevent fishermen from interfering with the run of fish by stretching nets across Nebraska streams at confluences with the Missouri river. Protection of fish generally in waters within the boundaries of the state is equally clear. There is the highest authority for these views. On this subject the supreme court of the United States spoke as follows:

"The territorial limits of Kentucky extend across the river to low-water mark on the northerly shore. * * * And we think it clear that no limitation upon the power of that commonwealth to protect fish within her own boundaries by proper legislation resulted from the mere establishment of concurrent jurisdiction by the Virginia Compact." *Nicoulin v. O'Brien,* 248 U. S. 113.

Plaintiff's understanding of concurrent jurisdiction is also at variance with the following view:

"Undoubtedly one purpose, perhaps the primary purpose, in the grant of concurrent jurisdiction was to avoid any nice question as to whether a criminal act sought to be prosecuted was committed on one side or the other of the exact boundary in the channel, that boundary some-

times changing by reason of the shifting of the channel." *Nielsen v. Oregon,* 212 U. S. 315.

To prevent conflict of authority and double punishment in the exercise of concurrent jurisdiction granted by congress to two states, where there is doubt about the exact situs of a crime committed on or near the boundary line in a river, the state first acquiring jurisdiction may retain it to the exclusion of the other.

Cases in federal district and circuit courts containing interpretations of concurrent jurisdiction at variance with rulings of the supreme court of the United States have been cited, but are of course not controlling.

Plaintiff insists that he owned and lawfully used his nets, traps and seines before the legislative act assailed was passed, and argues that they will be depreciated in value or destroyed without due process of law in violation of the Constitution, if the legislation is enforced. A valid exercise of police power may affect or destroy values, where the use of the property for its original purpose has become unlawful by a change in public policy as disclosed by a new statute. Prohibition thus affected property in breweries, but the legislation on that subject was nevertheless sustained. *Mugler v. Kansas,* 123 U. S. 623.

Invalidity of the legislative act in controversy has not been shown. The injunction granted by the district court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

Note—See Constitutional Law, 12 C. J. 931 n. 31— Criminal Law, 16 C. J. 61 n. 12, 168 n. 99—States, 36 Cyc. 829 n. 22, 830 n. 32, 840 n. 29—Treaties, 38 Cyc. 965 n. 42.

EUGENE L. BODGE, APPELLEE, V. SKINNER PACKING COMPANY, APPELLEE: CANADA CASING COMPANY, APPELLANT.

FILED MARCH 12, 1929. No. 26416.

1. **Appeal.** In the trial of a law action to the court without the intervention of a jury, its findings of fact on conflicting evi-

dence are entitled to the same force and effect as the verdict of a jury, and if the record contains evidence tending substantially to support such findings they will not be disturbed unless clearly wrong.

2. **Record** examined, and judgment of trial court found to be sustained by sufficient evidence.

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

Fradenburg & Matthews and *William P. Kelley,* for appellant.

William Richie, Jr., and *A. C. R. Swenson, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON and DAY, JJ., and HASTINGS and REDICK, District Judges.

THOMPSON, J.

This is an appeal from an order of the district court for Douglas county disallowing a claim filed by the Canada Casing Company against the Skinner Packing Company and its receiver. In the course of this opinion we shall refer to the claimant as the Canada Company.

The Canada Company is a corporation with its principal places of business at Montreal, Canada; Chicago, Illinois; and St. Louis, Missouri. The purpose of its organization was that indicated by its name, and included in such business was the manufacture (handling) of sheep casings used by packing companies in the manufacture of sausages and frankforters. The Skinner Packing Company was a corporation situate in the city of Omaha, and doing business as by its name signified. As an incident to its business it used in a limited way, at intervals, such sheep casings. Prior to the dates hereinafter mentioned the Skinner Packing Company had become financially embarrassed and closed its doors to business, save and except such as was necessary to close out the stock then on hand. On or about the 8th day of September, 1920, one Leavitt, who was at the time president and general manager of the Canada Company in Montreal, and also vice-

president of the Canada Company in Chicago, called at the plant of the Skinner Packing Company in Omaha for the purpose of selling to that company certain sheep casings, and introduced himself to the superintendent of the Skinner Packing Company and wanted to know who did the buying. He was taken by such superintendent to Mr. Crabbe, the purchasing agent, after meeting whom he was shown through the plant, which as heretofore indicated was then closed so far as its general operation was concerned, and as we find was known so to be by Leavitt. After passing through the plant with the superintendent he again renewed his question to Crabbe as to whether or not the Skinner Packing Company would give him an order for casings, and was informed that they would not at that time, but that he might call the next day at 10 o'clock, which he did, and then was given an order, signed by Crabbe as purchasing agent, for from four to five tierces of such casings to be shipped October 15, 1920. The order was in writing, signed as above stated, handed over to Mr. Leavitt, and he delivered it personally to the Chicago office of the Canada Company. Afterwards, without having informed anybody that he had given such an order, Crabbe wrote to Leavitt asking him not to ship until November 1, 1920. It might be well to state here that the evidence further shows that it was a rule adopted by the Skinner Packing Company, and well known to Crabbe, that he was without authority to give the order in question, or any other order, without first obtaining a requisition authorizing him so to do from the head of the department where the goods were needed, and after having such requisition approved by certain of his superior officers. Further, this procedure was not observed in the instance in question, but that which Crabbe did, he did on his sole initiative, and his superior officers were without knowledge that such order had been given, or that the letter requesting the extension of time of delivery had been written, until on or about the 15th day of November, 1920, when five tierces of such casings had arrived at Omaha

over the Chicago & Northwestern Railway, and were taken to the Skinner Packing Company plant. The chief officers becoming informed of this delivery, and on the same day, in the usual way procured the shipment to be received by the Chicago & Northwestern Railway and shipped back to the Canada Company at Chicago. Shortly thereafter a letter was written to such Canada Company by the Skinner Packing Company officers, informing it that the first knowledge the Skinner Packing Company had of such order having been given by Crabbe was the receipt of the shipment, and that the order was given without authority; that the return shipment had been made to it, and that it should get the goods at that point and place. On receipt of such notification, and after the goods had arrived at Chicago, to wit on November 22, 1920, the Canada Company immediately notified the Skinner Packing Company by wire that the goods had arrived but that it would not receive them, and they would remain there subject to the order of the Skinner Packing Company, as well as at its risk. The goods so remained for a time, and were later sold by the railway company for $33.75, and credit for that amount was given on the freight bill for the shipment. Then the claim in question was lodged.

We have carefully gone over the entire record, read the pleadings and bill of exceptions, and are convinced that the order in question was given without authority, and that the Skinner Packing Company knew nothing about it until the goods had landed in Omaha; that the circumstances surrounding the obtaining of the order by Leavitt were such as to inform him that the plant was closed, as it was, and that it was uncertain whether or not it would ever be reopened; that at any rate the Skinner Packing Company had casings of the kind on hand sufficient to operate for two months, and that this disputed order, if accepted, would serve the Skinner Packing Company for about six months additional. Further, we conclude that it was the duty of the Canada Company to receive the goods reshipped and thus avoid a loss by sale thereof. We are

strengthened in this conclusion, also, by the testimony of Mr. Leavitt, in which we find the following: "Q. And normally I take it if they (the goods) had been refused promptly the procedure would have been to have taken them back? * * * A. That is correct."

We might further state that the Skinner Packing Company was taken over by the Dold Packing Company about November 1, 1920, which was at or very near the time the casings in question were shipped by the Canada Company.

It is true that previous orders had been given by the Skinner Packing Company to the Canada Company for like casings, but in each instance the order was for but one tierce. Further, it is neither alleged nor proved that Leavitt, or any member of the Canada Company, at the time relied upon previous orders, or upon anything that indicated or tended to indicate apparent or implied authority on the part of Crabbe to sign and deliver the order in question. As to such previous orders, all correspondence, etc., relative thereto was addressed "attention provision manager," and not to a purchasing agent as in the instant case. Leavitt knew that the Skinner Packing Company had not been operating extensively, was at that time closed down, that it was not in need of casings to an extent covered by the order, and also must have known that where the goods were promptly returned, as in this case, the procedure would ordinarily have been to have taken them back.

Then, it might not be inappropriate to state that, in the trial of a law action to the court without the intervention of a jury, its findings of fact on conflicting evidence are entitled to the same force and effect as the verdict of a jury, and if the record contains evidence tending substantially to support such findings they will not be disturbed unless clearly wrong.

Under this record we are satisfied that the judgment of the trial court is right, hence should be, and is,

AFFIRMED.

GEORGE H. LAHNERS V. STATE OF NEBRASKA.

FILED MARCH 12, 1929. No. 26541.

1. **Criminal Law:** INSTRUCTIONS. It is not error for the trial judge to refuse to give an instruction directing the jury not to consider exhibits not received in evidence.
2. ———: CHECKS: PROTEST. There being no conflict of interest between the duty of one as cashier of a bank and his duty as notary public, it is not error to admit in evidence a protest made by him of a check presented to his bank for payment.

ERROR to the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

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

C. A. Sorenson, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON and DAY, JJ., and HASTINGS and REDICK, District Judges.

DAY, J.

The plaintiff in error, George H. Lahners, hereinafter referred to as the defendant, was prosecuted and convicted for violation of the statute relative to the making and uttering of a "no fund" check. The statute involved is section 1, ch. 31, Laws 1925, which is as follows:

"Any person who, with intent to defraud, shall make or draw, or utter, or deliver, any check, draft, or order for the payment of money, upon any bank or other depositary, knowing at the time of such making, drawing, uttering, or delivering, that the maker, or drawer, has not sufficient funds in, or credit with, such bank or other depositary for the payment of such check, draft or order, in full upon its presentation, shall, upon conviction, be punished."

The defendant made a check October 8, 1926, for the sum of $339.32, payable to the Community Produce Company. When this check was presented to the bank for payment October 14, 1926, payment was refused because the

defendant did not have sufficient funds in, or credit with, the bank to pay it.

The defendant contends in his assignments of error that it was error for the trial court to permit the county attorney, in his opening statement, to state to the jury that he would offer to prove, if permitted by the court, that some four or five months after this transaction the defendant gave a check for $5, and nine or ten months later he gave another for $142, which were refused payment by the bank. Defendant contends that these transactions were too remote to the one involved to be admissible solely for the purpose of throwing light on the intent of the defendant. We think the defendant's objection was good. So did the trial judge, because the record discloses that exhibits 21, 22, and 23, the checks in question, were not received in evidence by him and defendant's objections to their reception were sustained. The county attorney in his opening statement was entitled to outline his theory of the case. This he did simply and briefly with reference to these checks without personal comment. The court having sustained objections to their receipt in evidence, the jury were in effect told that these checks were not to be considered.

It was not necessary, therefore, that the trial judge give the instruction requested by the defendant, which in substance told the jury not to consider these checks. In this connection, we have also examined instruction No. 10, and the court in substance informed the jury that evidence had been received of the making, delivering and nonpayment of other checks, and that such evidence was permitted solely for the reason that it tended to throw light on the intent of the defendant to defraud when he made and uttered the check described in the information. This referred to the other checks received in evidence by the court. In this, the court followed the rule announced in *Hayward v. State,* 97 Neb. 9. The jury, undoubtedly, understood this instruction to refer to the checks offered and received, and not to apply to checks not received in evidence.

The defendant assigns as error the refusal of the trial judge to direct a verdict for the defendant for the reason that the evidence failed to disclose who had been defrauded. The evidence shows that the Community Produce Company is a partnership. The persons composing this partnership were defrauded by this "no fund" check. They delivered poultry to the defendant in return for said check. This is a super-technical objection which is answered by the evidence itself.

It is also contended that the court erred in receiving in evidence exhibit No. 5, being a notice of protest of the check, which is the basis of this prosecution, made at the request of the State Bank of Belvidere by its cashier, before himself as a notary, and, as such notary, protested by him at his own request as cashier of said bank. The cashier in this case had no interest in the check. There was no conflict of interest between his duty as cashier of the bank and his duty as notary public. Section 4764, Comp. St. 1922, provides only that the protest shall be made by a notary. There is no contention that the facts sought to be proved by said protest are not true. It was proved by other competent evidence and was not contradicted by any evidence adduced by defendant. Therefore, even if inadmissible, it is an error that could not be prejudicial to the rights of the defendant.

The last and most seriously urged assignment of error urged by the defendant is that the verdict is not sustained by sufficient evidence. In this connection he urges that the evidence does not show that he made and uttered the check in question with intent to defraud. That was the issue in this case and was practically the only issue. The evidence upon this question is conflicting. The defendant made and delivered the check involved October 8, 1926, for $339.32. There were nine other checks introduced in evidence, given within four days of it, the sum total of which checks was $1,397.66. It is true that on October 9, 1926, he deposited $2,450. He complains because the check was not presented for payment until the sixth day

after issuance. But there was at no time sufficient money deposited to take care of all the checks he had issued. He knew his account was in bad shape, because he testified that on October 5 the cashier of the bank called him in and said to him: "We have a total amount up to $1,300. If you can't get the money and if they don't send the money up here to you we will have to protest the checks and send them back." He borrowed the money to take up these checks from the Bruning State Bank. At this time the State Bank of Belvidere did not extend him credit and neither did Suiker. This is significant, we think, since he claimed that he was working for Suiker in the buying of poultry and that Suiker had agreed to finance him. He testified that Suiker had made arrangements with the bank for credit, but Suiker and the cashier of the Belvidere bank testified that no such arrangement was made. Suiker also testified that he bought poultry from defendant after he had loaded a car and that the money he paid him was an advance on the purchase price. This therefore made an issue of fact upon which there was conflicting evidence as to whether in giving the check the defendant did so with intent to defraud. It appears the jury believed the cashier of the bank and Suiker instead of defendant. With reference to the element of intent and knowledge in this offense the legislature provided:

"In any prosecution under this act as against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee because of lack of funds or credit, shall be presumptive evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank or other depositary; provided such maker or drawer shall not have paid the payee thereof the amount due thereon, together with all costs and protest fees, within five days after receiving notice that such check, draft or order shall have been protested, the notice of protest thereof shall be admissible as proof of such presentation for payment, nonpayment and protest; and if such notice of protest or the

drawee's notice of dishonor thereof shall state that payment of such check, draft or order was refused because of lack of funds or credit of the maker or drawer, then such notice of protest or notice of dishonor shall be presumptive evidence that there was a lack of funds in, or credit with, such bank or other depositary, for the payment of such check, draft or order.

"The word 'credit' as used herein shall be construed to mean an arrangement or understanding with the bank or depositary for the payment of such check, draft or order." Laws 1925, ch. 31, secs. 2 and 3.

It will be noticed that the offense is purely statutory and has no relation to the common law. It is a statute that in aid of the police power and upon the grounds of necessity might have eliminated intent and knowledge as an essential element. *State v. Striggles,* 202 Ia. 1318. The legislature has provided that the doing of the act in this case shall be presumptive evidence of intent and knowledge. The act denounced as a crime in this statute is *malum prohibitum,* and as such it is within the power of the legislature to lessen the degree of proof necessary relative to elements of the crime which might have been eliminated altogether as an essential element of the offense. The presumption provided by the statute is not conclusive and is rebuttable. It does not shift the burden of proof to the defendant. The presumption of innocence is still a matter of evidence to which the defendant is entitled, but along with it the jury are entitled to consider the presumption provided by this statute as to knowledge and intent.

The jury in this case, on the question of intent and knowledge, had the check upon which payment had been refused for lack of funds. They had nine other checks, unpaid, given at about the same time, aggregating $1,397.66. They knew that on the day his bank balance was $35.50, and that he deposited $2,450 the next day, which was insufficient by about $1,400 to pay his outstanding checks; that three days before he borrowed $1,500 to take up some outstanding checks; and that a week later

he filed a petition in bankruptcy to relieve himself of civil liability as to these checks. In addition, they had the conflicting testimony as to his arrangement for credit at the bank to take care of his checks. This is abundant evidence to sustain the verdict of the jury.

Finally, the defendant contends that the sentence is excessively severe. The amount involved in the check is considerable. The penalty imposed, one year in the penitentiary, is not nearly the maximum, of seven years. Of course, the court might have sentenced the defendant to pay a fine of $100 to $5,000, but after a careful perusal of the record we are of the opinion that the defendant had a fair and impartial trial; that his defense was properly submitted to the jury; and they found him guilty. The sentence imposed by the trial court is abundantly justified by the record, and this court will not, in this particular, substitute its judgment therefor.

AFFIRMED.

STATE, EX REL. HERBERT M. HIGGS, APPELLEE, V. PEARLE E. SUMMERS, APPELLANT.

FILED MARCH 12, 1929. No. 26334.

1. **Schools and School Districts:** MAINTAINANCE OF SCHOOL: DUTY OF COUNTY SUPERINTENDENT. Under the provisions of section 6261, Comp. St. 1922, if any school district shall for two consecutive years fail to maintain a public school as required by law to do, it shall be the duty of the county superintendent of the county in which such district lies to attach the territory of such district to one or more adjoining school districts.
2. **Statutes:** PROVISO: CONSTRUCTION. The general purpose of a proviso in a statute is to modify the operation of that part of the statute immediately preceding the proviso, or to except something from the operation of the statute which would otherwise have been within it, but it is not always so used. The word "provided" as it is used in section 6261, Comp. St. 1922, has the same meaning that the conjunction "and" or "but" would have if used in its place.
3. **Schools and School Districts:** MAINTAINANCE OF SCHOOL. Where at an annual school meeting, at which relator was present and

took part, it was voted that no school be held in said district for the ensuing year and that no tuition be paid, and thereafter three electors voluntarily donated a sufficient sum of money to an adjoining district to furnish school privileges for relator's children, *held*, such action by said electors was not binding on the school district and did not amount to the maintaining of a public school in said district as required by law.

APPEAL from the district court for Sheridan county: ROBERT R. DICKSON, JUDGE. *Reversed, with directions.*

E. D. Crites, F. A. Crites and *Lloyd H. Jordan,* for appellant.

J. E. Porter, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and BEGLEY and RAPER, District Judges.

BEGLEY, District Judge.

Action in mandamus to compel the respondent, as county superintendent of public instruction of Sheridan county, to make an estimate of the amount necessary to be expended for school purposes in school district No. 116, and deliver same to the county clerk for the purpose of levying school taxes for the coming year, as provided by section 6289, Comp. St. 1922, the school board in said district having failed to perform its duty. The respondent answered, alleging that said school district was financially unable to maintain a legal term of school and had failed to maintain a public school for two consecutive years prior to May 16, 1927, and on said day, pursuant to the provisions of section 6261, Comp. St. 1922, respondent entered an order discontinuing said school district and annexing its territory to certain surrounding districts, and that said order could not be attacked collaterally. On the trial a writ of mandamus was allowed and, respondent has appealed.

The facts are stipulated and may be summarized as follows: School district No. 116 is a small rural district in Sheridan county, comprising six sections, with a valuation

of $27,496. The cost of maintaining a school in said district is $100 a month. The law permits a levy of eight mills for school purposes, and, by a vote of the electors, a maximum levy of twenty mills. For many years prior to the fall of 1925 school was maintained and the district became indebted more than $1,600. Since said time no school has been held. There are thirteen electors in the district and only the four children of relator attend school. At the annual school meeting in said district in June, 1925, it was voted not to have school for the ensuing year, and also that no money be provided for school purposes, but thirty-five mills was voted to be applied upon the district indebtedness. At this meeting Herbert M. Higgs, the relator, moved, and it was seconded by his wife, that tuition be allowed. Said motion was lost by a vote of two to six. No school was maintained the following year and relator sent his four children to school in district No. 43, but no tuition was paid said district. At the annual school meeting in district No. 116 in June, 1926, on motion of relator, it was voted that thirty-five mills be levied for the ensuing year, to be used to finish paying the debt and repair of school property. It was again voted to hold no school for the following year. No school was held in 1926-1927, and relator again sent his children to school in district No. 43. In September, 1926, the officers of school district No. 43 refused to accept relator's children for school purposes unless the tuition, amounting to $96 a year was paid for the past year and also paid in advance for the coming year. Thereupon three electors of school district No. 116, two of whom were officers of the district, voluntarily contributed the amount and it was paid by personal check to district No. 43. On May 16, 1927, a petition signed by seven electors of school district No. 116 was filed with the respondent, requesting her as county superintendent to annex the property of said district to adjoining school districts and to close up its affairs. Respondent thereupon entered an order finding that said school district had failed to maintain a school from public funds

for two consecutive years and that its assessed valuation was far below the necessary amount required to maintain a legal term of school, and ordered the same discontinued, and that its property be annexed to the adjoining districts. No annual meeting of the electors of school district No. 116 was held in June, 1927, and on July 28, 1927, relator brought this action.

The dispute in this case arises over the proper construction to be placed upon section 6261, Comp. St. 1922, which reads as follows:

"When for a continuous period of one year a district shall have less than two legal voters residing therein, the county superintendent may, in his discretion, annex the district to one or more adjoining districts upon petitions signed by a majority of the legal voters of such adjoining district or districts: Provided, if any school district shall, for two consecutive years, fail to maintain a public school, as required by law to do, it shall be the duty of the county superintendent of the county in which such district lies to attach the territory of such district to one or more adjoining school districts."

Relator contends that the proviso relates to and is limited by the preceding part of the section, and that respondent had jurisdiction to attach the territory of such district to an adjoining district only if a petition signed by a majority of the legal voters of the adjoining district had been presented to her. Respondent claims the proviso is an addition to the preceding part of the section, and the duty in such cases is mandatory upon the county superintendent and no such petition is necessary.

The original section down to the word "provided" was enacted in 1897. Laws 1897, ch. 62. There was at that time no provision made for dissolving school districts that had ceased to hold school, and in 1909 the legislature amended the act by adding all after the word "provided," apparently to remedy this defect. Laws 1909, ch. 117. In construing this section we must bear its obvious purpose in mind. As a general rule the office of a proviso is to modify the

operation of that part of the statute immediately preceding the proviso, or to except something from the operation of the statute which would otherwise have been within it, but it is often used in other senses, such as here, where we are dealing with an addition by way of amendment made under new circumstances to a form of words adopted many years before. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing an amendment to them to precede their proposed amendment with the term "provided," so as to declare that notwithstanding existing provisions the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction "and" or "but" in the same place, and simply serving to separate or distinguish the two different paragraphs or sentences. 25 R. C. L. 984, sec. 231. In the case of *Radil v. Morris & Co.*, 103 Neb. 84, it was held that the word "provided" used in a section of the workmen's compensation act should be construed as meaning "and" or "but." Such also is the holding of the federal courts: *Georgia R. & Banking Co. v. Smith,* 128 U. S. 174; *United States v. Babbit,* 1 Black (U. S.) 55; *Interstate Commerce Commission v. Baird,* 194 U. S. 25; *United States v. Whitridge,* 197 U. S. 135; *American Express Co. v. United States,* 212 U. S. 522; *Chesapeake & Potomac Telephone Co. v. Manning,* 186 U. S. 238.

Therefore, the word "provided" as used in section 6261 should be construed to have the same meaning as the conjunction "and" or "but," and, if so construed, it directs the county superintendent, when any school district has failed to maintain a public school for two consecutive years as required by law, to attach the territory of such district to one or more adjoining districts, without requiring a petition therefor. To hold that children residing in a school district without educational facilities would be required to wait until a majority of the electors in the adjoining districts agreed to permit them to attend their school would in many cases result in a denial of the free

education guaranteed them by law. District No. 116 is financially unable to furnish school facilities for a legal term of school. While relator's children have a greater distance to go to school, yet it is located on the only public highway through the district, and is the school which they have attended for the past two years. It is an admittedly good school and relator's taxes will be less than if he remained in district No. 116.

The relator contends that tuition was paid for his children during the past two years, and that this amounts to the maintaining of a school in this district. However, the tuition was not paid by the district, but by private individuals, and against the express direction of the electors at their annual meeting. Relator was present at all school meetings and was aware of the action taken thereat. He was not misled and the school district is not bound by the acts of volunteers.

The judgment is therefore reversed and the cause remanded, with directions to the trial court to enter an order denying the writ of mandamus and dismissing the plaintiff's petition.

REVERSED.

DAY, J., dissents.

GEORGE A. HOAGLAND & COMPANY, APPELLEE, V. WILLIAM C. DECKER ET AL., APPELLEES: PRUDENTIAL INSURANCE COMPANY, APPELLANT.

FILED MARCH 12, 1929. No. 26266.

1. **Subrogation.** No general rule can be laid down which will afford a test in all cases for conventional subrogation. Whether or not the doctrine of conventional subrogation is applicable in any particular case depends upon its particular facts and circumstances, the principle not being enforced as a matter of legal right, but in order to subserve the ends of justice in the particular controversy under consideration.
2. ———. Conventional subrogation arises where one pays the debt of another under an agreement, express or implied, existing at the time of payment, with either the debtor or the cred-

itor, that the person paying shall be subrogated to the liens existing as security for the debt.

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

T. B. Dysart, N. M. York and *Stanley Cheff,* for appellant.

Cook & Cook, W. A. Stewart and *D. E. Harper, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and BEGLEY and RAPER, District Judges.

RAPER, District Judge.

William C. Decker purchased and took possession of a half section of land in Dawson county in late summer of 1924, under an executory contract, and in October or November 1924 began the erection of a dwelling and other buildings. He received a deed to the farm in May 1925. At the time he purchased this land it was incumbered by a mortgage to the Union Central Life Insurance Company for the sum of $7,500, which bore 7 per cent. interest, and due April 1, 1931. About the time he received his deed he applied to the Prudential Insurance Company, appellant, for a loan on the land to take up the Union Central mortgage. This new loan was to bear interest at 5½ per cent. and mature June 1, 1935. While the application for the loan was pending, appellant's agent told Mr. Decker that the new mortgage would have to be a first lien, and Mr. Decker agreed to it. The appellant's agents were informed that buildings were being erected, and that laborers and materialmen might have liens for labor and material furnished for such buildings, and it requested of Mr. Decker that waiver of those liens be furnished to appellant before the loan was closed and money paid. Decker did not secure the waiver. By some mischance, those waivers were not obtained, and that fact was overlooked when appellant paid its money on the prior mortgage. The appellant's mortgage was dated May 16, 1925, acknowledged May 23,

1925, and delivered and was recorded June 19, 1925. Pursuant to the arrangement and understanding with Mr. Decker, on June 22, 1925, appellant paid to the Union Central Life Insurance Company the amount due on its mortgage, and took a release of that mortgage, which release was recorded July 25, 1925. The testimony clearly discloses that it was the intention of the appellant and Mr. Decker that this new loan and mortgage was to take the place of the mortgage to the Union Central Life Insurance Company as a first lien on the land, and that appellant paid off the first mortgage with the expectation and belief that it was to get a first lien on the land and with that end in view.

The plaintiff, George A. Hoagland & Company, pursuant to oral agreement with Decker, between November 10, 1924, and April 14, 1926, furnished building material for the erection of the buildings on the premises, and N. Nelson, a carpenter, performed labor on the buildings during practically the same period, and George A. Hoagland & Company and Nelson each filed lien within the time provided by law for the amount of their respective claims. In October, 1926, George A. Hoagland & Company began this action to foreclose its lien, claiming first lien on the land, and making William C. Decker and his wife and N. Nelson and the appellant, with other parties, defendants. Nelson filed cross-petition asking foreclosure of his lien, and the appellant by cross-petition alleged the payment of certain taxes on the land to protect its mortgage, and pleaded the facts as above herein set out as to payment of the Union Central Life Insurance Company, and asking its mortgage be subrogated to the lien of the Union Central Life Insurance Company, and, because of a failure of the maker to pay interest and taxes, declared the whole sum due on its note and mortgage as authorized by the terms of the mortgage, and asked foreclosure and to be given first lien. Issues were joined on these various claims and trial had. The district court in its decree foreclosing each of said liens gave appellant a first lien for the

taxes paid, and gave George A. Hoagland & Company and N. Nelson a second lien of equal priority, and decreed appellant's mortgage as third lien. From that decree the Prudential Insurance Company appeals solely on that part of the decree which gave appellant's mortgage third lien instead of priority over the plaintiff and N. Nelson.

In *Cheesebrough v. Millard,* 1 Johns. Ch. (N. Y.) 409, Chancellor Kent said the right of subrogation is founded upon natural justice and is recognized in every cultivated system of jurisprudence.

"Subrogation in its broadest sense is the substitution of one person in place of another with reference to a lawful claim or right." 25 R. C. L. 1311, sec. 1. And it has been said that no doctrine of equity jurisprudence is more beneficent in its operation than is subrogation, and perhaps none stands in higher favor.

Courts recognize two kinds of subrogation, legal and conventional, and sometimes when the term is used without qualification legal subrogation is meant and may thus give rise to a misunderstanding of some of the court's holdings. The word "conventional" is defined as growing out of or established by convention; that is, an agreement or mutual engagement between persons. As the name implies, conventional subrogation is founded upon some understanding or agreement, express or implied, and without which there is no "'convention." Legal subrogation follows as a matter of legal right without any agreement.

Judge Good, in *State v. Holdrege State Bank,* 110 Neb. 814, at page 819, gives a concise and comprehensive statement of these distinctions: "Conventional subrogation arises where one pays the debt of another under an agreement, existing at the time of the payment, with either the debtor or the creditor, that the person paying shall be subrogated to the liens existing as security for the debt. It differs from legal subrogation which exists only in favor of the surety for the payment of the debt, or one who is compelled to pay the debt to protect his own rights. Conventional subrogation arises by reason of either an express

or an implied agreement between the third person paying the debt and either the debtor or creditor." He cites, in support, a large number of cases. In a still later case, *Prudential Ins. Co. v. Qualset,* 116 Neb. 706, this court held: "Generally, where one pays or advances money to pay a mortgage debt in whole or in part with the understanding that he is to have the benefit of the mortgage, he becomes a holder of the lien by subrogation." See, also, *Meeker v. Larsen,* 65 Neb. 158; *Frederick v. Gehling,* 92 Neb. 204; *Bohn Sash & Door Co. v. Case,* 42 Neb. 281.

Now, applying this principle of conventional subrogation to the facts in this case, there appears no reason why the appellant should not be subrogated to the lien of the Union Central Life Insurance Company's mortgage. There was an agreement and full understanding upon which appellant relied that it was getting a first lien in the place and stead of the old mortgage. The new mortgage was for the same amount as the old one; it was to the advantage of the mortgagor in that the new loan materially reduced the rate of interest, and the mere fact that appellant knew there was material and labor being furnished for buildings and asked Decker to procure release from the persons who were furnishing material and labor for waiver of liens, which Decker failed to do, is not such negligence as bars appellant from the right of subrogation. The plaintiff and Mr. Nelson were not placed in any worse position. They were in fact bettered somewhat, because their debtor, Mr. Decker, was relieved of a considerable sum in payment of interest. Decker defaulted on the interest, and if the new mortgage had not been given the interest charge would have been greater under the old mortgage. When they began to supply the means of erecting the buildings they knew there was a mortgage of $7,500 on the farm, and that their claims would be subordinate to that mortgage. The new mortgage does not change or lessen their security or prejudice them in any way.

Appellees insist that, if subrogation is granted in this case, *Bohn Sash & Door Co. v. Case,* 42 Neb. 281, and *Rice*

v. Winters, 45 Neb. 517, must be overruled. We do not so understand the holdings in those cases. It does not appear in the *Rice* case that there was an agreement with the debtor to give a first lien by the new mortgage to take the place of the older mortgage, nor in the *Rice* case or *Bohn* case that the persons who advanced the money to take up the prior valid mortgages were relying upon their new securities to take the place of the old ones. Commissioner Ryan in the *Bohn* case, page 298, says: "It is not enough to entitle to subrogation that with the proceeds of the Myers mortgage prior mortgages have been discharged. 'The real question in all such cases is whether the payment made by the stranger was a loan to the debtor through a mere desire to aid him or whether it was made with the expectation of being substituted in the place of a creditor. If the former is the case, he is not entitled to subrogation; if the latter, he is.'" In other words, they paid off the first liens without the intention to hold their right to succeed to the lien of the prior mortgages, and without the agreement of the debtor that the new mortgages were to be a first and prior lien. The facts in those cases were somewhat different from the case at bar. Appellees also cite *Webber v. Frye,* 199 Ia. 448. The facts in that case, in the opinion of that court, were not sufficient to invoke the rule of subrogation for the party because of inexcusable negligence, and that he did not intend to hold right to be subrogated to the original lien; but in that case the court held: "One furnishing funds for payment of mortgages and accepting new mortgage is subrogated to rights of mortgagee whose mortgage he pays, only if he acts without intent to waive or relinquish the lien of mortgage so paid." That is the equitable principle adopted in the Nebraska cases above cited.

The district court did not have the last case in this state before it when the trial was had. That case, *Prudential Ins. Co. v. Qualset, supra,* is the last expression of this court; it states the correct equitable rule, and is and should be followed in the case at bar.

Under the facts shown in this case, the appellant is entitled to the first lien on the premises by virtue of its mortgage, and it is so decreed, and the decree of the district court is so modified in that respect, and the cause is remanded to the trial court, with direction to modify its decree as above stated, and award appellant a first lien for taxes paid and for the amount of its mortgage with interest, and to award the plaintiff and N. Nelson, a second lien, they to prorate therein, and the decree as so modified is, in all other things affirmed.

AFFIRMED AS MODIFIED.

LOUIS POSPISIL, APPELLEE, V. ARTHUR ACTON, APPELLANT.

FILED MARCH 12, 1929. No. 26157.

1. **Assault and Battery:** DEFENSE: INSTRUCTION. Where, in a civil action of assault and battery, defendant pleaded self-defense and defense of his family, and the circumstances were such as to warrant the jury in finding that defendant acted in part in the defense of his family, which was present and nearby, such defense should be submitted to the jury by proper instructions.
2. **Trial:** INSTRUCTIONS. Where an instruction is properly requested upon some special feature of the case presented by the pleadings and evidence, it should be given, unless covered by other instructions of the court; and if the requested instruction is defective in form, it is the duty of the court to prepare and give a proper instruction upon the point covered by the request.

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

Jack, Laughlin & Vette, for appellant.

Bartos, Bartos & Placek and *James A. McGuire, contra.*

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

REDICK, District Judge.

Assault and battery. Plaintiff stated in his cause of action that the defendant, without any provocation, as-

saulted plaintiff by striking him with a chair, thereby causing him severe injuries. The defendant answered, alleging that at the time in question, while defendant was seated in a chair, plaintiff, without any provocation, struck defendant a violent blow upon his head, causing the defendant and the chair whereon he sat to turn about on the floor, and that defendant thereupon, and in self-defense, and in defense of his wife and children, quickly arose, seizing the chair in which he had been sitting, and admits that he then struck the plaintiff with said chair, but with no more force than defendant believed to be and which actually was necessary to repel said unlawful assault of the plaintiff. Plaintiff replied by general denial. The case was tried to a jury, which returned a verdict for the plaintiff for $1,324.80, upon which judgment was rendered, and defendant appeals.

The situation and relationship of the parties, as shown by the evidence, was substantially as follows: Defendant was a farmer about 28 years of age, weighed 150 pounds, and lived with his wife and two children, one 2½ years of age, and one about 9 months, in the house in which the assault took place. Plaintiff was the hired man on the farm, living with the family, and was a deaf mute. He was 36 years of age, weighed about 175 pounds, and very strong and husky. He had worked for defendant off and on for about a year and a half, and for several months prior to the assault. At the time of the trouble the evening meal had just been finished. The day before the assault the plaintiff had suffered an accident by falling from a wagon, and injured his back, of which he complained. The occurrences after supper, as detailed by the defendant and corroborated by his wife, are about as follows: Plaintiff left the supper table and, looking at the defendant, addressed him in sign language, with which communication was had between the parties, pointed to his back, and said, "I wish you had a back like mine." He then walked over a short distance and sat down in a rocking chair. Defendant was then sitting on a couch nearby

with his small boy, and, supposing plaintiff was joking, smiled and said nothing. After being seated, plaintiff said, always in sign language, "kill," "I will kill you," and repeated it several times, the while appearing and being very angry and excited. Defendant then got up, saying, "You can't talk like that in my house, I'll pay you off and you can get out," and walked past the plaintiff to a buffet, secured a time book and returned to the dining table for the purpose of writing a check for the amount due plaintiff. As he was sitting in the chair he turned his head around to look at a calendar for the purpose of getting the date, when without provocation, plaintiff arose quickly from the rocking chair and struck defendant a glancing blow on the side of the head. Defendant testifies that he warded off the blow by striking up plaintiff's arm; that, notwithstanding, the blow caused him to spin around in his chair, and he immediately got up, seized the chair and struck the plaintiff. He testifies that the deed was in self-defense and in defense of his family, and that he used no more force than was apparently necessary for that purpose. We have not attempted to give the language of the witnesses, but the above is the effect of their testimony.

The principal error assigned by defendant, and the one which we deem it necessary to consider, is the refusal of the trial court to give certain instructions requested by defendant. In the statement of the issues the trial court epitomized the answer of defendant as follows: "That without any previous provocation on his part the plaintiff violently, maliciously and unlawfully struck defendant a severe glancing blow along his right temple, and that defendant thereupon, and in self-defense, seized the chair in which he had been sitting and struck plaintiff upon the left side of his head with said chair, but with no more force than he believed to be and which actually was necessary to resist and repel said unlawful assault." And the subsequent instructions submitted the case to the jury upon the theory of self-defense only, without any refer-

ence whatever to the place of the assault or the claim of defendant that he acted in defense of his family.

The defendant requested the court to give the following instructions, among others:

"Instruction No. 1. You are instructed that the undisputed evidence in this case shows that the plaintiff was struck on the head by a chair in the hands of defendant. The defense in this case is that this was done in self-defense and in defense of his family, who were nearby. The burden of proof is on defendant to prove this defense by a preponderance of the evidence. And if you believe from the evidence that the defendant has so proved this defense, you will find for the defendant and against the plaintiff."

"Instruction No. 5. If, from the evidence in this case, the jury believe that the defendant acted in the defense of his person, or of his family, or both, from real and honest convictions as to the character of the danger, induced by reasonable evidence, although he might be mistaken as to the extent of the actual danger, then the jury should find for the defendant, unless from the evidence you believe that defendant used an unnecessary degree of force or violence under the circumstances."

By these instructions defendant sought to avail himself, not only of self-defense, but of his claimed defense of his family, and both instructions were refused.

In support of the ruling of the trial court plaintiff contends that the claim of defendant in his answer and evidence, that he acted in defense of his family, is insufficient in law, for the reason that, before one may claim to act in defense of a third person, such third person must have been the subject of an attack or in such imminent danger thereof as to induce one exercising a reasonable and proper judgment to interfere to prevent the consummation of the injury, and that no such situation is presented by the evidence. The rule is stated in 5 C. J. 638, sec. 35:

"A person is justified in using sufficient force to protect the members of his family, provided the apparent danger is such as to induce one exercising a reasonable

and proper judgment to interfere to prevent a consummation of the injury."

We approve this statement of the rule but under it the question to be determined is whether or not the danger to the family was so apparent as to justify the act of the defendant. This is a question of fact ordinarily for the determination of the jury. Of course, there may be cases where the claim of justification is so flimsy and without reasonable foundation that the court may decide it as a question of law. Is the instant case one of these? We think not. While the imminent attack was upon the defendant only, it must be remembered, upon the theory and evidence of the defendant, that the altercation took place in a room of the defendant's house, at a time just before dark, in the presence of defendant's wife, who was sitting with her small boy upon her lap only three or four feet away; that plaintiff looked furiously angry, was a deaf mute and therefore not entirely normal, and there was some evidence of some slightly violent conduct of plaintiff toward defendant's wife a few weeks previous to the occurrence. All of these facts were proper to be taken into consideration by the jury in determining the final question whether or not defendant acted, under all the circumstances, as a reasonably prudent man would have done.

We think the evidence was sufficient to require the submission to the jury of the question whether or not defendant was acting in defense of his family, because, taking the theory of the defense, the assault of defendant was entirely without provocation, was by a large and powerful man, apparently in a state of uncontrollable anger, and it was probably impossible for defendant in the excitement of the moment to measure with any degree of accuracy the final effects of such an attack if the same were not immediately stopped. But for defendant's good fortune in deflecting the blow, who can say who would be the next victim of plaintiff's passion. It seems a natural conclusion that defendant would have in mind the nearby presence of his wife and child, and that such situation had some part in prompting him in the determination

of the necessary measures to be taken to stop the assault upon himself and prevent its possible extension to his wife and child. Furthermore, the attack was made in a room of defendant's house, where escape was difficult and, even if possible, would have been the resort of a coward. An interesting discussion of the right of a man to defend his family when they are not directly attacked will be found in *Higgins v. Minaghan,* 78 Wis. 602. See, also, *Coons v. State,* 68 Tex. Cr. Rep. 596. Under such circumstances the defendant cannot be required to measure with accuracy the results of noninterference. All that is required of him is that he act as an ordinarily prudent man would act under the surrounding conditions, and this was a question for the jury.

But whether or not the defense of family is legally sufficient in this case, we think that defendant was entitled to have the jury instructed upon the point covered by the requests above quoted, if not in the exact language thereof, at least upon the subject of the presence of defendant's family at the time of the assault. Surely in determining the quality of defendant's act it was proper for the jury to consider the near presence of his family as an important circumstance tending to color his act. The instructions of the court entirely ignore this feature of the case and submit it to the jury as though the affair had taken place in the street and the two combatants were the only ones involved. It might not have been error for the court to fail to instruct upon such special feature of the case unless requested, but we think when such a feature is presented by the pleadings and evidence and a request for instruction, the jury should be instructed thereon, either in the language of the request or that of the court. In *Strubble v. Village of DeWitt,* 81 Neb. 504, it was held: "When instructions are asked by either party to the suit, which correctly state the law upon the issues presented by the pleadings and the evidence received during the trial, it is error to refuse them, unless the points are fairly covered by other instructions given by the court on its own

motion." And at page 505 Fawcett, C., said: "The two instructions requested by defendant correctly stated the law, were in point and should have been given (citing cases). If the court regarded them as defective in form, it should have treated them as requests for instructions on the points designated, and have properly instructed the jury upon the points requested." In *Western Mattress Co. v. Ostergaard,* 71 Neb. 575, we held: "When a special request is made for an instruction which fairly reflects either a meritorious cause of action or ground of defense, the court should either give the instruction requested or substitute another in its stead which embodies the same principle."

Plaintiff contends that instruction No. 11 given by the court meets all the suggestions of the requests. That instruction is as follows:

"The jury are instructed that, in determining the question of the reasonableness of the action of the defendant in striking the plaintiff, they should take into consideration the excitement of the occasion, if any such is proved, the previous violent conduct of the plaintiff towards the defendant, if any such is proved, and from a full, fair and candid consideration of all of the evidence and facts and circumstances proved on the trial determine whether the defendant acted as a reasonable man would under the same circumstances."

In the absence of any request on a particular feature of the case, defendant might not successfully urge error in this instruction, but we think that, where the court instructs the jury what matters may be considered in determining a certain point, all of the major contentions of the parties should be included and only the minor facts and circumstances left to be covered by the catch-all phrase "all other facts and circumstances proved." This would be especially so where the attention of the court is specially called to the point by requested instruction. By instruction No. 11 the jury might fairly conclude that the only important points for their consideration upon the

character of defendant's act were the excitement of the occasion and the previous violent conduct of plaintiff toward defendant, and that the facts and circumstances were of no great importance. We think, however, that the place of the assault, in defendant's home, the unprovoked assault upon defendant, and the near presence of his wife and small child were very important matters for consideration by the jury upon the point covered by the instruction.

For the reasons above stated, judgment must be reversed.

REVERSED AND REMANDED.

GOOD, J., dissenting.

I concur in the propositions of law as announced in the syllabus, but do not concur in the view that the propositions announced are applicable to the facts disclosed by the record.

The record discloses no act of violence on the part of plaintiff towards any member of the family of defendant other than himself; nor does the record disclose any threats by plaintiff against any one other than defendant. Under this state of facts, the trial court properly refused to submit to the jury the proposition that the defendant may have been acting in defense of his family. As I view the record, the only questions for the jury were: First, was defendant acting in defense of his own person when the injuries were inflicted on the plaintiff? second, if so, did defendant use more force than the circumstances warranted? and, third, if so, the amount of recovery. These questions were fairly submitted to the jury upon conflicting evidence. The judgment on the verdict should be affirmed.

IN RE ESTATE OF LOUIS HANSON.
JOHN M. HANSON ET AL., EXECUTORS AND TRUSTEES, APPELLEES, V. DOROTHY M. HARKSON ET AL., APPELLEES: HENRY W. HARKSON ET AL., APPELLANTS.

FILED MARCH 16, 1929. No. 25914.

1. Wills: CONSTRUCTION: REMAINDERS. The law favors early vesting of estates, and the inference of a vested remainder is stronger than the inference of a contingent remainder. *Davis v. Davis*, 107 Neb. 70.
2. ———: ———: ———. A will devising a life estate to the wife of a testator, his property at her death to be divided equally among his six children, and providing, in case of the death of any of them prior to the death of testator's wife, that the share of such one shall go to his or her heirs, construed to devise a vested remainder to the children living at the death of the testator.
3. ———: ———: "HEIRS." Unless excluded by unambiguous words or by clear implication arising out of the language used in a will, the description therein of "heirs" may include a surviving spouse as well as a surviving child or children; and therefore a surviving husband may be an heir of his deceased wife.
4. ———: "HEIRS": ORAL TESTIMONY. Record examined, and *held* that the trial court erred in receiving and following oral testimony as to the intention of the testator that the word "heirs" did not include the husband, who was an heir of his deceased wife.

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

Burkett, Wilson, Brown & Wilson and *Hall, Cline & Williams*, for appellants.

M. L. Easterday and *G. Porter Putnam, Jr.*, *contra.*

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

GOSS, C. J.

This is an appeal from the decree of the district court construing a will with particular relation to the word "heirs" therein.

The testator, Louis Hanson, died July 29, 1916. His will was executed June 28, 1915. Its first paragraph provided for the payment of funeral charges, administration of the estate and debts; the second gave to Ane Marie Hanson, his wife, the life income; the third provided a gift to the family church; the fifth appointed his two sons executors; the fourth paragraph, construction of which is asked, reads as follows:

"I give, devise and bequeath to my six children, hereinafter named, share and share alike all my estate, real, personal or mixed, remaining at the death of my said wife, Ane Marie Hanson, after the payment as directed in paragraph III, and desire that they divide the same equally between themselves without sale or partition suit. In case, for any reason, the estate cannot be divided by agreement into six equal shares and conveyed to each other by the legatees, I hereby authorize and empower my said executors, or survivor of them, to divide the estate into six equal parts and execute and deliver good and sufficient conveyance to each one of said children or the heirs of any deceased child one of such parts. The names of all my children are as follows: Callie Hanson, Hans D. Hanson, Ernest Hanson, John M. Hanson, Maura M. Hanson and Eliza M. Harkson. In case of the death of any of my said children prior to the death of my said wife, the share of such one shall go to his or her heirs."

Ane Marie Hanson, the widow of testator, died May 18, 1925.

Eliza M. Harkson, a daughter, died June 10, 1920 (after her father and before the death of his widow), leaving surviving her three children, Dorothy, Elaine and Ruby, and Henry W. Harkson, her husband. He claims an undivided one-eighteenth of the entire estate of Louis Hanson, being one-third part of the one-sixth part that was devised to Eliza M. Harkson, whose children, through their guardian *ad litem,* G. Porter Putman, Jr., claim that their father took no interest in the estate.

The Multnomah State Bank is interested as the holder

of a mortgage on the undivided interest of Henry W. Harkson.

The county court held in favor of the children of Eliza M. Harkson and that their father was not entitled to take either as the husband or as her heir.

On appeal the district court held:

"The technical definition of 'heirs' is those who would take in case of the demise of a person intestate, those to whom the law distributes in the absence of a will; and technically this would include Henry W. Harkson the surviving spouse of Eliza Hanson Harkson. It would seem, therefore, if the controversy is to be decided from the four corners of the will alone, without testimony as to the disposition of the testator towards Harkson at the time that the will was made and without testimony as to the surrounding circumstances, that there is no escape from the proposition that Henry W. Harkson is entitled to take under the will as well as his three children."

But the district court, over objection, received oral testimony relating to testator's feelings toward Henry W. Harkson, and relying thereon to modify the "technical definition of 'heirs'" decreed "that that portion of testator's property which would have gone to Eliza Hanson Harkson, had she been living at the time of the death of her mother, goes to, and is distributed to, her children, Dorothy, Elaine and Ruby Harkson, and not in any part to Henry W. Harkson."

From this decree Henry W. Harkson and the Multnomah State Bank have appealed.

Appellants assign the following errors:

1. That the court erred in holding that a vested remainder did not pass to testator's daughter, Eliza M. Harkson, upon his death.

2. That the court erred in holding that Henry W. Harkson was not entitled to an interest in the lands of the testator as the surviving spouse and as an "heir" of Eliza M. Harkson.

3. That the court erred in receiving and acting upon

oral testimony as to what the testator meant in his will by the word "heirs."

To the objective perception the apparent and external effect of this will was to cast a life estate upon the widow of the testator and the remainder upon his children, if living, or upon their respective heirs if any of the children were dead. As we have shown by the quotation from the decree of the district court, this is precisely what the court found "from the four corners of the will alone."

The testator died July 29, 1916. His widow entered into the possession and enjoyed the particular or life estate until May 18, 1925, when she died. Thereupon the remainder, attached to the life estate, ripened into a fee simple title, that is, into a freehold estate of inheritance, free from conditions and of indefinite duration. Who took that title so far as the share of Eliza M. Harkson, the deceased daughter, is concerned is the subject of inquiry here. Did it go to her children only or did her husband, as an heir, share it with the children?

One of the points involved and debated by the parties is whether the will created a vested remainder or whether the remainder was contingent. If the remainder vested in Eliza M. Harkson on the death of the testator, then her husband would be entitled to take under her, nothing appearing in the will to show a contrary intention on the part of the testator.

Davis v. Davis, 107 Neb. 70, was a suit to construe a will and to quiet title to interests in devised lands. It was brought by remaindermen claiming that their interests vested on the death of testator. The will gave a life estate to the widow, who was still living, and equal remainders "at her death" to four children. It provided, if any of the children should "die without heirs," the surviving children should take. After the death of the testator, one son died intestate and childless but leaving a widow. She claimed, subject to the life estate of testator's widow, an undivided one-eighth interest in the devised lands, being one-half of the one-fourth share of her deceased husband under

the will of his father. We held that, when the entire will is considered, the phrase "at her death" may fairly be construed to refer to the time when the enjoyment of the estate in remainder begins; that the expression "die without heirs" should be construed to refer to the death of a devisee during the life of the testator; that the policy of the law favors early vesting of estates and that the inference of a vested remainder is stronger than the inference of a contingent remainder, if the meaning of the testator is obscure; and that the deceased son "acquired at the death of his father an undivided one-fourth of a vested remainder in the devised lands, and that one-half of his interest, or an undivided one-eighth of the estate in remainder, descended to Ruby L. Davis under the statutes of Nebraska as the widow and the heir of her deceased husband."

The case just analyzed referred for definitions to *Wilkins v. Rowan,* 107 Neb. 180, which was decided on the same day. The facts are for our purpose adequately stated in a point of the syllabus which reads as follows:

"A devise of land to James for life, and at his death to the issue of his body, if he shall leave any such surviving him, but, if he shall not, then said land to go to the heirs at law of testator, *held,* an estate in remainder, and not an executory devise to the issue of James, and that B. and D., sons of James, took a vested estate in remainder at the death of testator, subject to open and let in afterborn issue."

The opinion in the foregoing case quoted *Archer v. Jacobs,* 125 Ia. 467 (which was also cited with approval in *Shackley v. Homer,* 87 Neb. 146, 177) as follows:

"Where a will devised one-fourth of testator's estate to his daughter for life, and upon her death the same to go, share and share alike, to her children or grandchildren, but, if she should die leaving neither children nor grandchildren, then to testator's son or his children, the daughter upon the death of the testator took a life estate, and her children then in being took a vested remainder,

although such remainder was subject to open and let in afterborn children, and although there was no certainty that such children would survive their mother or leave surviving issue."

From the foregoing we derive the conclusion that a will devising a life estate to the wife of testator, his property at her death to be divided equally among his six children, and providing, in case of the death of any of them prior to the death of testator's wife, that the share of such one shall go to his or her heirs, construed to devise a vested remainder to the children living at the death of the testator.

Case v. Haggarty, 91 Neb. 746, is cited as indicative of a holding contrary to what we have expressed here. There a mortgage upon an undivided one-third of the estate, made by a daughter, who died before the life estate of her mother terminated, was held not a lien and not subject to foreclosure as against the surviving children of the daughter. The will provided that, in case of the death of the daughter before the mother, her portion "should descend to her children, share and share alike." The opinion refers the word "descend" to the "enjoyment of the estate." While this case was not cited in *Davis v. Davis,* 107 Neb. 70, a somewhat similar clause was there discussed in these words: "Following the devise of the life estate to the wife of testator, the provision that 'at her death my property is to be divided equal between my four children' does not necessarily mean that the two estates shall not vest at the same time or that the remainder shall not vest until the death of testator's wife. When the entire will is considered, the phrase 'at her death' may fairly be construed to refer to the time when the enjoyment of the estate in remainder begins. There are precedents and sound reasons for this interpretation." In *Wilkins v. Rowan,* 107 Neb. 180, 190, 191, the *Haggarty* case was cited, quoted and discussed at some length, ending thus: "The rule is well established in other jurisdictions that an estate in remainder may vest in a devisee subject

to defeasance. This court has heretofore announced its adherence to that doctrine, and we shall hold in the instant case that Benjamin H. Rowan and David R. Rowan took a vested estate, defeasible or indefeasible, according to the intention of the testator." While the language in *Case v. Haggarty* is not as clear as we might wish it for the purposes of the present case, we are of the opinion that the author of it had in mind the same idea of the defeasibility of a vested remainder that was more fully expressed in the later case from which we have quoted.

We further held in *Davis v. Davis,* 107 Neb. 70, where the meaning of the word "heir" was the subject of definition, that "for the purposes of the Nebraska statutes of descent a widow may be an heir of her deceased husband." Conversely, it would follow that, under the statutes of descent, a surviving husband is the heir of his deceased wife. Comp. St. 1922, section 1220, as to real estate, and section 1222, as to personal estate. These statutes have been in force since 1907, at which time the estates of dower and curtesy were abolished (section 1223), and it was provided that the right of either spouse to inherit real estate from the other might be barred by deed or judicial sale (section 1224), or by antenuptial contract (section 1225). On this point of the surviving spouse being an "heir," we also note *In re Estate of Grobe,* 101 Neb. 786, and *Moore v. Markel,* 112 Neb. 743, which cites the *Grobe* case and says: "The interest which a widow takes in the real estate of her husband on his death is more than that of an heir." As the opinion in the *Moore* case explains carefully, all this statement means is that an ordinary heir may be barred of a prospective interest in real estate by a deed or contract made by an ancestor, but a widow's heirship of an interest in real estate of which her husband was seised during coverture, where both reside in Nebraska, cannot be so barred by her husband acting alone. She inherited in that case one-half of the real property, and the title of that interest vested in her on his death irrespective of the contract he had made alone to convey the title

to the whole interest. In the *Grobe* case the interest which the widow took in the real estate of her deceased husband was "more than that of an heir at law" in that the homestead was first awarded and then her share as an heir was set off to her. So, under the substantive law existing in Nebraska since 1907, either spouse may be an heir of the other. Unless excluded by unambiguous words or by clear implication from the language used in a will, the description therein of "heirs" includes a surviving spouse as well as a surviving child or surviving children.

From the preceding discussion it has developed that there was no legal ambiguity or obscurity in the words of the will. It must be accepted as fundamental that the intention of the maker of a will is to be gathered from the language of the will; that, in construing wills, courts are not to seek otherwise what the testator meant, if it can be discovered from his will what his words mean; that oral testimony cannot be resorted to in order to explain the intent of the use of a word the meaning of which, in the circumstances, is not only fixed in law but in fact; and that the word "heirs" had at the time of the making of the will in question, had long prior thereto, and still has, a certain and definite meaning. It follows that the trial court erred in receiving and following oral testimony as to the intention of the testator that the word "heirs" did not include one who was an heir.

For the reasons stated, the judgment of the district court is reversed and the cause is remanded, with instructions to enter a decree for the appellants in conformity with this opinion.

REVERSED.

GOOD, J., dissenting.

To the writer it appears that the construction given to the will of Louis Hanson in the majority opinion is unsound. In this jurisdiction the rule is well established that, in interpreting a will, the court will endeavor to place itself in the position of the testator and ascertain, from all the provisions of the will, his intention and, if lawful, give

effect thereto. The intent should be ascertained from a consideration of the whole will and all of its provisions, and not from any isolated or separate paragraph.

It will be conceded that the first sentence of paragraph 4 of the will of Louis Hanson, standing alone, would be sufficient to vest in the children of Louis Hanson the title to his real estate, subject only to the life estate of his widow, as provided in the preceding paragraph. An examination of the other provisions, however, clearly shows, to my mind, that it was the intention of the testator that his children should take the remainder only in event they survived their mother, and, if they did not survive their mother, it was as clearly his intention that the heirs of any child predeceasing their mother should take from him the share that would have otherwise gone to such child of the testator. The last sentence of said paragraph 4 is as follows: "In case of the death of any of my said children prior to the death of my said wife, the share of such one shall go to his or her heirs." If the construction placed upon the will by the majority opinion is sound, then the sentence would have no meaning and no effect. It will not be presumed that the testator put in this provision as a mere idle ceremony. The presumption is that he had a definite purpose in view in so doing. If, subject to the life estate of his widow, the remainder was vested in his children at his death, then he would have nothing that he could give to the heirs of any of his children who did not survive their mother. Louis Hanson doubtless fully realized that his children could not go into the possession or enjoyment of the remainder until after the death of their mother. He made provisions that would prevent the sale of the real estate until after the death of his wife. He further made provision that his executors had power to mortgage the real estate in the event that it was necessary for the proper support of his widow. If the remainder was vested in his children on his death, by what right or authority could his executors incumber the same by a mortgage? It is clear that it was the intention of the

testator that his executors should have power to incumber the real estate for the benefit of his widow, if necessary, and this intent and purpose was laudable and lawful; yet, this provision of the will would be nugatory if the children of Louis Hanson took a vested remainder, subject only to the life estate of their mother, as held by the majority opinion. As I view it, what Louis Hanson did was to give a life estate to his widow and create a contingent remainder which, subject to any incumbrance that might be placed thereon by the executors, would go direct from the testator to either his children or to their heirs, as the case might be. A contingent remainder is created where it is uncertain whether one of two persons or classes of persons will take, and the right of the one or the other to take depends upon the happening of some event in the future. In the instant case, it was uncertain at the death of the testator whether Mrs. Harkson or her heirs would take. It would depend on the contingency whether or not she survived her mother. The event which determined this was the death of Mrs. Harkson prior to that of her mother. By the happening of that event, it made the heirs of Mrs. Harkson the devisees of Louis Hanson.

In the strict sense of the word, one spouse is ordinarily not the heir of the other. The only case where one spouse may be properly said to be an heir of the other is where the first spouse to die leaves no known kindred capable of inheriting. Under such circumstances, the surviving spouse inherits that part of decedent's estate which would have gone to his next of kin, had he left such surviving capable of taking. The interest which the husband takes in the realty of his deceased wife is an inchoate right which is created by statute, and which is vested in him during the lifetime of the wife, but the right to the use and enjoyment of the interest so received becomes perfect only upon her death.

In my opinion, Henry W. Harkson was entitled to no part of or interest in the estate of Louis Hanson. All the share

that would have gone to Mrs. Harkson, had she survived her mother, was vested in her children who survived her.

Note—See Wills, 40 Cyc. 1440 n. 67, 1463 n. 33, 1650 n. 81, 1666 n. 16, 1675 n. 63.

JABE B. GIBSON, APPELLANT, V. ALBERT F. PETERSON ET AL., APPELLEES.

FILED MARCH 16, 1929. No. 26490.

1. **Taxation**: TAX SALE CERTIFICATE: FORECLOSURE: LIMITATIONS. The time within which a private holder of a tax sale certificate, other than a minor or an incompetent, may commence an action to foreclose such certificate is determined by section 6097, Comp. St. 1922, and such an action must be brought within five years from the date of the tax sale certificate.
2. **Statutes**: CONSTRUCTION. Where the language of a statute is clear and unambiguous it should be given effect according to its plain terms.

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

R. J. Shurtleff, for appellant.

Helen McGerr, William M. Ely and *H. D. Curtiss, contra.*

T. B. Dysart, amicus curiæ.

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

GOOD, J.

From a judgment of the district court denying him foreclosure of three tax sale certificates, on the ground that his causes of action were barred by the statute of limitations, the plaintiff has appealed. Each certificate was issued and dated May 17, 1922. This action was begun October 25, 1927.

Plaintiff contends that an action to foreclose a tax sale certificate may be brought at any time within three years after the expiration of the time for redemption from such tax sale, and that the time for such redemption is five

years from the date of sale. He relies upon sections 6068 and 6073, Comp. St. 1922, as giving to the owner of land, or one having an interest therein, a period of five years in which to redeem from a tax sale, and then relies upon section 6089, Comp. St. 1922, as extending the period, within which a foreclosure action may be brought, to three years after expiration of the time for redemption. An examination of section 6089, Comp. St. 1922, in connection with the preceding section, clearly shows that it relates to the right of counties and other municipal corporations to bring actions for foreclosure of tax liens, and not to the right of an individual purchaser at a tax sale. The section, therefore, is not applicable to the instant case.

Plaintiff also cites and relies upon the case of *Mead v. Brewer,* 77 Neb. 400. In that case it was held that an action to foreclose a tax sale certificate may be commenced at any time within five years from the date when redemption from the same may be made by the owner. That decision was rendered under a former revenue law. Section 179, ch. 77, Comp. St. 1889, authorized the bringing of an action to foreclose a tax lien "at any time before the expiration of five years from the date of such certificate." Under the law then existing, the landowner was entitled to a period of two years from the date of the tax sale certificate in which to redeem. The court took the view that the holder of the tax sale certificate was entitled to a period of five years within which to bring his action, and that, since it could not be brought during the time the owner of the premises might redeem, the holder of the tax sale certificate was entitled to a period of five years after the time for redemption had expired. See *Alexander v. Wilcox,* 30 Neb. 793; *Alexander v. Thacker,* 43 Neb. 494; *Darr v. Wisner,* 63 Neb. 305; *Stevens v. Paulsen,* 64 Neb. 488; *Whiffin v. Higginbotham,* 80 Neb. 468.

Defendants rely upon section 6097, Comp. St. 1922, as barring plaintiff's causes of action. That section, so far as applicable to the present consideration, is as follows: "If the owner of any tax sale certificate shall fail or neg-

lect to demand a deed thereon, or to commence an action for the foreclosure of the same within five years from the date of the sale, such tax sale certificate shall cease to be valid or of any force or effect whatever, and the real estate covered thereby shall be forever released and discharged from the lien of all taxes for which the same was sold. And it is hereby made the duty of each and every county treasurer of the state of Nebraska to enter on the tax sale records of his or her office a cancelation of all tax sales on which five years have elapsed since date of sale, with date of entry affixed, in language substantially as follows," etc.

It will be observed that the language of section 6097, Comp. St. 1922, does not purport to give to the holder of a tax sale certificate a period of five years within which he may bring his action to foreclose. It simply limits the time to a period which expires, by its terms, five years from the date of the certificate. In this respect it is unlike the former statute (Comp. St. 1889, ch. 77, sec. 179), wherein the holder of a tax sale certificate was given a period of five years within which to bring his action to foreclose.

Plaintiff, however, contends that section 6097, Comp. St. 1922, was repealed, by implication, by the enactment of chapter 105, Laws 1923. That chapter, by its title, was one to amend sections 6068 and 6089, Comp. St. 1922, and in no manner repealed or affected section 6097; nor are the sections which were amended in conflict with section 6097. As above pointed out, section 6089 relates to the right of counties and other municipal corporations to institute actions for foreclosure of tax liens, and the only changes made were, first, enlarging the number of municipal corporations enumerated which might bring such actions, and, second, a change in the rate of interest.

Plaintiff further contends that, pursuant to section 6065, Comp. St. 1922, the holder of a tax sale certificate has a perpetual lien, and that he may, therefore, enforce it at any time, without regard to any statute of limitations. It is

true that said section 6065 does stipulate that the holder of a tax sale certificate has a perpetual lien, but this court has hitherto held in *Foree v. Stubbs*, 41 Neb. 271, and in *Alexander v. Shaffer*, 38 Neb. 812, and other cases therein cited, that the provisions of the revenue law, by which taxes are declared to be perpetual liens, are for the exclusive benefit of the state and the different agencies thereof which are authorized to raise revenue by taxation for public purposes, and in *Alexander v. Shaffer* (page 816) it was said: "The limitation fixed in the revenue law is not merely a limitation as to the right of action, but it is a limitation upon the duration of the lien itself, and that upon the expiration of the period it is not merely the remedy to enforce the lien which expired, but the lien itself is extinguished absolutely."

A brief by Honorable T. B. Dysart, as *amicus curiæ*, has been filed in this case, wherein it is contended that, notwithstanding the language of section 6097, Comp. St. 1922, the owner and holder of a tax sale certificate is entitled to seven years from the date of the certificate in which to bring his action for foreclosure. The argument is based upon the proposition that section 6097 is, in substance, a reenactment of sections 4462 and 4463, Comp. St. 1901 (Comp. St. 1889, ch. 77, secs. 179, 180), and that the construction placed upon those sections by the court must be held to have been adopted by the legislature as the proper construction for section 6097, Comp. St. 1922. It is conceded that there is some difference in the wording of the statutes, and, as we view it, the wording is very material. Section 6097 nowhere purports to give to the holder of a tax sale certificate a period of five years within which he may bring his action, while the former sections did so provide. The wording of the former sections induced the holding that the statutory period of five years did not begin to run until the two-year period for the redemption had expired. In our opinion, the construction given by this court to said sections 4462 and 4463 should not be applied to said section 6097. The latter sec-

tion seems to be clear and unambiguous and should be given effect according to its plain terms.

We are of the opinion that the district court rightly held that plaintiff's action was barred. The judgment, therefore, is

AFFIRMED.

HOWARD COUNTY ET AL., APPELLEES, V. ANTON A. ENEVOLDSEN, APPELLANT.

FILED MARCH 16, 1929. No. 26432.

1. **Paupers:** SUPPORT. Under the facts stated in the opinion, *held*, that the daughter of defendant was a poor person unable to earn a livelihood in consequence of an "unavoidable cause" within the meaning of such phrase as used in section 5140, Comp. St. 1922, and that defendant, being of sufficient ability, was required under the provisions of said section to furnish such support.
2. ———: ———. Where the parents are poor persons without property or means and unable, on account of either physical or mental disability or other unavoidable cause, to support their infant children, and the children are without property or means and unable, on account of their tender years, to earn their livelihood, it is the duty of their relatives named in section 5140, Comp. St. 1922, who are of sufficient ability, to furnish support in the order they are named in section 5141, Comp. St. 1922.
3. ———: ———: DUTY OF COUNTY BOARD. Before a cause of action accrues in favor of a county or its county board under section 5140 against a relative who fails to furnish support to an indigent relative entitled to support under the provisions of said section, it is necessary that such delinquent relative be first directed by order of the county board to furnish support and refuse to do so.
4. ———: ———: SUFFICIENCY OF EVIDENCE. The evidence in this case *held* sufficient to show that the defendant refused to furnish support to his daughter and her minor children after being directed by the county board to do so.
5. **Appeal:** ISSUES. "A case must be tried in the district court upon appeal upon the issues tried in the lower court. This does not mean that no issuable fact can be pleaded in the petition in the district court that was not alleged in the bill of particulars in the lower court. If the identity of the cause of action is preserved in the petition it is sufficient." *Jacob North & Co. v. Angelo*, 75 Neb. 381.

Under the rule stated, error was not committed by the court in overruling the motion of defendant to strike out certain parts of the amended petition filed in the district court on the ground that such parts of the petition changed the issues from what they were in the county court.

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

Drake & Drake, for appellant.

Charles Dobry and *William F. Spikes, contra.*

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

HASTINGS, District Judge.

This action was commenced in the county court of Howard county by the plaintiffs, the county of Howard and its board of county commissioners, against the defendant, Anton A. Enevoldsen, pursuant to the provisions of section 5140, Comp. St. 1922, to recover money paid by the county for the support of Fredricka Petersen, daughter of defendant, and her four minor children.

Trial was had in that court and judgment rendered for the plaintiffs for the full amount claimed. From that judgment an appeal was taken to the district court, and trial had to a jury, which returned a verdict for the plaintiffs for the sum of $152.85, the full amount claimed. Judgment was entered on the verdict and defendant appeals.

It is the contention of the defendant that his daughter, Fredricka Petersen, was able to earn her own livelihood, and not prevented therefrom by any physical or mental disability or unavoidable cause, and that therefore he was not required under section 5140, Comp. St. 1922, to furnish support for her; and that as to her minor children he was not required to furnish support because their parents were of sufficient ability. He also contends that he was not directed by the county to support his daughter and grandchildren, prior to the furnishing of the greater part of such support by plaintiff county, and that until

directed to do so by the county board no recovery could be had against him for money expended by plaintiff county prior to the board directing him to furnish such support; and that the evidence shows no refusal by him to furnish such support after being directed by the county board to do so.

The right of the plaintiffs to recover against the defendant is purely statutory, and to recover against him they must have established their right under the provisions of section 5140, Comp. St. 1922, which provides:

"Every poor person, who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy or other unavoidable cause, shall be supported by the father, grandfather, mother, grandmother, children, grandchildren, brothers or sisters of such poor person if they or either of them be of sufficient ability; and every person who shall refuse to support his or her father, grandfather, mother, grandmother, child or grandchild, sister or brother, when directed by the county board of the county where such poor person shall be found, whether such relaative shall reside in the same county or not, shall forfeit and pay to the county board, for the use of the poor of their county, such sum as may be by the county board adjudged adequate and proper to be paid, not exceeding ten dollars per week for each and every week for which they or either of them shall fail or refuse, to be recovered, in the name of the county board, for the use of the poor aforesaid, before a justice of the peace or any other court having jurisdiction: Provided, whenever any persons become paupers from intemperance or any other bad conduct, they shall not be entitled to support from any relative except parent or child; and *provided* further, such poor person entitled to support from any such relative may bring an action against such relative for support in his or her own name and behalf."

Under that statute, before a recovery could be had the plaintiffs were required to prove that Fredricka Petersen was a poor person unable to earn a livelihood in conse-

quence of some bodily infirmity, idiocy, lunacy or other unavoidable cause. There is no evidence to show that she was unable to earn a livelihood in consequence of any bodily infirmity, idiocy or lunacy; so, if plaintiffs are entitled to recover in this action it must be because of evidence showing inability by reason of some "other unavoidable cause."

The evidence without conflict establishes that Fredricka Petersen was granted an absolute divorce from her husband, Johanes Petersen, by the district court for Howard county on the 17th day of March, 1925, on the ground of extreme cruelty. The decree awarded her the custody of their four minor children, whose ages ranged from ten years to one year, and ordered her husband to pay $15 a month to her to be used by her in support of said children. Thereafter Mrs. Petersen, in order to provide a home for herself and minor children, rented a house in Dannebrog, for which she paid rent at the rate of $10 a month until the same was reduced to $8 a month. On account of the tender years of her children, she was obliged to, and did, devote the greater part of her time to their care. When not thus engaged, she did such work as she could do under the circumstances. This work consisted of washing and ironing for others, and her earnings from that kind of work were very small and, with the $15 a month required to be paid by her husband, insufficient to support herself and children. She had no property or means. The $15 a month was not regularly paid by her husband and at the time of the trial of this cause he was delinquent about $205 in his payments. Her former husband had no property or means, and was unable to do work of any consequence on account of mental and physical disability. He was confined in the hospital for the insane at Hastings for some time, later he was sent by his mother at her expense to Green Gables for treatment, and after returning from Green Gables he lived with his mother and was in part supported by her.

Being unable to earn a livelihood for herself and minor

children, she made application to the county board for county aid, which was granted.

Under the facts stated, is an "unavoidable cause" shown within the meaning of those words as used in said section 5140?

The statute under consideration was intended to accomplish two purposes: First, to provide support for a poor person coming within its provisions, by relatives in the order named therein, and who were of sufficient ability to do so; second, to relieve the public from the burden of such support. The purposes intended to be accomplished are both laudable and humane.

The words "unavoidable cause" used in the statute should be given such meaning as will carry out the purpose for which the statute was enacted. Mrs. Petersen was confronted with a situation that she could not avoid and in consequence of which she was rendered unable to earn a livelihood. It could only be avoided by deserting her infant children, consigning their care to other persons financially able to provide for them, or placing them in homes for dependent children. This she was not required to do in order to enable her to support herself. It was her duty as a mother to keep her children together and give them that care and attention that only a mother can. By faithfully performing that duty she was unable to earn her livelihood. This view is supported by authority. In the case of *South Hampton v. Hampton Falls*, 11 N. H. 134, it is said:

When a poor person "is sick, and needs the assistance of his wife, who is otherwise able to maintain herself, both may, by the necessity of such assistance, become paupers, and liable to support. * * * If there is any more unexceptionable or meritorious cause of pauperism than this, it is unknown to us. The wife necessarily became a pauper, unless it became her duty to desert her husband on his death bed; an act which we should not require of her, even though it should expose the defendant town to the necessity of her maintenance while in the discharge of such a duty."

In *Inhabitants of Poland v. Inhabitants of Wilton,* 15 Me. 363, it was held that where a father was able to support himself, but was unable to support his wife and children, he was a poor person or pauper within the meaning of the law.

Under the facts in this case, Mrs. Petersen was prevented from earning her livelihood because of the care and attention that it was necessary for her to give to her infant children and this is clearly within the meaning of the words "or any other unavoidable cause" as the same are used in said section 5140. To give this phrase any other construction under this state of facts would be to render meaningless and in part destroy the humane purpose for which the statute was enacted. We hold that Mrs. Petersen, under the facts disclosed by the record, was, at the times that aid was furnished to her by the plaintiffs, a poor person unable to earn a livelihood in consequence of an unavoidable cause, and that, under said section 5140, it was the legal duty of her relatives, who were of sufficient ability, to support her in the order named in section 5141, Comp. St. 1922. Under the provisions of section 5140 her father, being of sufficient ability to do so, is required to furnish such support to his daughter. Neither the father nor mother being of sufficient ability to furnish support for their minor children, the legal duty to do so devolved on the grandfather. The record in this case shows that he has not performed the legal obligations thus imposed upon him. During all of the time that his daughter was struggling to keep her children together and giving them the care that their tender years demanded, he never helped them or offered to help them by furnishing them the support that they so much needed. He not only failed to furnish them any support but refused to do so. The ties of blood did not seem to appeal to him. He seemed insensible to his moral and legal obligations to his kindred. Had he applied the money that he must have expended in litigating the claim of plaintiffs, through three courts, in aid of his needy daughter

and grandchildren, their burdens would have been materially lightened.

It is contended by counsel for the defendant that a greater part of the money expended by plaintiffs for the support of Mrs. Petersen and her minor children was furnished before defendant was directed by the county board to support them, and as to such money so expended there can be no recovery. Upon this question the evidence shows that the defendant was not directed by the board of county commissioners to support his daughter and grandchildren until the 2d day of March, 1926.

For the county or its board of commissioners to have a cause of action under section 5140 against a delinquent relative, it is necessary that such delinquent relative be first directed by the county board to furnish support to the needy relative and refuse to do so. This means that the county board must first make an order directing or commanding the delinquent relative to furnish the necessary support to the indigent relative. If, when so directed, he refuses, then the statute provides that such delinquent relative "shall forfeit and pay to the county board, for the use of the poor of their county, such sum as may be by the county board adjudged adequate and proper to be paid, not exceeding ten dollars per week for each and every week for which they or either of them shall fail or refuse."

The provisions of the statute are prospective only. It does not provide for the recovery of the money expended for the indigent person prior to the order directing the delinquent relative to support such relative and his refusal to do so. In other words, the right of action can only exist in favor of the county or its county board for such sums as have been ordered paid by the county board after the delinquent relative has been directed by order of the county board to furnish support to the indigent relative and has refused to do so.

Under statutes similar to ours the rule is stated in 21 R. C. L. 724, sec. 27, to be:

"There can be a recovery, however, only in case the liability is complete in accordance with the terms of the statute. Many statutes making persons liable for the support of destitute relations provide for the imposition of such liability by an order directing the support of the pauper by such relation as shall be liable, but there can be no such recovery if the support is not first directed."

Under a statute almost identical with ours it was said in *Multnomah County v. Faling,* 49 Or. 603:

"The duty of providing such support is purely statutory and the procedure provided for its enforcement is exclusive. * * * Under this statute the county court has no cause of action against a delinquent relative except upon his failure to perform the duty imposed upon him by statute 'when directed by the county court.' The provision is that every person who shall refuse to support his or her parents, children, brother or sister, 'when directed by the county court,' shall forfeit and pay to the county for the use of the poor the sum of $30 per month, or such other sum as the court shall find sufficient, 'to be recovered in the name of the county court' before a court having jurisdiction. To fix a liability in favor of the county court and against a delinquent relative, it is necessary therefore that an order be made by the court directing him to discharge the duty imposed upon him, and that such direction has been ignored."

It follows that plaintiffs were not entitled to recover for any money expended by them in support of Mrs. Petersen and her minor children prior to March 2, 1926. The verdict of the jury and the judgment entered include the sum of $115 expended prior to the order directing the defendant to support his indigent relatives and to that extent cannot be sustained.

It is further claimed by counsel for the defendant that there is no evidence of a refusal upon the part of the defendant to furnish support for his daughter and her minor children after being directed by the county board to do so. It is true there is no evidence that after the order

was made directing him to furnish such support he refused either verbally or in writing. This we do not consider necessary. It is sufficient if the evidence is such as to show that he did not intend to comply with the order and had no purpose to do so. The evidence shows that prior to the order being made he had informed the county authorities that he had "nothing to do with supporting Mrs. Fredricka Petersen and family." On March 13, 1926, pursuant to the direction of the county board, the county clerk mailed to the defendant, by registered letter, a certified copy of the order of the board directing him forthwith to support his indigent relatives and to continue such support during the necessity therefor. The envelope in which the copy of the order was sent had the return card of the clerk upon it, a return receipt was requested, and he, evidently knowing what the content of the letter was, refused to receive it and it was returned to the clerk unopened. Thereafter a certified copy of the order was served upon him by the sheriff. He did not comply with the order, nor did he evidence any intention to do so. The county board took no further action until April 6, 1926, and defendant had from March 13 to that time to comply with the order. His conduct shows that he did not intend to comply with the same and the jury were fully justified in finding that he had refused to do so.

It is claimed that error was committed by the trial court in overruling the motion of the defendant to strike out certain parts of the amended petition, for the reason that the parts of said petition at which the motion was directed changed the issues from what they were in the county court. This contention has no merit. The identity of the cause of action was not changed by the allegations in the amended petition in the district court to which the motion was directed. In the petition in the district court the facts were alleged more in detail, but the identity of the cause of action was preserved, this was all that was required. *Jacob North & Co. v. Angelo,*

75 Neb. 381; *Coleman v. Spearman, Snodgrass & Co.*, 68 Neb. 28; *Lubker v. Grand Detour Plow Co.*, 53 Neb. 111.

The defendant assigns as error the following remark, made by the trial judge in the presence of the jury at the close of the evidence, "I do not see anything to submit to the jury," and the making of a motion thereafter by counsel for plaintiffs in the presence of the jury for a directed verdict. The jury were excused. The motion was argued and overruled by the trial court. This was in no way prejudicial to the defendant and does not merit further consideration.

It appears from the evidence that, after the defendant had by order of the county board been directed to support his indigent relatives, on April 6, 1926, the board ordered that $15 a month be paid for their support. The defendant failed and neglected to make the payments for the months of April and May, and the plaintiffs paid such amounts to Mrs. Petersen for the support of herself and minor children for those months. This amounted to $30, for which plaintiffs were entitled to recover, but they were not entitled to recover the $115 paid by them prior to the order directing the defendant to furnish such support.

It is therefore ordered that judgment of the district court be affirmed, if within 20 days plaintiffs file in this court a remittitur in the sum of $115; otherwise, that the judgment be reversed and the cause be remanded.

AFFIRMED ON CONDITION.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, V. BANKING HOUSE OF A. CASTETTER: EMIL FOLDA, RECEIVER, APPELLANT: WILLIAM REEH, INTERVENER, APPELLEE.

FILED MARCH 16, 1929. No. 26406.

1. **Appeal:** TRANSCRIPT: TIME. To review errors of law occurring upon the trial of an equity case a motion for new trial is necessary, and a transcript upon appeal, in such case, filed within

three months from the date of overruling such motion is in time.

2. ———: REVIEW. Where a defense of the statute of limitations is not pleaded, nor brought to the attention of the trial court by objection to evidence or otherwise, it will not ordinarily be considered on appeal.

3. Evidence: CONTRACT: PAROL EVIDENCE. Where a written contract for the sale of real estate recited that a certain sum was received by the vendor as a cash payment, and provided that the deed of vendor and mortgage of vendee to secure remainder of purchase price should be deposited with vendor bank in escrow, *held*, that parol evidence is inadmissible to show that the "cash payment" was also to be held in escrow, as it tended to contradict, vary and add to the written contract and change the legal effect of its terms.

4. ———: ———: ———. In such case the proffered evidence did not tend to prove a condition precedent to the taking effect of the contract, but to vary and contradict the terms of the contract itself.

APPEAL from the district court for Washington county: CHARLES LESLIE, JUDGE. *Affirmed in part, and reversed in part.*

C. M. Skiles, I. D. Beynon and *Swarr, May & Royce*, for appellant.

Henry Mencke and *M. O. Cunningham, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, and DAY, JJ., and ELDRED and REDICK, District Judges.

REDICK, District Judge.

Claim against the Banking House of A. Castetter, insolvent, in the hands of a receiver, by William Reeh, intervener. The claim was allowed and ordered paid from the depositors' guaranty fund and the receiver appeals.

Objection to the jurisdiction of this court is made because the transcript was not filed within three months from the date of the decree. A motion for new trial was filed based upon errors occurring at the trial, and transcript was filed within three months from the date the motion was overruled. This was in ample time. *Bowers v. Raitt*, 96 Neb. 460.

The facts are as follows: On June 9, 1919, the intervener and F. H. Claridge entered into the following written agreement:

"This agreement made this 9th day of June, 1919, by and between F. H. Claridge and William Reeh, witnesseth, that F. H. Claridge has sold to William Reeh and William Reeh has bought of F. H. Claridge the following lands in Dakota county, Nebraska, to wit (describing them)." "And the said F. H. Claridge hereby acknowledges receipt of $2,000 in cash as part payment on said land, and the said Reeh hereby agrees to pay $6,500 on March 1, 1920, and assume a mortgage of $10,000 now upon said land and give a mortgage to said F. H. Claridge of $11,860 due five years after March 1, 1920, bearing 6 per cent. interest from March 1, 1920, and the above amounts being $30,360 or $165 per acre, being the purchase price of the farm; the said Claridge is to pay all taxes of 1919 and prior and pay all interest on the mortgage up to and including March 1, 1920, possession to be given to said Reeh on March 1, 1920, and the said Claridge is to give a warranty deed and to furnish an abstract showing good and merchantable title; said Claridge is to make a deed to said land at once and place same with the Banking House of A. Castetter, Blair, Nebraska, in escrow, and said Reeh is to make a mortgage as above and deposit same with the above bank."

While the contract was made in the name of Claridge, the land belonged to the bank of which he was president, and the contract is treated as though made in the name of the bank. The cash payment referred to in the contract was made by Reeh giving his personal check for $750, dated June 9, 1919, and an assignment to the bank of a note and mortgage of one Jacobson for $1,250. The check was cashed immediately and the $2,000 payment credited to the real estate account of the bank. The next day, June 10, 1919, Reeh executed and delivered to the bank his note for $6,500, due March 1, 1920, a note for $11,860 dated March 1, 1920, and due five years there-

after, and a mortgage on the land securing this second note as provided by the contract. On the same day Claridge executed a warranty deed to Reeh, which was to be delivered to the purchaser March 1, 1920, when he paid the $6,500 note, at which time the mortgage and note for $11,860 were to be delivered to Claridge. The notes, mortgage and deed were left with the bank in escrow awaiting the payment of the $6,500 note and the furnishing of an abstract by Claridge showing good, merchantable title.

Reeh was unable to pay his note March 1, 1920, and on August 10 executed a new note due March 1, 1921, for $6,100, $400 rent of the farm for 1920 being credited upon the original note. Matters remained in this situation until March 15, 1921, when the Banking House of A. Castetter was declared insolvent and a receiver appointed under the banking department of the state of Nebraska. Subsequently the receiver, without the knowledge of Reeh, filed the deed and mortgage held in escrow by the bank and brought suit against Reeh on the $6,100 note. Reeh answered that suit setting up want of consideration for the note and secured judgment against the bank, which judgment, on appeal, was affirmed by this court.

It therefore appears that the deed of the lands had never been legally delivered to Reeh and, by the judgment referred to, the note of Reeh for $6,100 was without consideration, or the consideration thereof had failed. The defense of want of consideration was based upon the failure of Claridge to furnish an abstract showing good and merchantable title to the lands covered by the contract. The situation then is that the bank retained the $2,000 cash payment on the contract and Reeh has received nothing therefor except the naked title evidenced by the record of the undelivered deed wrongfully withdrawn from escrow.

On June 14, 1926, Reeh intervened in this proceeding, setting up the facts as above outlined, and claiming that

the $2,000 cash payment was a trust fund or special deposit and praying judgment against the bank and the receiver for that amount with interest at 7 per cent., and that the same be allowed as a preferred claim and paid out of the depositors' guaranty fund. He also offered to execute and deliver to the bank any instrument necessary to release intervener's apparent interest in the land by virtue of the recording of the Claridge deed, and prayed that the contract and his note and mortgage for $11,860 be canceled.

So far as the plaintiff's rights growing out of the contract are concerned, the action is in substance one for money had and received, to recover from defendants a sum of money in their hands which in equity and good conscience belongs to intervener. The situation finds its analogy in the ordinary case of a contract for the sale of real estate where a cash payment has been made and the vendor thereafter is unable to make title. In such case the vendee is entitled to recover the consideration paid in an action for money had and received, and therefore the judgment of the district court is correct to the extent of its award against the bank.

It is claimed in the brief of appellant that the action is barred by the statute of limitations, but the statute was not pleaded and the point was not presented to the district court, is not included in the assignments of error in this court and therefore will not be considered.

The real important question involved is the correctness of the order of the district court requiring the judgment of intervener to be paid out of the depositors' guaranty fund. In this regard the claim of intervener is that, under the circumstances above set forth and the evidence, to which reference will now be made, the $2,000 constituted a "trust fund" or a "special deposit." To sustain this proposition intervener produces parol evidence, which was admitted by the trial court over objection of receiver, to the effect that, at the time the written contract was entered into between Claridge and Reeh, it was orally

agreed that the $750 check and the $1,250 note and mortgage constituting the cash payment should be placed in escrow, together with the deed of Claridge and the note and mortgage for $11,860, and held by the bank until the transaction was completed.

The receiver objected to this evidence on the ground that it was thereby sought by parol to change and vary the terms of the written contract. If this evidence was competent and sufficient to establish the facts claimed, the fund would have constituted a special deposit, entitling the intervener to preferment as claimed; if not, that portion of the judgment awarding payment out of the depositors' guaranty fund is erroneous.

The parol evidence rule is well established in this state (*Security Savings Bank v. Rhodes,* 107 Neb. 223; *Atlas Refining Corporation v. Vaughan,* 110 Neb. 753; *Davis v. Ferguson,* 111 Neb. 691; *Dawson County State Bank v. Durland,* 114 Neb. 605), and where applicable will be enforced. Its wisdom has been established for so long a period and by so many decisions that its authority is not now open to question. There are, however, numerous situations which are frequently referred to as exceptions to the rule, but more accurately are cases to which the rule is inapplicable. The final test, however, in every case is whether or not the parol evidence offered tends to contradict or vary the terms of the written contract or alter their legal effect.

If the fund in question constituted a "trust fund" or "special deposit," then the title thereto remained in the intervener, and the bank was merely his agent to hold the same in escrow until finally disposed of upon performance of the agreement. There is confessedly nothing in the wording of the contract furnishing any basis for such a conclusion, which must therefore be founded entirely upon the evidence offered. Is there anything in the wording of the contract opposing or contradicting the conclusion sought to be established? We think this question must be answered in the affirmative. In the first place,

the amount is referred to in the contract as "cash as part payment on said land." A payment, in the absence of fraud or mistake, which is not alleged, passes the title of the money to the party receiving it and the payor loses all interest in and control over it. It becomes the property of the payee, and while, under the circumstance of failure of consideration, the payor may be entitled to recover a like amount, his claim therefor is against the property of payee, and not against the particular money with which the payment is made.

And, secondly, the written contract provides specifically for the deposit in escrow of the deed and $11,860 mortgage, saying nothing of the check and mortgage constituting the cash payment, and under the familiar rule of *expressio unius est exclusio alterius* it seems perfectly clear that to permit it to be shown by parol that the check and $1,250 mortgage were to be held in escrow would be in direct contradiction of the recital of the contract that they were made as a cash payment, and operate to destroy the legal effect of those terms; and also would add, to the documents to be placed in escrow under the terms of the contract, other documents, thereby adding to and varying the writing.

The contract in question is complete on its face and purports to set forth the entire agreement of the parties. It is susceptible of complete enforcement according to its terms. In such case parol evidence is not competent to show that it is incomplete, or to alter the legal effect of the terms used. *Dawson County State Bank v. Durland,* 114 Neb. 605; *Grant v. King,* 117 Minn. 54. "A written contract complete on its face cannot be shown to be incomplete by resorting to the oral negotiations leading up to its execution." *Davis v. Ferguson,* 111 Neb. 691. Intervener argues that the placing of the papers in escrow was a condition precedent to the taking effect of the contract. If this be conceded, it avails nothing to the intervener, because the written contract provides what papers shall be placed in escrow, and does not mention as part of them

the check and $1,250 mortgage. This part of the contract is just as sacred from attack by parol evidence as any other part. However, the escrow agreement is part of the contract itself, and not a condition precedent to its taking effect.

The intervener cites a number of cases from this state which he claims justify the action of the trial court in receiving the evidence to which objection is made, but we think all of them are clearly distinguishable and do not support the contention. *Gregory v. Littlejohn,* 25 Neb. 368, where a contract was placed in the hands of a custodian until certain conditions, not mentioned in nor within the terms of the contract nor in writing, were complied with, and it was held that such conditions might be shown by parol.

Dodd v. Kemnitz, 74 Neb. 634, holding that it was competent to show by parol that the delivery of the contract was upon a condition precedent which had not been fulfilled. In that case the evidence was received to show that the contract was not to be in effect until approved by other members of the board of education; here the evidence is offered for the purpose of adding a term to the contract itself.

First Nat. Bank v. Burney, 91 Neb. 269, holding that, in an action upon a promissory note, oral evidence between the original parties may be introduced to show the purpose for which the note was executed and delivered, or to show an agreement which constituted a condition upon which the performance of the terms of the note depended. This case, however, was disapproved in *Security Savings Bank v. Rhodes,* 107 Neb. 223, 226.

Rankin v. Northern Assurance Co., 98 Neb. 172, holding that, where a receipt for an insurance premium fails to state upon which of two applications it was to be applied, parol evidence was admissible for the purpose of making the application.

National Engraving Co. v. Queen City Laundry, 92 Neb. 402, in which the written contract showed on its face

that it did not contain the entire contract.

In *Fletcher v. Brewer,* 88 Neb. 196, where the contract was silent as to the date when the deed was to be delivered, it was held that such date could be supplied by parol evidence.

Bell v. Wiltson, 5 Neb. (Unof.) 486, where the instrument was incomplete upon its face and the consideration, not being stated, could be shown by parol.

Also *Mothershead v. Lewis,* 117 Okla. 167. This is evidently an erroneous citation as no question of parol evidence is involved therein.

In none of these cases was it sought to add to, vary, contradict, or to change the legal effect of the terms of the contract, except where the contract on its face was incomplete.

Intervener further cites a statement of the rule from 22 C. J. 1283, sec. 1715, that, "where a written instrument, executed pursuant to a prior verbal agreement or negotiation, does not express the entire agreement or understanding of the parties, the parol evidence rule does not apply." This rather general and all inclusive statement of the rule, standing by itself, would seem to justify the reception of parol evidence in *all* cases, but, when interpreted in connection with the cases cited and illustrations given under the rule, is not contrary to the views herein expressed. Furthermore, in section 1720 it is said: "The parts of the agreement proposed to be proved by parol must not be inconsistent with, or repugnant to, the intention of the parties as shown by the written instrument; for, to receive parol proof of a part not reduced to writing, which is directly repugnant to the intention of the parties as expressed in the written instrument, would contravene the rule that parol evidence cannot be received to contradict or vary the terms of a written agreement."

We conclude that the parol evidence offered was incompetent and that the claim of the intervener that the fund in question was a trust fund or a special deposit must fail.

The judgment of the district court is reversed in so far

as it orders the intervener's claim paid from the depositor's guaranty fund, and in all other respects is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

TINA STALCUP ET AL. V. LAWRENCE P. JEPSEN ET AL.

FILED MARCH 16, 1929. No. 26446.

1. Witnesses: COMPETENCY: HUSBAND AND WIFE. In proceedings in aid of execution upon a judgment against the husband, the wife is an incompetent witness for the judgment creditor for the purpose of showing that she has in her possession and control money or property of the husband which should be applied upon the judgment.
2. ———: ———: ———. In such case, the wife's attitude as a witness for the judgment creditor would be antagonistic to the husband, and therefore "against" him within the meaning of that term as used in the statute prohibiting husband or wife from being a witness, one against the other.

ERROR to the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed and dismissed.*

Sterling F. Mutz, for plaintiffs in error.

C. J. Campbell, F. B. Baylor and *Harry R. Ankeny, contra.*

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

REDICK, District Judge.

Elmer T. Stalcup and Tina Stalcup are husband and wife. Lawrence P. Jepsen obtained a judgment against Elmer T. Stalcup, issued an execution thereon, which was returned unsatisfied, and instituted proceedings in aid of execution wherein a referee was appointed by the court to take testimony and report the facts. After an extended examination of the husband, his wife, Tina Stalcup, was called to testify before the referee and was asked a number of questions as to her indebtedness to her husband and whether or not she had under her control personal property and real estate which in truth and in fact be-

longed to him. Objection was made by counsel on behalf of both husband and wife to the reception of such testimony, on the ground that the wife was not a competent witness against her husband in the case, and that communications between husband and wife were privileged. The objections were overruled by the referee, and, upon advice of her counsel, Tina Stalcup refused to answer. The facts were reported to the district court and an order was made and served upon Tina Stalcup to show cause why she should not be punished for contempt for refusing to answer the questions, and the court, being of opinion that sufficient cause had not been shown, adjudged her guilty of contempt, imposed a fine of $10 and costs upon her, and directed that she be committed until she answered the questions. Tina Stalcup and her husband filed a petition in error in this court to review the order of commitment for contempt.

A number of questions of procedure are discussed in the briefs, but in our view there is but one question necessary to be determined, and that is the competency of the wife as a witness in proceedings in aid of execution upon a judgment against the husband, where it is sought to prove by her testimony that she has property of the husband under her control which had been conveyed to her in fraud of the husband's creditors, or whether she was indebted to her husband. The question involves the proper construction of section 8837, Comp. St. 1922, as follows:

"The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other, but they may in all criminal prosecutions be witnesses for each other; Provided, however, the wife shall be a competent witness against the husband in all prosecutions arising under section thirty-nine of the Criminal Code (9584)."

We think the question cannot be considered an open one in this state. In *Weckerly v. Taylor*, 74 Neb. 772, an

action was brought by a judgment creditor of the husband against the husband and wife and an insurance company to compel the application of the sum of $1,250, claimed by the creditor to be due the judgment debtor from the insurance company as a weekly indemnity, but which had been assigned by the husband to the wife, and it was held that the husband was an incompetent witness in that action. Now, this case is not decisive because the wife was claiming under the assignment, and by the husband's testimony it was sought to defeat the assignment, and therefore his evidence would be clearly against his wife, but it was said: "The appellee seeks to justify the admission of the husband's testimony on the assumption that, in an action by the wife against the company on the policy, the testimony solicited would be favorable to her interests, and that he was not, therefore, an incompetent witness in this action. We think, however, the true test is whether the proceeding in its character is an adversary one, and, if the interest of the party litigant who seeks to produce the husband's testimony is antagonistic to that of the wife, the husband should be held to be an incompetent witness in behalf of the antagonist." This language is applicable to the present case in that the judgment creditor is the antagonist of the husband, and testimony of the wife in his favor would be necessarily against the husband.

However, in *Niland v. Kalish,* 37 Neb. 47, it was held, under the provision of section 331 of the Code of Civil Procedure (section 8837, *supra*): "A wife, over her husband's objection, cannot be required to testify as to facts which, it is claimed by the adverse party, would show that a transfer of property from her husband to herself was fraudulent. Neither can the husband under like circumstances be compelled to testify against his wife." That was an action in the nature of a creditor's bill to set aside the title of the wife to certain real properties conveyed to her by her husband as having been made in fraud of creditors. It was offered to show by the wife that the real estate in question had been bought with funds belonging to the hus-

band, and it was held that she was an incompetent witness for that purpose. It was claimed in that case that evidence that the husband was the owner of the real estate was evidence in his favor rather than against him, and substantially the same contention is made here, but the court said: "Such a construction, however, savors too much of casuistry and cannot be accepted as the sense in which the offer was made and insisted upon, for this whole proceeding was on the theory that Solomon had no property whatever, and plaintiffs could hardly be suspected of the inconsistent attempt to establish in Solomon's favor a basis for credits."

If this were a proceeding on a creditor's bill against the husband or wife for the purpose of subjecting property in the name of and under the control of the wife to the payment of the judgment against the husband, the case of *Niland v. Kalish, supra,* would be directly in point, and there would be no question but that the wife would be an incompetent witness as to the matters here sought to be elicited. What difference does it make that the proceeding is one in aid of execution? These proceedings are generally considered as a substitute for a bill of discovery, and the power of the court is ample to order the application of any property, revealed by the investigation, to the satisfaction of the judgment. It does not supersede the remedy by creditor's bill, but may become the foundation for such proceeding. The purpose of both proceedings is substantially the same—to establish a fraudulent holding by the wife. If the wife is an incompetent witness in the latter action, it would seem to follow that she is incompetent in these proceedings. Her testimony here could not be received in a subsequent proceeding, and therefore would be valueless.

It is argued, however, that the husband is not a party to these proceedings, and has no interest therein. To this we cannot assent. The proceedings are in the same case in which the judgment was rendered, he is a party throughout the proceeding, and is interested to the extent of the

charges of fraud against him. *In re Mayer,* 97 Fed. 328 (bankruptcy). He is also interested to the extent of a husband's interest in his wife's property, which would be destroyed if the property is taken away from her. It is further argued that the testimony of the wife would be against herself only, and not against her husband, as he had parted with all his interest to her, but we think this is answered by the suggestion above, that her testimony was expected to be in favor of the husband's antagonist and therefore against him. *De Farges v. Ryland & Brooks,* 87 Va. 404.

A number of cases from other jurisdictions have been cited by defendant in error as sustaining his contentions and position in this case, to wit: *Frankenthal v. Solomonson,* 20 Wash. 460; *Petition of Mary J. O'Brien,* 24 Wis. 547; *Thompson v. Silvers & Hoffman,* 59 Ia. 670; *Jacobsen v. Andrews,* 45 S. Dak. 490. But we are not thereby persuaded to change our views expressed in the case of *Niland v. Kalish, supra.* In addition, defendant in error cites *Olmsted v. Edson,* 71 Neb. 17, to the proposition that, "even if the testimony of plaintiff in error in the supplemental proceedings be viewed in the nature of a deposition for discovery in an action against herself and husband, she was a competent witness." The case does not bear him out. The case was by husband and wife for false imprisonment. Their depositions were sought to be taken by plaintiff in another action in which the husband and wife and another were defendants. They refused to be sworn on the ground that they were husband and wife and were not competent witnesses against each other. The court said: "It is not alleged that the evidence sought to be elicited from them and preserved in the form of depositions was not against their codefendant or was evidence sought to be elicited from one of the plaintiffs against the other. The proper and orderly thing for them to have done was to have taken the oath as witnesses and if, by the questions propounded, it appeared that the answers would constitute evidence by the one against the other, to have

then made the proper objections, which, undoubtedly, would have been sustained." It thus appears that the husband and wife were on the same side of the case, it did not appear that the evidence sought was against them or either of them, and the only question decided was that they were not justified in refusing to be sworn.

The view we have taken of the incompetency of the wife in this case is supported by *Berles v. Adsit,* 102 Mich. 495, which was a garnishment proceeding, and the wife was held incompetent to testify as garnishee. Also *DeFarges v. Ryland & Brooks,* 87 Va. 404; *In re Kessler,* 225 Fed. 394; *In re Mayer,* 97 Fed. 328.

The cases cited by defendant in error from other jurisdictions, we think, place too much stress upon the question whether or not the husband is a party to the particular proceedings in which the testimony of the wife is sought to be elicited. It was held in *Stocker v. Stocker,* 112 Neb. 565, that sections 8835 and 8838, Comp. St. 1922, providing that neither husband nor wife can be examined in any case as to any communication made by one to the other while married, were enacted for the purpose of affording protection to the marital relation, to foster mutual confidence between husband and wife, and to prevent the disclosure of any confidential communication from one to the other. The same language is applicable to the enactment under consideration. Such enactments are based upon a sound public policy for the preservation of the home and domestic peace therein. And while in some quarters there seems to be a disposition to consider lightly the institution of marriage and the obligations arising out of it, we think we are safe in declaring that the vast majority still cling to the old-fashioned conception of the marriage relation as the foundation of our social fabric, and that laws enacted for the purpose of preserving that institution in all its pristine importance are to be looked upon with favor by the courts and interpreted in the sense required by the public policy which dictated their enactment.

We are of the opinion that the wife was an incompetent witness in the proceedings before the referee, and that her objection and that of her husband should have been sustained. The judgment of the district court is reversed and proceedings for contempt dismissed.

REVERSED AND DISMISSED.

LENA SEYBERT V. CAMDEN M. SEYBERT ET AL.: BEULAH SPRIECK, APPELLANT: WALTER J. FECHNER, APPELLEE.

FILED MARCH 16, 1929. No. 26493.

1. Wills: CONSTRUCTION. The settled rule in Nebraska is that, where the meaning of the testator is clear from the terms of the will, the courts will unhesitatingly give full force and effect to such meaning, thereby effectuating the intent of said testator.
2. ———: ———. In arriving at the intent of the testator, the court will consider all of the language used by the maker of the will, and endeavor to give each part of the same its proper meaning and effect. In the present case the concluding sentence of the controverted paragraph is not to be excluded in arriving at the intent of the testator.
3. ———: ———. *Held*, in the case at bar, that the devise in question goes to the issue of Edward Sprieck, his daughter Beulah Sprieck, and not to his estate or to his administrator *de bonis non.*

APPEAL from the district court for Stanton county: DEWITT C. CHASE, JUDGE. *Reversed, with directions.*

Henry J. Beal and *Daniel J. Gross*, for appellant.

Zacek & Nicholson and *A. E. Wenke, contra.*

Heard before ROSE, GOOD, EBERLY and DAY, JJ., and REDICK and SHEPHERD, District Judges.

SHEPHERD, District Judge.

On the 20th day of August, 1898, Frederick Sprieck died in Stanton county, leaving considerable real and personal property and a will directing the distribution of the same.

The significant and controverted part of said will is as follows:

"I give and bequeath all the rest and residue of my estate that remains after paying the above bequests to Paul Bolz, August Bolz, Edward Sprieck, Lena Sprieck, Pauline Sprieck and Alma Sprieck, to share and share alike, as tenants in common, to be paid to them as they respectively become of age. In case any one of them shall die in my lifetime, or in the lifetime of my beloved wife, leaving issue or descendents, I direct that his or her share shall not lapse, but shall be paid to such descendants, in equal proportion."

By this paragraph (paragraph 12 of the will) the testator gave his widow a life estate and definitely disposed of the remainder to his nephews and nieces named in said paragraph, and to their children.

The widow, Augusta Sprieck, died on the 8th day of February, 1927. Meanwhile, Edward Sprieck, one of the beneficiaries mentioned in said paragraph, had married, had had a daughter born to him, had seen her grow to the age of sixteen years, and had himself died on the 9th of October, 1921, leaving him surviving his widow, Olga, and his said daughter, Beulah Sprieck. Following the death of said Edward Sprieck his widow, Olga, married again and became Olga Deleski. Edward's estate was probated in Madison county. It did not satisfy his creditors in full, and after the death of Augusta Sprieck the defendant Fechner, administrator *de bonis non* of the estate of Edward Sprieck deceased, was duly appointed.

The question as to the devisee or devisees arose in partition brought by Lena Seybert, formerly Lena Sprieck, a niece mentioned in the described paragraph.

By the decision of the district court Olga Deleski and Beulah Sprieck took undivided halves of Edward Sprieck's portion, subject to Edward's debts. And the order was that Edward's portion should be paid to Fechner, the administrator *de bonis non* of his estate.

This is a case, however, in which Edward Sprieck re-

ceived a vested interest defeasible by a condition subsequent, and in which that condition subsequent occurred, resulting in the passing of the portion which Edward would otherwise have received to his daughter, Beulah, as a substituted devisee. Beulah does not take as the heir of her father, Edward, but as the devisee of her grand-uncle, Frederick Sprieck; and she takes from him because he specifically named her as such devisee by the title of issue or descendent.

It seems clear that it was the intention of Frederick Sprieck that Edward should have an undivided one-sixth of the remainder of his estate if he was living at the time of the demise of his mother, Augusta Sprieck (widow of the testator), but that in the event of his death before the death of the testator's widow his portion should go to and become the property of his child or children. It is argued by the appellee that the words, "in case any one of them shall die in my lifetime, or in the lifetime of my beloved wife, leaving issue or descendants, I direct that his or her share shall not lapse, but shall be paid to such descendants in equal proportion," in said paragraph 12 of the will add nothing to the rest of the paragraph and take away nothing, and that they should not be considered at all. The rule of law is that all of the provisions of a will should be given some force and effect with a view of ascertaining and making effectual the intent of the testator. *Schnitter v. McManaman,* 85 Neb. 337; *In re Estate of Buerstetta,* 83 Neb. 287; *Marsh v. Marsh,* 92 Neb. 189.

It must be considered that the testator in this case knew the law and had some reason for using the words in question. It is quite obvious that he intended that the issue of Edward should have his bounty without subjecting the latter to the payment of Edward's debts. Otherwise, the language would not have been used.

Where the intent of the testator is clear from the terms of his will, courts will unhesitatingly give full force and effect to such intent. This is so well settled in Nebraska as to require no citation of authority. The plain and or-

dinary meaning of issue or descendants is issue of the body or lineal descendants. Anderson's Dictionary of Law, 570. The property therefore goes to Edward's child, Beulah Sprieck.

The case of *Wilkins v. Rowan,* 107 Neb. 180, is very much in point as an authority in this case. In that case the language of the court, in syllabus No. 3, was to the effect that the vested interest was defeasible, and not absolute, and that upon the death of the father his three minor children took his interest, not as heirs at law, but as descendants and substituted devisees. A similar holding of the court is to be found in *Case v. Haggarty,* 91 Neb. 746. The principle involved is not only adopted in this state, but is of general recognition throughout the United States.

In view of the foregoing, it is obvious that the decree of the trial court must be reversed, and that an order must issue from this court directing a decree in conformity to this opinion. It is so ordered.

REVERSED.

STATE OF NEBRASKA V. JAMES SEWARD.

FILED MARCH 23, 1929. No. 26459.

1. **Criminal Law**: EXCEPTIONS TO RULINGS. For the purposes of reviewing the rulings of a trial judge on exceptions taken by a county attorney, under section 10192, Comp. St. 1922, a motion for a new trial is not ordinarily necessary to be filed in the district court; and was not necessary here.
2. ———: APPEAL FROM MAGISTRATE: COMPLAINT. Under section 10001, Comp. St. 1922, it is the duty of the district court to hear and determine an appeal from a magistrate upon the original complaint, unless such complaint shall be found insufficient or defective, in which event the court, at any stage of the proceedings, shall order a new complaint to be filed therein, and the case shall proceed thereon the same in all respects as if the original complaint had not been set aside.
3. ———: COMPLAINT: VARIANCE: ADMISSION OF EVIDENCE. If there be a variance between the complaint appearing in the transcript and the original complaint, and it appears material to the rights either of the state or of the defendant to explain

or to reconcile the variance by competent evidence as to the true facts, such evidence should be received.

4. **Intoxicating Liquors:** COMPLAINT: SUFFICIENCY. The original complaint in this case examined and *held* to state an offense in the second count, which was dismissed by the court.
5. **Indictment and Information.** Record examined and exceptions by the county attorney sustained.

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

H. F. Mattoon, for plaintiff in error.

H. H. Wilson, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and DAY, JJ., and BLACKLEDGE and REDICK, District Judges.

GOSS, C. J.

This cause appears here on exceptions by the state to rulings of the district court in a criminal trial.

October 3, 1927, a complaint in two counts was filed against James Seward before a justice of the peace. The first count charged intoxication. The second count charged unlawful possession of liquor on said day in defendant's private dwelling-house and alleged, with specifications, a previous conviction, on June 11, 1927, for unlawful possession of liquor. Trial was had and the justice fined defendant on the first count and sentenced him to 60 days in jail on the second count. He appealed.

The cause came on for trial in the district court December 8, 1927. Prior to arraignment on said day, the defendant moved to quash the second count, on grounds which will be stated presently. The court overruled the motion. After the trial had been entered upon, the defendant objected to the introduction of any evidence relating to the second count and moved to strike all evidence given in support thereof. The reasons for the motion were, in short, substantially as in the motion to quash, that the second count, as shown by the transcript of the justice of the peace charged that the defendant had "intoxicating liquor in his private dwelling-house, for the purpose of sale,"

whereas, the original complaint (which was sent up to the district court by the justice) charged that the defendant had "intoxicating liquor in his private dwelling-house, for the purpose of unlawful sale, use and disposition." The court sustained the motion on the express theory that the complaint described in the transcript was the controlling one on which the defendant was tried below and that the variance between that and the original complaint was fatal. The court sustained the motion as to the second count. We have examined the original complaint and find that it states an offense in the second count. Hence, the ruling complained of is on a material matter.

Thereupon the state asked leave to make a showing to have the transcript corrected to show that in the lower court the state had asked and obtained leave to amend the complaint. This was overruled.

The state then asked leave to file an amended complaint to conform to the transcript. This was denied.

Thereupon, the second count being dismissed, the defendant obtained leave to withdraw his plea of not guilty to the first count and to plead guilty on that count. With that feature of the case we have nothing to do.

The then district judge who tried the case below appeared by his attorney in this court and by brief and oral argument resisted the sustaining in this court of the exceptions duly taken by the state in the court below.

He objects to our jurisdiction to consider the exceptions because no motion for a new trial was filed by the state in the court below. This is a statutory matter specially provided for. The defendant is not concerned at all in its event; he has been discharged on this count. No motion for a new trial would avail anything to the state. None is provided for in the statute, nor is any implied therein for such a case as is before us. As provided by statute, the reasonable notice to the judge has been given, he has appeared by a competent attorney to argue the case, and doubtless his only remaining function suggested by the statute will be duly performed by the judge—to fix the

limited compensation allowed for his attorney, to be paid out of the treasury of the county. Ordinarily a motion for a new trial is not necessary in such a proceeding. None was necessary here. Comp. St. 1922, sec. 10192.

The state excepted chiefly to the court's ruling that there was a substantial variance between the original complaint and the justice court's transcript and excepted also to the rulings refusing the state an opportunity to reconcile any difference between them, or to permit the case to be tried on the original complaint, or to permit a new complaint to be filed. Section 10001, Comp. St. 1922, expressly provides that the trial on appeal from a magistrate shall be upon the original complaint. It further provides that, if the original complaint be found insufficient or defective, "the court, at any stage of the proceedings, shall order a new complaint to be filed therein."

The state suggested a diminution of the record and was prepared to show by the magistrate that his transcript was erroneous in fact and that, as offered to be corrected, it would show the complaint to be exactly in words as the original complaint on which the defendant was put upon his trial in the district court. The objection of the defendant was to the effect that the original complaint showed the interlineation of the words "use and disposition." The state offered to show by the magistrate and to produce his order, made *nunc pro tunc,* that in the justice court the complaint had been duly amended before trial to include the words named above. The district court refused these offers and held that the only change he would permit in the transcript would be to "insert any matter in that transcript which the records now show in the court below."

No inference can be drawn from the mere interlineation of the words "use and disposition" in the original complaint that they were so inserted in that complaint after the hearing or without authority. *Hoover v. State,* 48 Neb. 184. That was a trial under the Code for a felony; but trials for minor offenses are governed by the gen-

eral provisions of the Criminal Code "as far as the same are in their nature applicable." Comp. St. 1922, sec. 9998. The prosecutor tried by every way applicable to satisfy the captious objections of the defendant to reconcile an apparent variance between the original complaint and the transcript. These offers did not meet with the approval of the trial judge.

It is suggested that the original complaint was altered by the interlineation of the words "use and disposition" and that such alteration was made without authority. "Interlineations or erasures cast less suspicion upon official acts or documents than upon mere private papers. If an interlineation or erasure appears on the face of a public record, such as an officer's return, or an official document, or one coming from proper official custody, and there is no evidence to show when it was done, it will be presumed, in the absence of evidence to the contrary, to have been done when the officer had authority to do it. So papers filed in court will not be presumed to have been fraudulently altered on account of interlineations or erasures." 2 C. J. 1278, sec. 195, and cases cited thereunder.

If a magistrate may, by design or by oversight, so make his own records, or so certify a record, as not to state correctly any material fact involved in or necessary to a trial of the case on appeal, it would lead to injustice never contemplated by either the spirit of the law nor by the practice and procedure laid down in the Criminal Code and in the interpretations thereof by the court. These matters are vital not only to a defendant but to the state. We reject the idea. We hold that the court should, in that stage of his rulings, have allowed the offered proof to be tendered.

However, back of that in the history of the trial, we are of the opinion that the trial court erred basically in not allowing the case to proceed on the original complaint. The trial in such a case is to be had on the original complaint "unless found insufficient or defective" and a new complaint is thereupon filed. Comp. St. 1922, sec. 10001.

As shown in the statement of this case, a motion to quash was filed before the beginning of the trial and was overruled. Defendant was then arraigned and pleaded not guilty. Evidence was taken. The objections to the evidence resulting in the situation heretofore described were the same as in the motion to quash, which was overruled. Defendant attempted to do and succeeded in doing by indirection what he had failed to do by direct attack. Section 10113, Comp. St. 1922, is as follows: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue." We held in *Olsen v. State,* 114 Neb. 112: "By entering a plea of not guilty to a criminal information, the defendant waives all defects therein which may be excepted to by a motion to quash or a plea in abatement." We further said: "Had he attacked the information by motion, and had it been sustained, an amended information might have been filed." *Lindley v. State,* 117 Neb. 597, and cases there cited. The defendant is not here for review, but the rulings of the court are here for consideration on exceptions. Can it be said and be supported by reason or logic that a trial court may refuse to quash a complaint and later, on the trial, on identically the same facts, refuse to allow the complaint to be amended, and dismiss it? We are of the opinion that the trial court erred and that the exceptions taken by the county attorney should be sustained.

EXCEPTIONS SUSTAINED.

Note—See Criminal Law, 16 C. J. 383 n. 71; 17 C. J. 86 n. 41—Intoxicating Liquors, 33 C. J. 731 n. 81.

BERNARD R. STONE, APPELLEE, V. THEODORE JENSEN, APPELLANT.

FILED MARCH 23, 1929. No. 26489.

1. **County Courts:** JUDGMENT: VACATION. A county court has inherent power to vacate or modify its judgments in civil cases, that are without the jurisdiction of a justice of the peace,

during the term at which such judgments were rendered, and for this purpose the term is the monthly term of court beginning at 9 o'clock a. m. on the first Monday of each calendar month, as defined by section 1133, Comp. St. 1922.

2. ———: ———: ———. A county court is without power to vacate or modify its judgments, in civil cases beyond the jurisdiction of a justice of the peace, after the expiration of the monthly term of court at which such judgments were rendered, except for the causes and in the manner provided by section 9160, Comp. St. 1922.

3. ———: ———: ———. Where a county court, after the expiration of the term at which it was rendered, and without any motion, petition or application by, or notice to, any party to the action, attempts to vacate and set aside its judgment in a civil action, in a case beyond the jurisdiction of a justice of the peace, such attempt is void for want of jurisdiction.

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

Anson H. Bigelow, for appellant.

John W. Yeager and *Bernard R. Stone, contra.*

Heard before ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and REDICK and SHEPHERD, District Judges.

GOOD, J.

This appeal requires us to determine whether section 1133, Comp. St. 1922, or section 9168, Comp. St. 1922, defines the term of the county court at which such court may, in its inherent power, vacate or modify its judgment rendered during the term. The question arises in this manner:

Plaintiff began a civil action in the county court against several defendants, to recover a sum in excess of the jurisdiction of a justice of the peace. The cause was heard, and on the 2d of December, 1927, and during the November term, judgment was rendered in favor of plaintiff and against Jensen and two others for the sum of $413.89. The next term of court, as fixed by section 1133, Comp. St. 1922, began on December 5, 1927. On December 8, 1927, without the filing of any motion, petition or appli-

cation by any party to the action, the county court, apparently on its own motion and without notice to any of the parties, entered an order setting aside the judgment theretofore rendered, and then entered a new judgment against Jensen and one other defendant for the same amount as the original judgment. On December 14, 1927, Jensen filed an appeal bond and attempted to appeal to the district court. In the latter court the plaintiff filed a motion to dismiss the appeal, on the grounds that the county court was without jurisdiction to enter the order of December 8, setting aside the judgment previously entered on December 2, because the term of court at which the judgment was rendered ended on December 4, and a new term began December 5; that the judgment attempted to be rendered on December 8 was void; and that the appeal bond was not filed within ten days from the entry of the original judgment and, therefore, the attempt to perfect the appeal was of no force and effect. The district court sustained the motion and dismissed the appeal. From that judgment defendant Jensen prosecutes an appeal to this court.

Defendant contends that the county court has inherent power to vacate its judgment, rendered in term cases, at any time during the term at which such judgment was rendered, and contends that the term of the court for such purpose is defined by section 9168, Comp. St. 1922.

Chapter 19 of the Civil Code comprises sections 9160 to 9168, inclusive, Comp. St. 1922, and is devoted to the power of courts to vacate or modify its own judgments or orders after the term at which they were made. Section 9160, Comp. St. 1922, provides nine grounds for vacating a judgment after the term at which it was rendered: First, by granting a new trial of the case within the time and manner prescribed in section 8828, Comp. St. 1922; second, by a new trial granted in proceedings against defendant constructively summoned, as provided by section 8583; third, for mistake, neglect or omission of the clerk or irregularity in obtaining a judgment or order; fourth, for fraud prac-

ticed by the successful party in obtaining the judgment or order; fifth, for erroneous proceedings against an infant or person of unsound mind, where the condition of such defendant does not appear in the record nor the error in the proceedings; sixth, for the death of one of the parties before judgment in the action; seventh, for unavoidable casualty or misfortune, preventing the party from prosecuting or defending; eighth, for errors in a judgment shown by an infant in 12 months after arriving at full age, as prescribed in section 8951; ninth, for taking judgments upon warrants of attorney for more than was due the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place for taking such judgment.

Sections 9161 to 9166, inclusive, Comp. St. 1922, provide the method of exercise of the powers granted, and section 9167 fixes the time within which such proceedings must be commenced. Section 9168 is as follows: "The provisions of this chapter shall apply to the supreme court and county court, so far as the same may be applicable to the judgments or final orders of such courts. The parties shall be limited to the same time in which to commence proceedings; and in estimating time, the county court shall, for such purpose, be considered as holding, in each year, three terms of four months each, the first commencing on the first day of January of each year."

Defendant argues that the four-month term, mentioned in the section quoted above, fixes the term of court within which the court has inherent power to vacate or modify its own judgments, and that it is not until after the expiration of the four months that proceedings for the causes mentioned in section 9160 shall be required to be commenced. On the other hand, plaintiff contends that the term of court, as defined by section 1133, Comp. St. 1922, fixes the term of court during which the county court has inherent power to vacate or modify its own judgments. Chapter 14 (secs. 1057-1219) Comp. St. 1922, deals with courts and their powers. Article VI of that chapter, being

sections 1127 to 1172, inclusive, defines the county court, its jurisdiction and powers, and by section 1133 it is provided: "It shall be the duty of the county judge, in each county, to hold a regular term of court at his office at the county seat, commencing at 9 o'clock a. m. on the first Monday of each calendar month, for the trial of such civil actions brought before such court as are not cognizable before a justice of the peace. Such regular term shall be deemed to be open without any formal adjournment thereof until the third Monday of the same month, when all causes not then finally determined shall be continued by such court to the next regular term; but such courts shall be deemed to be always open for the filing of papers and issuance of process in civil actions, and for the purpose of taking and entering judgment by confession." In many of the sections of article VI of chapter 14 reference is made to the term of the county court, and always the reference is to the monthly term beginning on the first Monday of each calendar month.

Defendant cites, as sustaining his contention that the county court has discretion to vacate its judgments or final orders in nonjustice-court civil actions during the four-month term mentioned in section 9168, *supra, Volland v. Wilcox,* 17 Neb. 46, *Bradley v. Slater,* 55 Neb. 334, *Eager v. Blake,* 1 Neb. (Unof.) 852, and *State v. Duncan,* 37 Neb. 631.

In *Volland v. Wilcox, supra,* it was held: "A county court, for sufficient cause, may vacate or modify its own judgments, in term cases, during the term at which they were rendered." In that case there were set forth the several provisions of the act of March 3, 1873, concerning the organization, forms and jurisdiction of probate courts, and it clearly appears that the term to which reference was made in that opinion was the monthly term of the county court. However, there is no discussion in that case as to whether the four-month term of the county court, as provided by section 9168, Comp. St. 1922, would be applicable. In that case *Hansen v. Bergquist,* 9 Neb. 269, was cited and

followed. In the latter case the county court, on the 18th of May, modified a judgment rendered the day before. It was within the monthly term, and no question was presented as to whether the four-month term, mentioned in section 9168, was applicable.

In *Bradley v. Slater, supra,* there was a holding that a court of general jurisdiction possesses inherent power to vacate or modify its own judgments during any term at which they were rendered. In that case the reference was to a judgment of the district court.

In *Eager v. Blake, supra,* it was held: "The power of the court to modify or vacate its own judgments or orders at the term at which they were rendered is an inherent power and exists independent of any statute and can be reviewed only for an abuse of discretion." The judgment in that case was one rendered by the district court, and it was by that court vacated at the same term.

In *State v. Duncan, supra,* the rule was also announced that—"The county court, acting within its special jurisdiction, has power to vacate judgments and final orders during the term at which they were rendered."

In none of the cases cited was it held or even suggested that the four-month term, mentioned in section 9168, *supra,* was that at which a county court has inherent power to vacate or modify its judgments. We have also made an extended research into the decisions of this court and have been unable to find a single case where it has been held or intimated that section 9168 defines the term of court within which a county court may, in its inherent power, vacate or modify its judgments.

Section 1133, Comp. St. 1922, defining the terms of court as commencing on the first Monday in each calendar month, defines the term fixing the return day, the answer day, the time for pleading, for trial, and, apparently, for all purposes generally. A careful examination of section 9168, Comp. St. 1922, makes it apparent that the three terms of court, therein mentioned, are for one purpose only, and that is in estimating the time that the parties

are given in which to commence proceedings to vacate or modify a judgment *after* the term at which it was rendered. In fact, the whole of chapter 19 of the Civil Code, comprising sections 9160 to 9168, inclusive, relate to the powers of courts to vacate or modify their judgments or orders after the term at which such judgments or orders were made. Since the three terms of four months each, mentioned in section 9168, are for the single purpose above indicated, it is clear that this section cannot have the effect of extending beyond the monthly term of court, as defined by section 1133, the time within which a county court may exercise its inherent power to vacate judgments or orders during the term at which rendered.

The action of the county court on December 8, in attempting to vacate its judgment, legally rendered on December 2, was void for want of jurisdiction. The only valid judgment against the defendant was that which was rendered on December 2, 1927. As a condition to his right to appeal, defendant was required to file his appeal bond within ten days from the rendition of that judgment. This he failed to do. The attempted appeal was abortive and the district court properly sustained the motion to dismiss it.

The judgment is

AFFIRMED.

EVA HENRY, APPELLANT, V. RUDGE & GUENZEL COMPANY, ET AL., APPELLEES.

FILED MARCH 23, 1929. No. 26258.

1. Sales: WARRANTY: BREACH: REMEDIES. Where, in a completed sale, there is a breach of warranty by the seller, the buyer may at his election keep the goods and maintain an action against the seller for damages for the breach of warranty, or he may rescind the sale, and return or offer to return the goods to the seller and recover the price or any part thereof which has been paid, but the buyer cannot have both remedies. Comp. St. 1922, sec. 2538.
2. ———: ———: ———: ———. If the buyer rescinds the sale, returns the goods and accepts and receives the purchase price,

he cannot thereafter maintain an action against the seller for breach of warranty.

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

Charles E. Matson and *Calvin Webster,* for appellant.

Hall, Cline & Williams, Claude S. Wilson, Roy F. Gilkeson and *Hymen Rosenberg, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and BEGLEY and RAPER, District Judges.

RAPER, District Judge.

Action by plaintiff and appellant against the defendants and appellees, who were alleged retail dealers in shoes in Lincoln. Plaintiff in her petition alleges that on May 8, 1926, she purchased a pair of shoes which, she informed defendant's salesman, she wanted for street wear, and the salesman exhibited shoes which the salesman orally warranted to be in all respects fit and proper for such use, and, relying upon such representation, she bought the shoes, and thereafter, about July 10, 1926, without fault or negligence on her part, the heel on one of the shoes came off as plaintiff was descending a flight of stairs, thereby causing her to fall and receive severe injuries. Plaintiff alleges that the shoes were inferior and defective, in that the heels were not securely nailed or fastened on the shoes, but were insecurely glued on, which defect could not be discovered by an examination prior to the time the heel came off, and that said shoes were not reasonably fit for the purpose for which the plaintiff had purchased them.

The defendants in their separate answers, in so far as pertinent to the decision in this appeal, admit the purchase of the shoes, deny generally the allegations of the petition, and allege that in July, 1926, the plaintiff returned said shoes, claiming one of the heels had come off, and the defendant Kohler Shoe Company, offered to repair the shoe and replace the detached heel, but plaintiff refused to ac-

cept said offer, and thereupon elected to return and deliver, and did at said time return and deliver, said shoes to the defendant Kohler Shoe Company, which company then and there received and accepted said shoes, and said defendants, at plaintiff's demand, then made reimbursement to plaintiff for said shoes.

Trial was had to a jury, and at the close of plaintiff's testimony, at request of defendants, the court gave peremptory instructions to the jury to return verdict for defendants, which was done, and judgment entered dismissing the action, from which judgment plaintiff appeals.

Plaintiff's evidence discloses that about May 8, 1926, she went to the store and told a clerk that she wanted a pair of shoes for street and every-day wear. The clerk showed her some shoes which she tried on, and they looked and felt all right, and she told the clerk that she had been buying her shoes at Mayer Brothers and Magee's, and that she relied on what the clerks told her, and the clerk responded that neither Mayer Brothers nor Magee had any better shoes than these she had on and that, in fact, there were no better shoes in town. She asked the price, and, on being told the price, she said, "Well, I will take your word for it and take the shoes;" and she relied on the clerk's statement, took the shoes and paid for them. She wore them five or six times, and on July 10, while visiting at a relative's home, as she started to descend a flight of stairs, the heel of one of the shoes dropped off, causing her to fall down the stairs, the fall resulting in severe injuries to her; there were no tacks in the heel of the shoe, the heel being fastened insecurely by some kind of glue.

About five days later she went to the store with her shoes and told the clerk that the heel had come off, and he said he would have the heel put on, but she told him she did not care to have them fixed, and asked the clerk for his superior. She was taken to the office of the manager, or one over the clerk, who told her they would fasten the heels on for her and the shoe would be as good as new; but she said she did not care to have them fixed that way.

She told him that when the heel came off she had fallen down stairs and was hurt, and had not seen her doctor yet and did not know how badly she was injured, but would see him later about her personal injuries. The manager then told the clerk to give her a pair of new shoes. She was given another pair, which she accepted. She was then offered the old shoes for a small price, which she agreed to pay, and the old shoes were left at the store to have the heels nailed on. In four or five days she went back to the store to get the old shoes. She paid $1 that she was yet owing on them and took the old shoes. She at that time told the clerk that she had been injured by the fall down a flight of stairs and "in regard to my personal injuries I will see you folks later." This is a résumé of her testimony covering the purchase, the alleged warranty she relies on, and the alleged rescission.

There are several phases of the case treated at considerable length in the able briefs of the parties—as to whether there is a warranty, whether the retail dealer is liable for such defects in merchandise, whether, if liable at all, the dealer can be held for consequential damages, and some other questions; but it will be unnecessary to consider such questions and they are not determined.

But, assuming there was a warranty, the plaintiff's testimony shows clearly that the sale was rescinded. She returned the shoes and was fully repaid the purchase price and it was done at her request and voluntarily. Counsel urge that she did not intend to rescind, and that her statement that she would see the defendants later about her injuries indicated that she was not consenting to a rescission. There can be no such thing as a partial rescission, except in certain cases where the contract is divisible. Where the sale is for a particular article, there can be no partial rescission. After the return of the shoes and repayment to her of the purchase price, the rescission was complete. In *Apex Chemical Co. v. Compson,* 171 N. Y. Supp. 60, the court held that rescission seems to follow as a matter of law the return of the property, and that

the return itself operates as a conclusive presumption of law that the plaintiff intended to rescind. When plaintiff returned the shoes and received payment for the purchase price, it was an irrevocable election to rescind, and her statement to the effect that she would see the defendants later about her injuries was ineffectual to modify or disaffirm her election to rescind.

Having rescinded the contract, plaintiff has no right of action for damages for breach of the warranty. She cannot rescind and claim damages for breach of the warranty.

The uniform sales act provides: "1. Where there is a breach of warranty by the seller, the buyer may, at his election, * * * (b) accept or keep the goods and maintain an action against the seller for damages for the breach of warranty; * * * (d) rescind the contract to sell or the sale and refuse to receive the goods, or, if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

"2. When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted." Comp. St. 1922, sec. 2538.

This court has in several cases held that, where a party rescinds a sale and receives or demands or recovers the purchase price therefor, he cannot also demand damages for a breach of the warranty. *McCormick Harvesting Machine Co., v. Brown,* 5 Neb. (Unof.) 356; *Phelps v. Shuck,* 107 Neb. 490; *Alfree Mfg. Co. v. Grape,* 59 Neb. 777; *First Nat. Bank of Chadron v. Tootle,* 59 Neb. 44; *First Nat. Bank of Chadron v. McKinney,* 47 Neb. 149.

The trial court was right in directing a verdict for the defendants, because of plaintiff's rescission of the sale.

The judgment of the district court is

AFFIRMED.

LYNN A. PECKHAM V. STATE OF NEBRASKA.

FILED MARCH 23, 1929. No. 26747.

1. **Kidnapping.** A statute denounced as a crime the enticing away of a child with intent to detain or conceal it from its parents; *held* to define two separate offenses, one to detain and one to conceal.
2. **Criminal Law:** KIDNAPPING: INSTRUCTION. Where a defendant was charged only with concealing a child, it was reversible error for the court to instruct that he might be convicted of either detaining or concealing.

ERROR to the district court for Johnson county: JOHN B. RAPER, JUDGE. *Reversed.*

Laflin & Laflin, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

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

REDICK, District Judge.

Defendant was convicted under an information charging him with forcibly and fraudulently taking and enticing away "one Doris Parish, a minor child under the age of eighteen years, to wit, of the age of fourteen years, from the home of Doris Parish, with the intent of him, the said Lynn A. Peckham, to unlawfully, maliciously, and feloniously take and conceal said child from Henry Parish and Mrs. Henry Parish, the grandfather and grandmother respectively of the said Doris Parish," and was sentenced to the penitentiary for not less than one nor more than three years. Defendant prosecutes error to this court.

A large number of errors have been assigned, but one only will be considered as it necessitates a reversal of the judgment. The prosecution was had under section 9561, Comp. St. 1922, which reads as follows:

"Whoever maliciously or forcibly or fraudulently leads, takes or carries away or decoys or entices away any child

under the age of eighteen years, with intent unlawfully to detain or conceal such child from its parent or parents or guardian or other person having lawful charge of such child, shall be imprisoned in the penitentiary not more than twenty years nor less than one year."

It will be noted that this statute denounces two crimes, one being with intent to detain, and the other with intent to conceal. This follows from the use of the disjunctive conjunction "or" in describing the crimes. The defendant was charged only with intent to conceal.

The trial court properly stated the charge in the first instruction to the jury, and in the fourth instruction quoted the statute as above set out, omitting the punishment, and these instructions are not subject to criticism; but by the eighth instruction the jury were told: "You are instructed that the state is not required to prove for how long a time the defendant did intend to detain or conceal said Doris Parish, if you so find. It will be sufficient on that point if the evidence establishes beyond a reasonable doubt that defendant intended to detain or conceal Doris from her grandparents for any period of time." The intent to "detain" or "conceal" is again referred to in instructions Nos. 5, 10, and 14,.

Instruction No. 12, was as follows: "The jury are instructed that it is not necessary for the state to establish beyond a reasonable doubt that in enticing Doris Parish away, if the defendant did entice her away, the defendant did intend then and there and thereby both to detain and conceal Doris Parish from her grandfather and grandmother, but if you believe that it was the intention of the defendant, from all of the evidence beyond a reasonable doubt, in enticing Doris Parish away, if he did entice her away, to then and thereby either unlawfully detain or conceal her from her grandfather and grandmother unlawfully and feloniously, then you would be warranted in finding the intent as charged in the information."

It thus appears that the jury were instructed that they might convict the defendant of either detaining or con-

cealing Doris Parish, whereas the information charged him only with concealing.

In *Bundy v. State,* 114 Neb. 121, we held that, where the information under this statute charged the defendant with detaining the child and the instructions of the court used the word "conceal" in addition to the word "detain," an issue was presented which was not in the information, and the case was reversed on that ground. We think this case cannot be distinguished from *Bundy v. State, supra,* but is ruled thereby. It follows that the judgment must be and is reversed and the cause remanded.

REVERSED.

FRED M. TRIMBLE V. STATE OF NEBRASKA.

FILED MARCH 23, 1929. No. 26749.

1. **Evidence** examined, and *held* sufficient to sustain the verdict.
2. **Criminal Law:** INSTRUCTIONS: REASONABLE DOUBT. An instruction that a reasonable doubt is "such a doubt as, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in such condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge," is not erroneous as excluding a doubt arising from a want of evidence.
3. ———: ———: ———. The court is not required, on its own motion, to instruct the jury that a reasonable doubt may arise from the want of evidence.
4. ———: ———. Upon the question of the identification of defendant as the party who committed the crime, it is ordinarily sufficient for the court to instruct the jury that they must be satisfied that the defendant is guilty beyond a reasonable doubt. If defendant desires a more specific instruction as a guide to the jury in the determination of this point, he should request such instruction.
5. ———: ———. It is not error for the court, in a criminal case where the penalty upon conviction is to be fixed by the court, to instruct the jury that they have nothing to do with the punishment and are not to consider it in arriving at their verdict.
6. ———: NEW TRIAL. The expression of an opinion by a prospective juror that defendant was guilty, not founded on knowledge of any facts and not amounting to a firm conviction on the

part of the juror, is not sufficient of itself to require the granting of a new trial, and it was no abuse of discretion to refuse it.

7. ———: VERDICT: IMPEACHMENT. Affidavits of jurors that during their deliberations a juror said he had made up his mind before the case had ended are incompetent for the purpose of impeaching the verdict.

8. ———: EVIDENCE: DISCRETION OF COURT. Where a proper foundation is laid for the introduction of certain evidence and upon cross-examination facts are elicited tending to show the evidence incompetent, it is within the sound discretion of the court to sustain or overrule a motion to strike it out.

9. ———: INSTRUCTIONS: EVIDENCE OF DETECTIVES. It is not error for the court to fail or refuse to instruct the jury as to the care to be taken in considering the evidence of detectives, when the witnesses are detectives regularly employed by a city, and have no pecuniary interest in the result of the case.

10. ———: ROBBERY: INSTRUCTIONS. A statute defining robbery was repealed and reenacted, the only change being in the duration of punishment. Defendant was charged with that crime committed after the repeal. The complaint did not contain the section under which it was drawn, but the court in its instruction inadvertently referred to the section repealed. The definition and elements of the crime were the same in both sections. *Held*, defendant not prejudiced by the error.

ERROR to the district court for Richardson county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

John C. Mullen and *Lloyd Dort*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before ROSE, DEAN, GOOD, THOMPSON and DAY, JJ, and REDICK and SHEPHERD, District Judges.

REDICK, District Judge.

Defendant was convicted of the crime of robbery in the district court for Richardson county and sentenced to the penitentiary for a term of ten years, and presents his petition in error to this court, alleging a number of errors in instructions, the refusal of the court to grant a new trial by reason of misconduct of two jurors, that the evidence is not sufficient to sustain the conviction, failure of the

court to instruct the jury as to the weight to be given to testimony of detectives, failure to instruct upon the identification of the defendant, and an error in stating incorrectly in one of the instructions the section of the statute upon which the information was founded. We will discuss these assignments in our own order.

The prosecuting witness, Joseph Kunhart, and three members of his family, who were present, testified without contradiction as to the manner in which the robbery was committed, and the principal dispute is as to whether the defendant was the guilty party. The defendant was positively identified by the four members of the Kunhart family, who testified that they had known him for a number of years, had heard him speak in person and over the telephone a number of times, and recognized him by his voice and his crippled hand. They testified that he was accompanied by his son, Durban Trimble, and detailed with great particularity the various events leading to the robbery. The defendant had lived for many years on a farm within three and one-half miles of the Kunhart place. The robbers were masked so that their faces could not be recognized, but their identification was positive, and unshaken upon cross-examination.

In addition to the denial of the defendant, the defense was based upon an alibi consisting of the evidence of a number of witnesses testifying by deposition tending to show that on the evening of the 20th day of August, 1927, the date of the robbery, the defendant was in the city of St. Joseph, Missouri, and stopping at the Metropole Hotel. To meet this defense the state produced a witness who testified that the defendant was seen in the city of Humboldt early in the evening of August 20, and the testimony of two detectives from St. Joseph attacking the reputation for truth and veracity of nearly all of the alibi witnesses.

It thus appears that there were disputed questions of fact, both as to the charge and the defense, which were proper to be submitted to the jury. It would prolong this opinion to unnecessary length to set out the evidence in

detail, and it must suffice to say that the entire record has been read with great care, and we have reached the conclusion that the jury were warranted in finding the defendant guilty beyond a reasonable doubt. The evidence of guilt is not as convincing as could be desired, but depends for its acceptance upon the credibility of the witnesses and the weight to which their evidence is entitled. These are questions for the sole determination of the jury, and we are unable to say that their conclusion is incorrect, much less that it is clearly wrong. It may be remarked in passing that Durban Trimble, defendant's son, was not called as a witness, nor his absence accounted for. This fact, in all probability, had considerable influence with the jury.

The next assignment to be considered is with reference to instruction No. 4, on the subject of reasonable doubt, which reads as follows:

"A reasonable doubt to warrant an acquittal in a criminal case is not a mere possible doubt, but is such a doubt as, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in such condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. If, after the entire comparison and consideration of all the evidence, you have an abiding conviction to a moral certainty of the truth of the charge, you are then satisfied beyond a reasonable doubt. You are not at liberty to disbelieve as jurors, if from all the evidence you believe as men. Your oath imposes no obligation on you to doubt, where no doubt would exist if no oath had been administered."

The principal objection to this instruction is that it fails to state that a reasonable doubt may arise from a lack of evidence in the case, and 16 C. J. 997, sec. 2411, is cited, as follows:

"It is proper to charge, and error to refuse to charge, that a reasonable doubt may arise either from the evidence or from a want of the evidence, and that the absence of sufficiently satisfying evidence may be a ground for a reasonable doubt of defendant's guilt. Hence, as a general

rule, an instruction that a reasonable doubt must be one suggested by, or arising out of, the evidence adduced is erroneous, as it excludes all reasonable doubts that may arise from the lack or want of evidence, although there are some decisions to the contrary."

We think the paragraph quoted states the law correctly, but is inapplicable to the instruction complained of. It is not incumbent upon the court in every case to instruct the jury that a reasonable doubt may arise from want of evidence in the case, though, if requested so to do, such instruction should be given. The cases hold that, where the court instructs the jury upon what circumstances will give rise to a reasonable doubt, it is error to say that such doubt must be one suggested by or arising out of the evidence, because it excludes all reasonable doubt that might arise from the lack or want of evidence. Instruction No. 4 did not present that proposition. Its language is that a reasonable doubt is "such a doubt as, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in such condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." This does not exclude a reasonable doubt arising from a want of evidence in the case, but rather suggests that a lack of evidence sufficient to convince the jurors of the truth of the charge is sufficient to raise a reasonable doubt. In *State v. Gardiner,* 205 Ia. 30, it was held that, where the instruction on reasonable doubt contained the phrase "arising from the consideration of the whole case," the omission to instruct that it might arise from the want of evidence was not erroneous, although in the case of *State v. Smith,* 180 N. W. 4 (192 Ia. 218), it had been held: "An instruction that a reasonable doubt must be one suggested by, or arising out of, the evidence is erroneous as excluding those arising from want of evidence." In *State v. Tennant,* 214 N. W. 708 (204 Ia. 130) it was held that the "omission, in instruction defining 'reasonable doubt,' to instruct that reasonable doubt may as well arise from absence of evidence as from evidence introduced"

was not reversible error. In *Hiller v. State,* 116 Neb. 582, the following instruction was approved: "By the term 'reasonable doubt,' as used in these instructions, is meant an actual doubt, one that you are conscious of after going over in your minds the entire case, giving consideration to all the testimony and every part of it." It seems, therefore, as above suggested, that the instructions criticized are those which by their terms exclude a want of evidence as a basis for reasonable doubt, but the cases so holding are not applicable to the present one.

This instruction is also criticized because it failed to instruct the jury what evidence was proper to be considered by them on the question of the identification of the defendant. We fail to see why that subject could be properly introduced into the instruction in question. The jury were fully instructed upon the law of the case, and that it was incumbent upon the state to prove, beyond a reasonable doubt, "that on or about the 20th of August, 1927, in Richardson county, state of Nebraska, Fred M. Trimble, forcibly and with violence made an assault upon Joseph Kunhart, and did put him in bodily fear and did forcibly and by violence take and carry away lawful money of the United States, and other personal property of the said Joseph Kunhart, with the intent on the part of said Fred M. Trimble to rob or steal." This instruction sufficiently informed the jury that the jury must be satisfied beyond a reasonable doubt of the identity of the defendant with the robber. If defendant desired a more specific instruction upon that particular point, he should have requested one, which he failed to do. *Osborne v. State,* 115 Neb. 65, where it was held: "If either party desires an instruction which would serve only to guide the jury in weighing certain features of the evidence in connection with the issues, he must request such specific instruction."

Defendant complains of instruction No. 7 on the defense of alibi, and argues that the following sentence placed the burden of proof as to this defense upon the defendant: "If you are not satisfied beyond a reasonable doubt of the de-

fendant's presence at the commission of the crime charged against him, you should acquit him." This sentence deals with the presence, not the absence, of defendant, and will not bear the construction claimed for it.

He also complains of instruction No. 8 on the subject of circumstantial evidence, but this is in the precise language of the syllabus in *Smith v. State,* 61 Neb. 296, and is without error.

Defendant also complains of instruction No. 10 telling the jury that they have nothing to do with the punishment of the defendant and are not to consider it in arriving at their verdict. This complaint is without merit. Cases cited where the jury fixes the penalty are not in point.

Also instruction No. 12 the general one upon the credibility of witnesses. This instruction has been approved many times and is not subject to criticism.

Error is claimed for the refusal of the court to grant a new trial for misconduct of juror Cooper, and affidavits of two witnesses for defendant are to the effect that prior to the trial Cooper had said on one occasion that he believed Trimble got the money. The affidavit of Cooper states these affidavits are not true, "as I believe," and states positively that he never discussed the case with any one as to the guilt or innocence of the defendant before it was submitted to the jury. The mere expression by a prospective juror of a belief that defendant was guilty, not founded on knowledge of any facts and not amounting to a firm conviction or conclusion on the part of the juror, is not sufficient of itself to require the granting of a new trial. 16 C. J. 1154, sec. 2650. The juror upon his *voir dire* said he knew nothing about the case except what he read in the paper, and had not formed or expressed any opinion, that at that time he had no opinion, and that he could try the case fairly and impartially; also, that he was not acquainted with defendant or Kunhart. We think this evidence fails to show bias and prejudice of the juror requiring a new trial, and that the trial judge did not abuse his discretion in refusing it.

Error is also claimed for refusal to grant a new trial for misconduct of juror Prichard. Defendant presented affidavits of several jurors that, upon entering the jury room for deliberation, Prichard said: "I have my mind made up that the defendant is guilty, and I had my mind made up before the trial was ended." Prichard's affidavit is that, after he was elected foreman, "I told the other jurymen that now was the time to discuss the case, but that I had my mind made up as soon as I heard all the evidence in the case and before the attorneys made their arguments," and he is supported substantially by a number of other jurors. This was an attempt by affidavits of the jurors to impeach their own verdict by showing what took place in the jury room during their deliberations as to a matter inhering in the verdict. Suppose the juror had said that in making up his verdict he had disregarded the evidence or instructions. Evidence of this would be incompetent within the reasoning of *Johnson v. Parrotte,* 34 Neb. 26, 30. We think the affidavits were incompetent. See *Palmer v. Parmele,* 104 Neb. 30; *Corn Exchange Nat. Bank v. Ochlare Orchards Co.,* 97 Neb. 536. However, while a juror should try to withhold final judgment until after argument and instructions, it is common knowledge that, as the evidence is produced, the mind receives impressions, strong or weak, which go to make up the final decision, which the arguments and instructions may alter or confirm. The statement complained of was made after the case had been finally submitted to the jury, and it would be a matter of some difficulty for the juror himself, *a posteriori,* to determine at what particular point his mind had been made up. We are of opinion that it would establish a dangerous precedent to permit the verdict to be set aside upon such evidence. No abuse of discretion on the part of the court is shown by this ruling. *McColley v. State,* 116 Neb. 512.

Error is claimed in the reception by the court of the evidence of two detectives from St. Joseph as to the reputation for truth and veracity of a number of defendant's

alibi witnesses, and also for refusal of the court to strike out such testimony after cross-examination. Before testifying that the reputation of the respective witnesses was bad, the detectives stated that they knew their reputation in the community in which they lived, and therefore a proper foundation was laid. Upon cross-examination defendant elicited answers tending to show that the witnesses were not competent, which, perhaps, had they appeared before the evidence in chief was given, it would not have been error for the court to exclude such witnesses; but the evidence having been received after sufficient foundation shown, and in some respects strengthened by the cross-examination, we think the court did not err in refusing to strike it from the record. A consideration of the entire evidence of these witnesses enabled the jury to determine what weight should be given their testimony. Defendant might have asked the privilege of preliminary examination of the witnesses as to their qualifications before the answers objected to were given, but did not do so.

Complaint is made of the failure of the court to instruct the jury as to the care to be taken in considering the evidence of detectives. This point is not well taken for the reason that the witnesses in question were regular detectives of the city of St. Joseph and had no pecuniary interest in the result of the trial, and were, therefore, within the class to which such an instruction has been held inapplicable. *Keezer v. State,* 90 Neb. 238; *Flanagan v. State,* 117 Neb. 531.

Defendant was charged with the crime of robbery as defined in section 9557, Comp. St. 1922. This section was amended by chapter 71, Laws 1927, which went into effect July 23 of that year. The amendment reenacted the definition of the crime, and merely extended the maximum term of punishment to fifty years, and repealed the original section. The information did not state under what act it was drawn, but the court, by instruction No. 1, erroneously stated that the charge was under section 9557, Comp. St. 1922. As the crime with which defend-

ant was charged was committed August 20, 1927, he now claims that by reason of the error of the court he was convicted under a statute which had been repealed. We think this contention is unsound. The definition and elements of the crime are precisely the same in both statutes, and no possible prejudice to defendant resulted from the erroneous citation, which was not necessary to be given in the instruction. The act of 1927 was in effect at the time of the commission of the crime, and defendant had no more right to commit robbery, if he did so, in August than he would have had at any prior date in that year. The deletion of the words "Compiled Statutes of Nebraska" and "1922" and the substitution therefor of the word "Laws" and "1927" would correct the instruction and not change its legal effect.

It is further complained that the trial judge was unfair to defendant, but there is absolutely no evidence in the record to sustain this charge. Other alleged errors are discussed in the brief, but not included in the assignment of errors, nor considered of importance by the court, and therefore will not be considered.

We find no prejudicial error in the record, and the judgment is

AFFIRMED.

NINA DODSON, APPELLANT, V. F. W. WOOLWORTH COMPANY, APPELLEE.

FILED MARCH 28, 1929. No. 26856.

1. **Pleading:** DEMURRER. "A demurrer to a pleading admits only such facts as are well pleaded, mere conclusions of the pleader not being admitted." *Busboom v. Schmidt*, 94 Neb. 30.
2. **Master and Servant:** INJURY TO SERVANT. Whenever an employer puts his employees at work with fellow servants who are to him known to be incompetent, insane and dangerous, and injuries to such co-employees, while engaged in their master's business, result therefrom, which may reasonably be said to have been induced by the peculiar conditions of the employment

thus created and permitted by the master, such injuries so inflicted may properly be said to be not only received in the course of employment, but also as arising out of such employment.

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

Hasselquist & Chew, for appellant.

Kennedy, Holland, DeLacy & McLaughlin, contra.

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

EBERLY, J.

The plaintiff, an employee of the defendant, commenced a common-law action against the defendant for damages occasioned by injuries received due to the negligence of the latter. To this petition the defendant filed a general demurrer which was sustained by the district court for Douglas county, and the plaintiff electing to stand on her petition as amended, the action was thereupon dismissed. From this order plaintiff appeals.

This court is not only committed to the doctrine that a general demurrer admits only the truth of all allegations well pleaded in the pleading demurred to and does not permit conclusions of law (*Hallstead v. Perrigo*, 87 Neb. 128), but has announced the rule governing this matter in the following terms:

"A demurrer to a pleading admits only such facts as are well pleaded, mere conclusions of the pleader not being admitted." *Busboom v. Schmidt*, 94 Neb. 30.

Examining the amended petition in the light of the authorities referred to, it is patent that the controlling question under the allegations of this pleading is: "Did the injuries complained of arise out of and in the course of plaintiff's employment?"

If this be determined in the affirmative, the injuries must be compensated under the terms of the workmen's compensation law and the action of the trial court in sustaining the demurrer is to be approved. If determined in the

negative, error was committed and a reversal must follow.

The controlling facts disclosed by the pleading demurred to may be epitomized as follows: The appellant, while regularly employed by the defendant in its business and at a place where her presence was required by such employment, and while actually subject to her master's directions, was shot by one William Lewis, resulting in the injuries set forth in the petition. Lewis, it is averred, at the time of the infliction of these injuries by him, was likewise an employee of the defendant; that immediately before his being employed by defendant, Lewis had been committed to the state hospital for the insane at Lincoln, by reason of having been found insane, after having been sentenced to the state penitentiary upon a conviction of murder, all of which was well known to the defendant at the time Lewis was employed by it; that while thus employed during several weeks prior to the time plaintiff's injuries were inflicted, Lewis became actually insane and conducted himself in and about defendant's store as an insane man, all of which was fully known to the defendant, and that the defendant, because of such condition, had removed Lewis from a department situated near where plaintiff worked, and assigned him to duties elsewhere in its store, where plaintiff performed her services.

On the day on which plaintiff's injuries were received, it is alleged that Lewis left the place in the store where he was working and came to the plaintiff in the same store and at a place where her services were then required by the defendant, and shot the plaintiff, intending to kill her, which act on the part of Lewis was due to the personal hatred and ill-feeling of Lewis against the plaintiff and wholly caused by the demented and insane condition of Lewis; that the defendant was negligent in that, after it was advised and had actual knowledge of said employee being insane and in a dangerous condition, and of his threatening and attempting to shoot other employees of the defendant, and customers in such store, it negligently and carelessly retained said incom-

petent and insane servant in its employ and exposed the plaintiff and other employees to the danger of his acts; and that the defendant was also negligent in that it failed and neglected to provide a safe place for the plaintiff to work, and in hiring and retaining said Lewis, who was unfit for the duties assigned to him and to be performed within the store where plaintiff was employed, and was mentally incompetent and unfit to associate with other employees, and that the injuries to the plaintiff were the direct and proximate result of the negligence of the defendant, in knowingly employing and retaining in its employment said William Lewis who was mentally incompetent and insane.

It must be conceded that the nature of the employment in which plaintiff was then engaged conferred upon her the compensable status under the terms of the Nebraska workmen's compensation act. It is also true that at the time the injury was inflicted she was actually occupied within her master's business in a place where her employment required her services to be performed. The injuries were therefore received in the "course of her employment."

The sole question remaining is: Did these injuries "arise out of" her employment? Is there a causal connection between the employment and the injuries to be properly deduced from a consideration of all the allegations of the amended petition?

Injuries "arise out of an employment" when there is apparent to a rational mind, upon a fair consideration of all the circumstances constituting and surrounding the transaction in which they are inflicted, a causal connection between the work, including the conditions under which it is required to be performed, and the accident involved. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of an exposure occasioned by the nature of the employment, then it arises out of the

employment. The causative danger must be peculiar to the work, and to the related conditions which surround its performance, and it must not be simply common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but, after the event, it must appear to have had its origin in a risk connected with the employment and to have followed from that source as a rational consequence.

Fair examples of the proper application of the test above indicated may be said to be the following:

The claimant, while employed as a foreman of a shoe factory, receives injuries resulting in the loss of an eye through the act of an employee of a machinery company who had been repairing machines in defendant's plant, and who approached the claimant in a dark room, placed his arms about claimant's neck and drew his head forward onto a lead pencil in his pocket in such a manner that the lead penetrated the eyeball. *In re Markell v. Green Felt Shoe Co.*, 221 N. Y. 493.

In *In re Heitz v. Ruppert*, 218 N. Y. 148, horses, of which the claimant was the driver, were sprinkled with water by another employee, who intentionally sprinkled some water on claimant. Shortly afterwards, claimant touched the other workman on the shoulder, saying: "George, don't do that again." The other man slapped claimant on the shoulder, and, as claimant turned around, his finger struck claimant's eye, causing the injury.

In *McNicol's Case*, 215 Mass. 497, a workman was killed by an intoxicated fellow servant, who, when intoxicated, was quarrelsome, dangerous, and unsafe to be permitted with his fellow employees, all of which was known to the superintendent.

In *Socha v. Cudahy Packing Co.*, 105 Neb. 691, a workman actually engaged in performing his duties, and not engaged in any playful or sportive act, sustained injuries as a result of a playful application of a compressed

air-hose against his person by a fellow workman, and it was held by this court to be an injury arising out of his employment.

As applied to the facts disclosed in the pleading demurred to, in view of the principles heretofore approved by this court, it would seem that the proper rule is:

Whenever an employer puts his employees at work with fellow servants who are to him known to be incompetent, insane and dangerous, and injuries to such employees, while engaged in their master's business, result therefrom, which may reasonably be said to have been induced by the peculiar conditions of the employment thus created and permitted by the master, such injuries so inflicted may properly be said to be not only received in the course of employment, but also as arising out of said employment. Such being the character of the injuries disclosed in the instant case, they are compensable exclusively under the terms of the workmen's compensation act. *Socha v. Cudahy Packing Co.*, 105 Neb. 691; *Boyce v. Burleigh*, 112 Neb. 509; *Marchiatello v. Lynch Realty Co.*, 94 Conn. 260; *Anderson v. Security Building Co.*, 100 Conn. 373; *Kaiser Lumber Co. v. Industrial Commission*, 181 Wis. 513; *In re Katz v. Kadans & Co.*, 232 N. Y. 420.

It follows that the district court for Douglas county rightfully sustained the demurrer of the defendant to the petition of plaintiff, and the judgment of dismissal entered must therefore be affirmed.

AFFIRMED.

GERTRUDE WILLIAMS V. STATE OF NEBRASKA.

FILED MARCH 28, 1929. No. 26741.

1. **Criminal Law:** EVIDENCE OF OTHER OFFENCES. On trial under an information charging the unlawful practice of medicine without a license by attending a specific obstetrical case, evidence is admissible of other acts occurring so near in point of time and being so nearly similar in character as may lead to a logical inference that they were committed in pursuance of some delib-

erate purpose or scheme planned beforehand, even though those acts may constitute another criminal offense. In such case, the former acquittal of defendant upon trial on an information charging defendant with the other alleged offenses will not, on the subsequent trial, exclude evidence of the facts which were the basis of former prosecution.

2. **Witnesses:** CROSS-EXAMINATION. While much discretion rests in the trial court in determining the extent to which cross-examination may be pursued, yet prejudice to the party calling a witness should not be permitted to result from a violation of the rule that cross-examination should be confined to matters and transactions brought out on direct examination. *Held,* prejudice resulting from a violation of the rule is apparent in the instant case, in view of the fact that the witness being examined was the husband of defendant, and he was thus required to become a witness against his wife, within the inhibition of section 8837, Comp. St. 1922, as amended by chapter 75, Laws 1925.
3. **Criminal Law:** INSTRUCTIONS. "It is the duty of the court on its own motion to instruct the jury as to the general rules of law applicable to the case, and in such a way as not, either by omission or by expression, to withdraw from the consideration of the jury an issue or essential element necessary for its determination." *Osborne v. State,* 115 Neb. 65.
4. **Physicians and Surgeons:** OBSTETRICAL CASE: EMERGENCY. Under section 8168, Comp. St. 1922, an emergency exists when the exigency of an obstetrical case is of so pressing a character that some kind of action must be taken before the services of a regularly qualified medical practitioner can be readily procured.
5. **Evidence** *held* insufficient to sustain a verdict.

ERROR to the district court for Nance county: LOUIS LIGHTNER, JUDGE. *Reversed and dismissed.*

G. F. Rose, J. R. Shields and *Prince & Prince,* for plaintiff in error.

O. S. Spillman, Attorney General, and *Carroll Thompson, contra.*

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

ELDRED, District Judge.

The defendant was convicted of practicing medicine, obstetrics and surgery without a license. The specific

charge of which the accused was convicted being that she did, on or about the 19th day of June, 1927, for fees charged, attend one Nevada Morris in an obstetrical case, and did prescribe and administer medicine and hypodermics to said Nevada Morris. From the sentence pronounced by the court the case is here for review on a petition in error. Plaintiff in error is herein referred to as defendant.

Complaint is made that the state was permitted on cross-examinatoin of Dr. Williams, the husband of the defendant, to show that defendant was present on other obstetrical cases and performed services of a similar character as in the Morris case, the contention being that evidence of such other independent transactions was not only incompetent, but that the inquiry as to such other transactions was not proper cross-examination; and, further, violated the rule that a husband may not be a witness against his wife.

In support of the contention that evidence of other offenses was incompetent, the plaintiff in error cites *Wehenkel v. State,* 116 Neb. 493, wherein it is said:

"To make evidence of other acts available in a criminal prosecution, some use for it must be found as evidencing a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, which is of itself evidence bearing upon the particular act charged."

The facts in the case cited are clearly distinguishable from the facts in the instant case. The evidence complained of in the *Wehenkel* case related to offenses of a character entirely different from the offense for which the accused in that case was on trial, and was not confirmatory of any evidence tending to establish the crime charged.

As a further reason why the evidence of the other claimed offenses should not have been received, it is suggested that the defendant had been charged with and acquitted of having committed such other offenses. It appears to have been the theory of the prosecution that the

specific act for which the accused was tried was committed pursuant to a scheme or device between herself and her husband to enable her to practice obstetrics without complying with the law. In such case, evidence of other acts occurring so near together in point of time, and being so nearly similar in character as to lead to a logical inference that they are committed in pursuance of some deliberate purpose and scheme planned beforehand, is admissible, even though those acts may constitute another criminal offense. The case is fairly within the rule followed in *Koenigstein v. State*, 101 Neb. 229:

"Under such circumstances the former acquittal of the defendant upon an indictment charging him with receiving a bribe from the keeper of one of such disorderly houses will not exclude evidence of that offense upon a subsequent trial of an indictment for receiving a bribe from the keeper of another such house. Such evidence is allowed only for the purpose of strengthening the evidence of the offense charged in the subsequent trial by showing the general plan or system under which the bribe was received. The two crimes are distinct, and neither is an element of the other. But when such evidence is introduced the defendant should be allowed to prove his acquittal on the former trial."

While we conclude that evidence of the other acts or transactions complained of was competent, had it been properly adduced, we cannot agree that it was properly brought out on cross-examination of the witness Dr. Williams. This witness was called by the defendant and examined in chief and testified as to facts relative to the transaction upon which the prosecution was founded, but was not examined and did not testify as to any other transaction. On cross-examination he was required to testify, over the objection of the defendant, as to facts and circumstances involving other similar but entirely independent transactions, in no manner brought out or referred to on his direct examination. The rule that the right to cross-examine a witness is confined to matters

or transactions brought out on his direct examination, and that evidence to support an independent transaction cannot be elicited on cross-examination, is well established, and obtains in a criminal prosecution the same as in a civil action. If it is desired to examine a witness upon other matters, the parties desiring such examination must make the witness their own, and call him for that purpose.

While considerable discretion rests in the trial court in determining the extent to which cross-examination may be pursued, yet prejudice to the party calling the witness ought not be permitted to result from a violation of the rule. Prejudice resulting from a violation of the rule is apparent in this instance, in view of the fact that the witness being examined was the husband of the defendant. The husband was thus required to become a witness against his wife, within the inhibition of section 8337, Comp. St. 1922, as amended by chapter 75, Laws 1925.

Complaint is made that error was committed on account of attorneys being allowed to assist in the prosecution who were employed or were to be paid by private citizens for their services. The record shows the appointment by the court of counsel to aid in the prosecution. No objection or exception appears to have been made to the order making such appointment. It may be that the prosecution was inspired somewhat by business competitors of Dr. Williams. Dr. Balcom, a witness for the state, testified that he intended to help pay the attorneys who were prosecuting the case. The practice of counsel, who are employed by or are to be paid by private citizens, to assist in the prosecution of a criminal case is not, under our practice, looked upon with favor. However, the right of any counsel to assist in the prosecution of this case was not challenged, nor any ruling of the court asked thereon after it was developed during the trial that the compensation of any attorney assisting in the prosecution was to be paid by private citizens; hence, error therein is not available at this time.

Is the evidence sufficient to sustain a verdict? The law

charged to have been violated provides: "Nothing in this article shall be construed to prohibit gratuitous services in case of an emergency; * * * to nurses in their legitimate occupations; nor to the administration of ordinary household remedies." Comp. St. 1922, sec. 8168. It is contended that the evidence was not sufficient to establish that the services rendered were not within the exceptions above mentioned, all of which were made issues on the trial of the case.

By the instructions the first clause of the proviso was submitted to the jury; that is, whether the services were rendered in a case of emergency. The second and third clauses of such proviso were not submitted to the jury by the instructions. As to the last mentioned exception or clause, three witnesses called by the defense testified on this subject, Drs. Williams, Dewey, and Lueschen, and evidence offered by them tends to support defendant's theory of the case in that particular. Likewise, evidence was submitted by both the defense and prosecution as to the duties of nurses. These questions thus became issues in the case which should have been submitted to the jury and the jury advised that, if such evidence raised in the minds of the jury a reasonable doubt as to the guilt of the defendant, the defendant should be given the benefit of such doubt. The failure to instruct the jury upon these questions withdrew from their consideration essential elements necessary for determination under the evidence.

"Under our practice in a criminal case tried to a jury, no matter how strong the proof of an affirmative fact presented by the state, and notwithstanding there may be no contradiction thereof, still it is for the jury to say whether or not the fact is established." *Osborne v. State,* 115 Neb. 65.

On the question of emergency the court instructed the jury: "If you find that she (defendant) was there in the genuine capacity of a nurse and that the child was born sooner than was expected and before a doctor could arrive, then it would not only be the right but the duty of

the nurse to do what was necessary until a duly qualified physician arrived." It is contended by the defendant that there is no competent evidence that the defendant did not attend Mrs. Morris in the genuine capacity of a nurse, acting in the line of her legitimate occupation. It appears from the evidence that Nevada Morris and the interested members of her family intended to get along without a doctor. Her mother-in-law had had some previous experience in such matters and was going to look after her. She became sick on the morning of the 18th. About midnight it was concluded that they should have some help. Nevada Morris had previously stated that she did not desire a man doctor and expressed the desire that if she had to have anybody she preferred Mrs. Williams. Her husband called the doctor at the request of his mother. He knew that his wife preferred Mrs. Williams to a man doctor. However, according to his testimony and the testimony of Dr. Williams, Ross Morris, the husband, called Dr. Williams over the telephone and told him he needed a doctor. That was about 1 o'clock in the morning. The husband testified that he was advised by Dr. Williams that "he was busy and had to go immediately;" that "he could not come himself, that he was just called out and was starting out of the door." He said: "Would Mrs. Williams be all right?" I said, "Yes; if you cannot get any one else." And he said: "I will have her here and you can get her on the way down; stop at the office and get my suit case." Dr. Williams said he would get there if he could. "My mother asked for help. She told me I had better get a doctor if I could; did not tell me what doctor to get; said they would like to have Mrs. Williams if they could get her; arranged for Dr. Williams to come as soon as he could; Mrs. Williams was at the house, I should judge about an hour; the child was born 20 to 25 minutes after she arrived."

Dr. Williams, who was the only other witness testifying to the employment or the circumstances under which the defendant attended Nevada Morris, testified: Called

me over the phone about 1:30 in the morning; I was at the hospital then; said his wife was sick; they expected a baby at their house. "At that time I asked him who was there to take care of his wife at the present time, and he said his mother, and I asked him if he wanted me to bring a nurse with me, and he said, 'Yes;' he said, 'I would like to have Mrs. Williams come.' And I said, 'All right.' I told him I could not be there just at present, I was up there then ready to get necessary material and instruments ready to go to the country a few miles, and I would be back in 20 or 30 minutes at the most, and I presumed I would have plenty of time to get back." The husband did not say what nurse he wanted. I asked him, and he said he would like to have Mrs. Williams come down. I directed him to get his car and come to my residence and get Mrs. Williams, and on the way back to stop at my office and get the special grip that I have for such cases. "I phoned Mrs. Williams that Morris was coming and to be ready for him, and for her to go down there, and told her to stop at the office with him and get the grip, and I would be back in 15 or 20 minutes;" was not able to get back in that length of time; got back in about an hour; a storm came up and I was delayed, and it was an hour before I got back to town. Went to the telephone to find out if anything was urgently needed; was not back in time to attend case.

There is no other direct evidence as to the capacity or circumstances under which the defendant attended Nevada Morris. There is evidence on behalf of both the state and defendant as to the duties of nurses; and it also appears by the testimony of several witnesses that it is a common and usual practice for doctors retained in such a case to send in advance a nurse to take charge and prepare the patient. A bill was rendered, although not paid, by Dr. C. D. Williams. The written portion of the bill is in the handwriting of the defendant, who acted as secretary in the office of Dr. Williams, but it does not appear that she personally ever collected or attempted to collect

anything for her services. The only other evidence supporting the theory of the state is the inference that may be drawn from the evidence as to the manner in which Dr. C. D. Williams and his wife, the defendant, had been handling his business generally, and particularly in cases of this character. Most of this evidence we have previously held was erroneously received on account of not being proper cross-examination.

The defendant having gone to the Morris home at the request of Dr. Williams, and being advised by him that he was to follow "in 15 or 20 minutes," and a storm coming up which delayed him, the birth of the child being imminent, made this, as far as the defendant was concerned, an emergency case in which she was justified in rendering the assistance for which she may have been qualified; and in so doing she was within the purview of the exception of the statute that it should not apply to "nurses in their legitimate occupations." We are inclined to the view that any inference that might be logically drawn from other facts and circumstances shown by the evidence as to the general method of handling business by Dr. Williams and the defendant was not sufficient to make out a case against defendant in the light of the direct testimony of just how she happened to attend Mrs. Morris on the occasion in question, and that the state failed to establish the guilt of the defendant in this case beyond a reasonable doubt.

Under section 8168, Comp. St. 1922, an emergency exists when the exigency of an obstetrical case is of so pressing a character that some kind of action must be taken before the services of a regularly qualified medical practitioner can be readily procured. *People v. Lee Wah,* 71 Cal. 80. If the defendant was sent as a nurse in advance of Dr. Williams, who was expected to follow in 15 or 20 minutes, as the evidence indicates, and the birth of the child became imminent, on the failure of the doctor to arrive as contemplated, from some unforseen cause, it was the duty of the nurse to render the assistance necessary,

so far as she was qualified, and ordinary humanity would require that she should not be liable criminally for so doing. We conclude that the judgment should be reversed and the case dismissed.

REVERSED AND DISMISSED.

ANTHONY E. LANGDON, APPELLEE, V. KENNEDY, HOLLAND, DELACY & MCLAUGHLIN, APPELLANT.

FILED MARCH 28, 1929. No. 26415.

1. **Joint Adventures.** Where an attorney, retained on a contingent fee to prosecute a claim, engages another lawyer to assist in the litigation, and they are to share in such fee, if successful, and, if not successful, to receive nothing for services, *held*, thereby, that the relation established between them is that of joint adventurers or special partners, and not that of employer and employee.
2. **Attorneys:** SPECIAL PARTNERSHIP. Where attorneys are engaged in the prosecution of litigation for a contingent fee, a special partnership relation is established between them, and in the absence of any agreement they will be held, upon the successful result of the suit, to share equally in the distribution of the fee.
3. ———: ACTION: DEFENSE. *Held*, that the answer of defendant did not state facts sufficient to constitute a defense to plaintiff's cause of action, and that the sustaining of a demurrer thereto by the trial court was without error.
4. **Pleading:** MOTION TO STRIKE. A motion to strike out certain parts of the answer, on the ground that such parts of the answer stated a defense not pleaded in the lower court, *held* properly sustained.

APPEAL from the district court for Douglas county: JAMES E. RAIT, JUDGE. *Affirmed.*

Kennedy, Holland, DeLacy & McLaughlin, pro se.

S. L. Winters, contra.

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

HASTINGS, District Judge.

This action is a controversy between attorneys over the

division of a fee. The defendant collected the amount of the fee due under a contract for a contingent fee and retained two-thirds of the fee and paid the remaining one-third to the plaintiff as his share. Plaintiff claimed he was entitled to an equal division of the fee and commenced this action in the county court of Douglas county to recover the difference. Judgment was rendered in that court in favor of the plaintiff and appealed to the district court by defendant. In that court plaintiff filed a motion to strike out certain parts of the answer of defendant on the ground that same changed the issues from what these were in the lower court. The motion was sustained. Thereupon, plaintiff filed a demurrer to the answer of defendant, stating as ground therefor that the answer failed to state facts sufficient to constitute a defense to plaintiff's cause of action. The demurrer was sustained, and, defendant refusing to plead further, judgment was entered in favor of the plaintiff for the full amount claimed. Defendant appeals.

It is first contended that the trial court committed error in sustaining the motion to strike out certain parts of the answer, and, second, in sustaining the demurrer to the answer.

The motion to strike was sustained to that part of defendant's answer which alleged, in substance, that defendant advised plaintiff of his intention to claim two-thirds of the fee and that plaintiff made no objection thereto, but permitted the defendant to brief and argue the case on appeal and brief and argue two motions for rehearing, and that by such conduct and silence on his part, when advised of the intention of defendant, plaintiff was thereby estopped from claiming a 50 per cent. division of the fee. An examination of the answer in the county court shows that nothing of this kind was alleged. If the new allegations of the answer in the district court were sufficient to plead an estoppel, then it presented a change of the issues from what these were in the county court, and the ruling of the trial court striking out such allegations

was right; if the allegations were not sufficient to allege an estoppel, then they present no defense to plaintiff's cause of action and no prejudice resulted in their being stricken from the answer.

The remaining question involved is: Was error committed in sustaining the demurrer to the answer?

The allegations of the petition, so far as they are material to the solution of the question presented, are: That on the 7th day of January 1919, plaintiff entered into a contract with one John Mercer whereby plaintiff agreed to represent Mercer as his attorney in an action to recover damages for personal injuries against the Omaha & Council Bluffs Street Railway Company, of Omaha, Nebraska; that under the terms of said contract plaintiff was to receive from Mercer 40 per cent. of any sum recovered from said street railway company; that after plaintiff and said Mercer entered into said contract plaintiff, as agent and attorney for said Mercer, engaged defendant firm, a copartnership, to assist plaintiff in representing said Mercer; that suit was filed in the district court for Douglas county by Mercer against said street railway company and prosecuted to judgment, which judgment, on appeal to the supreme court was reversed and remanded.

Plaintiff further alleged that, on or about the time of the beginning of the second trial of said suit in the district court, plaintiff and Yale C. Holland, acting for said partnership, entered into an oral agreement whereby said plaintiff and said defendant were to share equally whatever was recovered or obtained in said suit on said contract between plaintiff and Mercer.

The allegations of the answer of defendant, so far as they are material, admit the contingent fee contract between the plaintiff and Mercer; admit that plaintiff employed the defendant to prosecute the action named in his petition to final judgment, and that the second trial of said case resulted in a verdict and judgment for $7,500, which amount with interest and costs was ultimately collected by defendant, and that the fee which attorneys for

plaintiff in that action was received was approximately $3,600. The defendant specifically denied that defendant ever, at any time, through Yale C. Holland or any other member of the firm, entered into any agreement with plaintiff, oral or in writing, whereby plaintiff and defendant were to share equally in the fee, but, on the contrary, alleged that there was at all times an implied understanding that, if successful in winning said lawsuit, defendant's share of the fee would be commensurate with its efforts and the results obtained and the service rendered, and that it would be what the services were fairly and reasonably worth. Defendant further alleged that it did all the work in preparing the case for trial, filing of pleadings, conducted both trials in the district court, argued the motions for new trial, prepared briefs in both appeals and in motions for rehearing; that defendant did all the work, and that the time expended thereon amounted to more than 26 full days, and that the plaintiff was of no assistance whatever, either in the preparation of the case or the trial thereof or the presentation thereof to the supreme court. Defendant alleged that its services in said case were fairly and reasonably worth the sum of $2,500, and that a division of the fee in the proportion of one-third to plaintiff and two-thirds to defendant was more than fair and reasonable to the plaintiff under the circumstances. Defendant further alleged that the custom and practice in such cases, where the forwarding attorney contributes no more to the case than did plaintiff in this instance, is for the forwarding attorney to receive one-third and the trial attorneys two-thirds of the fee, and that there was an implied agreement that the defendant was to receive the latter amount in the event of the successful outcome of the suit. Defendant for further answer denied all the allegations of plaintiff's petition not admitted.

The demurrer to the answer admitted the truth of the facts well pleaded, but not the averments of legal conclusions therein.

The only construction to be placed upon the allegations of the answer are: That plaintiff and defendant, if successful in winning the lawsuit, were to share in the fee that would be obtained under plaintiff's contract with Mercer; if not successful, they were to have no fee.

Under this construction of the pleadings, plaintiff and defendant were engaged in a joint adventure and occupied a special partnership relation and, it not appearing from the facts alleged in the answer that there was any agreement as to how the fee was to be shared by the parties, if successful, the law requires that they share equally in the distribution. In the case of *Jones v. Thomas,* 106 Neb. 635, it was held by this court: "Where several attorneys engage in the prosecution of litigation for a contingent fee, in the absence of any other agreement, they will be held, upon the successful result of the suit, to share equally in the distribution of the fee." See *Underwood v. Overstreet,* 188 Ky. 562, 10 A. L. R. 1352; *Gill v. Mayne,* 162 N. W. (Ia.) 24; *Henry v. Bassett,* 75 Mo. 89; *Senneff v. Healy,* 155 Ia. 82, 39 L. R. A. n. s. 219; *Robarts v. Haley,* 65 Cal. 397; *Ford v. Freeman,* 40 Cal. App. 221; *Hereford v. Meserve,* 272 Fed. 353. The rule is based upon the theory that attorneys so prosecuting litigation for a contingent fee are engaged in a joint enterprise or joint adventure and occupy a special partnership relation. Where such a relationship exists a partner— "Has no right by implication to claim anything extra by reason of any inequality of services rendered by him, as compared to those rendered by his copartners. The reason for this rule lies in the fact that each partner in taking care of the joint property is practically taking care of his own interest and is but performing his own duties and obligations growing out of the partnership. Furthermore, the relative value of the services rendered by the several partners of a firm cannot be estimated and equalized, for it is impossible to see how far the relative knowledge, skill and ability of each enter into the adjustment of the terms of the contract. The courts therefore usually decline to look into

the question as to which partner has performed the more onerous duties or as to whether one has been more skilful or more industrious than the other. And a partner is not entitled to claim compensation for his services in business without a special contract therefor, although he attends almost exclusively to the business." 20 R. C. L. 877, sec. 90. See *Consaul v. Cummings*, 222 U. S. 262; 15 R. C. L. 502, sec. 4; 33 C. J. 860, 861, secs. 65-67.

The defendant concedes the correctness of the rule announced, but insists that such rule only applies where there is a joint contract between attorneys and their client to prosecute a case for a contingent fee, and contends that the rule does not apply where one attorney is so employed by the client and then employs another attorney to assist him in the prosecution of the litigation. Defendant argues, where no agreement is made as to what fee shall be received by the attorney employed to assist, that such attorney is entitled to the fair and reasonable value of his services from the attorney so employing him. This would be true if the sole relation existing between such attorneys was that of employer and employee, but here, under the pleadings, we have a different situation, as already disclosed. We see no reason why an attorney who has been retained to prosecute a claim for a contingent fee cannot employ another attorney to assist him, with the understanding that the attorney employed is to share in the contingent fee, if successful, and, if not, he is to receive nothing for his services. Such arrangement establishes between them the relation of joint adventurers or special partners, the same as if they had been retained by a common client on a contingent fee. In 33 C. J. 845, sec. 11, it is said: "An agreement by an attorney who has been retained to prosecute claims on a contingent fee to share the fee with another lawyer who is employed to act as counsel in the litigation establishes between them the relation of joint adventurers, and not of employer and employee."

There is an attempt in the answer to plead a custom. In this regard it was alleged that the custom and practice in such case, where the forwarding attorney contributes no more to the case than the plaintiff did in this instance, is for the forwarding attorney to receive one-third and the trial attorneys two-thirds of the fee, and that there was an implied agreement that defendant was to receive the latter amount in the event of the successful outcome of the suit. In 17 C. J. 518, sec. 81, the following is stated to be the rule:

"Where it becomes necessary to plead a custom or usage, all the essentials requisite to its validity and binding effect must be averred. Hence, the pleading should either aver knowledge on the part of the person to be charged or allege facts authorizing the conclusion that it was of such general notoriety that he will be presumed to have knowledge. So, an allegation of a custom must show that it is general and uniform, and that it has been recognized for a long period of time. A usage is not sufficiently pleaded by a single averment that it has been constantly and uniformly recognized and abided by in a certain city in similar cases."

The allegations in defendant's answer seem to fall far short of pleading a custom. The claim was not forwarded or sent by plaintiff to defendant for recovery within the meaning of the custom attempted to be pleaded. The relations existing were entirely different. The pleadings disclose that a special partnership relation existed whereby plaintiff and defendant were to share in the division of a contingent fee without agreement as to how the fee should be divided, and in such cases the law fixes what the division shall be. The custom attempted to be pleaded constitutes no defense to plaintiff's cause of action.

The allegations of defendant's answer which are admitted to be true by the demurrer show that it was due to the skill and services performed by defendant that a favorable result was obtained for the client. Under the circumstances the conscience of the plaintiff should have

intervened and defendant been allowed to keep, of the fee collected, a sufficient amount to recompense defendant for its valuable services, but there seems to have been no such intervention of conscience, hence, this lawsuit. We conclude, notwithstanding the outstanding services performed, that the facts alleged in defendant's answer constitute no defense to plaintiff's cause of action, and that the trial court committed no error in sustaining the demurrer and entering judgment in favor of the plaintiff.

It is therefore ordered that the judgment of the trial court be and the same is hereby

AFFIRMED.

MARY E. HAYNES, APPELLEE, V. FARMERS & MERCHANTS STATE BANK OF WAHOO, APPELLANT.

FILED MARCH 28, 1929. No. 26458.

1. **Banks and Banking:** TRANSACTION WITH PRESIDENT: NOTICE TO BANK. While the knowledge of a bank president who obtains a note for his own profit by false representations is not ordinarily to be imputed to the bank, still, if he is not only its president, but its practical owner and general manager, who has actually been given the complete control of its business and affairs by its directors, and who has habitually exercised the same, the bank will be held for his knowledge if it discounts the said note.
2. **Contracts:** MORTGAGE: RATIFICATION. In order to ratify a mortgage or other instrument procured by fraud, there must be an unequivocal act, with full knowledge of the fraud, confirming the contract, act or lien in question.
3. **Appeal.** A money judgment for rents in a decree setting aside a deed, which is not supported by any evidence in the bill of exceptions, must upon appeal to this court be reversed, though the decree in general is affirmed.

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

C. M. Skiles and *J. H. Barry,* for appellant.

Paul F. Good, Coufal & Shaw and *McKillip & Barth, contra.*

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

SHEPHERD, District Judge.

Beauchamp and Winter, the former a salesman and the latter the president and manager of the Farmers & Merchants Bank of Wahoo, engaged in the automobile business, conducting the same in the name of E. K. Beauchamp. In the latter part of 1920 the business needed money and it was procured by getting Mrs. Haynes, who was Beauchamp's mother-in-law, to sign notes. She signed so many in the course of a short two years that on the 12th day of December, 1922, Winter, in whose bank said notes seem to have been congregated, persuaded her to sign a $20,000 mortgage to secure the same, together with new notes amounting to that sum. In May or June of 1925 the automobile business had gone to ruin and the bank was in a bad way. A new president and a new board of directors began to function for the bank and immediately importuned Mrs. Haynes for a deed whereby they might sell the farm at a private sale, pay the mortgage and render her the surplus. And this, by the assistance of Winter who had a great deal of influence over her, they were successful in securing.

On the 29th of August, 1925, Mrs. Haynes began this action in equity to cancel said notes and conveyances and to recover the land and its rents and profits. She declared that she signed and delivered the said notes and conveyances wholly without monetary consideration. She averred that she was inexperienced, weak of mind, altogether under the influence of Winter and Beauchamp, and that she was led to sign in all instances by false and fraudulent representations deceitfully made by them for the purpose of defrauding her. She alleged that these representations were to the effect that their automobile business was profitable; that Winter practically owned the bank, was worth more than $100,000 above his debts, and was a man of the highest integrity; that said bank was financially sound; that Beauchamp was earning more than $5,000 a year;

that her signing was sought merely to assist the bank in making a showing to satisfy the examiner, and that she would not be required to pay. And she alleged that they further told her at the time of making the described mortgage of $20,000 that she had previously signed obligations totalling $18,000, when in fact said obligations did not exceed the sum of $12,000.

All this was generally denied by the defendant, the Farmers & Merchants Bank of Wahoo, which answered that it had parted with every dollar of the claim which it held against her, and asserted that she was estopped to maintain to the contrary.

The decree of the district court was in Mrs. Haynes' favor, canceling the notes, deed and mortgage and awarding her a judgment against the defendant for $1,380 for rents and profits from the farm.

No doubt appellee was overreached, as the trial court found. The record so indicates unmistakably. Mrs. Haynes was little learned, inexperienced, old, easily influenced and possessed only of the mental capacity of a child of 14 years. She was not able to handle important business involving large sums of money or to withstand the importunities of men of affairs who professed to be her friends. The record also discloses facts and circumstances sufficient to show that all of the representations alleged as made by way of inducement and otherwise were actually made, and were false and designedly false. The woman was defrauded by a couple of rascals who secured money from the bank for their own purposes and bilked her out of her farm to make the bank whole.

It is insisted, however, by the appellant bank that it is not to be charged with the fraud in question, because, in the first place, a note given for the assistance of a bank in its difficulties with the bank examiner may not be avoided on the ground that an official of the bank who procured the same to be given promised the giver that it would not be collected, and because, in the second place, knowledge of frauds practiced by a bank official is not to

be imputed to the bank itself in case the note obtained thereby is for the personal profit of such official.

The first proposition is sustained by the holdings of this court in *Farmers Nat. Bank v. Ohman,* 112 Neb. 491. The second proposition is also generally accepted and has had recognition in this state, the reason being that banks act by their directors, and that a fraud perpetrated by an official for his own benefit will not ordinarily be disclosed by him to such directors or to the bank.

But the latter rule certainly has its limitations and exceptions. The presumption ought not to obtain in a case where the president who practices a fraud is the practical owner of the bank and the general manager of the same, and where its board of directors has committed to him complete control and direction of all of the business and affairs of the the institution, and he has habitually exercised the same. It would be purblind justice, indeed, to so hold if the proofs establish such a condition. Nor are we disposed to hold that such authority could only be delegated to such official by a formal and recorded action of the board. It is enough that the actual condition exists and is proved.

The evidence shows to the satisfaction of this court, as it evidently did to the trial court, that Winter was vested with just such power and authority in connection with the business of the Farmers & Merchants Bank of Wahoo, appellant herein. It follows, therefore, that his knowledge was the knowledge of the bank.

A party taking a promissory note, even before due and for a valuable consideration, will not be entitled to collect the same if it has been obtained by fraud and if he had knowledge of that fact at the time of such taking. This familiar doctrine, which does not require the citation of authorities, is sufficient to sustain the decree of the district court upon the facts found.

The new president and directors of the bank were not successful at first in obtaining the deed which they urged Mrs. Haynes to make. Upon the occasion of their first

visit for that purpose she desired to take time to consider and to obtain advice. It may be noted in passing that she had at first refused to sign the mortgage which was made December 12, 1922, upon the advice of her older son who had been present when she was then solicited so to do. A considerable time afterward said president and directors arranged with Winter to call upon her and to persuade her to sign the deed in question, making arrangements to visit her immediately upon the conclusion of his call. This they did, and then obtained from her the deed which they wanted, the consideration thereof being $20,000. Now, the true amount for which Mrs. Haynes had obligated herself, aside from the $20,000 worth of notes which she executed when the mortgage was taken, did not exceed the sum of about $13,000, as the books of the bank and the testimony of the witnesses show. Undoubtedly these directors must be charged with knowledge as to the real extent of her obligations, for they not only had such obligations in their possession in the bank, but also the bank records concerning the same. They knew absolutely that $1,000 of the $20,000 consideration recited in the mortgage and in the deed was in the form of a note which was turned over to Beauchamp. It seems clear to us that in taking this deed for $20,000 the new president and the directors, and therefore the bank itself, participated in the fraud which had been practiced by Beauchamp and Winter. Having knowingly taken said deed, whether it be considered as an absolute conveyance or as a mortgage, for a greater amount than the real indebtedness of Mrs. Haynes, they can hardly be heard to say that the bank is innocent in the transaction. By so doing they ratified the acts of Winter and participated with him in the fraud. Nor can they in law be charged with a lesser degree of turpitude than he. As he made the fraudulent representations to Mrs. Haynes knowingly and deceitfully for the purpose of defrauding her, so the bank must be considered to have acted. *Brucker v. Kairn,* 89 Neb. 274. Moreover, the bank did not surrender any por-

tion of the notes and obligations signed by Mrs. Haynes, not even when they secured the said deed from her. They retained all of the benefits secured by Winter, as well as by themselves, and ought in equity to be estopped from seeking to hold either the said obligations or the real estate in question.

In the case of *Buchanan v. Wilson,* 97 Neb. 369, this court said in the second paragraph of the syllabus: "The plaintiff, although not wholly insane, was shown to be mentally weak and a man of poor judgment, and in such case if the weak mental condition of the plaintiff enabled the defendant the better to take advantage of the plaintiff, and he did take advantage of him, and thereby fraudulently acquired the plaintiff's property for much less than its true value, the contract should be rescinded at the plaintiff's request, and plaintiff should recover his property; and it will be immaterial whether the plaintiff was wholly insane at the time the trade was made." The doctrine thus stated applies to this case with peculiar force. But it does not need; by both knowledge and participation the fraud practiced was the fraud of the bank, and it was enough to void the notes and conveyances in suit.

It is contended on the part of the bank that in placing the deed on record, together with a contract from the bank agreeing to pay her the surplus after applying the proceeds of the sale to the bank's claim, Mrs. Haynes ratified the deed and all of the transactions leading up to the same, and is estopped. But it does not appear that at the time of filing said instruments she was fully advised of all of the fraud that had been practiced upon her. Considering her mental weakness and considering also the fact that she was not so fully advised, the court is of the opinion that she did not ratify and was not estopped. In order to ratify a mortgage or other instrument procured by fraud, there must be an unequivocal act, with full knowledge of the fraud, confirming the lien. *Burnham v. Lawson,* 103 N. Y. Supp. 482; *Staley v. Housel,* 35 Neb. 160.

Although the bank is charged in the amended petition with the collection of farm rents amounting to $1,380, no testimony in regard to the same, or any portion of it, appears in the bill of exceptions. It is stated dehors the record that evidence upon the point was actually adduced, but that a mistake occurred whereby it was omitted from the bill. There being no evidence in the bill to support the judgment for such rents in the sum of $1,380, the decree of the district court must be modified in the respect indicated.

The judgment of the district court in so far as it awards judgment of $1,380 to plaintiff for rents is erroneous, in all other respects it is right. The judgment is hereby modified so as to deny plaintiff any recovery for rents and in all other respects the judgment is affirmed.

AFFIRMED AS MODIFIED.

L. L. CORYELL, APPELLANT, V. OLD COLONY INSURANCE COMPANY ET AL., APPELLEES.

FILED APRIL 5, 1929. No. 26547.

Insurance. Where a policy of insurance covers "direct loss or damage by fire" and the loss and damage for which recovery is sought was occasioned by soot, smoke and volatilized oil accompanying them and escaping from the open door of an oil burning furnace at all times operated and controlled by the insured alone; where the flames from the furnace extended outside the open door thereof but did not ignite or burn any of the property insured and were extinguished as soon as the door was closed and the oil turned off; and where it is not shown that the furnace door was opened accidentally, by an explosion or otherwise; *held*, that the loss and damage was not contemplated by the contract of insurance and the insured cannot recover.

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

Sterling F. Mutz, for appellant.

C. C. Flansburg, contra.

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

GOSS, C. J.

This was an action to recover on fire insurance policies. A jury was waived and the case was tried to the court. Judgment was entered in favor of the defendants. Plaintiff appealed.

In his petition plaintiff alleged that he was the owner of the dwelling-house in question; that he insured it by the policies set out; that he performed all the terms and conditions to be performed on his part; that while the insurance was in effect he "suffered a loss by fire, said property having been burned and smoked to the plaintiff's damage in the sum of $1,000;" and that upon notice of loss the defendants waived proof of loss, denied liability and advised plaintiff to bring suit.

The defendants demurred to the petition in the first paragraph of the answer; and in the second and last paragraph thereof, without waiving the demurrer, the defendants admit their corporate existence, admit their right to do business in Nebraska, admit the issuance of the policies, and deny each and every other allegation contained in the petition.

On the trial the parties stipulated in writing some facts definitely, and then stipulated that if plaintiff were called as a witness he would testify to certain things fully set out, and that these things should be given the same force and effect as if he were sworn and testified. The written stipulation was received in evidence without objection. Among these things so stipulated to be considered as testified to by the plaintiff it appeared: That the house was heated by a furnace installed for that purpose and having an oil burner, controlled by a thermostat set at 73 degrees and not changed at any time under consideration; that about midnight on April 14, 1926, plaintiff went to his furnace in the basement, inspected it and found it was working properly and made no adjustment of it; that he

awakened about 5 o'clock in the morning of April 15, observed smoke, soot and oil therefrom over the house, went to the furnace to ascertain the cause and "found that the furnace door, which he had left closed upon retiring about midnight, had been opened by some process in the absence of plaintiff, the cause of said door being open being unknown to plaintiff;" that the flames from the oil burner were shooting out of the open door from three to five feet, striking the asbestos covered heat pipes near the ceiling of said basement room, "blackening and charring the covering on the heat pipes;" that with an iron bar plaintiff shut the furnace door; that the plaintiff then turned off the oil and the fire subsided; that the soot, smoke and oil therefrom which had accumulated over the rooms of the house required redecoration of the house and time and labor; that the damage was in the sum of $1,000; and that the flames "did not ignite or burn any other part of the house than the asbestos covering on the pipes" aforesaid.

Plaintiff was present at the trial and testified supplementing his testimony given in the stipulation. On direct examination he testified that the furnace door was closed when he retired between midnight and 1 o'clock.

On cross-examination he testified that he always opened the furnace door at night to inspect the furnace and that he did so on this occasion. The door fastened by a "lip on the edge of the door that traveled up an inclined plane and dropped in a slot." He thinks the lip was in the slot when he left it that night. On further cross-examination he answered in the affirmative a question framed to show that he had no independent recollection of closing the door, only because he always did so and thinks he did it that night. He gave his theory that the door was opened by some force from the inside. His judgment was that the volume of flame was greater when he shut the door in the morning than at night, greater than when it was burning around the ignition plate. On redirect examination he testified that he was very sure he closed the door at

night. There was no expert testimony nor any evidence based on experience or observation to indicate that such a furnace door might be opened accidentally from the inside or by any force operating from the inside. On cross-examination plaintiff admitted that nothing was burned in the furnace room, stating that it was fireproof.

The defendants claim (1) that the damage was caused by the plaintiff's own negligence in leaving the door open; and (2) that the fire was a "friendly" fire and not a "hostile" fire.

The general rules of pleading relating to contracts apply to actions on insurance contracts. It was incumbent on plaintiff to allege that he performed all the terms and conditions precedent on his part. 26 C. J. 492, sec. 693. This he did. "The general requirement as to averring performance of conditions and warranties relates only to affirmative warranties and conditions precedent; it is not necessary to negative the occurrence of facts which would constitute a breach of a promissory warranty or condition subsequent." 26 C. J. 493, sec. 693; 14 R. C. L. 1431, sec. 591. "He need not as a rule anticipate affirmative defenses either by positive or by negative allegations." 26 C. J. 496, sec. 701.

No negligence of plaintiff, either by reason of leaving the furnace door open or otherwise, was pleaded by the defendants in their general denial. The judgment of the trial court is general. It contains no specific findings of fact, nor does the bill of exceptions show any opinion or statement from the court as to the ground on which he rendered judgment. In view of the pleadings and the rules ordinarily governing them and of the general trend of the evidence in the case, we infer that the judgment was based upon a conclusion of the trial court that, under the law and the evidence, the defendants were free from liability because the fire had its origin in the furnace and because this particular situs and this particular fire constituted the source from which the damaging elements emanated. However, in stating that negligence was not

pleaded as a defense, we do not wish to be understood as eliminating the proper force of the evidential facts relating to the furnace door being open when the damage was done, and that this was the means by which the fire, smoke, and other elements complained of, reached the interior of plaintiff's house, instead of going up the chimney.

In policies insuring against "direct loss or damage by fire," as was the case here, an actionable fire is frequently called a "hostile fire" to distinguish it from a nonactionable fire, which is called a "friendly fire," that is, a fire intentionally built within a stove or furnace or in some other proper place contemplated by both the insured and insurer. The general rule seems to be that the insurer is not liable for the consequences of a friendly fire so long as the fire itself is confined within the limits of the proper agencies employed for the purpose; and if a friendly fire get out of bounds so as to ignite property insured and thus to damage it, or so as to cause a second fire with consequent damage by reason of such secondary fire, it will be considered a hostile fire, for whose damages the insurer is liable. 26 C. J. 340, secs. 429, 430; 14 R. C. L. 1216, sec. 396; 6 Cooley's Briefs on Insurance, 4933-4935.

In *Way v. Abington Mutual Fire Ins. Co.*, 166 Mass. 67, where the damage was caused by the soot in a chimney becoming ignited, it was called a hostile fire. In the opinion the court cited the English case of *Austin v. Drew*, 4 Camp. (Eng.) 360, often cited as a leading example of a fire held to be friendly. Sugar was damaged by excessive heat, but the fire causing this heat remained in the place provided for it. This latter case is very thoroughly analyzed and discussed by that eminent jurist Caleb Cushing. We content ourselves, as to *Austin v. Drew*, with a reference to Judge Cushing's opinion in *Scripture v. Lowell Mutual Fire Ins. Co.*, 10 Cush. (Mass.) 356. This later case has been cited to us. We do not find it very analogous to the case at bar. A boy took a cask of gunpowder to the attic of the insured house and fired the gunpowder with a match. It caused damage both by explosion and by combustion.

On the theory that the ignition of the gunpowder was the proximate cause of both the combustion and the explosion, the court held that the damages for both were covered by the insured. This ignition patently was hostile.

Cannon v. Phœnix Ins. Co., 110 Ga. 563, was a case arising when the insured was "arranging a stove" on the ground floor, the pipes of which extended through the ceiling and through the second story of the building. These pipes disengaged at the ceiling of the second floor. When a fire was built in the stove, smoke and soot escaped in the second story and damaged goods there. It was held that it was a friendly fire and that damages caused by water used in cooling a portion of the ceiling heated by the pipe but not actually ignited could not be recovered under the policy covering "all direct loss or damage by fire."

In *Lavitt v. Hartford County Mutual Fire Ins. Co.*, 105 Conn. 729, damage was done to an insured house and contents by reason of a defect or of defective action of an oil burning furnace. As in the instant case, as soon as it was discovered and the oil was turned off, the fire ceased. The court was bound by the finding of the trial court that there was no actual ignition of a board attached to a ceiling in the cellar because the board about which the oral testimony was conflicting had not been preserved for review. The plaintiff had testified that this board was aflame when he entered the cellar. The court held that "fire" as used in the policy "was not restricted to its technical or scientific meaning, but was intended in the sense of ignition, including its action in charring, scorching, cracking, smoking, or heating, though no flame be seen." By reason of the state of the record, the fire was held to be a friendly fire and plaintiff's claim of error was denied.

In *Hansen v. LeMars Mutual Ins. Ass'n*, 193 Ia. 1, plaintiff lit the oil burners under a boiler of water to heat it for the family washing and went back to bed. An hour later he was awakened by the smoke and soot which filled the house. He averred that the flames extended nearly to the top of the boiler and emitted in great quantities the smoke

and soot complained of. He turned down the burner and the fire went out. There was no evidence that there was any leak or that the oil in the tank had ignited. Held, that plaintiff could not recover.

The plaintiff relies on *O'Connor v. Queen Ins. Co.*, 140 Wis. 388. Plaintiff's servant built in the furnace a fire of material highly inflammable and not intended to be used. It caused intense heat and great volumes of smoke and soot to escape through the registers to the rooms and thus damaged the property insured. While the syllabus states there was no ignition outside the furnace, the opinion says that "around the mop boards was burned and the mop boards blistered; the wall paper charred and burned and the chimney cracked from the excessive heat;" and "the fire was extraordinary and unusual, unsuitable for the purpose intended, and in a measure uncontrollable, besides being inherently dangerous because of the unsuitable material used." It was held to be a hostile fire. Judge Marshall filed a dissenting opinion, reviewing many cases and expressing the opinion that the majority opinion had gone "beyond any substantial support in the books." The majority of the Wisconsin court felt justified in the opinion, probably because of the "extraordinary and unusual" development of what otherwise might even by them have been found to be a friendly fire. The opinion seems out of step with the general trend. It was not followed in *Hansen v. LeMars Mutual Ins. Ass'n*, 193 Ia. 1, but the opinion there contents itself by quoting the Wisconsin court's description of the "extraordinary and unusual," "in a measure uncontrollable, besides being inherently dangerous," fire. In 6 Cooley's Briefs on Insurance, 4933, in discussing the rule that damage, without ignition, resulting from a friendly fire, is not covered by the ordinary policy, the author refers to the *O'Connor* case alone as an example where "the rule above stated is materially qualified" and expressly refers to the dissenting opinion of Judge Marshall therein.

Appellant cites *City of New York Ins. Co. v. Gugenheim*,

7 S. W. (2d) 588, decided by court of appeals of Texas, July 14, 1928. The facts recited in that case show that the oil which was used as fuel in the furnace escaped into the air jacket or compartment outside of the combustion chamber, and was there ignited when the fire in the furnace proper became hot enough to heat the air sufficiently in the air compartment. "The smoke and soot from the oil burning in the air compartment went through the air vents into the house and damaged the furniture, fixtures and walls to the amount agreed upon." The opinion cites and discusses numerous cases illustrative of the distinction between a friendly and a hostile fire and follows what it seems to consider the proper rule, that this secondary fire was a hostile fire.

Appellant also cites and relies on *Pappadakis v. Netherlands Fire & Life Ins. Co.*, 137 Wash. 430, "where fire escaped from a crack in the top of a bakery oven, until the flame heated an automatic sprinkler head, releasing and throwing a large quantity of water over the bakery and damaging the bakery and stock therein." The court held that the fire was a hostile fire on the expressed conclusion that it was "a fire out of place." Of course, the fact that the fire escaped from an accidental crack in the top of the oven would seem to differentiate the facts to that extent from an escape of fire from an open furnace door, as in the instant case. The opinion discusses *Cabbell v. Milwaukee Mechanics Ins. Co.*, 218 Mo. App. 31, also cited by appellant, and describes it as a case where a furnace in a basement of a dwelling exploded and threw out upon the basement floor live chunks of coal, and it was there held that the live coals, thus thrown out from the furnace, would constitute actual ignition outside of the furnace so as to come within the terms of the rule stated. We have read the *Cabbell* opinion and are unable to say whether the policy was like that in suit here or not, but there is an intimation in the syllabus that it was a broader policy. The syllabus contains this: "Where a policy, by its express terms, insured owner against loss

or damage to his buildings by fire, it was broad enough to include all fires, and to cover the damage arising from smoke and soot resulting from the explosion of a hot water plant."

To the extent, if any, that the cases cited and heretofore discussed have not been distinguished or are not distinguishable, we do not regard them as of authority to modify what we conceive to be the settled rule applicable to the case under review. We are of the opinion that the correct rule to be applied to the particular situation is this: Where a policy of insurance covers "direct loss or damage by fire" and the loss and damage for which recovery is sought was occasioned by soot, smoke and volatilized oil accompanying them and escaping from the open door of an oil burning furnace at all times operated and controlled by the insured alone; where the flames from the furnace extended outside the open door thereof but did not ignite or burn any of the property insured and were extinguished as soon as the door was closed and the oil turned off; and where it is not shown that the furnace door was opened accidentally, by an explosion or otherwise; it should be held that the loss and damage was not contemplated by the contract of insurance and the insured cannot recover.

Moreover, in this case a jury was waived and the matter was tried to the court. No specific findings of fact were requested or made but the court found generally for the defendants. The inference is that he found, as we have found, the issue of fact as to the unexplained open door in favor of the defendants. This finding has the same force and effect as if found by a jury. We may not overturn it even if we might have found differently, unless it was clearly against the preponderance of the evidence.

For the reasons stated in the opinion, the judgment of the district court is

AFFIRMED.

GOOD, J., dissenting.

I am unable to concur in the majority opinion. The facts disclosed by the record show that the fire was hostile and not friendly, and plaintiff was therefore entitled to recover.

REDICK, District Judge, concurs in this dissent.

The following opinion on motion for rehearing was filed February 28, 1930. *Former judgment of affirmance vacated, and judgment of district court reversed.*

1. **Insurance:** "FRIENDLY" AND "HOSTILE" FIRES. The question involved herein is whether the fire insurance policies, which are made the basis of this action, cover the fire involved, that is, whether such fire was what is known in insurance law as "friendly," by reason of which no recovery can be had, or "hostile," by reason of which recovery may be had. Under the facts reflected, *held* to be the latter, and recovery granted.
2. ———: ———. A "friendly" fire is one that remains confined in the place intended. A "hostile" fire is one not so confined.
3. **Judgment Vacated.** Our holding in this case reported *ante*, p. 303, is set aside.

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

THOMPSON, J.

This is an action based on certain fire insurance policies issued to the plaintiff, appellant, by the defendants, appellees, respectively, to recover $1,000, a reasonable attorney's fee and costs, for loss and damage caused by fire, smoke, and soot, to the property covered by such policies. The issue was as to whether the fire, which is claimed to have given rise to such alleged right of recovery, is one which comes within the provisions of the policies. The trial court determined it did not, to reverse which finding the plaintiff appeals.

It is our conclusion from an examination of the pleadings that they do not put in issue negligence or any wrongful act on the part of the plaintiff; that the petition is in usual form in such cases, and is not vulnerable to the demurrer interposed by way of the answer. It might here be

said, further, that we have examined the evidence and conclude that, even if the pleadings had presented the issue of negligence or wrongdoing on the part of plaintiff, the same would not find support in the record. Also, we are convinced that, if the fire was one covered by the policies, the plaintiff is entitled to recover of the defendants the sum of $1,000, together with interest thereon, attorney's fees and costs, as prayed. As to whether or not the fire was one coming within the scope and intent of the policies depends upon the proper application of the law to the facts reflected by this record, which are, in substance, as follows: There are four policies involved, all in Nebraska standard form, and, so far as material for our consideration, covered the dwelling house of plaintiff and the household and personal effects therein contained. Three of such policies insured against "all immediate and direct loss or damage by fire," and the fourth against "all direct loss or damage by fire." The dwelling was of two-story and basement construction, the basement being fireproof. On the date in question this dwelling was equipped with a hot air heating apparatus, commonly known as a Quaker furnace, with hot and cold air pipes leading to all parts of the house. In such furnace there was installed a Sun gravity oil burner, supplied with an automatic thermostat, trip bucket, and other ordinary equipment. The specific gravity of the oil used was 38-40 Baume. In this furnace the oil is fed on a hot plate resting at the base of the firebox, where it vaporizes and then ignites; and thus the necessary heat is generated, and by means of the hot air pipes is distributed to the different parts of the building, as is, in a somewhat similar manner, the cold air through the cold air pipes. At about 12 o'clock on the night in question, plaintiff, as was his custom, went to the basement, opened the coal door of the furnace (in size about 12 by 16 inches), glanced in, observed nothing unusual in its operation, closed the door, which fastened by a "lip on the edge of the door that traveled up an inclined plane and dropped in a slot," and then retired to his room in the second story. Early the follow-

ing morning he awakened, arose, and observed smoke, soot and oil over the rooms and personal effects. He then went to the basement to ascertain the cause, and on arriving found the door of the furnace open, which he had closed at midnight, and which had been opened by some process unknown to him in his absence. The flames, oil, soot and smoke from such oil burner were shooting out of the furnace door, to its full width, a distance from the door of from three to five feet, striking the ceiling and the asbestos-covered heat pipes near the ceiling, blackening and charring such covering. Thereupon plaintiff procured an iron bar, closed the furnace door, and turned off the oil, and on his having done so the fire subsided. The aforementioned smoke, soot, and vaporized oil permeated the entire house. The flames shooting out of the door were greater in volume than those which plaintiff had seen in the firebox at midnight. While plaintiff testified that he did not hear any explosion, it was his belief that force from the inside of the furnace opened the door, because he was sure he closed the door before retiring. No part of the furnace was broken. The loss and damage sustained by plaintiff, by reason of the foregoing, were as by him alleged in his petition. While others of the household had access to the furnace, plaintiff was the only one who exercised such privilege.

Counsel for these respective parties have, with discriminating care, both by way of authorities cited and argument, presented their views of the issues involved. It is the contention of defendants that the base of the fire in fact rested upon the evaporating plate, and however far it may have extended from this plate, even as in this case, it is a "friendly" fire, and that the combustion all occurred inside the furnace, where it was intended it should. The plaintiff insists that the fire was "unfriendly" or "hostile" from the point where it passed from the furnace, if not from the time it passed from the heated plate in the furnace, and that combustion occurred outside the furnace, and at a place where it was not intended it should. A careful

consideration leads us to conclude that these contracts of insurance do not cover a loss or damage occasioned by fire, smoke, or soot, so long as the fire is kept confined in the furnace, the place intended; that while it thus remains it is a "friendly" fire, and if damages are caused by it while it is so confined recovery therefor cannot be had. This the parties seem to concede. Here, however, their contentions diverge. We take the reasonable view to be that when it is admitted, or clearly proved, that the loss and damage were caused from and by fire, after it had passed from the place of its intended confinement, as in this case, then and by reason thereof the insurance company is liable for loss and damage, not only that caused by burning, but from soot and smoke as well. The fire causing the damage having passed from the place where it was intended to be, it thus became a "hostile" element, and so remained until extinguished.

A reasonable deduction from the facts admitted and proved, including the damaged condition of the rooms and personal effects, is that that which was rushing out of the furnace door, to its full width, called "flames," was laden with soot and vaporized oil, and as these materials carried by the flames passed through and out of the door, the outer rim of such flames, on meeting the air in the furnace room, ignited such materials and produced combustion, which process continued from the time the door opened until the fire was extinguished.

We should remember in this consideration that this court has uniformly held: "Courts will construe policies of insurance more strongly against the party by whom the contract has been drafted, and who has had the time and opportunity to select, with care and ingenuity, and with a view to its own interests, the language in which the contract is couched." *Connecticut Fire Ins. Co. v. Jeary,* 60 Neb. 338. Numerous cases bearing upon this subject will be found collated in *Farmers Union Grain Co. v. United States Fidelity & Guaranty Co.,* 109 Neb. 142.

This instant case is not distinguishable on any reason-

able hypothesis from that of *Cabbell v. Milwaukee Mechanics Ins. Co.*, 218 Mo. App. 31, wherein it was held: "To constitute loss or damage by fire, within the usual terms of a policy, there must be actual fire, one which becomes uncontrollable, or breaks out from where it was intended to be, becoming a hostile element, and a recovery may be had for resulting losses or damages in regard to which there has been no actual ignition, caused by smoke, soot or by heat, but where the fire is one confined within its usual limits a recovery cannot be had for loss or damage caused thereby." It cannot consistently be said that the fire here in question was "confined within its usual limits," nor that the facts in this case fail to bring it within the rule announced in the first part of the above quoted holding.

The conclusions hereinbefore expressed find support in *O'Connor v. Queen Ins. Co.*, 140 Wis. 388, and *Pappadakis v. Netherlands Fire & Life Ins. Co.*, 137 Wash. 430.

Thus, we are impelled to conclude that the fire in question was "hostile," and not "friendly," and, being "hostile," was covered by the policies in suit; further, that the judgment of the trial court is without support in the evidence, and contrary to the law applicable thereto. There is allowed plaintiff as attorney's fee $150 in this court, and $150 in the trial court.

Our previous holding in this case, reported, *ante*, p. 303, is set aside, and the judgment of the trial court is reversed and the cause remanded, with directions to enter judgment for the plaintiff in harmony with this opinion.

REVERSED.

GOSS, C. J., dissenting.

I dissent. My views may be found in the first reported opinion in this case, *Coryell v. Old Colony Ins. Co., ante*, p. 303.

The opinion of the present majority contains features, quite aside from the mere fixing of liability on facts like those involved here, that seem to be pregnant with trouble in future cases. The first point of the syllabus is very gen-

eral, but holds this fire to have been a "hostile" fire. But in the opinion appears this conclusion:

"The fire causing the damage having passed from the place where it was intended to be, it thus became a 'hostile' element, and so remained until extinguished."

This might be a correct proposition if the facts justified it; but in this case it is equivalent to saying that whenever any fire reaches outside the immediate receptacle in which it was intended to be and any damage is done by fire, smoke, oil, or soot, it is a "hostile" fire as that term is defined also in the second point of the syllabus. The opinion finds, as "a reasonable deduction from the facts admitted and proved," just when and how the fire became an actionable fire under the policy. It says in effect that, as long as that which was called "flames" was in the furnace, it was a "friendly" fire, but when it got outside of the furnace door, laden with soot and vaporized oil, and came in contact with the air in the furnace room, "the outer rim of such flames" ignited the soot and vaporized oil and produced combustion. Thus, according to this conclusion of the opinion, was born a "hostile" fire, and it carried oil, smoke, and soot from the furnace throughout the house. This of course was stated in an attempt to show from the evidence, in compliance with what has always been the law in nearly every jurisdiction, that there must be a second fire before there can be induced "hostile" fire. One need not be a scientist to know that the soot and vaporized oil here were the result of imperfect combustion on the plate inside the furnace; and that the soot once formed would not burn by contact either with the air or with fire outside the furnace. The evidence shows that the fire continued to come out of the furnace until plaintiff shut it off. This ended both fires. Until then, according to the opinion, the center of the column of fire coming out of the furnace door and reaching up to the pipes must have been a "friendly" fire, but the "outer rim" of this column was a "hostile" fire. This explanation seems fantastic.

There is no evidence nor any presumption that any va-

porized oil consumed outside of the furnace produced any soot. We know that the flames did not ignite the asbestos covering of the pipes outside the furnace. It must be concluded that there was no secondary or hostile fire and that any unconsumed soot and vaporized oil was taken out of the furnace by a "friendly" fire, as that term has always been understood, except in the one case cited by the present opinion: *O'Connor v. Queen Ins. Co.*, 140 Wis. 388. On such facts as are present here that case stands alone, so far as I know. The dissenting opinion therein follows the almost unanimous rule in England and the courts of this country. The two other cases relied on, *Cabbell v. Milwaukee Mechanics Ins. Co.*, 218 Mo. App. 31, and *Pappadakis v. Netherlands Fire & Life Ins. Co.*, 137 Wash. 430, are discussed in the former opinion in this case.

Unless controlled by statute, insurance contracts should be ruled by the same principles as any other contracts. The damage to plaintiff's property makes a strong appeal, but it appears that the decision goes contrary to principle and weight of authority. Whenever a court extends the rules to allow a recovery, it makes trouble for the future. It seems to me the opinion does just this.

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

DON A. CHAPIN, APPELLEE, V. HERBERT C. NOLL, APPELLANT.

FILED APRIL 5, 1929. No. 26471.

1. **Parol Evidence.** "The rule that evidence of a parol promise cannot be shown for the purpose of enlarging or changing the written contract, where the action is one to enforce the contract, is not applicable where the action is in fraud for damages or to rescind the contract and to prove the oral promise as the fraudulent representation which acted as an inducement to the contract." *Schuster v. North American Hotel Co.*, 106 Neb. 672, 679.
2. **Fraud:** QUESTION FOR JURY. "In an action for damages for fraud and deceit in the sale or exchange of property, it is for the jury to determine from the evidence whether facts and circumstances are established which show that plaintiff was justified in relying on the representations made by defendant, and

whether such representations were made to induce the exchange of properties." *Sanders v. Nightengale*, 109 Neb. 667.

3. **Witnesses:** EXAMINATION. "A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof." Comp. St. 1922, sec. 8848.
4. **Fraud:** AFFIRMANCE. It is well established that the jury in a proper case are the sole triers of questions of fact. Evidence examined and *held*, that the verdict is supported thereby.

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

Hainer, Flansburg & Lee, John W. Yeager and *B. R. Stone*, for appellant.

Stewart, Stewart & Whitworth, contra.

Heard before ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and REDICK and SHEPHERD, District Judges.

DEAN, J.

This action was begun by Don A. Chapin, plaintiff, to recover $75,000 from Herbert C. Noll, defendant, for an alleged fraud which plaintiff charges was perpetrated against him in the purchase of a certain business carried on by defendant in Lincoln under the trade-name of "Noll Electric Company." Defendant was engaged at the time in the sale and repair of electrical supplies, automobile accessories and batteries, and also Atwater-Kent radios and their accessories. The jury returned a verdict for plaintiff for $31,583. Defendant appealed.

The parties executed a written contract under date of March 8, 1926. An excerpt therefrom covers the part of the contract which is in disagreement here. The excerpt follows:

"Party of the first part hereby sells, conveys, and delivers all his right, title and interest in the business at 317-321 South Eleventh street, Lincoln, Nebraska, to party of the second part, and party of the second part hereby purchases all of said business for the sum of five thousand ($5,000) dollars in cash, receipt whereof is hereby

acknowledged, and the total inventory of the business as of March 8, 1926, to be paid by party of the second part to party of the first part immediately upon completion of the inventory. Said inventory to be taken as follows: All goods on hand January 1, 1926, are to be included at the same price as listed in inventory of that date. All goods purchased since January 1, 1926, are to be included at cost price. All goods on hand January 1, 1926, but not listed in inventory of that date, are included in this sale but are not to be priced in inventory. The property herein sold by party of the first part to party of the second part includes all merchandise on hand, furniture, fixtures, machinery, equipment, supplies and contracts in or on the aforesaid premises whether shown or not shown in the aforesaid inventory, and party of the first part hereby covenants with party of the second part that he is the lawful owner of said property, that it is free from all incumbrance, that he has good right to sell the same as aforesaid, and that he will warrant the same as against the claims and demands of all persons whomsoever."

Plaintiff charges that, as an additional inducement to him to enter into the contract, defendant sold to him the exclusive right to the sale and distribution of Atwater-Kent radios in the Lincoln territory, at a discount of 50 per cent. from the list price thereof so long as defendant held the agency therefor. This radio distribution right in itself was counted by the parties one of the most valuable business adjuncts in the sales right field in Lincoln.

Plaintiff also charges that, before and up to the moment the contract was signed, the defendant falsely represented to him that the business paid him $28,000 in the year preceding the sale to plaintiff, and that, from the Lincoln business, together with a like business in Omaha, $170,000 in profits was realized in one year by defendant. Plaintiff also testified that, upon reading the contract, there were some things therein that he asked defendant to explain, and that "one was that he was selling

me a lot of contracts and wasn't naming what the contracts were and that he wasn't naming the contracts; they belonged to the business; he was selling all of the contracts and it wasn't necessary to pick out just one contract and name just one contract." Plaintiff testified that the defendant told him that, in respect of the Atwater-Kent business, "they were not supposed to have subjobbers or subdistributors and we would have to work it along; that it would be all right, but he didn't want to put it in writing or do anything that would jeopardize his account with them, but as long as he had (orally) named all of the contracts which he had, he told me that was one of them and it was named with the rest of them, and he didn't except that and he didn't except any of the others, and I took it for granted that that (Atwater-Kent) was one of the contracts." Plaintiff also testified that he subsequently ordered radios from defendant, but that he refused to fill the orders sent him for radios and shipped only a trifling number. It also appears from plaintiff's evidence that he made repeated appointments with defendant to get a settlement of the disputed differences between them, but that defendant never did "show up."

Continuing, the plaintiff testified that he soon afterwards discovered that the defendant, upon whose statements and representations in respect of the business he implicitly relied, had greatly overcharged, cheated, and defrauded him in the transaction; that the profits which defendant represented he had realized in 1925, instead of being $28,000, approximated only about one-half of that sum; that he afterward discovered that the inventory which defendant took on January 1, 1925, was in the sum of $16,429.21, but that defendant falsely and wickedly represented, and informed him, that his profits were almost twice that sum; that the Atwater-Kent rights, which defendant represented he had included in the sale, but which were not so included, were worth $30,000; that subsequently plaintiff went to defendant and informed him that he had checked the inventory and had found out that he had

been cheated and defrauded, all as herein pointed out, and that he tried to get defendant to adjust the matters, but that he would not keep any appointment with plaintiff to right the grievous wrongs which he had perpetrated.

The defendant denied plaintiff's charges of fraud. He admitted that he received $5,000 in cash for the "good-will" of the business and also $36,800 as a second payment. Defendant also admitted that the sale contract was signed before the inventory of the merchandise was completed. But he also testified that none of the used, obsolete, or unsalable merchandise was included in the inventory or charged to plaintiff. He also testified that the business was worth all that defendant paid him, namely, $51,462.74, and that at the time of the sale it was making a good profit; that when plaintiff complained that the merchandise was listed at an extravagant figure on the inventory, defendant gave him a check for $1,494.42, and he contends that this sum was in full settlement of all claims by plaintiff against him. Defendant denied plaintiff's complaint that he engaged in any business in Lincoln after March 8, 1926, of the same character as that he had sold to plaintiff. He also testified that plaintiff wanted him to incorporate the Atwater-Kent radios in the written contract, but that he refused to do so, and told plaintiff that he, the plaintiff himself, could sign a dealer's contract with the Atwater-Kent company; that he had never discussed radios with plaintiff in connection with the business until the final contract was signed. On the cross-examination, however, defendant admitted that plaintiff did ask him about the radios. On this point defendant testified: "I told him I wasn't selling him the radio business, I was only selling him the automotive business, and he said, 'Well, you agreed to sell me everything as of the January 1st inventory, everything that was in the inventory;' and I said, 'I know it;' I said, 'I didn't think you were interested in the radio business;' and I says, 'All right, I will keep my word.' "

On further cross-examination, the defendant appeared

to be somewhat confused as to what he had stated in a certain deposition wherein he averred that he had never given plaintiff a statement of the Lincoln business before the sale, but at the trial he stated, first, that he had given him a statement, and finally that he did not know whether he had done so. Confronted with a financial statement which the bookkeeper had prepared at defendant's direction, defendant said he had never seen it before and that he did not have it prepared for him, but when shown a letter which contained a request therefor he admitted that he had directed that the financial statement be prepared.

A financial statement was given by defendant to plaintiff for examination. The sum of the inventory of the goods for January 1, 1925, is shown thereon to be $27,429.21, and the net profit is shown to be $28,104.76, for the same year. But the evidence of defendant's bookkeeper, Mrs. Fern Westhafer, tends to prove that the true inventory, as shown by the store records, totaled only $16,429.21 for the same year, instead of $27,429.21 as claimed by defendant on the financial statement given to plaintiff. This witness informed the jury that, if the figures were changed, they were changed at defendant's direction.

A witness who was formerly employed by defendant in his store testified that the yearly worth of the radio contract for the Lincoln trade and territory was probably $25,000 to $30,000 to any dealer. Another witness who was in defendant's employ for some time before the sale, and was present when the inventory of the stock was taken, had about 10 years' experience in selling stock and was familiar with market values. He informed the jury that about 30 per cent. of the Noll stock was invoiced when plaintiff purchased it, and that it was not worth over 25 cents on the dollar, and the remainder of the stock was not worth more than 50 per cent. of the list or wholesale price; that there were some obsolete and used parts in stock, and that the used parts were in with the new stock.

He stated that, in his opinion, the goods that were inventoried were worth from $20,000 to $22,000. Another of Noll's former employees told the jury that at the time plaintiff took over the business, in his opinion, 40 per cent. of the stock was obsolete and only about 10 per cent. or 20 per cent. was usable.

A certified public accountant testified, on the part of plaintiff, and he informed the jury that he had checked the books of the business and found that the profit for 1925 should be reduced from $28,000, as listed by defendant, to about $14,000, and that the inventory should be approximately $12,000 less than shown by the financial statement for 1925 which defendant furnished to plaintiff. Another accountant, also called by plaintiff, testified that, from a computation of the books of defendant and a check of the inventory list, defendant's inventory should be $21,667.21, instead of $38,315 as listed by defendant.

Defendant argues: "The written contract was complete in its terms. The consideration moving from the defendant was specific and executory in character, and the contract obligation could not be enlarged nor the consideration supplemented by proof of an oral agreement of a further consideration." And in support of the argument 22 C. J. 1172 is cited, which reads: "For the same reason, where the writing is complete upon its face, an additional executory consideration cannot be shown by parol, or, as it is sometimes expressed, new terms cannot be engrafted into an agreement by parol under the guise of varying the consideration."

But the rule is otherwise where the element of fraud abounds in the transaction as in the present case, and in such case the following rule is pointed out by a recognized authority and it is clearly applicable to the facts throughout:

"It is well established that, as fraud vitiates everything which it touches, parol evidence is always admissible to show, for the purpose of invalidating a written instrument, that its execution was procured by fraud, or that, by rea-

son of fraud, it does not express the true intentions of the parties." 22 C. J. 1215.

The text goes farther and points out that the rule is not rendered inapplicable, even though there is an agreement between the parties or a provision in the contract "that no verbal agreements affecting its validity will be recognized. * * * Only the victim of fraud can be permitted to show such fraud by extrinsic evidence; one is estopped to show his own fraud to impeach a writing which is sought to be used against him."

In *Schuster v. North American Hotel Co.*, 106 Neb. 672, at page 679, this rule is aptly stated in an opinion by Flansburg, J.:

"The rule that evidence of a parol promise cannot be shown for the purpose of enlarging or changing the written contract, where the action is one to enforce the contract, is not applicable where the action is in fraud for damages or to rescind the contract and to prove the oral promise as the fraudulent representation which acted as an inducement to the contract."

In *Sanders v. Nightengale,* 109 Neb. 667, we held:

"In an action for damages for fraud and deceit in the sale or exchange of property, it is for the jury to determine from the evidence whether facts and circumstances are established which show that plaintiff was justified in relying on the representations made by defendant, and whether such representations were made to induce the exchange of properties." See also *Farmers Cooperative Grain Co. v. Startzer,* 112 Neb. 19.

The record of conviction of the defendant for the commission of a felony in a Texas court, on the defendant's plea of guilty, was received in evidence. The record in the Texas court had to do with the theft of certain personal property. Defendant contends that it was error for the court to permit plaintiff to introduce the Texas record in evidence. But section 8848, Comp. St. 1922, provides:

"A witness may be interrogated as to his previous con-

viction for a felony. But no other proof of such conviction is competent except the record thereof."

We do not think the court erred in the respect noted.

We have examined every material question presented in behalf of the respective parties and it appears to us that reversible error has not been pointed out. That the verdict is abundantly supported by the evidence sufficiently appears. It is well established that the jury in a proper case are the sole triers of questions of fact. Other assignments of alleged error in respect of instructions and of the introduction of certain of the evidence are urged which we have examined and find are without substantial merit. It follows that the judgment of the district court must be, and it hereby is,

AFFIRMED.

WALTER L. MOORE ET AL., APPELLEES, V. CITY OF CENTRAL CITY ET AL., APPELLANTS.

FILED APRIL 5, 1929. No. 26666.

1. **Municipal Corporations:** CONTRACTS: VALIDITY. The city council of Central City was authorized by a majority vote of the citizens to enter into a contract for the repair and rebuilding of the city hall building and to transfer a sum "not to exceed $10,000" from an electric light fund to a general fund and thence to the city hall building fund therefor, pursuant to the election held under section 4371, Comp. St. 1922. *Held,* that the contract is void from the fact that the council named a sum of money which was $540 in excess of the amount authorized by the vote of the people to be used for the proposed object.
2. ———: ———. "The city council of a city of the second class cannot incur any expense or enter into any contract on behalf of the city unless an appropriation shall have been previously made concerning such expenditure, except in cases where the proposition has been sanctioned by a majority of the legal voters of the city." *McElhinney v. City of Superior,* 32 Neb. 744.

APPEAL from the district court for Merrick county: LOUIS LIGHTNER, JUDGE. *Affirmed as modified.*

Walter R. Raecke, for appellants.

Elmer E. Ross and *Donald F. Sampson, contra.*

Mann & Whitten, amici curiæ.

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

DEAN, J.

This is a suit in equity begun by Walter L. Moore, Arthur J. Bowle, and William B. Miller, plaintiffs, in behalf of themselves and all others similarly situated, to enjoin the city of Central City, John W. Machamer, as mayor, Eric Wright, as treasurer, and Edward Bishop, Claude Carrington, George Fitch, Paul Nielsen, Frank Parker, and Vern Riggs, as members of the city council, from entering into a proposed contract to repair, remodel, and furnish a city hall by expending funds transferred from the "electric light fund" to a "city hall building fund." On motion of the plaintiffs, the court rendered judgment on the pleadings and the defendants were enjoined from entering into the proposed contract and from expending the sum of $10,000, as provided in the contract, and the defendants were directed, as officials of the municipality, to transfer the above sum of $10,000 back to the electric light fund of the city, from whence it was taken by the council, on the ground that the money was appropriated for an unauthorized purpose. Defendants appealed.

Central City is a municipal corporation of the second class having a population of less than 5,000 inhabitants. All of the individual parties to this suit are resident owners of taxable real and personal property in the city.

The present case comes within the rule announced in *State v. Lincoln Gas Co.*, 38 Neb. 33, where the court said:

"Where a case is submitted solely upon the pleadings, the party seeking affirmative relief must, by the pleadings alone, show himself entitled to the relief sought. In such case the question is not, upon whom rests the burden of proof; but who, upon the facts established by the pleadings themselves, is entitled to judgment."

And in *McMillan v. Chadron State Bank,* 115 Neb. 767, this is said:

"A motion for judgment on the pleadings requires a consideration of what may be found in all the pleadings as the ultimate facts."

March 8, 1926, at a regular session of the city council this resolution was adopted:

"Whereas, the city of Central City, Nebraska, has recently acquired by purchase the former Young Men's Christian Association buildings, located on lots four (4) and five (5), block ten (10), Metcalf's Addition to the city of Central City, Nebraska, as a new city hall, and,

"Whereas, it will be necessary to use the sum of not to exceed $10,000 for the purpose of repairing, remodeling and furnishing said property in order to use the same properly and to the best advantage as a city hall, and,

"Whereas, there is now in the electric light fund more than $10,000 which is not at the present time needed for the electric light department of said city, and it would be more economical to transfer said fund from the electric light fund to the general fund of said city to be used for said repairing, remodeling and furnishing than it would be to vote bonds and issue the same, now,

"Therefore, be it resolved by the city council of the city of Central City, Nebraska, that the city clerk of said city is hereby instructed to submit a proposition to the voters of said city at the next regular city election to be held on April 6, 1926, for the transfer of the sum of not to exceed $10,000 from the electric light fund of said city to the general fund of said city, for the purpose of repairing, remodeling and furnishing the new city hall of said city."

April 6, 1926, the substance of the foregoing resolution was submitted to and adopted by a majority vote of the electors. July 22, 1927, at an adjourned session of the city council, bids were regularly submitted for repairing and rebuilding the city hall. The lowest bid was in the sum of $10,540, and the contract was let to such bidder, and it is alleged that the city council "is now having a con-

tract prepared for execution on behalf of said city," and that, unless restrained, the work of remodeling and rebuilding the city hall will at once proceed.

While the defendant city is without an electric light plant, it maintains, nevertheless, a distributing electric light system from which electric current may be and is sold to consumers. The current so distributed is bought by the city from a private source. So that the question now here is whether the city council had lawful authority to transfer the surplus funds, so derived from the sale of electric current, for the purpose herein pointed out. We think the city was well within its lawful rights in the premises. This authority was derived from a majority vote of the people at the election held for that purpose under the "Annual Appropriation Ordinance" act, namely, section 4371, Comp. St. 1922, which, among other provisions, contains this:

"No further appropriation shall be made at any other time within such fiscal year, unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city or village, either by a petition signed by them or at a general or special election duly called therefor."

Clearly, no estimate or appropriation was a prerequisite to authorize the use or expenditure of the $10,000 in question, because the money in question was not derived from taxation. In *State v. Martin*, 27 Neb. 441, in construing section 4371, above cited, we held:

"The money which this section requires to be annually appropriated, as a condition precedent to its being drawn from the city treasury, is the money raised, or authorized to be raised, by taxes 'to be levied during that year.' This is obvious from the language of the first clause of the section, but were it doubtful as to its construction, and its being limited to such moneys, the doubts would be put to rest by the language of the second clause, 'unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city or

village.' Where a proposition to borrow money for any lawful purpose has been submitted to a vote of the people of a city or village, the proposition carried, the money borrowed and placed in the treasury, such money is appropriated for the purpose intended, and is subject to the control and disposal of the mayor and council of the city, or the president and board of trustees of the village, within the purview of the appropriation, without an ordinance such as is required to be passed in the section cited."

In *McElhinney v. City of Superior,* 32 Neb. 744, in an opinion by Norval, J., this is said:

"The city council of a city of the second class cannot incur any expense or enter into any contract on behalf of the city unless an appropriation shall have been previously made concerning such expenditure, except in cases where the proposition has been sanctioned by a majority of the legal voters of the city."

Clearly, pursuant to the election held under section 4371, the city council was empowered to enter into a contract for the repair of the city hall building and to transfer a sum "not to exceed $10,000" for this purpose. But, as above noted, the proposed contract calls for an expenditure of $540 in excess of the amount authorized by the electors. If a city council could lawfully enter into a contract for the city which was $540 in excess of $10,000, it follows that the council might enter into a contract for a much greater sum than that which is involved in this suit and which was authorized by the electors. This would be a dangerous precedent and we cannot sanction the act of the council in the premises. It plainly appears that a transfer of $10,000 and no more was authorized by the people from the electric light fund to the general fund and thence to the city hall fund for the repair of the city hall building. In view, therefore, of the fact that the contemplated contract calls for an expenditure of $540 in excess of the amount authorized by the electors, it follows that no contract whatever was entered into by the city nor could a lawful contract be entered into between the proposed

contracting parties for a greater amount than $10,000. The proposed contract is therefore illegal and void.

It follows that the judgment of the district court, to the extent that it requires the city council to transfer the sum of $10,000 back to the electric light fund, is erroneous, and in other respects is approved, and the judgment is therefore modified so as to enjoin the city council from entering into the proposed contract.

AFFIRMED AS MODIFIED.

O. E. ERWIN, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

FILED APRIL 5, 1929. No. 26504.

1. "Rolling Store," as involved herein, defined in opinion.
2. Peddlers: PERMIT: OCCUPATION TAX. Under sections 3489 and 3496, Comp. St. 1922, a metropolitan city may, by ordinance, define "peddlers" and include in such term a "rolling store," and impose on applicants for permits to operate such stores a permit fee and an occupation tax, and provide penalty for operating a "rolling store" upon its streets without first having obtained the permit and paid the occupation tax.
3. ———: ———: USE OF STREETS. By such permit the applicant is granted an extraordinary use, a tolerated use, of the streets.
4. Licenses: OCCUPATION TAX. In such case the city may, under a regulatory ordinance, impose a tax which of itself would serve a restrictive purpose.
5. Constitutional Law: CLASSIFICATION. "Classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition." *Seabolt v. Commissioners of Northumberland County*, 187 Pa. St. 318.
6. Licenses: OCCUPATION TAX: CONSTITUTIONALITY. "The amount of an occupation tax is not to be measured by the profits of the business taxed, but should be considered as one incident to local self-government, and when thus considered it appears *prima facie* reasonable in amount, courts of justice should not declare the ordinance void, unless and until it is clearly shown by competent evidence that the license charge is in fact unreasonable

or confiscatory." *City of Grand Island v. Postal Telegraph Cable Co.*, 92 Neb 253.

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

George Evens, for appellant.

John F. Moriarty and *Shotwell & Ready, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and DAY, JJ., and BLACKLEDGE and REDICK, District Judges.

THOMPSON, J.

In this suit Erwin, appellant, owner and operator of what is known as a "rolling store," in the city of Omaha, was denied an injunction prohibiting the enforcement by appellees of ordinance No. 12811 enacted by the city council of such city. To reverse this judgment Erwin appeals, and contends, among other things, that the court erred in not finding the ordinance unconstitutional and void for the reason that the occupation tax exacted is unreasonable, arbitrary, discriminatory, prohibitory and confiscatory, and intentionally designed to entirely prohibit operation of a "rolling store" such as he desires to operate. It might be well to describe briefly the "rolling store" here involved; it being the first of its kind ever attempted to be operated in the city. It is a miniature store, stocked with all kinds of merchandise usually carried in a grocery store, placed on an automobile truck chassis, so that the store can be moved from house to house, and the merchandise sold therefrom the same as it would be sold from a store at a fixed location. The vehicle in question is about 16 feet long by 6 feet wide, and has an aisle down the center for the use of customers. The scheme of the business is to give purchasers cash and carry prices at their doors.

It is admitted that the ordinance was legally passed and approved; that it provides, in substance, that persons operating rolling stores in the city of Omaha are "ped-

dlers," and shall first procure a permit and pay therefor a fee in the sum of $10 a month, and pay in addition thereto an occupation tax in the sum of $15 a day, "provided the payment of such tax ($15 a day) at the end of each month rather than in advance may be secured by bond with approved sureties in double the amount of such tax per month, conditioned for the payment of such tax at the end of the month;" and further provides that any person who fails to pay the tax when due shall be liable to a fine of not less than $5 nor more than $50, and the court may commit to jail any person against whom such fine shall be assessed until the fine is paid. A penalty is also imposed for failure to obtain the permit. Erwin, notwithstanding the provisions of such ordinance, and with full knowledge thereof, began operating a rolling store on the streets of such city without procuring a permit therefor and paying the occupation tax imposed, was arrested, found guilty and sentenced, to reverse which judgment he appealed to the district court, where such appeal is still pending. He then instituted this action.

The term "peddling" is defined in section 2 of the ordinance as follows: "The going about in the city from house to house, or from place to place, over and through the streets and public places of the city, and selling or offering to sell at retail, and forthwith to deliver, any goods, wares and merchandise of whatever kind, nature and character, * * * either from wagons, carts or vehicles of any character or from packs carried upon the person, or otherwise transported. Any person peddling, as hereinabove defined, shall be known and termed as a 'peddler' for the uses and purposes of this ordinance. Peddlers using or employing wagons, carts or vehicles of any kind and character and carrying on any such business as defined (in this section) are hereby classified as peddlers operating a rolling store, and shall be subject to the provisions of this ordinance relating to the operation of such store."

The occupation tax heretofore indicated, however, is

limited to those operating a "rolling store" as in this case; the others are charged simply a permit fee which varies in amount as it is applied to the things carried and the means of transporting same.

Section 3489, Comp. St. 1922, here involved, gives and grants unto metropolitan cities the following powers, among others: By ordinance to "levy any tax or special assessment authorized by law and to appropriate money and provide for the payment of the debts and expenses of the city. * * * To care for and control * * * streets, avenues, parks and squares within the city. * * * To regulate the transportation of articles through the streets, and to prevent injuries to the streets from overloaded vehicles."

Section 3496 provides: "The council shall have power to tax for revenue, license and regulate * * * peddlers; * * * such tax may include both a tax for revenue and license. The city council shall have power to raise revenue by levying and collecting a tax on any occupation or business within the limits of the city and regulate the same by ordinance."

In *State v. Omaha & C. B. Street R. Co.*, 100 Neb. 716, we held: "A city of the metropolitan class has control of its streets, and, while it cannot prohibit the general and ordinary use for which the streets are constructed, it is within the reasonable discretion of the authorities of such city to prescribe the uses to which a street may be put and to regulate the traffic thereon." In the instant case it cannot reasonably be said that operating rolling stores of this species would be other than an extraordinary use, a tolerated use, of the streets; a situation easily distinguishable from the one giving rise to the above quotation, and others of our holdings wherein the law is similarly expressed.

Is this ordinance vulnerable to the challenges interposed? It is not an unreasonable classification to place what is known as "rolling stores" in the category of "peddling," for in fact operators of such stores are peddlers,

however with broadened privileges. They travel from house to house, or from place to place, upon the streets, with their goods for immediate sale and delivery as does an ordinary peddler; in addition, they demand and receive a larger part of such streets as well as a longer and more obstructive use thereof; they create and maintain an enhanced danger to the traveling public, and besides the city incurs a greatly increased expense by way of police protection, and maintenance of the streets.

As to the extent of the fee and tax: Under the ordinance in question the privilege extends to all the streets and alleys in the city, is without restriction as to locality, time when used, size of vehicles, number of permits for which one person might apply, or the number of persons to whom permits would be granted if application was made therefor, except as restricted by such imposed fee and tax. With such a situation confronting the officers of the city, they might with propriety, under a regulatory ordinance, impose a tax which of itself would serve a restrictive purpose. As well said in 37 C. J. 192, 193:

"The rule that the license fee can cover only the expense of issuing the license and regulating the business does not apply to those occupations or privileges which, although tolerated, are hurtful to public morals, productive of disorder, or injurious to the public. In such case fees or taxes may be imposed in such sums as to have a restraining or repressive effect, or even to prohibit the occupation or privilege." Further, "As to occupations or privileges which are in their general effect injurious or offensive to the public welfare, fees or taxes that are practically prohibitive may be imposed."

The law as announced in the above quotations will be found sustained by the following cases: *Village of Minneota v. Martin,* 124 Minn. 498; *H. G. Hill Co. v. Whitice,* 149 Tenn. 168; *St. Louis Poster Advertising Co. v. St. Louis,* 249 U. S. 269; *Alaska Fish Salting & By-Products Co. v. Smith,* 255 U. S. 44.

Thus we conclude that, while the ordinance on its face

is restrictive, from it we are not warranted in finding that it is necessarily unreasonable or prohibitive. Neither is it open to the objection that the classification made therein is arbitrary. In this latter conclusion we are upheld by *Rosenbloom v. State,* 64 Neb. 342, wherein we approved the holding in *Seabolt v. Commissioners of Northumberland County,* 187 Pa. St. 318, as follows: "Classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition." Such an objectionable purpose is not disclosed by the record before us.

It yet remains to be determined whether or not, as a matter of fact under the evidence adduced, the tax imposed is unreasonable or prohibitive. In *Littlefield v. State,* 42 Neb. 223, we held: "Where such an ordinance is clearly within the general powers of a municipal body it is presumed to be reasonable, and the judicial power of the state will not be exercised to declare it void, unless from its inherent character, or by proofs adduced, it is shown to be unreasonable." Further, in *City of Grand Island v. Postal Telegraph Cable Co.,* 92 Neb. 253, we held: "The amount of an occupation tax is not to be measured by the profits of the business taxed, but should be considered as one incident to local self-government, and when thus considered it appears *prima facie* reasonable in amount, courts of justice should not declare the ordinance void, unless and until it is clearly shown by competent evidence that the license charge is in fact unreasonable or confiscatory."

Applying the rules thus announced to the evidence before us, and considering the case as one here for determination *de novo,* the finding of the trial court that "the license tax of $15 a day on plaintiff's rolling store is more than the reasonably to be expected profits per day of conducting said store and will naturally prevent the conducting of said business upon defendant city's streets," is not sustained. The test revealed by the evidence, to wit, oper-

ating one rolling store at a certain locality in this metropolitan city for a period of five or six days, is of too limited a nature to fairly test the question as to whether or not such ordinance is in fact unreasonable or prohibitive. Such test, to be forceful, should have challenged the entire scope of the ordinance, as well as its purpose.

Thus it will be seen that, while we agree with the conclusion of the learned trial judge to the effect that the petition is without equity, we do so without approving certain of his findings.

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. CITIZENS STATE BANK OF ROYAL, APPELLEE AND CROSS-APPELLEE: C. B. PUNTENAY ET AL., INTERVENERS, APPELLEES AND CROSS-APPELLANTS: AMERICAN STATE BANK OF NEWCASTLE ET AL., INTERVENERS, APPELLANTS AND CROSS-APPELLEES.

FILED APRIL 11, 1929. No. 26774.

1. **Banks and Banking**: LIABILITY OF STOCKHOLDERS: CONSTITUTIONAL PROVISION. The provisions of section 7, art. XII, of the Constitution, are self-executing. No legislative act is necessary for their enforcement. The stockholders' liability thereby created is free from legislative interference.
2. ———: ———. The liability of stockholders created by section 7, art. XII, of the Constitution, is for the benefit of all creditors of the bank against all who are stockholders when the creditor's claim accrues. The Constitution gives no preference to any creditor or class of creditors. All are on an equal footing, limited by the constitutional provision that the stockholder is liable only to those creditors whose claims accrue while he is such stockholder.
3. **Subrogation**. Equitable subrogation was invented by equity courts for the purpose of doing full and complete justice between the parties.
4. ———. Equitable subrogation will be applied by courts of equity in all cases demanded by the dictates of equity, good conscience and public policy. No inflexible rule for its application can be laid down, but it will be generally applied in that

class of cases where one pays the debt of another in the performance of a legal duty imposed by contract or the rules of law.

5. **Banks and Banking:** DEPOSITORS: LIENS. Section 8033, Comp. St. 1922, as amended by section 12, ch. 30, Laws 1925, construed, and *held* to give to depositors of a failed bank a lien only on the assets of the bank.
6. ———: LIABILITY OF STOCKHOLDERS The constitutional double liability of stockholders of a state bank is not an asset of the bank, but is for the security of the bank's creditors.
7. **Opinion Disapproved.** The rule announced in the sixth paragraph of the syllabus of *State v. Farmers State Bank*, 103 Neb. 194, is expressly disapproved.

APPEAL from the district court for Antelope county: DEWITT C. CHASE and WILLARD E. STEWART, JUDGES. *Affirmed.*

Fred S. Berry and *Charles H. Kelsey*, for Citizens State Bank.

Webb Rice, Ralph M. Kryger, Mapes, McDuffee & Mapes and *Courtright, Sidner, Lee & Gunderson*, for Puntenay and Beck.

C. M. Skiles and *Perry, Van Pelt & Marti*, for American State Bank and Guaranty Fund.

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

GOOD, J.

The problem for solution presented by this appeal is the proper distribution of a fund arising from the enforcement of the constitutional double liability of stockholders of an insolvent state bank.

Citizens State Bank of Royal became insolvent, and in receivership proceedings its affairs have been wound up and its assets distributed. The claims of depositors have been paid from the depositors' guaranty fund. The assets of the bank were insufficient, by the amount of more than $19,000, to reimburse the guaranty fund. There are allowed and unpaid claims of general creditors in excess

of $17,000. The receiver now has in his hands a fund arising from the enforcement of the double liability of stockholders, as provided by section 7, art. XII, of the Constitution of Nebraska. He filed a petition in the receivership proceedings, setting forth all the facts and praying for an order directing the proper distribution of the fund.

The department of trade and commerce of Nebraska and the guaranty fund commission of Nebraska (hereinafter referred to as the department and the commission, respectively) intervened and set up the facts relative to the payment of claims of depositors from the guaranty fund, and that the fund in the hands of the receiver was insufficient to fully reimburse the guaranty fund, and prayed that the court decree that the department, for the benefit of the guaranty fund, have a first lien and claim upon all funds in the hands of the receiver, realized from the collection of liability of stockholders of the bank, and that the general creditors have no right or interest therein.

American State Bank of Newcastle, Nebraska, also intervened, setting forth that it was a contributor to the guaranty fund, and joined in the prayer of the petition of the department and the commission. General creditors of the failed bank also intervened and set forth the facts of the allowance of their claims; that they were unpaid and in amounts exceeding the fund in the hands of the receiver, and praying that said fund be distributed *pro rata* among the general creditors, and that the department and the commission, representing the depositors' guaranty fund, be excluded from any participation in such distribution. No question is raised as to when any of the claims accrued.

All of the facts were stipulated. The trial court found and determined that the fund in the hands of the receiver was for the benefit of all the unpaid creditors of the bank; that the department and the commission, representing the depositors' guaranty fund, were, to the extent that the fund had not been reimbursed, subrogated to the rights

of depositors and were entitled to share *pro rata* with the general creditors in the distribution of the fund. The department, the commission and American State Bank have appealed, and the general creditors have filed a cross-appeal.

The fund, in question, in possession of the receiver is about $7,000, and is insufficient to either fully reimburse the guaranty fund or pay in full the allowed claims of general creditors. If either is entitled to a preference, then nothing remains for the other. The appellants base their claim to a preference on sections 8033 and 8035, Comp. St. 1922, and cross-appellants base their claim to preference on section 7, art. XII, of the Constitution.

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

Section 8033, Comp. St. 1922, as amended by section 12, ch. 30, Laws 1925 (hereinafter referred to as section 8033), so far as applicable, is as follows: "The claims of depositors, for deposits, not otherwise secured, 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. If the cash in the hands of the receiver, available for such purposes, be insufficient to pay the claims of depositors whose deposits are not otherwise secured, and holders of exchange, not given for a previously existing debt of the bank other than a deposit, the court in which the receivership is pending, or a judge thereof, upon the hearing shall

determine the amount required to supply the deficiency and cause the same to be certified to the department of trade and commerce, which shall thereupon draw against the depositors' guaranty fund in the amount required to supply such deficiency and shall forthwith transmit the same to the receiver, to be applied on the said claims of unsecured depositors and holders of such exchange."

Section 8035, Comp. St. 1922, so far as applicable, is as follows: "To the extent of the amount paid from said guaranty fund to satisfy the claims of creditors, the department of trade and commerce for the use and benefit of said fund, shall be subrogated to all the right of the creditors thus paid, to participate in the assets of such bank, and the same shall be enforced and collected by the receiver."

It has been judicially determined that section 7, art. XII, of the Constitution, is self-executing; that no act of the legislature is necessary for the enforcement of its provisions, and that the liability thereby created is free from legislative interference.

In *Bodie v. Pollock,* 110 Neb. 844, it was held: "Sections 4 and 7, art. XII, of the Constitution, are self-executing when considered together, as they have been and should be; and, so considered, they form a complete constitutional rule to the effect that, while stockholders in banks are subject to the double liability set out in said sections, such liability cannot be enforced until the property of the bank has been exhausted, and the amount justly due judicially determined." The same rule was announced in *Farmers Loan & Trust Co. v. Funk,* 49 Neb. 353, and in *State v. German Savings Bank,* 50 Neb. 734. In the latter case, in the opinion it was said (p. 738): "It will be observed at once that the general effect of these two provisions is to establish a liability, free from interference by the legislature, on stockholders of all corporations, subject to certain conditions, for their unpaid subscriptions; and in the case of banking corporations, an additional liability for a further amount equal to the amount of stock held

by any person for the purpose of paying debts incurred while such person is a stockholder." In that case, it was further held that a banking act which purported to authorize a receiver to collect unpaid subscriptions upon a report that, in his opinion, the assets of the bank were insufficient to pay its liabilities was in conflict with section 4, art. XII, of the Constitution.

It will thus be seen that the rule is established that the provisions of the Constitution, contained in said section 7, may not be limited or extended by legislative act. It follows that whatever rights are given by this constitutional provision to the creditors of a state bank remain unaffected and unhampered by any legislative act. The liability so created against stockholders in favor of all creditors of the bank cannot be divested or taken from them. The liability of the stockholder to the creditors of such bank for claims accruing while he was such stockholder becomes and is a security to such creditors, and the legislature may not, by any act, relieve such stockholder of the liability so created. If the contention made by the general creditors should prevail, it would result in this anomalous situation: If there were no general creditors of the bank and the only creditors of the bank were the depositors, and because the depositors were first paid from the depositors' guaranty fund, all stockholders would be relieved of this constitutional liability.

Counsel for the general creditors contend that they are the only unpaid creditors, since the claims of depositors have been satisfied from the bank's assets and the guaranty fund, and, further, that the department is not subrogated to the claims of depositors who have been paid from the guaranty fund. To sustain this contention they cite and rely upon the decisions of this court in *Rogers v. National Surety Co.*, 116 Neb. 170, and *Cleary v. Fidelity & Deposit Co.*, 117 Neb. 478.

In *Rogers v. National Surety Co., supra,* it was held: "Section 8035, Comp. St. 1922, construed, and *held* to limit by express terms the subrogation therein provided for the

benefit of the depositors' guaranty fund, upon payment made to creditors, to 'all the right of the creditors thus paid, to participate in the assets of such bank.'" In that case two questions were presented for determination: First, was the obligor on a bond, given to a county to indemnify it from any loss by reason of a deposit made by it in a state bank, a cosurety with the guaranty fund, and liable as such for contribution to the depositors' guaranty fund? The other question has no application to the matters in hand. The decision in that case went no further than to determine the extent of the statutory subrogation provided in section 8035. It was limited to the subrogation "therein provided."

In *Cleary v. Fidelity & Deposit Co., supra,* it was held: "The only statutory subrogation authorized to augment or replenish the depositors' guaranty fund is that provided by section 8035, Comp. St. 1922, and the subrogation therein provided is limited to the assets of the bank." The language used indicates that it was carefully chosen for the purpose of limiting the holding to the statutory subrogation, and not to determine whether there might be an equitable subrogation, aside from any statutory provision.

The rules announced in the cases above discussed do not go to the extent of determining whether the department, upon the payment of claims of depositors, may be subrogated in equity to the rights of such depositors against the stockholders for the liability created by section 7, art. XII, of the Constitution.

The doctrine of equitable subrogation did not originate in statute or custom, but was invented by equity courts for the purpose of doing full and complete justice between the parties, without much regard to legal forms. Originally, the right of subrogation was limited to transactions between principals and sureties, but courts of equity have expanded the doctrine so that now it will be applied where one, not acting voluntarily, pays the debt for which another is primarily liable, and which, in equity and good conscience, the latter should have discharged. The doctrine

will be applied in all cases where demanded by the dictates of equity, good conscience and public policy. No inflexible rule for its application can be laid down, but there are four classes of cases to which the doctrine will be generally applied. Two of these classes only need be mentioned, one of which is where one pays the debt of another in the performance of a legal duty imposed by contract or the rules of law, and another where one pays the debt of another on the invitation of the public, and whose payment is favored by public policy. *Eaton v. Hasty*, 6 Neb. 419; *Frederick v. Gehling*, 92 Neb. 204; 25 R. C. L. 1313, sec. 2; 1314, sec. 4; 1322, sec. 10; 37 Cyc. 363, 370.

The department was compelled by law to pay from the guaranty fund the claims of depositors. Under the equitable principles above announced and discussed, immediately upon such payment, the department became subrogated to the rights of depositors whose claims it had paid. By reason of such subrogation, the department was entitled to share in the fund in the hands of the receiver.

We will now consider the contention of the appellants that under the provisions of sections 8033 and 8035, Comp. St. 1922, the department has a first lien on all the assets of the bank, including the liability of stockholders, and is entitled to the whole of the fund now in the receiver's hands.

Section 7, art. XII, of the Constitution, creates a liability in favor of all the creditors of the bank. Nowhere in the Constitution is an attempt made to classify creditors so as to give one creditor or class of creditors a preference over others. As heretofore pointed out, this constitutional provision is self-executing and creates a liability free from interference by the legislature, so that if the sections of the statute above mentioned should be construed to sustain the contention of appellants they would violate the constitutional provision and for that reason be invalid. However, we do not think that these sections of the statute should be so construed.

It is a well-recognized rule that if a statute is susceptible

of two or more constructions, one of which would be constitutional and the other unconstitutional, the former is to be preferred. The meaning, intended by the legislature, of the words, "including the liability of stockholders," as used in section 8033, is not free from doubt. The language may have been intended to refer to the liability of stockholders for unpaid subscriptions. An unpaid subscription of a stockholder is an asset of the bank, and if this meaning was intended then the lien provided for in said section would attach to this liability of the stockholder, as the lien granted is upon all the assets of the bank. The legislature may have intended the language used to refer to the constitutional double liability of stockholders, and intended to cover only such part of this liability as inured to the benefit of depositors. If the latter was the intention, the statute in this respect was nothing more than declaratory of the constitutional provision. We are persuaded that this was the intended meaning. Section 8035 does not attempt to subrogate the department to anything except the rights of depositors and holders of exchange, paid from the guaranty fund, to a preference in the distribution of the assets of the bank.

Our attention has been called to the rule announced in the sixth paragraph of the syllabus in *State v. Farmers State Bank,* 103 Neb. 194, wherein it was held, in substance, that the state banking board, for the use and benefit of the guaranty fund, was subrogated to the rights of depositors to participate in the assets of the bank, and that the banking board became a general creditor and was entitled to prorate with other nonpreferred creditors in the bank's assets. The rule there announced was applied in *State v. Farmers State Bank,* 106 Neb. 387, for the reason only that it had become the law of that case. In the latter opinion it was clearly recognized that an error had been committed in the rule announced in the first opinion. The rule announced in the sixth paragraph of the syllabus in *State v. Farmers State Bank,* 103 Neb. 194, is now express-

ly disapproved and is no longer to be considered an authority.

We are of the view that section 8033, when properly construed, does not give to depositors a lien on anything except the assets of the bank. Since the fund arising from the enforcement of the constitutional double liability of bank stockholders is not an asset of the bank, it follows that the depositors, as such, have no lien thereon. But the double liability of stockholders is a security for all creditors of the bank. The term "creditors" includes depositors.

Section 8033, as we interpret it, is not in conflict with section 7, art. XII, of the Constitution. The general creditors and the department, by reason of the latter being subrogated to the right of depositors and holders of exchange, are entitled to share ratably in the fund in the receiver's possession.

The judgment of the district court is based on sound principles of law and equity, and is

AFFIRMED.

J. E. WAKELEY V. STATE OF NEBRASKA.

FILED APRIL 11, 1929. No. 26335.

1. **Criminal Law**: DENIAL OF CONTINUANCE. Action of the trial court in denying application for continuance examined, and *held* to be within its sound discretion.
2. ———: INSTRUCTION. The following instruction given by the trial court approved: "The defendant has introduced evidence tending to show his reputation as an honest, law-abiding and truthful citizen. If his good character as an honest, law-abiding and truthful citizen is proved to your satisfaction, then such fact should be considered by you in connection with all the other facts in the case; and if after a consideration of all the evidence in the case, including that bearing upon the good character of the defendant, the jury entertain a reasonable doubt as to the defendant's guilt it is your duty to acquit him, but if the evidence convinces you beyond a reasonable doubt of defendant's guilt, you must so find, notwithstanding his good character."

3. ———: EXPERT WITNESSES: INTERROGATION AS TO FEES. An expert witness may be interrogated as to the amount of fees paid or promised to be paid him in excess of the legal fees provided by statute for ordinary witnesses.
4. ———: HANDWRITING: EXPERT TESTIMONY. The evidence of an expert witness on handwriting based wholly upon the "comparison of hands" or, in the older phrase "similitude of hands" is in the nature of circumstantial evidence.
5. ———: CIRCUMSTANTIAL EVIDENCE: REFUSAL OF CAUTIONARY INSTRUCTION. Evidence in the record, so far as applicable to the first two counts of the information, examined, and *held* to be wholly circumstantial in its nature and that therefore refusal of the court to give a cautionary instruction on this subject, when so requested by the defendant, constituted error.

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

O'Sullivan & Southard, Hugh A. Myers and *Bernard J. Boyle,* for plaintiff in error.

O. S. Spillman, Attorney General, and *Lester C. Dibble, contra.*

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

EBERLY, J.

An information was filed against the plaintiff in error, hereinafter referred to as defendant, in the district court for Douglas county, charging defendant in three distinct counts with: (1) Forging a certain draft of $4,700; (2) forging an indorsement "L. H. Gibson" on the back of said draft; (3) with uttering and publishing said forged draft and forged indorsement thereon.

Trial resulted in a verdict of guilty as to the three charges contained in the information, followed by a sentence as provided by law. From this conviction the defendant prosecutes error, making numerous assignments which will be discussed for convenience under four heads: (1) Errors alleged to have been committed by the district court in refusal of application for continuance; (2) in re-

fusal of tendered charge to jury on subject of character; (3) refusal to permit cross-examination on the subject of fees received or to be received by certain expert on handwriting testifying in said cause; (4) refusal of court to give certain instructions tendered on the subject of circumstantial evidence.

At a proper time the defendant presented an application for continuance of this trial based upon his then physical condition. This application was supported by affidavit from his physician, but was denied by the trial court. In this we find no error.

Application for continuance, based on the mental and physical condition of the defendant at the time of the application therefor, is addressed largely to the discretion of the trial court. This must necessarily be so, for that court has the defendant before it in person and can, to some extent, judge from his personal appearances whether his physical condition is such as to enable him to stand the ordeal of trial. But this means, which the trial court has, in determining the defendant's physical condition, cannot be preserved in the record except in an imperfect way. *Goddard v. State,* 78 Ark. 226; *State v. Lee,* 58 S. Car. 335. In view of a record considered as an entirety in this case, we, as a reviewing court, are not enabled to say that error was committed by the trial court in denying the continuance applied for.

The defendant presents exceptions to instruction No. 11 given by the court on its own motion and also complains of the refusal of the district court to give instruction No. 1 requested by the defendant upon the same subject. The instruction complained of as given by the court was:

"The defendant has introduced evidence tending to show his reputation as an honest, law-abiding and truthful citizen. If his good character as an honest, law-abiding and truthful citizen is proved to your satisfaction, then such fact should be considered by you in connection with all the other facts in the case; and if after a consideration of all the evidence in the case, including that bearing upon the

good character of the defendant, the jury entertain a reasonable doubt as to the defendant's guilt, it is your duty to acquit him, but if the evidence convinces you beyond a reasonable doubt of defendant's guilt, you must so find, notwithstanding his good character."

This instruction appears to be in accord with the previous decision of this court. *Lillie v. State,* 72 Neb. 228; *Sweet v. State,* 75 Neb. 263.

" 'The trial of criminal cases is by a jury of the country, and not by the court. The jurors, and they alone, are to judge of the facts, and weigh the evidence. The law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact the jurors come from all classes of society, they are better calculated to judge motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice. But to give it full effect, the jury must be left to weigh the evidence and to examine the alleged motives by their own tests.' The whole matter is for the jury to determine. The question being discussed is whether the matter was properly left to the jury." *Lillie v. State,* 72 Neb. 228, 243.

It may be conceded that the propositions contained in the requested instructions are true and that good character has, and ought to have, great weight. The other evidence in the case may be sufficient to convict a person of bad character when it would be wholly insufficient if good character were shown, but the same is true of other substantive matters of defense. Must the court single out each substantive fact in the evidence that tends to establish innocence, and tell the jury that, if a consideration of all other evidence would require a verdict of guilty, they must still consider whether the particular fact pointed out would not be sufficient to raise a reasonable doubt? The attention

of the jury, in the instant case, was directly called to the character of the defendant by the court. And they were told that evidence of good character was to be considered with all of the other evidence in the case and to be given such weight as the jury may deem it entitled to. This was done in the instruction quoted. *Lillie v. State*, 72 Neb. 228, 243. And the refusal of the district court to give the instruction requested was therefore not erroneous.

Error is predicated upon refusal of the court to allow Wallace O. Shane, expert handwriting witness for the state, to be cross-examined as to his fees for his expert testimony. This matter has been fully determined in the case of *Fetty v. State, ante*, p. 169. In the opinion of the court by Goss, C. J., we find the following language which is a discussion of a similar assignment of error:

"We think the court should have allowed this question to be answered by the witness for what effect it would have, if any, on the jury, and to allow the jury to know his pecuniary interest in the case and to weigh his credibility as to his other testimony in the light of that influence. * * * In *Olive v. State*, 11 Neb. 1, Judge Lake held that the court erred in refusing to allow a witness on cross-examination to be examined as to his interest in a damage suit brought by survivors of the deceased whose murder was the subject of the case on trial. In *Blenkiron v. State*, 40 Neb. 11, it was held: 'In the cross-examination of a witness it is competent to interrogate him in regard to any interest, pecuniary or otherwise, and the extent of such interest he may have in the result of the case in which he is testifying, as affecting his credibility.' 40 Cyc. 2671, citing numerous cases, that: 'A witness may be interrogated as to payments to him by one of the parties, in excess of his legal fees, or offers or promises of such payment.' The testimony of Mr. Shane was a very material element in connecting the defendant with the handwriting in the letter set out in the information. The jury should not have been prevented from knowing what fees and expenses he was to receive. The answer may not have

affected them at all in favor of defendant, but that is not a matter upon which the trial court, or we as a reviewing court, have a right to speculate. In excluding the evidence we think the court erred."

Appellant also assigns as error the refusal of the court to give instruction No. 8 requested by the defendant. This instruction, it may be said, was the usual cautionary instruction, proper and required to be given in criminal cases when the evidence relied upon for conviction is wholly circumstantial. By its terms it is limited in its application to "the evidence relied upon by the state in this case in proof of the first two counts of the information."

The state in effect concedes the instruction requested to be correct as an abstract proposition, but contends that evidence in the record in support of the second count given by an expert on handwriting, though based solely on the results of comparison made by him between certain writings of the defendant established as genuine and the questioned document, is to be deemed "positive and direct," as distinguished from "circumstantial." The language of the state's brief on this point is:

"As to the first count—the forgery of the draft—the jury had to draw one inference, that defendant, himself, raised the draft. As to the second count—the forgery of the name of L. H. Gibson—the jury had to draw no inference; the proof as to this was positive and direct. Defendant's instruction number 8, a proper instruction on circumstantial evidence, covered both counts; it was thus part good, but was part bad, and was properly refused."

The decisive question presented here is, therefore: Is the evidence of an expert on handwriting derived wholly from "comparison of hands" direct or circumstantial evidence?

Whatever may be the established rule elsewhere as to "comparison of hands" or, in the older phrase, "similitude of hands," in Nebraska by statute the evidence respecting handwriting may be given by comparisons made by ex-

perts, or by jury, with writing of the same person which is proved to be genuine. Comp. St. 1922, sec. 8854.

In this connection it is to be remembered that—"Under the denomination either of *circumstantial* or of *direct,* every thing to which the denomination of evidence is applicable stands included. * * * In every case, therefore, of circumstantial evidence, there are always at least two facts to be considered: (1) The *factum probandum,* or say, the *principal* fact—the fact the existence of which is supposed or proposed to be proved, the fact evidenced to—the fact which is the subject of proof; (2) the *factum probans,* the evidentiary fact—the fact from the existence of which that of the *factum probandum* is inferred." 3 Bentham, Judicial Evidence, p. 2.

"Thus, the characteristics of indirect or circumstantial evidence, as distinguished from that which is direct, are, first, the existence and presentation of one or more facts of the class described as *evidentiary;* and, secondly, a process of *special inference,* by which these facts are so connected with the fact sought, as to tend to produce a persuasion of its truth. Hence, it has been very significantly called in Scotch jurisprudence, *argumentative* evidence." Burrill, Circumstantial Evidence, p. 5.

"Indirect evidence, however, is more commonly termed, in practice, *circumstantial* and *presumptive,* both words being sometimes used indifferently, to express the same idea. Strictly, the former is the more general term, and includes the latter as its species. * * * All presumptive evidence is circumstantial, but all circumstantial evidence is not presumptive." Burrill, Circumstantial Evidence, p. 7.

It is obvious, therefore, where proof is confined to questioned documents which a person is charged with forging, which are submitted to a jury with writings of the same person proved to be genuine, as the sole basis of comparison, but without expert testimony, such jury by a process of inference must determine the actual connection between the facts thus proved and the fact or facts sought to be

established. In other words, what is placed before them is no more than the evidentiary facts from the existence of which the *"factum probandum"* must be determined. The conclusion follows that evidence so considered is not "direct evidence," but is properly designated as "circumstantial evidence."

This conclusion is in effect supported by the instruction of the district court approved by this court in *Morgan v. State,* 51 Neb. 672. The approved instruction in that case contained the following language:

"Evidence is either direct and positive or presumptive and circumstantial. Evidence is direct and positive when the very facts in dispute are communicated by those who have had actual knowledge of them by means of their senses and where therefore the jury may be supposed to perceive the fact through the organs of the witnesses. It is presumptive or circumstantial, where the evidence is not direct, but where, on the contrary, a fact which is not directly and positively known is presumed or inferred from one or more other facts or circumstances which are known."

But are we justified in considering the evidence of an expert in handwriting of a higher degree when the basis of the conclusion he states is solely the writings, which, when submitted directly to the jury, are properly designated by the term "circumstantial evidence?" Would it be logical to say that, if the individual jurors who constituted this trial jury, after this evidence had been submitted to them as circumstantial evidence, had been properly instructed in the science professed by handwriting experts until they had each attained the qualifications of an expert on that subject, this fact would have resulted in a change in the nature of what had theretofore been submitted to them as "circumstantial evidence" to "direct evidence?" In other words, the true foundation of the testimony of an expert in handwriting is simply to make the jury see with their own eyes what he says is in the handwriting concerning which he testifies. He is, in fact

and in truth, merely a trained observer who points out, explains and evaluates for the purpose of identification the characteristics of the handwriting submitted to him, so that the jurors may fully understand and give due consideration to this evidence thus adduced. It would seem that a stream cannot rise higher than its source, and that as the basis of his evidence, and the foundation of his testimony, is wholly "circumstantial evidence," notwithstanding this expert may point out the peculiar characteristics existing in the same, which might otherwise pass unnoticed, and so explain them that the jury may feel justified in accepting his conclusions, yet the original evidence, the actual writings offered as proof, including his conclusions derived therefrom, must be, and ever remain, in the nature of "circumstantial evidence."

It is to be noted, however, that the question here determined relates solely to the "nature of the evidence." It may be conceded that the determination of a jury based upon circumstantial evidence made under proper instruction may be sustained even as against direct evidence. That, however, is determined, not by the nature of the evidence, but by the weight of the evidence. Such, indeed, were the questions before this court in *In re Estate of O'Connor*, 101 Neb. 617, and 105 Neb. 88, and the determination there made on the subject of the weight and sufficiency of the evidence is in no manner in conflict with the determination here made as to the inherent nature of the testimony of the expert on handwriting in this record.

We have not overlooked the other assignments of error as made by the defendant; however, their separate consideration would unduly extend this opinion.

Because of the refusal of the district court to give instructions tendered on the subject of "circumstantial evidence," and its refusal to permit cross-examination on the subject of fees received or to be received by certain experts in handwriting testifying on the trial of said cause, the judgment is reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

THOMAS J. CRUMMEL ET AL., APPELLEES, V. NEMAHA COUNTY ET AL., APPELLANTS.

FILED APRIL 11, 1929. No. 26344.

1. Waters: OBSTRUCTION: ABATEMENT. Where an obstruction in a watercourse constitutes a permanent and irremediable injury to the rights of the riparian owner, he is not confined to an action for damages, but may, on a proper showing, have a decree ordering the removal or abatement of the obstruction.
2. ———: ———. It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which may be reasonably anticipated to drain there, and this is a continuing duty.
3. Evidence examined, and *held* to support the decree of the trial court.

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

Ernest F. Armstrong and *Lee Kelligar*, for appellants.

Edgar Ferneau and *Fred G. Hawxby*, *contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and ELDRED and REDICK, District Judges.

EBERLY, J.

This is an action in equity praying for a mandatory injunction to require the defendant board of county commissioners to provide an adequate waterway under a certain bridge situated on road No. 5 of Nemaha county, known as the Brownville-Auburn road. There was a judgment and finding for the plaintiffs, from which the defendants appeal.

The plaintiffs are owner and tenant respectively of an 80-acre tract of land north of and adjacent to the road in question. A stream of water rises about four miles northeast of plaintiffs' land and flows in a southwestern direction over and across this land and under the bridge in litigation to the Nemaha river, where it empties. While its channel, the evidence discloses, has been straightened and improved north of road No. 5, it is in truth and in fact

a natural watercourse over which, as part of the public highway referred to, the defendant county has in times past constructed and now maintains a steel bridge of a "low-truss and underslung" type, with concrete floor. The steel floor beams of this bridge extend from two and a half to three feet below the floor of the bridge, which also has connecting and lateral rods below the floor beams referred to. This construction, it is the theory of the plaintiffs, which finds ample support in the evidence, during periods of ordinary high water, intercepts and stops floating debris, including cornstalks, branches of trees, underbrush and floating logs, which interrupted by and suspended in said bridge cause the deposit of silt in the channel of said stream under said bridge and in the channel south thereof, the effect of which is to form a dam and confine and hold the water northward of said bridge and thus flood the cultivated lands of plaintiffs; that, by reason of the negligent construction and maintenance of said bridge in the manner just described, the flood waters passing down said channel of said watercourse were forced back from plaintiffs' land during the cropping seasons of 1922, 1923, and 1924, and growing crops on twenty acres of said land through which said stream passes were destroyed and ten or twelve acres were injured or damaged and the yield reduced thereon and the tilling of the same made unsafe and hazardous. And it fairly appears that succeeding years will witness a repetition of these events so long as the conditions complained of are permitted to continue. It is admitted that due demand was made upon the defendants to remedy the condition they had caused by their negligent construction, and that this action was prosecuted by the plaintiffs to require defendants to provide and maintain an adequate waterway under said bridge so as to permit all ordinary flood water to pass thereunder, and for this purpose to reconstruct said bridge so as to provide such proper waterway or channel.

While in part conflicting, a careful consideration of the record supports the conclusion that the district court, in

determining the issues substantially in accordance with the theory of the plaintiffs, is sustained by the evidence. Under the facts stated it is quite patent, and there was, and is imposed upon the county authorities of Nemaha county the duty, in the construction and maintenance of the bridge in question, to exercise due care so that the natural flow of the waters in the watercourse in question, in seasons of either low or usual high water, be not obstructed or interfered with by such structure.

In the case of *Omaha & R. V. R. Co. v. Brown,* 29 Neb. 492, this principle was applied where injuries to plaintiff's land was caused by overflow of the Platte river due to the negligent and wrongful construction of a railway bridge across the same. It is disclosed in that case that the piers and braces under the bridge in question were so close together that brushwood, trash and blocks of ice in the seasons of spring flood lodged thereon and backed the water over the plaintiff's premises. In that case this court held that it was the duty of the railroad company to so construct its bridge across watercourses as to allow the passage of such flood waters as may reasonably be expected to occasionally occur. See, also, *Smith v. Chicago, B. & Q. R. Co.,* 81 Neb. 186.

In other words, the principle is well established that it is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there, and this is a continuing duty. *Soules v. Northern P. R. Co.,* 34 N. Dak. 7; 27 R. C. L. 1147, sec. 77.

It also fairly appears that the plaintiffs in this case are not limited to an action for damages as their sole remedy. The rule is:

"Where an obstruction in a watercourse constitutes a permanent and irremediable injury to the rights of a riparian owner, he is not confined to an action for damages, but may, on a proper showing, have a decree ordering the removal or abatement of the obstruction." 40 Cyc.

577. See, also, *Baumgartner v. Bradt*, 207 Ill. 345; *Roe v. Howard County*, 75 Neb. 448; *Flesner v. Steinbruck*, 89 Neb. 129.

We have not overlooked the contention of the appellant that the county board is forbidden by statutory provision, highly penal, from incurring liabilities beyond its legal appropriation and levy, but we do not find that the principle has any application to the facts in this case as disclosed by the evidence. If we concede the contention of the county board as to the ultimate liability for damages on part of a drainage district for the latter's negligent construction or maintenance of its improvements situated south of this bridge, being in the nature of a contributing cause, still, under the facts in this case, and in view of the relief here sought, it would seem that the same constitutes no defense to the present action.

In the case of *Jacobson v. Van Boening*, 48 Neb. 80, which differs somewhat as to the facts, but which is similar, so far as principle is involved, this court announced the rule that, as "against a continuing injury to land caused by an unlawful discharge of surface waters by an adjoining proprietor, equity will afford relief," and also that "to such an action it is no defense that the injury is in part threatened by the acts of another. The plaintiff has his remedy against each one contributing thereto."

In view of all the evidence in the record, we are constrained to find that the decree of the district court, requiring the defendant county to clean out and restore the channel of this watercourse within the limits of the public highway and remove the existing obstructions to the same and to eliminate a continuing nuisance by rebuilding this bridge as in such decree provided, is in all respects fully sustained.

It follows therefore that the judgment and decree of the trial court is correct and is in all things

AFFIRMED.

Note—See 29 L. R. A. n. s. 789; L. R. A. 1917A, 517; 27 R. C. L. 1147.

REDICK, District Judge, dissenting.

I am compelled to dissent from the opinion in this case for the following reasons:

From that portion of the record quoted in the briefs, it seems to me beyond question that the real cause of the flooding of plaintiff's lands is the filling up of the ditch south of the bridge in question. The raising of the bridge would be of very doubtful efficacy, and at most a temporary makeshift. The passage under the bridge had been several times cleaned out but, because of the lack of spillway to the south, filled right up again. If the bridge were raised, the only result in a few years would be the accumulation of silt on plaintiffs' lands and upon those south of the bridge. When the bridge was built in 1916 it was adequate for the passage of water as long as the ditch to the south remained open until 1922.

I think the decree of the court requiring the bridge to be raised goes beyond what is necessary to afford plaintiffs all the relief to which they are entitled. It seems clear from the evidence that, if the watercourse above, beneath and below the bridge were cleared out, a sufficient passageway for the waters would be furnished. Under section 2697, Comp. St. 1922, the overseers of the road district have the power to enter upon the lands above and below the bridge and clean out the natural watercourse and keep it in that condition. In my judgment the decree should order this to be done, rather than to require the bridge to be raised, which would entail considerable unnecessary expense.

ROSE, J.

For reasons stated in the dissent of Judge Redick, I am of opinion that plaintiffs were not entitled to the relief granted.

JOHN O'NEIL V. STATE OF NEBRASKA.

FILED APRIL 11, 1929. No. 26793.

1. **Criminal Law:** CIRCUMSTANTIAL EVIDENCE: INSTRUCTIONS. In a criminal prosecution, where the state relies wholly on circumstantial evidence to sustain a conviction, it is error for a trial judge to refuse to instruct the jury, when requested to do so by the tender of a proper instruction, that the circumstances, proved beyond a reasonable doubt, must, to sustain a conviction, be consistent with every reasonable hypothesis of guilt and inconsistent with any reasonable hypothesis of innocence.
2. ———: ———: ———. In such a case, an instruction that the defendant must be proved guilty beyond a reasonable doubt does not correct this omission.

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

John P. Tinley and *John C. Mullen,* for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before ROSE, GOOD, EBERLY and DAY, JJ., and REDICK and SHEPHERD, District Judges.

DAY, J.

John O'Neil was convicted of murder in the second degree and sentenced to life imprisonment in the penitentiary. He brings this proceeding in error and complains: (1) of the instructions given by the trial court; (2) of the refusal of the trial court to give a requested instruction; (3) that the evidence is not sufficient to sustain the verdict.

An unidentified man was found dead in a place, known as "Hobo Camp," in the city of Fairbury, Nebraska. His throat was cut almost from ear to ear, and his death resulted from the loss of blood. Broken parts of several razors were found near the location of the body of the deceased, none of which were proved to belong to defendant. O'Neil and the deceased had, as a result of chance meeting near the entrance, entered the "Camp" together a short

time before the tragedy. The defendant is a cripple, with one leg amputated, and is unable to get about except on crutches, while the deceased was an able-bodied man. A short time after their entry to the "Camp," O'Neil was seen leaving the place, with his face bruised, scratched and bleeding profusely. He was seen to go to the nearby river, where he washed himself of the blood, when he went uptown to lie upon the grass in the courthouse grounds. The state's evidence of the principal fact, viz., that O'Neil killed the deceased by cutting his throat with a razor, is entirely circumstantial.

One complaint in this case involves instructions to the jury, given or requested and refused, relative to circumstantial evidence. In this regard instruction No. 19 given to the jury by the court is assigned as error:

"The court instructs the jury that circumstantial evidence is to be regarded by the jury in all cases. It is many times quite as conclusive in its convincing power as direct and positive evidence of eyewitnesses. When it is strong and satisfactory, the jury should so consider it, neither enlarging nor belittling its force. It should have its just and fair weight with the jury; and if, when it is taken as a whole, and fairly and candidly weighed, it convinces the guarded judgment, the jury should act on such conviction. You are not to fancy situations and circumstances which do not appear in evidence, but you are to make those just and reasonable inferences from circumstances proved which the guarded judgment of a reasonable man would ordinarily make under circumstances."

This court has held that giving this instruction is not reversible error in *Smith v. State,* 61 Neb. 296; and followed in *Lamb v. State,* 69 Neb. 212; *Ambrose v. State,* 111 Neb. 606; and *Egbert v. State,* 113 Neb. 790.

The defendant also complains that the court refused to give an instruction requested by him upon circumstantial evidence. The requested instruction is given herein for comparison with and reference to instruction No. 19 given by the court:

"Where circumstances alone are relied upon for conviction, the rule is, to warrant a conviction, such state of facts and circumstances must be shown that they are consistent with the guilt of the defendant, and such as cannot upon any reasonable theory and hypothesis be true and the defendant be innocent; and in this case this rule should be applied by the jury to that portion of the evidence offered by the state wholly of a circumstantial nature, and if the jury find from the evidence that all the incriminating circumstances upon which the prosecution relies for a conviction will as well apply to some other person or persons as to the defendant, or if such facts and circumstances are reconcilable with any reasonable theory or hypothesis other than the guilt of the defendant, or if such facts and circumstances, together with the direct evidence offered in this case, do not satisfy the minds of the jury beyond any reasonable doubt of the guilt of the defendant, then you should by your verdict acquit him."

This identical instruction has also been approved by this court. *Davis v. State,* 51 Neb. 301, 319. It is within the doctrine, as to circumstantial evidence, asserted in *Morgan v. State,* 51 Neb. 672; *Kastner v. State,* 58 Neb. 767; *Casey v. State,* 20 Neb. 138; and *Lowe v. State,* 110 Neb. 325. Therefore, in view of the decision of this court, the instruction requested by the defendant was a proper instruction.

Was it an instruction that the trial court was required to give, upon a proper request? The instruction, given by the court in this case, was taken verbatim from an instruction given in *Smith v. State, supra.* While this court held in that case and subsequent cases that the giving of said instruction was not reversible error, we do not find that this court has ever held that the instruction is a complete statement of the law of circumstantial evidence. The rule as to circumstantial evidence as stated in *Smith v. State, supra,* is as follows:

"To justify conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence

beyond a reasonable doubt, and, when taken together or as a whole, must be of such a character as to be consistent with each other, and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence."

This is the general rule as to circumstantial evidence and this court has not deviated from it. In this case, the defendant testified that he did not cut the throat of deceased. In addition to this he was entitled to the benefit of the failure of the state to prove, beyond a reasonable doubt, facts and circumstances consistent with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence. There is evidence in the record, tending to prove, that others than defendant were in "Hobo Camp" at or about the time the deceased met his death. "Hobo Camp" is described by the record as a tract of unoccupied land near the railroad tracks and the river, and is described by one witness, at least, as a wilderness of shrubbery. It derives its name from the fact that it is frequented by "Hobos." The court, when properly requested as in this case, should have instructed the jury as to the law of circumstantial evidence, with a view to the theory of the defendant's defense.

However, the state contends that the instructions as a whole correctly state the law. If this is the fact, then there is no prejudice to the rights of the defendant. In the state's brief it is written that, since the trial court instructed the jury, they could not find the defendant guilty, unless the evidence proved him guilty beyond a reasonable doubt, this subject was properly and sufficiently covered. *State v. House,* 108 Ia. 68, is cited to support this contention. Relative to the complaint that the court did not instruct the jury with the usual caution, "that conviction must be consistent with every reasonable hypothesis of guilt, and inconsistent with any reasonable hypothesis of innocence," the court said: "Where an instruction is correct as given, though not as explicit as desired, error cannot be predicated thereon, in the absence of a request."

It will be recognized that the situation differed from ours, in that in this case the defendant requested the instruction. Here the verdict rests wholly upon circumstantial evidence. We do not think the instruction given in the instant case is made sufficiently explicit by the instruction upon the question of reasonable doubt to justify the court to refuse to give the requested instruction. It therefore follows that the erroneous refusal is not corrected by the giving of the instructions as to reasonable doubt. The instructions of the court do not, taken as a whole, correctly state the law as to circumstantial evidence; the defendant made a proper request and the refusal of the trial court to give the requested instruction was prejudicial to his rights.

The last question for our consideration is: Was the evidence sufficient to sustain the verdict? The evidence has already been discussed in detail in the statement of the case and the discussion of the other assignments of error. No good purpose will be served by further quotations from the evidence. This case will be tried again and perhaps on different evidence. We think it well to suggest that the purpose of the trial of the defendant is to determine whether or not he killed the deceased. It is a heinous crime, punishable by extremely severe penalties. The spirit, as well as the letter of the law, requires that the defendant, although a "Hobo," is entitled to the same fair trial as the most distinguished or most provident citizen. Because of this error, herein detailed, the judgment is reversed and the cause is remanded.

REVERSED.

WILLIAM HORN ET AL., APPELLANTS, V. HENRY HORN ET AL., APPELLEES.

FILED APRIL 11, 1929. No. 26365.

1. **Deeds:** DELIVERY. The question as to the delivery of a deed is purely one of intent to be determined by the facts and circumstances of each particular case.

2. ———: ———. It is not essential to the validity of a deed that it should be delivered to the grantee personally. It is sufficient if the grantor delivers it to a third person unconditionally for the use of the grantee, with instructions to deliver it to the grantee on death of grantor; the grantor reserving no control over the instrument.
3. **Evidence** considered, and *held* to sustain decree of trial court.

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

Dort, Cain & Dort, for appellants.

John Wiltse and *Joseph C. Reavis, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and ELDRED and REDICK, District Judges.

ELDRED, District Judge.

The plaintiffs, William Horn and Anna Fehr, heirs of Emmi Horn, deceased, bring this action against the other heirs and representatives of the deceased, for the partition of an eighty-acre tract of land in Richardson county, Nebraska. The petition is in the usual form and alleges that Emmi Horn died January 16, 1927, testate, but that she failed to dispose of the property in controversy by her will, and therefore died intestate as to such property. The defendant Henry Horn answered claiming ownership of such property. No issue is raised by the other defendants. The trial court found in favor of the defendant Henry Horn and entered a decree quieting and confirming title in him. Plaintiffs appealed.

The deceased by her will disposed of all of her property not previously deeded by her. The will was executed the same day and immediately after the deed in question. A number of errors are assigned by the appellants in their brief, but in effect they all raise the same question; that is, that the evidence is not sufficient to sustain the finding and decree of the trial court. The real question involved is: Was there such a delivery of the deed from the deceased to Henry Horn for the premises in controversy as was necessary to transfer the title to him?

The deed from Emmi Horn to Henry Horn had not been filed for record at the time of grantor's death. At that time the record title to the premises was vested in Emmi Horn; the premises having been deeded to her by her daughter Louisa (Lucy) Horn. The deceased left surviving as her sole heirs four children, the plaintiffs, William Horn and Anna Fehr, Henry Horn and Emma Horn, defendants, and two grandchildren, Wilma Zentner and LeRoy Zentner, also parties defendant. Each of these heirs, by the terms of the will of the deceased, received a portion of her estate. The will specifically described the real estate, as well as some personal property devised and bequeathed thereby; but no mention was made of the real estate in controversy. The will contained no residuary clause.

On Friday morning, January 14, 1927, Emmi Horn was suffering from a strangulated hernia at her home where her daughter Emma Horn was caring for her. The plaintiff William Horn and the defendant Henry Horn, both of whom resided a few miles in the country, were each notified of their mother's serious illness. Henry arrived at his mother's home about 5 o'clock a. m., the same day. William arrived there about an hour before his mother's death, Sunday evening. About 5 o'clock a. m., Lawyer Wilhite arrived and prepared two deeds and a will, one of the deeds being the deed in controversy, and the other deed being to the daughter Emma Horn for some South Dakota property. In order to get the description of the property to be conveyed it was necessary to secure some papers from the safety deposit box in the Richardson County Bank. On account of the box being in the vault of the bank, secured by a time lock, the box could not be procured until about 8 o'clock. It was taken from the bank to the home by Henry Horn. About half an hour later an officer of the bank, Bert K. Baker, went to the residence of the deceased. It is undisputed that the deeds were executed prior to the execution of the will.

Appellants direct particular attention to portions of the

testimony of the witnesses Dr. Hustead and Bert K. Baker. Dr. Hustead, who was with the deceased several hours before any of the witnesses other than Emma Horn arrived on that morning, testified: "I asked Mrs. Horn why—what business she had that would detain her from going to the hospital. She said her business affairs were in such condition she wanted those fixed up; that she did not intend to go there to the hospital and die without a will and do without certain things, and have the attorneys get all of her money. That is exactly what she said. She said she was going to deed the property because she did not want them to fight over a will; that the deeds she made she wanted them to stand, and in case she got well she might probably change it if she recovered from the operation; but if she died she wanted things just as she had made it."

Dr. Hustead arrived at the home of Emmi Horn about 1:30 or 2 a. m.; remained until about 7 a. m.; went to hospital for a few minutes and returned with Dr. Shook about the time the deeds were being prepared by Lawyer Wilhite. There is nothing to indicate that Dr. Hustead held any conversation with Mrs. Horn about the disposition of her property after that time; hence, it must follow that whatever Mrs. Horn may have said to the doctor about her probable desire to change the deeds if she recovered from the operation were statements made several hours before the deeds were executed; while the statements testified to by other witnesses hereinafter mentioned were made at the time of or after the execution of the deeds.

With reference to the delivery of the deed the witness Baker testified that deceased gave him the deed; that he put it in the safety deposit box as soon as its execution was completed, and put the box in its place in the vault, and the deed was left there until it was turned over to Henry Horn as administrator of Mrs. Horn's estate. After the deeds were signed he asked Emmi Horn what to do with them and she told him to put them in her box and said what to do with the key. This was a safety deposit box and no one has a key but the owner of the box, and she said to give

the key to Miss Emma. He further testified: "I think Henry Horn had some papers in there. Whether he had the key or not, I don't think so, unless he got the key from his mother." Witness was not in the room where Mr. Wilhite and Mrs. Horn were when Wilhite was writing the deed and did not know what was said between them at that time. He was asked to go in and witness the deed. The deed was not handed to Henry, but was handed to the witness. He did not know what Mrs. Horn may have said to Mr. Wilhite at the time the will was executed about the deeds. He was not in the room at that time. Henry Horn called him at the house and met him at the bank. Henry had his mother's key and went in and got the box and went down to the house.

The testimony of this witness is not inconsistent with the decree of the court. It appears that Henry Horn had other papers in this safety deposit box where the two deeds executed were placed; that while the box in which the deeds were to be placed was to be in the custody of the bank of which Mr. Baker was an employee, neither the bank nor Mr. Baker were entrusted with the key to the box; but the mother, according to witness, directed him to deliver the key to Miss Emma, grantee in one of the deeds. The direction for the surrender of the key to the box to one of the grantees indicates that there was an intention on the part of the grantor to part with all control over the deed, and to place both deeds where they would be accessible to grantees. *In re Estate of Johnson,* 116 Neb. 686.

J. R. Wilhite testified: Went to the home of deceased about 5 o'clock a. m.; went down with Henry Horn. Emmi Horn asked him to write will and deeds. The deeds were prepared, executed and acknowledged before the will was made. "I asked her what I must do with the deeds, both deeds. She said: 'Give them to Bert Baker and let him keep them in the Richardson County Bank until after my death and then give them to the children'." And further: "Well, after we left the house, Bert Baker and I left the house, the last ones to leave the house, I thought I had both

deeds on the table, and I took it up and put it in my pocket, thinking I had both deeds, and went up in the office to put the seal on, I found I did not have but one deed. I then went down to the Richardson County Bank and Bert Baker was in there, and I asked him about the other deed, and he gave it to me; took it out of the box, and I took it up and put the seal on it and came back and gave it to him." Did not hear her tell Bert Baker what to do with the deeds; did not think he carried that message to Bert Baker; did not hear deceased say to Henry Horn: "Henry, this is your deed; read it and take care of it." Did not see him put the deed in the box; after deeds were made was not taking part in the conversation about the room; was working on the will.

According to this witness the deeds were to be left in the box at the bank until after the death of grantor and then delivered to the children. There appears to have been no reservation on the part of grantor of any control over them. The direction testified to by another witness that the key was to be delivered to Miss Emma further indicates an intention to relinquish all control over the deeds.

It is not essential to the validity of a deed that it should be delivered to the grantee personally. It is sufficient if the grantor delivers it to a third person unconditionally for the use of the grantee, with instructions to deliver to the grantee on death of grantor; the grantor reserving no control over the instrument. *Roepke v. Nutzmann,* 95 Neb. 589; *Dunlap v. Marnell,* 95 Neb. 535; *Owings v. First Nat. Bank,* 97 Neb. 257.

Emma Horn testified: "Just as she got ready to sign her name to this she looked at Bert Baker, and she said, 'This note and the deeds I want you to keep and deliver as soon as I die.' And Bert Baker looked at her, and said, 'Yes.' She went on signing her name to the note." Saw her sign the deed which Henry had; "After she read it and looked it over she called my brother Henry in from the opposite room, and Henry come in, 'What do you want, Mother?' 'I want you to look at this deed—see this.' She

handed it over to him to read, then he takes this deed and lays it in that box." Asked if her mother said anything further, she testified, "Yes, 'this was Lucy's wish I had to fulfil. Lucy wanted you to have this land.' She wanted Emma to have the South Dakota land and the $1,000 for taking care of her. And she says: 'Now I want to do this as Lucy wanted me to do it; I have fulfilled my promise.' And he looked at her and says, 'Yes.' After she had handed Henry the deed he put it in the box" himself, without any instructions. Witness was grantee in the other deed for 120 acres of South Dakota land.

Mrs. Ruth Horn testified: Was present when Bert Baker witnessed deed to Henry Horn. When Judge Wilhite got through with deed he handed it to Mrs. Horn. She took the deed and opened it up and closed and handed it to Henry Horn, and she said: "Henry this is your deed; read it and take care of it." Henry opened the paper up and read it and folded it back and placed it in one of his pockets. After that, when we were getting ready to go to the hospital, he took the deed from his pocket and placed it in the box; in their box that they kept at the bank. When Mrs. Horn said, "Henry, this is your deed; read it and take care of it," Judge Wilhite and Bert Baker were in the room. Mr. Wilhite was sitting at the table and Bert Baker was standing over toward the door by the kitchen. The will had not been signed at that time.

Henry Horn testified: Mr. Wilhite made out two deeds. I gave him the description from the deed of Louisa Horn. I read the deed and folded it up. I looked at the deed and check and put them in this hip pocket here, because I just had my sweater and my overcoat on. Then she asked me to pick up the rest of the papers and put them in the box. I cleaned up everything off the bed and table and I think I said, "This is too valuable for me to carry around." I put it in my box, in her box; her papers that she handed me; both of them; did not tell Bert Baker that I was putting the deed in the box. He was not there at the time I closed it. Judge Wilhite was there.

Complaint is made of the admission of the testimony of Henry Horn, the grantee in the deed; but disregarding his testimony as to any conversation or transaction with the deceased and as to delivery of the deed and how he came by it, the rule would not exclude his testimony as to what he did with the deed.

The fact that the deed was delivered by Emmi Horn to Henry Horn and by him put in his pocket, and then later by him placed in the box, accounts for the failure of Lawyer Wilhite to secure both deeds when he picked up the papers from the table to take to his office for the purpose of affixing his official seal. It seems probable that, at the time Wilhite was gathering up the papers he desired, Henry Horn had the deed to the land in controversy in his pocket, and that it was later put in the box.

That it was the intention of the grantor to make an absolute delivery of the deed is not only apparent from the testimony heretofore referred to, but other circumstances shown by the evidence tend to show the reason for the grantor desiring to favor the children Henry and Emma. A friendly relationship existed between the mother and these two children. They cared for her during her fatal illness; while the feeling between the mother and the daughter, Mrs. Fehr, and the son, William Horn, was not harmonious. That the feeling between the two last-named children and their mother was not friendly, from whatever cause, is conceded by them in their testimony, and is further demonstrated by the fact that, though William was notified on Friday morning of the serious illness of his mother, he did not go to see her until about an hour before her death on Sunday evening. But there was a further reason. It is uncontroverted that the property deeded to Henry as well as that deeded to his sister Emma had been conveyed by the daughter Lucy to their mother; and, according to the mother's statement, it was the wish of Lucy that the mother should convey the property to Henry and Emma, the mother remarking at the time of making the deeds that she had now carried out Lucy's wish.

The fact that the will contained no residuary clause, and that it did not purport to dispose of the land to which the deeds were made just prior to the making of the will, but did dispose of other real estate she appears to have owned, strongly indicates her intention to convey the title to the premises in controversy, and her belief that she had done so.

"Delivery is purely a question of intent to be determined by the facts and circumstances of each particular case." *Roepke v. Nutzmann,* 95 Neb. 589.

While there appears some conflict in the testimony of the several witnesses, it is more as to the details surrounding the transaction than as to their real import. If the case had turned upon the testimony of Dr. Hustead, it may be that the decree could not be sustained. Mrs. Horn may have thought early in the morning when talking to Dr. Hustead that she might want to change the deeds if she recovered, yet it is probable that, as the day advanced and she more fully realized the seriousness of her condition, she concluded to make a complete disposition of the property she was deeding. As previously pointed out, the statement made by the grantor to the doctor was prior to the execution of the deeds and prior to the making of the statements testified to by other witnesses. There is nothing in the testimony of any other witness inconsistent with an intent on the part of the grantor to make an unconditional delivery of the deed, without any right on her part to reclaim or recall it.

It is urged by appellants that it was the disposition of the mother to always retain control of her own property. That disposition is not inconsistent with the deeding of the property in question. Here was property which had been conveyed to her by Lucy, and as to which she felt under a moral obligation to dispose of according to Lucy's wish. In other words, as to the real estate deeded, she was fulfilling the trust conferred upon her, while as to the remainder of the property, as to which no trust relationship is shown to have existed, she did retain control thereof, only disposing of it by her will.

The trial court, with the advantage of observing the witnesses while testifying, found that there had been such a delivery of the deed as was sufficient to transfer the title to the land in controversy, and quieted the title thereto in the defendant Henry Horn. After due consideration, this court has reached the same conclusion. The decree of district court is

AFFIRMED.

Note—See Deeds, 54 L.R.A. 865; 9 L.R.A. n.s. 224; 38 L.R.A. n.s. 941; 8 R.C.L. 991; 2 R.C.L. Supp. 701; 4 R.C.L. Supp. 586.

ROBERT R. GARRETT V. STATE OF NEBRASKA.

FILED APRIL 11, 1929. No. 26591.

1. **Divorce:** TIME OF TRIAL. The provision of the statute that no suit for divorce shall be heard or tried for a period of six months after service has been had or perfected is a limitation upon the power of the court and any divorce granted within the period so prescribed is without authority of law and void.
2. ———: ———. The period of six months fixed by such statute means calendar months, and in the computation of such time, the statute being a special statute, the rule of strict construction is to be pursued, giving to each and every word of the provision its plain and ordinary meaning. *Held,* in this case that, since the service of summons was had on the 19th day of October, 1926, the waiting period did not expire until the end of April 19, 1927, and the court was without jurisdiction to render a decree on the latter date.
3. **Constitutional Law:** STATUTES. Where a provision of law is plain and unambiguous in its terms and not susceptible of more than one construction, courts are not concerned with the consequences that may result therefrom but must enforce the law as they find it.
4. **Judgment:** WANT OF JURISDICTION. A decree of court which is void for want of jurisdiction may be attacked in any proceeding in which any person seeks to assert a right under it. It may be attacked whenever it is sought to be enforced or in any suit in which its validity is drawn in question.

ERROR to the district court for Box Butte county: EARL L. MEYER, JUDGE. *Reversed.*

Mitchell & Gantz, for plaintiff in error.

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

Heard before ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and REDICK and SHEPHERD, District Judges.

SHEPHERD, District Judge.

This is a homicide case, brought here on petition in error from Box Butte county. Plaintiff in error was charged with shooting and killing William Kinsley, maliciously and with premeditation. The case was tried in February of 1928 and resulted in a verdict of murder in the first degree, duly rendered on the 16th day of that month and year. Sentence was to imprisonment for life and was pronounced on the 21st day of the same month.

The said William Kinsley had been riddled with shot and instantly killed as he passed before a window in his farm house about sixteen miles northwest of Alliance on the evening of the 26th day of November, 1927. Mrs. Clara Garrett testified upon trial that she was close to the deceased and that the shot that killed him came through the described window at his back. She testified further that she immediately looked through the window and saw the plaintiff in error outside, gun in hand, and that after pointing said gun at her and making her come out and go with him the latter told her that it was he who had killed Kinsley.

The plaintiff in error took the stand in his own behalf and denied any part in the shooting, denied that he was at the place where the shooting occurred, and denied the story of Mrs. Garrett *in toto.* He also presented an alibi sworn to by many witnesses in his behalf.

The assignments of error are numerous, relating chiefly to rulings of the court upon trial. Complaint is also made that the verdict and judgment are not sustained by the evidence and by the law, but are alike contrary to the law and to the evidence, and that the evidence disclosed no mo-

tive for the crime. A careful survey of the record leads us to conclude that no prejudicial error was committed, save in one instance on the reception of evidence.

The plaintiff in error made timely objection to the testimony of Clara Garrett. The ground of his objection was that she was his wife, both on the date of the commission of the crime and on the date of the trial, whereby she was precluded by law from testifying against him. The language of section 1 (8837) ch. 25, Laws 1925, is as follows: "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other."

The record discloses that Clara Garrett was married to the plaintiff in error on the 26th day of February, 1908, and had lived with him for many years, bearing him two daughters. She began an action against him for a divorce on the 13th of October, 1926, and service of summons was perfected in that case on the 19th day of October of that year; and on the 19th day of April, 1927, trial was had and a decree of divorce was formally signed. Said decree was filed on the 21st, but it plainly appears that the case was heard, tried and decided on the 19th. Afterward, on the 26th day of November, 1927, as hereinbefore stated, the killing took place.

If the decree in said divorce case was void as rendered before the court had jurisdiction to render it, that is to say, within a period of time less than six months from and after the date on which service of summons was perfected, the objection to the reception of said evidence must be held to have been well taken, and in such case the judgment of the district court must be reversed, unless the divorce law is unconstitutional, or the divorce not subject to collateral attack; for the testimony of Clara Garrett was material and damaging, and must have had its influence upon the jury.

There is, we think, no escape from the conclusion that the divorce was granted a day before it could have been

legally granted. When the statute says "months" in a case like this it means calendar months. *Brown v. Williams,* 34 Neb. 376. And in a case of this character, where a certain period of time must elapse before the court is vested with power to act, the rule is to exclude the first day and include the whole of the last in said period. It is true that this court has held in connection with the service of summons in justice of the peace courts that the three days' notice required before the defendant is obliged to appear is satisfied by excluding the day of service and including the third day therefrom, so, for example, that when summons is served on the 6th the trial may be had upon the 9th. But the time in question in this case is fixed by special statute, not by the Code, and the Code must yield to the special statute. *Calland v. Wagner,* 86 Neb. 755; Comp. St. 1922, sec. 9525. The court expressly said in the case last above cited that section 895 of the Code (Comp. St. 1922, sec. 9521) "is general in its application, and does not control where there is a special provision in a statute directing the method of computing time." The special provision under consideration directed that the justice must render judgment "either at the close of the trial, * * * or on or by the fourth day thereafter, both inclusive;" and the opinion goes upon the theory of strict construction in which each and every word of the law is to be given due meaning and effect. Section 9525, above cited, is in part as follows: "Where, by general or special statute, a civil action, legal or equitable, is given and the mode of proceeding therein is prescribed, this Code shall not affect the proceedings under such statute, until the legislature shall otherwise provide."

Section 1 (1520) ch. 63, Laws 1925, provides: "That no suit for divorce shall be heard or tried for a period of six (6) months after service has been had or perfected." This is a special statute and the precise question as to the proper computation of time where the provision is of this character was determined in *McGinn v. State,* 46 Neb. 427, in which the court held, construing the provision of the law

to the effect that an enactment of the legislature should only become operative three months after the date of the adjournment of that body, that an amendment by the legislature of 1893 took effect on the 9th day of July following, said legislature having adjourned on the 8th day of April of that year. In an elaborate opinion filed in that case Judge Post said:

"The authorities are not, as will be observed, harmonious upon the question whether the first day—in this instance, the day of the adjournment of the legislature—is to be included in the prescribed period. That question is, however, not an open one in this state. Indeed, it is clear that section 895 of the Code of Civil Procedure, providing that 'the time within which an act is to be done as herein provided shall be computed by excluding the first day and including the last,' was intended to establish a uniform rule, applicable to the construction of statutes as well as to matters of practice. * * * It follows that the period of three calendar months after the adjournment of the legislature of 1893 terminated at midnight of the 8th day of July of that year."

It is obvious from this authority that the six months waiting period provided in the divorce statute did not end until midnight of April 19, 1927, and that the court had no power or authority to hear, try or determine the divorce case of Garrett v. Garrett on that day. And just as certainly, since the court had no power or authority to hear and determine said case and to enter the decree, its action in that behalf was without jurisdiction, and a mere nullity. To the same effect is *Johnston v. New Omaha Thomson-Houston Electric Light Co.*, 86 Neb. 165. It follows that Clara Garrett was the wife of the plaintiff in error at the time of the trial and that her testimony should not have been received over his objection.

Supporting this conclusion is the case of *Pelton v. Drummond*, 21 Neb. 492. The following is the first paragraph of the syllabus of said case: "In an application for license to sell intoxicating liquors under the provision of chapter

50 of the Compiled Statutes, it is necessary to give at least two weeks' notice of the same in the manner provided by law, and where the notice is published in a newspaper, the county (city or village) board has no authority to take any action thereon until the expiration of the time during which the notice must be given. Any action taken by them before the expiration of the two weeks will be void." The action of the district court in hearing the divorce case of Garrett v. Garrett, and entering a decree therein, was entirely without authority and its decree was void.

Where a special statute prohibits a court, a judge or a commission from taking action before the expiration of a certain time, or before doing a certain thing, such court, judge or commission is precluded to that degree from proceeding in that behalf. Such was the holding in *Hurford v. City of Omaha,* 4 Neb. 336, in which the court said that, because it was provided by statute that the grade could not be changed until the damages were assessed and tendered, the proceedings of the city council changing the grading of a street without such preliminary assessment and tender was altogether void.

The doctrine finds further support in 15 R.C.L. 845, sec. 319, which is to the effect that, where a statute prohibits a judge or court from trying a case before a certain time, and the court or judge tries said case before the end of the time so limited, the decree or judgment therein rendered is void and may be attacked collaterally. A decree of court which is void for want of jurisdiction may be attacked in any proceeding in which any person seeks to assert a right under it. It may be attacked whenever it is sought to be enforced, or in any suit in which its validity is drawn in question. 15 R. C. L. 841, sec. 316.

We are not persuaded by the authorities cited by the state in its brief to the effect that in case of irregularity in service of summons, where the service is personal, no advantage can be taken of such irregularity except in the direct proceeding. The decision in these cases goes upon the theory that the provisions concerning service are directory

merely, not mandatory, and that the mistake or irregularity does not go to the matter of jurisdiction. In the case at bar, however, the requirement of the statute is, as we have seen, jurisdictional, and the failure to observe that requirement results in lack of power and authority.

Section 1 (1520) ch. 63, Laws 1925, is a special statute and it must be strictly construed. 25 R. C. L. 1057, sec. 282. The following is from said section: "A statute creating a new summary jurisdiction unknown to the common law should be strictly construed; nothing is to be presumed that is not expressly given by the act. A statute is not to be given a construction at variance with established rules of procedure unless the intention of the legislature is apparent. Where a proceeding is established by statute which differs radically from that of the common law it must be strictly pursued." It is evident that the legislature intended to make, and did make, the statute in question a limitation upon the power of the courts in the awarding of divorces.

The state has an interest in the marriage relation; it is a party in a divorce case. It is a general principle in the law of divorce that courts possess only such powers as are conferred by statute, and may justify their proceedings and judgments only by reference to the statutes. Because of this and because of the interest of the state referred to, our legislature has made various changes in the law for the purpose of conserving and maintaining that relation. It is common knowledge that the tendency among lawmakers has been to discourage divorce and to protect marriage.

This is to be considered in connection with the problem of ascertaining what the intention of the legislature was in providing that no divorce case shall be heard or tried for a period of six months after the completion of service of summons. It was undoubtedly to give parties time to recover from anger, to recall affection, to remember benefits, to reflect on the well-being of offspring, and to consider from the standpoint of personal duty and responsibility. Immediate trial and preparation for trial are inherently

such as to keep alive resentment and develop new animosity, hence the waiting time prescribed by the lawmaker in order that the relation in which the state is so vitally interested may not be terminated too easily and too speedily.

The provision is in harmony with the tendency of modern thought in connection with divorce. To set it aside by decree of court, or to shorten the time prescribed, would be to go contra to both the letter and spirit of the legislative enactment; it would be to judicially legislate in a fashion most unwarranted. And while it is true that courts are possessed of certain equity powers that legislatures cannot take away or control, instanced and announced in *Lacy v. Zeigler*, 98 Neb. 380, the situation in the case at bar is not such as to justify the exercise of such powers.

It is probably true that the legislature did not anticipate the question that arises in this case. Lawmaking is, indeed, a function for the wisest and most experienced—for the legislator versed in the theory of laws and able to forsee their practical operation. Special statutes have their reflex action as well as their remedy for the evil at which they are aimed. It probably did not enter the mind of the legislature of 1925 that this particular provision of the divorce law would arise to shield a murderer, as might happen, or to prevent the state from showing the facts against one accused of crime. But with this consideration we have naught to do. Whether or not the provision is a wise one is not for us to decide. Where a provision is plain and unambiguous in its terms and not susceptible of more than one construction, courts are not concerned with the consequences that may result therefrom but must enforce the law as they find it. 25 R. C. L. 1017, sec. 255; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559; *Henry & Coatsworth Co. v. Evans*, 97 Mo. 47.

It remains to say that the law is not unconstitutional. Counsel do not favor the court with authorities sustaining the state's contention in this respect, other than by a bare recital of sections 3, 13, and 25, art. I of the state Constitu-

tion. Nor is their somewhat perfunctory argument persuasive. Statutes similar in principle have in several instances been upheld by this court. *Schmidt v. Boyle,* 54 Neb. 387; *Reed v. Reed,* 70 Neb. 775; *Minor v. Morgan,* 83 Neb. 400. The provision questioned is neither arbitrary nor unreasonable. Under the police power of the state it is not within the inhibition of the fundamental law.

We repeat that, where power is lacking and where the judgment of the court is without jurisdiction and void, no change of status can result from such judgment.

The language quoted from 25 R. C. L. 1057, sec. 282, does not permit us to speculate or to attempt to find a way around. The law is plain and it must be enforced. The objection made by the plaintiff in error was well taken and the testimony of Clara Garrett should have been excluded. The failure of the trial court to sustain the objection was reversible error.

The judgment in the case is reversed and the case is remanded for new trial in accordance with this opinion.

REVERSED.

ROSE, J., dissenting.

In my opinion the decree in the divorce case of Garrett v. Garrett was evidence of the wife's divorce when introduced in the present prosecution of her former husband for murder. For the purpose of granting the wife a divorce the district court was a court of general jurisdiction. In the suit for divorce, the record showed that the district court had jurisdiction of both husband and wife and of the subject-matter of the suit for divorce. In connection therewith the decree of divorce, when entered on the journal of the district court, was, in collateral proceedings, its own evidence of the district court's jurisdiction to sever the marriage relation of the Garretts. If the decree was in fact entered a day too soon, an attack on that ground was available to defendant on appeal only. There was no appeal from the decree granting defendant's former wife a divorce. The husband and the wife were in fact separated when she testified against him. To each other the relation

of husband and wife did not exist. The statute requiring an interval of six months between the service of summons in the divorce case and the granting of a decree of divorce therein had served its purpose. The judicial interpretation that excludes the decree of divorce as evidence in the prosecution for murder required a resort to technicalities that defeat the purpose of the criminal law. In my view of the record, the conviction of defendant in the prosecution for murder should not be set aside on the ground stated in the opinion of the majority.

GOOD, J., concurs in dissent.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, PLAINTIFF, V. BECK FINANCE CORPORATION, DEFENDANT.

FILED APRIL 19, 1929. No. 26474.

Referees: REPORT: EXCEPTIONS OVERRULED: WRIT OF OUSTER ALLOWED. This original case, referred to a referee at the same time the companion case of *State v. Central Purchasing Co.* p. 383, *post,* was referred, was heard before the referee on a stipulation that the findings and conclusions herein by the referee might follow those of the companion case; and it was stipulated here that the matter should be heard upon the briefs in the other case.

Record and evidence examined, same principles announced here as in the syllabus of the *Central Purchasing Co.* case; and *held* that the exceptions should be overruled, the report of the referee approved, and Beck Finance Corporation ousted from doing business in the state of Nebraska.

Original action by the state to oust defendant from doing business in the state. *Writ of ouster allowed.*

O. S. Spillman, Attorney General, George W. Ayres and *T. J. McGuire,* for plaintiff.

Daniel J. Gross, Smith, Schall, Wright & Sheehan, and *Harry L. Welch, contra.*

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

GOSS, C. J.

This is a companion case to *State v. Central Purchasing Co.* the opinion in which follows this. It was stipulated in advance by the parties, and the stipulation was duly allowed by the court, that the questions involved in this case are the same as those involved in the *Central Purchasing Co.* case and that it should be heard upon the briefs filed therein.

This case was referred to Honorable L. J. Te Poel as referee at the same time the other case was referred. At the hearing before the referee, after the examination of one witness, the parties stipulated that the business of the defendant here was conducted in all material respects as that conducted by the other company, in which other case the testimony had already been taken; and that, subject to all rights of review in the supreme court, the findings and judgment entered in the case of *State v. Central Purchasing Co.* might be followed in this case.

The findings and conclusions of law of the referee in this case were against the defendant and were like those in the *Central Purchasing Co.* case. We have examined the record and the evidence. We are of the opinion that there is no substantial difference in the two cases; that the exceptions by defendant should be overruled, the report of the referee adopted, and the Beck Finance Corporation, a foreign corporation, ousted from doing business in the state of Nebraska. Judgment will be entered accordingly.

EXCEPTIONS OVERRULED, AND WRIT OF OUSTER ALLOWED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, PLAINTIFF, V. CENTRAL PURCHASING COMPANY, DEFENDANT.

FILED APRIL 19, 1929. No. 26475.

1. **Loan of Money.** "A loan of money is the delivery by one party and the receipt by the other party of a given sum of money, upon an agreement, express or implied, to repay the sum loaned, with or without interest." 38 C. J. 126, sec. 1.

2. **Sales.** "A sale is a transfer of the absolute or general property in a thing for a price in money, which the buyer pays or promises to pay for the thing bought and sold." 23 R. C. L. 1186, sec. 2.

3. **Corporations:** QUO WARRANTO. "The rule is settled in this state that foreign corporations do business here as a matter of comity and not as a matter of right. The privilege extended to a foreign corporation may be revoked at the pleasure of the state, and *quo warranto* proceedings brought by the attorney general in the name of the state is one of the proper proceedings to cancel or annul the privilege. *State v. Standard Oil Co.*, 61 Neb. 28; *State v. Nebraska Distilling Co.*, 29 Neb. 700." *State v. Brictson Mfg Co.*, 113 Neb. 781.

4. ———: OUSTER. Report of referee and evidence examined; exceptions overruled, report adopted and writ of ouster allowed.

Original action by the state to oust defendant from doing business in the state. *Writ of ouster allowed.*

O. S. Spillman, Attorney General, George W. Ayres and *T. J. McGuire,* for plaintiff.

Daniel J. Gross, Smith, Schall, Wright & Sheehan and *Harry L. Welch, contra.*

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

GOSS, C. J.

This is an original action in the name of the state of Nebraska, on the relation of O. S. Spillman, then attorney general. The purpose of the action was to enjoin and oust the defendant, a nonresident corporation, from doing business in this state. The issues requiring evidence to be taken, the court appointed Honorable L. J. Te Poel, of Omaha, as referee, with instructions to take evidence and to report the same to this court, together with his findings of fact and conclusions of law. Upon the referee's report the defendant filed its exceptions and the case was duly briefed and orally argued to the court.

The referee found that the defendant was a corporation foreign to Nebraska, probably originally incorporated under

the laws of Delaware; that it complied with the laws of Nebraska in the matter of appointing a resident agent, as required of foreign corporations in this state; that it did business in Omaha from some time in the fall of 1926 until this suit was commenced in March, 1928; that numerous parties in that period went to its office and obtained money from it on assignments of wages or salary, the total number of transactions being approximately 11,000; that the form of instrument (set out in the evidence) executed by the party obtaining money is in two parts, separated by a perforated line, the upper part purporting to be an application to the defendant to purchase wages or salary "already earned," the lower part purporting to be an assignment of these wages or salary; that in every instance, save one as to one employee, in evidence, the party obtaining money from the defendant drew his wages or salary in person on payday and brought to defendant an amount 10 per cent. in excess of what he had obtained, and that in the case of one employee, who obtained semi-monthly larger amounts than the usual transactions showed, there was brought back 8 per cent. more than the amount obtained from the defendant; that there was no serious attempt on the part of defendant to collect from the employer on the instruments; that, in several hundred transactions with employees of the Union Pacific Railroad Company, notice of assignment was given in only three or four instances; that it does not appear that any suit was ever brought, or any legal remedy resorted to, against the employer if the employee failed or refused to come in with the money after he drew his pay covered by the instrument he had signed; that the record shows the railroad employees in Nebraska are paid twice a month (as required by section 5389, Comp. St. 1922), and that many railroad employees obtained money from defendant twice a month over a period of several months, each time closing the previous transaction, thus returning each month a total of 20 per cent. in excess of the actual money obtained from defendant; that the manager of defendant testified that he considered it the duty

of one obtaining money on an instrument to deliver the money which the instrument called for; that when the money was paid the instrument was stamped "Delivered" but was retained by defendant; that the defendant company advertised that these transactions by which railroad men could obtain money were "strictly confidential," the advertisement in evidence further showing: "Quick money for railroad men, no collateral required, no indorsement, no mortgage."

In addition to the findings of fact the referee concluded as matters of law: (1) That the defendant is a foreign corporation doing business as such in Nebraska; (2) that the transactions had by the defendant company amounted to loans and not to sales; (3) that the defendant violated the positive laws of the state by charging interest at the rate of more than 10 per cent. per annum, in that it charged 20 per cent. a month, and that it has therefore forfeited its right to do business in the state; (4) that no right of the defendant guaranteed by the federal Constitution is violated by the enactment and enforcement of the usury laws of the state; that the state laws provide a reasonable classification, provide no distinctions, and in no way discriminate against the defendant because it is a foreign corporation; (5) that this is an action in equity, and that the court may properly grant an order enjoining the defendant from continuing to do business in the state; because defendant has so little property that can be reached, the referee sees no practical occasion for the appointment of a receiver and does not recommend such an appointment.

The report of the referee is a thorough statement of the facts shown in the evidence and a learned presentation of the law from which his conclusions are derived.

The exceptions of defendant are many, but its brief and argument narrow the propositions of law to two. The first is: "The buying of earned salaries or wages at a discount is not the loaning of money and is not a violation of the usury laws of the state of Nebraska." Heading the long list of citations under this proposition is section 2845, Comp.

St. 1922. This section, in its present form, was adopted in 1915. It makes it unlawful for any person, firm, partnership or corporation to engage or continue in the business of making loans or of purchasing or making loans on salaries or wage earnings at a greater rate than 10 per cent. per annum. Defendant says this statute was copied word for word from the Ohio statute, and that it is fundamental that, when we adopt a statute in its entirety from a sister state, we also adopt the decisions of that state with respect to the interpretations of the statute. Therefore, our attention is directed by defendant to the case of *State v. Mehaffey*, 112 Ohio St. 330, involving the same type of contract as in the instant case. There the supreme court of Ohio held that the relations created by the transaction are not those of creditor and debtor, but of buyer and seller, to which the question of interest has no relation; that the subject of discounts is not dealt with, and that, if the practice of the defendant requires supervision, it is a question for the legislative branch and not for the courts. Conceding the influence, but not the entire control, of previous interpretations of a statute adopted from a sister state, we note that the Ohio case was decided April 14, 1925. This was ten years later than the adoption of our statute, upon which defendant seeks to fasten the interpretation. It is to be noted, also, that the Ohio statute seems to have been interpreted by that court in the light of other statutes. The subsequent interpretation by the Ohio court could not of course have been adopted when our legislature enacted the statute, nor in adopting the statute itself was the legislature or this court consenting to be bound by any interpretation that might thereafter be put upon the statute by the courts of the state from which the statute was adopted.

A considerable proportion of those who obtained money from the defendant were married men and heads of families. No instrument in evidence, so far as we discover, shows that, when any of the borrowers were heads of families, the signatures of their wives were obtained nor that the instruments were acknowledged. Section 2459, Comp.

St. 1922, provides: "Every contract or agreement for the sale, assignment of the wages or earnings of the head of a family shall be void unless such contract, agreement, assignment or transfer shall be executed and acknowledged by both husband and wife in the same manner that conveyances of real estate are required to be signed and acknowledged by the laws of this state."

The defendant set out in its brief the blank form of instrument as typical of those used, and there are many executed ones in the record. None of these have any place for the execution and acknowledgement by husband and wife required under the section quoted. It is evident that in all such cases the defendant was violating a positive statute. All the circumstances are for consideration in determining defendant's attitude to the well-known public policy and spirit of the law and in an analysis of the question as to whether the defendant was seeking by evasion and by indirection to make an usurious loan under the guise of purchasing a right of action.

In the case of *Tennessee Finance Co. v. Thompson,* 278 Fed. 597, the facts were very similar to those here. The court held that it was the settled rule to look through the forms adopted to evade the usury laws and to ascertain as a fact whether it was a good faith sale or a loan at usurious interest. There it was held to be a loan and not a sale.

In *McWhite v. State,* 143 Tenn. 222, the defendant was convicted of usury and prosecuted appeal in error to the supreme court. The transaction was with a railroad employee on plans similar to those of the defendant in the case involved in this opinion. The court held that the defendant's plan was clearly "an extension of credit, an advance, or loan, to the employee, with the assignment held over the employee as a sort of club or collateral security."

"A loan of money is the delivery by one party and the receipt by the other party of a given sum of money, upon an agreement, express or implied, to repay the sum loaned, with or without interest." 38 C. J. 126, sec. 1.

"Goods" does not mean "money" nor "things in action," but the analogy is valuable. In our Uniform Sales Act, which relates to goods, a sale is defined as follows: "A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." Comp. St. 1922, sec. 2470.

"A sale is a transfer of the absolute or general property in a thing for a price in money, which the buyer pays or promises to pay for the thing bought and sold." 23 R. C. L. 1186, sec. 2.

The courts in such a case as this are not bound by forms but will look beyond form to the real substance. Looking through the scheme of the defendant to acquire and retain an unlawful and usurious rate of interest for the use of its money, and discerning the real substance of its transactions, we are of the opinion that its transactions pictured in the evidence were not *bona fide* purchases of rights of action from its customers, but rather were loans of the defendant to its customers. As such they were strongly infected with usury, were unlawful, and were contrary to the public policy of the state.

The defendant's second proposition is: "A foreign corporation cannot be ousted from doing business within a state unless it has violated a law or laws of the state which carries with it the right of ouster, or unless it be a matter of public concern."

The answers to this proposition need not take much time nor space. The defendant has, as demonstrated by the evidence, habitually violated the laws of the state, and it is a matter of public concern that all persons within the state shall be protected from a continuation of those acts. For authority we quote from a comparatively recent opinion: "The rule is settled in this state that foreign corporations do business here as a matter of comity and not as a matter of right. The privilege extended to a foreign corporation may be revoked at the pleasure of the state, and *quo warranto* proceedings brought by the attorney general in the name of the state is one of the proper proceedings to cancel

or annul the privilege. *State v. Standard Oil Co.*, 61 Neb. 28; *State v. Nebraska Distilling Co.*, 29 Neb. 700." *State v. Brictson Mfg. Co.*, 113 Neb. 781. The syllabus in the *Brictson* case says: "When a foreign corporation licensed to do business in Nebraska violates the law or fixed policy of the state, it may be ousted therefrom in an action of *quo warranto* by the attorney general in the name of the state." Under section 9280, Comp. St. 1922, the petition filed herein is a sufficient information to support a judgment against the defendant, ousting it from exercising its rights and privileges as a corporation within the state.

It is the opinion of the court that the exceptions of the defendant to the report of the referee should be overruled, that the report of the referee should be adopted, and that the defendant should be ousted from continuing to do business as a foreign corporation in this state.

EXCEPTIONS OVERRULED, AND WRIT OF OUSTER ALLOWED.

PETERS TRUST COMPANY, TRUSTEE, APPELLEE, V. FRED H. HECHT ET AL., APPELLEES: PETERS TRUST COMPANY, APPELLANT.

FILED APRIL 19, 1929. No. 26606.

1. Interest is the compensation agreed upon or allowed by law, not exceeding 10 per cent., upon any loan or forbearance of money, goods or things in action.
2. Mortgages: FORECLOSURE: AFFIRMANCE. Appellant loaned $12,000 to a borrower and took his real estate mortgage to secure a note for 10 years at 6 per cent. per annum, payable semi-annually, according to 20 interest coupon notes attached. At the same time appellant took the borrower's second mortgage on the same property to secure a note for $1,200, payable in 20 equal semi-annual instalments. Both notes and mortgages accelerated the maturity on failure to pay any interest or instalment when due. A few weeks after delivery appellant assigned the first mortgage to itself as trustee for certificate holders as beneficiaries under the trust. After making five payments of interest to the trustee and five payments of instalments, the borrower defaulted and the trustee foreclosed. Appellant, as cross-petitioner, was given a judgment lien in the decree for

two instalments past due at the time of decree. It appealed because the district court refused to give it judgment and decree for the entire unpaid balance of its note and mortgage. *Held*, in the absence of evidence of any other consideration for the $1,200 note and mortgage than the loaning of appellant's own money as above recited, that the judgment should be affirmed.

APPEAL from the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

T. B. Dysart, for appellant.

L. H. Cheney, Cordeal, Colfer & Russell and *Butler & James, contra.*

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

GOSS, C. J.

This is an appeal in equity by Peters Trust Company, one of the defendants in a mortgage foreclosure. It is aggrieved by a decree giving it judgment for less than it claimed on a second mortgage.

On June 5, 1923, Fred H. Hecht and Edna A. Hecht, husband and wife, executed and delivered two mortgages on their farm lands to Peters Trust Company of Omaha. The first mortgage was to secure a note for $12,000, due in 10 years, with interest at 6 per cent. per annum, payable semi-annually on the first day of July and of January in each year, according to 20 interest coupon notes for $360 each. The second mortgage was to secure a note for $1,200, payable in 20 instalments of $60 each on the same due dates as the notes secured by the first mortgage. All the notes were executed by the mortgagors and all provided for acceleration of maturity on default and for 10 per cent. interest after maturity. On August 14, 1923, Peters Trust Company duly sold and assigned the first mortgage for $12,000 and notes secured thereby to Peters Trust Company, trustee for trust certificates, series A-8, but continued to hold the second mortgage.

The makers paid the first five coupon notes for $360 each

on the first mortgage and the first five instalments of $60 each due on the $1,200 mortgage. On default of further payments, Peters Trust Company, trustee, began foreclosure of the first mortgage, making Peters Trust Company a defendant, along with other proper defendants. Peters Trust Company answered and by cross-petition set up its claim for a balance of $900 due on its $1,200 note and for 10 per cent. interest after maturity on the two instalments then past due and for like interest on the remainder of the balance matured by the acceleration feature.

The makers of the notes and mortgage pleaded that Peters Trust Company, trustee, and Peters Trust Company are one and the same, and that the $1,200 mortgage "was executed to the Peters Trust as a purported commission" charged by Peters Trust Company for securing the $12,000 loan, but was in fact a scheme to exact interest in addition to that provided by the first mortgage and notes, and that the contract was usurious. In their answer to the cross-petition of Peters Trust Company, the makers charged that the $1,200 note and mortgage were wholly without consideration. The reply of plaintiff and of Peters Trust Company denied each and every allegation pleaded by the makers except as specifically pleaded or admitted by plaintiff's petition or by the answer and cross-petition of Peters Trust Company.

The decree in the district court gave the Peters Trust Company, trustee, as plaintiff, a lien for a satsifactory amount on the first mortgage. It has not appealed. The decree found that the contract was not usurious. The decree also found that there was due and unpaid to Peters Trust Company the two instalments of $60 each, maturing respectively July 1, 1926, and January 1, 1927 (on the $1,200 note), and entered judgment for Peters Trust Company, cross-petitioner, for $127.66, being for the past-due instalments with interest to the date of the decree.

We discover no specific findings in the decree as to whether the court found that the $1,200 note and mortgage were given as a commission for securing and serving a loan evidenced by the first mortgage and notes for $12,000, or

whether the second mortgage was given to secure an additional rate of interest on the loan.

The evidence as to what was the actual consideration for the $1,200 note and mortgage is very unsatisfying. Indeed, after the introduction in evidence, without objection, of the notes and mortgages held by the various parties, the rest of the bill of exceptions consists of a little over two pages of colloquy. The counsel for the defendants who were the makers of the mortgage stated that it "represents a commission;" and then, answering a question from the court as to the basis of the commission, said: "Upon the agreement, I suppose, to pay 7 per cent. interest on the first mortgage." Thereupon counsel for Peters Trust Company said "six per cent. and a mortgage." The argument in appellant's brief proceeds upon the basis that the mortgage was given to secure an agreed "commission" for making the loan and that, instead of being paid in cash, the commission was to be paid in instalments.

We may conclude, from the trial court's allowance of only the instalments past due, that the court took the view that the second mortgage merely evidenced additional interest of 1 per cent. per annum as compensation on the first mortgage loan. Appellant did not prove what is meant by a commission mortgage. We cannot infer that it means that any actual money passed from the lender to the borrower as the consideration for the second mortgage, but we think the inference is that it was an additional sum the borrower contracted to pay to the lender by reason of the $12,000 in money actually loaned to the borrower and evidenced by the note for that amount secured by the first mortgage. It was therefore intended by both parties either that it should be paid to compensate the lender for the use of the $12,000 or else for some other service rendered or to be rendered by the lender to the borrower. The evidence utterly fails to show any explanation of the nature of that service. There is in evidence no application, written or otherwise, by which Peters Trust Company is made a broker or agent to secure a loan of money for the borrower and to be compensated for such service.

Both mortgages were made in favor of Peters Trust Company. Not until more than two months later did it assign its first mortgage to Peters Trust Company, trustee.

The facts in this case do not bring it within the rule that might be asserted by appellant with more legal force and sanction if Peters Trust Company had been constituted an agent or broker for the mortgagor and had rendered service to him in securing a loan from some third party. But here the Peters Trust Company was, so far as the evidence shows, lending its own money. It took a first mortgage for the full amount of the money it loaned the borrower and it took a second mortgage for the amount of $1,200, not representing money loaned but now claimed by it as a commission.

Interest is the compensation agreed upon or allowed by law, not exceeding 10 per cent., upon any loan or forbearance of money, goods or things in action. Comp. St. 1922, sec. 2834; 15 R. C. L. 4, sec. 3; 33 C. J. 178, sec. 1; 4 Words and Phrases, 3706.

Under the facts proved and heretofore stated, the only consideration between the borrower and lender was the $12,000 in money. The trial court allowed the full interest thereon as set forth in the contract evidenced by the notes secured by the first mortgage, and, in addition thereto, allowed appellant 1 per cent. per annum on that principal sum as if included in the instalments coming due on the note secured by the second mortgage up to the date of default. We are of the opinion that, in the particular circumstances, the appellant cannot have legal grounds for reversal on appeal by reason of the judgment and decree. We desire it to be understood that we are expressing no opinion upon the effect of contracts arising out of other states of facts between borrower and lender than those here considered, whether arising upon so-called commission mortgages or otherwise.

For the reasons stated, the judgment of the district court is

AFFIRMED.

OKLAHOMA VANDERVERT, APPELLEE, V. FRANK A. ROBEY, APPELLANT.

FILED APRIL 19, 1929. No. 26577.

1. **Trial.** Under the law and the facts, the issues here involved were clearly for the jury.
2. **Negligence:** AUTOMOBILES: CARE REQUIRED IN DRIVING. "Backing out from private property onto a public highway is an operation demanding a high degree of skill and caution to avoid danger or injury to any person on the highway or collision with any vehicle thereon, and one engaged in such operation must use greater care than would be required of one driving along the highway." 42 C. J. 1022, sec. 759.
3. ———: ———: ———. "The duty of the driver of a vehicle, about to enter upon the highway from a private drive, to look for vehicles approaching on the highway implies the duty to see what was in plain sight, unless some reasonable excuse for not seeing is shown." *Kemmish v. McCoid*, 185 N. W. 628 (193 Ia. 958).
4. **Appeal:** HARMLESS ERROR. "Where an instruction, though erroneous, is not prejudicially so and cannot by any course of logical reasoning be deemed to have resulted in disadvantage to the complaining party, it should not be allowed to work a reversal." *Johnson v. Samuelson*, 116 Neb. 297.
5. **Instructions.** The jury were fairly instructed upon every material issue here involved, and we are unable to find that any of the submitted instructions could have resulted in the deprivation of any substantial right to either party litigant.
6. **Affirmance.** From an examination of the record and the law applicable thereto, we conclude that the evidence amply supports the verdict.

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

Burkett, Wilson, Brown & Wilson and *Albert S. Johnston*, for appellant.

Stewart, Stewart & Whitworth, contra.

Heard before GOSS, C. J., DEAN, EBERLY and DAY, JJ., and LIGHTNER and REDICK, District Judges.

DEAN, J.

This action was begun in the district court for Lancaster

county by Oklahoma Vandervert, a minor of 18 years, by Tina Vandervert, his mother and next friend, to recover $20,000 as damages for personal injuries sustained by him through the alleged negligence of Frank A. Robey, defendant. Throughout the record, and in the briefs of the parties, Oklahoma Vandervert is referred to as plaintiff and he will hereinafter be so designated. The Nebraska Material Company, hereinafter called the company, was joined as a party defendant on the ground, as alleged, that it had an interest or right of subrogation in such amount as plaintiff might recover to the extent of payments made to plaintiff by the company for compensation and medical services. This right of subrogation accrued under section 3041, Comp. St. 1922. The jury returned a verdict for $3,500, from which $870.50 was ordered deducted by the court and directed to be paid to the company because these payments were made by the company under the subrogation proposition. Defendant Robey alone appealed.

A brief summary of the material evidence submitted in support of the plaintiff's allegations follows. The accident happened June 5, 1927. Plaintiff was hauling sand at the time for the company in a large motor truck. He testified that his truck was moving at about the rate of 12 miles an hour shortly before noon when he saw the defendant backing his car out of his driveway on Twenty-Second street. Plaintiff honked his truck horn, but defendant continued to back his car out into the street. Thereupon plaintiff slackened his speed and honked and yelled in an attempt to attract defendant's attention. It appears that another car was parked so nearby that plaintiff did not have room to get by and it was therefore necessary for him to drive the truck over the curbing into the defendant's driveway to avoid a collision with his car. And, by so doing, the truck struck a tree and the left wheel was broken off.

Plaintiff testified that, from the fact that the steering wheel was adjusted to the front axle, the force of the impact caused the wheel to strike him and he was thereby severely injured. Plaintiff's younger brother, who was in

the truck at the time, removed him from the truck to the ground, and plaintiff was then taken to a hospital where he was placed in a cast from his chest down to his knees in which he remained for approximately four and a half weeks, and when he was subsequently removed to his home he lay on a cot for about a month. He testified that he walked a little, but that he had a pain in his side, and that, as he expressed it, he "always had that tingling" in his foot or leg, and was "kind of dizzy;" that the first work he did was more than six months after the accident and shortly before Christmas, and that the work then consisted in carrying small boxes at a store for a day and a half, and that it made him so tired that he could not sleep and the tingling in his foot grew worse and the pain in his side was constant; that he consulted a doctor and was advised by him not to attempt any work and he did no work from thence until the trial, and that his left leg was then stiff and he became tired easily. Plaintiff testified that he weighed 142 pounds before the accident and about 115 pounds when he left the hospital.

In respect of the brakes, a witness who had driven the truck shortly before the accident testified that he had adjusted both the foot brake and the hand brake and that they were then in good condition. To substantially the same effect was the evidence of Rudolph Kreisels, the owner of the truck. This witness testified that shortly after the accident the defendant informed him that he "backed out of the drive and he got out in the middle of the street and killed his engine, and then by that time he said he never noticed the truck coming, but his wife noticed the truck coming and she holloed the truck was coming. He said he was kind of excited and he killed his engine and by that time the truck kind of coasted forward. Q. You mean the truck or car? A. I mean the car coasted forward and crowded the truck over the curb." The truck owner further testified that defendant, on the day of the accident, "said the kid done a wonderful job of driving just at that point, you know."

The defendant testified that the truck "did not appear to be coming very fast," and that he heard plaintiff honking the truck horn and heard him yell. He denied that he killed the engine of his car, but testified that his car was stationary in the street only long enough to change gears, and he denied ever telling any one that he had killed his engine in the middle of the street. True, in his answer, defendant alleged that plaintiff was exceeding a lawful rate of speed, but on the cross-examination he testified that plaintiff was going no faster than 10 to 15 miles an hour, and that he saw the truck coming but continued to back out of the driveway into the street, and he said that he assumed that he "would have plenty of time to get out of the way."

From the evidence of the defendant's wife, who was in the car at the time, it appears that she first noticed the truck when it was crossing the intersection nearby, and that she heard honking about the time the rear wheels of her husband's car reached the street from the driveway, and that about the time they started to back into the street the truck was about 60 or 70 feet away.

Dr. Clayton Andrews, called by plaintiff, treated plaintiff after the accident. He testified that at the time plaintiff "had the appearance of a man that has been recently hurt and fairly badly shocked. He was in severe pain and there was some abdominal distention, and complaint of pain around his pelvic bones, unable to walk, and pain on motion in his legs and back, or his pelvis rather, and shock condition from the accident, plus the pain and inability to move his affected parts;" that plaintiff was put in a cast and remained at the hospital from June 5 until July 8, 1927, and that he came back to see the witness once a week for a month thereafter; that plaintiff appeared to be in pretty good condition, but later, after he had done work, he complained of pain in his leg and foot; that there would subsequently perhaps be a slight limitation of motion which might entirely disappear or which might not.

Dr. Deppen, called by defendant, testified that he ex-

amined plaintiff in September, 1927, at the request of defendant's attorney; that he had a complete history of the plaintiff's injury; that he made X-ray pictures of the plaintiff which disclosed fractures that had apparently healed, and found that the muscles were smaller around the left hip or left leg than they were on the right side, due to disuse and from being in a cast, but that the conditions he named would ultimately disappear. He corroborated plaintiff's evidence in that he advised him not to go to work at that time on account of physical conditions arising from the injuries complained of.

Under the law and the facts, the issues here involved were clearly for the jury. *Frish v. Swift & Co.*, 97 Neb. 707. On a like situation this observation has been made:

"Backing out from private property onto a public highway is an operation demanding a high degree of skill and caution to avoid danger or injury to any person on the highway or collision with any vehicle thereon, and one engaged in such operation must use greater care than would be required of one driving along the highway." 42 C. J. 1022, sec. 759, and cases there cited.

In *Uhl v. Fertig*, 56 Cal. App. 718, this rule was announced:

"As between a motor vehicle moving along a main artery of travel and another vehicle emerging from private ground abutting the highway, the former must be conceded the first right to pass."

The rule is aptly stated in *Kemmish v. McCoid*, 185 N. W. 628 (193 Ia. 958): "The duty of the driver of a vehicle, about to enter upon the highway from a private drive, to look for vehicles approaching on the highway implies the duty to see what was in plain sight, unless some reasonable excuse for not seeing is shown."

An answer to defendant's argument of contributory negligence and rapid driving on the part of plaintiff is that the defendant himself testified, as noted above, that plaintiff was driving at a rate that did not exceed 10 to 15 miles an hour.

Complaint is made by defendant of certain of the court's instructions. Defendant argues: "This court has uniformly held that it is the duty of the court to instruct the jury in the law of the case, and to fairly cover the issues, whether requested by counsel to do so or not; and that failure to do so is error." We think the argument is not applicable to the fact. The jury were fairly instructed upon every material issue here involved, and we are unable to find that any of the submitted instructions could have resulted in the deprivation of any substantial right to either party litigant. In *Johnson v. Samuelson,* 116 Neb. 297, we held: "Where an instruction, though erroneous, is not prejudicially so and cannot by any course of logical reasoning be deemed to have resulted in disadvantage to the complaining party, it should not be allowed to work a reversal." We think the rule in the *Johnson* case is equally applicable to the facts in the present case. The evidence fairly supports the verdict and the facts come within the meaning of the law applicable thereto.

Additional assignments of alleged error are presented by defendant, but upon examination, and in view of the facts, we do not find it necessary to prolong the discussion herein. It follows that the judgment must be and it hereby is in all things

AFFIRMED.

STATE, EX REL. KATHERINE GARTON, RELATOR, APPELLEE, V. W. R. FULTON, COUNTY JUDGE, RESPONDENT, APPELLANT.

FILED APRIL 25, 1929. No. 26565.

1. Mandamus: INFERIOR COURTS. While mandamus will lie to compel an inferior court to hear and determine a cause if within its jurisdiction and when properly brought into court, yet it will not lie to coerce judicial discretion of an inferior court, nor to predetermine the character of the judgment that the court shall enter.
2. ———: ———: REMEDY AT LAW. Mandamus will not issue to review the action of an inferior court where there is an ade-

quate remedy at law, and the writ may not be used to usurp or take the place of an appeal or writ of error.

3. ———: ———: ———. Mandamus will not lie to compel a county court or judge thereof to vacate an order, made by such court or judge, denying a defendant a jury trial in a case wherein defendant is charged with a violation of the liquor law, if the court has jurisdiction of the parties and the subject-matter, since there is an adequate remedy by appeal, or proceedings in error, to review the ruling and order made by the court or judge.

4. **Constitutional Law**: STATUTES: VALIDITY. This court will refuse to pass upon the constitutionality of a statute unless it is necessary to a proper disposition of an action pending in this court.

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

Guy A. Hamilton, for appellant.

F. L. Bollen, contra.

Elmer E. Thomas, amicus curiæ.

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and LIGHTNER and REDICK, District Judges.

GOOD, J.

Respondent has appealed from the allowance of a peremptory writ of mandamus, commanding him, as county judge of Fillmore county, to grant and award to relator a jury trial in an action pending in the county court of said county, wherein relator is charged with the unlawful sale of intoxicating liquors, and wherein such sale is charged to be a second offense.

From the record it appears that in the county court of Fillmore county a complaint was filed wherein relator was charged with the unlawful sale of intoxicating liquors as a second offense; that relator appeared in said action, pleaded not guilty thereto and demanded a jury trial. The county court, upon due consideration, refused her demand and denied a jury trial. Thereupon, this proceeding was instituted, with the result indicated.

In the application for the writ relator alleges that re-

spondent based his refusal to grant a jury trial upon his construction of the provisions of section 3287, Comp. St. 1922, which in part reads as follows: "Magistrates and police courts are hereby vested with jurisdiction to try without a jury all violations of this act and of all such ordinances wherein the penalty does not exceed a fine of one hundred dollars or imprisonment for a period of three months, and upon the conviction such magistrates and police judges shall impose sentence." Relator further charges that in her belief the said section of the statute is violative of sections 6 and 11, art. I, of the Constitution. The sections, so far as material, are as follows: Section 6: "The right of trial by jury shall remain inviolate." Section 11: "In all criminal prosecutions the accused shall have the right to * * * a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." In his return to the alternative writ respondent set forth the fact that a complaint had been filed against the relator charging her with the unlawful sale of intoxicating liquors, and charging the sale to have been a second offense, as provided under section 3238, Comp. St. 1922; that the plea of not guilty was entered; that relator demanded a trial by jury and that respondent, in the impartial and careful exercise of the duties vested in his office, refused the request.

Both relator and respondent, by their counsel, have earnestly requested this court to determine whether section 3287, Comp. St. 1922, is violative of sections 6 and 11, art. I, of the Constitution, and whether the relator was entitled to a jury trial in the cause then pending in the county court. If the action is properly brought to this court and presented by this appeal, it is the duty of the court to pass upon and determine the questions argued; but, on the other hand, if the questions argued have not been properly brought to this court, any attempted determination would be of no force or effect as a precedent and would be nothing more than *dictum*. Our first consideration, therefore, will be to determine whether or not the constitutionality of said

section 3287 has been properly brought to this court in this action.

Mandamus is an extraordinary remedy. Section 9224, Comp. St. 1922, authorizes the issuance of a writ of mandamus to an inferior tribunal to compel the performance of an act which the law especially enjoins as a duty, and may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, but cannot control judicial discretion. Section 9225, Comp. St. 1922, provides that the "writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." The availability of mandamus, as a remedy to compel a judicial tribunal to act and the extent to which the tribunal's act may be coerced, has frequently been before this and other courts. The decisions are not entirely harmonious. We will proceed to a review of the decisions of our own court and make reference to the decisions in other jurisdictions.

In *State v. Nemaha County,* 10 Neb. 32, it was held: "Mandamus is not a proceeding to correct errors; it is invoked merely to compel action, and creates no new powers."

In *State v. Powell,* 10 Neb. 48, wherein it was sought to compel a justice of the peace to reinstate a judgment on the docket of his predecessor, it was "held, that the error, if any, in setting aside the verdict and judgment, cannot be reviewed on an application for a mandamus." The ruling was based on the assumption that the action could have been reviewed by proceedings in error.

In *McGee v. State,* 32 Neb. 149, it was held: "A mandamus will not issue to correct errors committed by a court, or other tribunal, exercising judicial powers." In that case relator sought by mandamus to compel the county supervisors to reassemble as a board of equalization and strike from their records an entry relating to the equalization of the assessment of relator's property. The district court granted the writ. On appeal to this court, in the course of the opinion, it was said (page 154): "Mandamus will not

lie where there is a plain and adequate remedy in the ordinary course of the law." It was pointed out in the opinion that decisions of the county board of equalization may be reviewed in the district court by petition in error, and that such remedy is full and complete.

In *State v. Churchill,* 37 Neb. 702, it was held: "Mandamus will not lie to compel officers exercising judicial functions to make a particular decision, or to set aside or vacate a decision already made."

In *State v. Merrell,* 43 Neb. 575, it was held: "This court has no authority under the Constitution and the laws of the state to compel by mandamus the county board of a county to allow a claim against such county, although the court may be of opinion that such claim is a valid obligation against the county and that it has no defense thereto.

"A county board in the adjustment of claims against a county acts judicially, and this court cannot, by mandamus, control the judicial discretion of such board. *State v. Churchill,* 37 Neb. 702, reaffirmed.

"Mandamus is the last resort of a litigant and the courts will not employ this remedy when such litigant has a plain and adequate remedy at law; nor in the absence of such remedy unless the relator has a clear right to have the officer to whom he wishes the writ directed perform the identical ministerial act prayed for."

In *Nebraska Telephone Co. v. State,* 55 Neb. 627, it was held: "A litigant will not be permitted to invoke the extraordinary remedy of mandamus when an express statute affords him an adequate remedy for the redress of the grievance of which he complains."

In *State v. Fawcett,* 64 Neb. 496, it was held: "A party who complains that a trial judge has incorporated incompetent, irrelevant or improper matter in a bill of exceptions by way of amendment on the ground that he took judicial notice thereof at the hearing, has a 'plain and adequate remedy in the ordinary course of the law,' within the purview of section 646, Code of Civil Procedure (now appearing as section 9225, Comp. St. 1922), by obtaining a re-

view of the action of the judge in considering the matter complained of." In that case an application for mandamus was made to compel the settling of a bill of exceptions, and the writ was denied.

In *State v. Jessen,* 66 Neb. 515, it was held: "The writ of mandamus will not issue merely to correct errors; it must further appear that the remedy prayed for by the application for the writ can be obtained by that means only and as a last resort, and that the relator has no adequate remedy in the due and ordinary course of the law.

"The writ will not ordinarily issue when its effect would be to reverse or vacate an order of a court or tribunal having jurisdiction to make the order, and especially when such order is one that may be reviewed on error or by appeal."

In *State v. Drexel,* 75 Neb. 751, it was held: "The appeal provided by the revenue law from the decision of the county board as to the liability of property to taxation is a plain, adequate, legal remedy, and mandamus will not lie to correct errors of the county board in such decision."

In *State v. Hoctor,* 98 Neb. 15, it was held: "While the writ of mandamus may be issued to require an inferior tribunal or board to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control its judicial discretion."

In *State v. Troup,* 98 Neb. 333, it was held: "Although the common-law writ of prohibition has been abolished in this state, the duty is still imposed upon this court to prevent violation of law by inferior tribunals, and, where there is no adequate remedy in the ordinary course of the law, mandamus is the proper remedy." In that case the district court dismissed an action to recover damages for personal injuries because of the refusal of plaintiff to comply with an order of the court to submit to a physical examination by a physician or surgeon to ascertain the nature and extent of the injuries of which she complained. The plaintiff in that action then applied to the supreme court for a writ against the judge who made the order,

requiring him to reinstate her cause and proceed to trial thereof. While this court held that mandamus was a proper remedy to review the question, it denied the writ. We infer that, had it been shown that the trial court had acted capriciously or arbitrarily, amounting to a refusal to hear and determine a cause of which it had jurisdiction, the writ would have been granted.

In *State v. Board of Commissioners,* 105 Neb. 570, it was held: "The court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of inferior tribunals."

In *State v. Lancaster County,* 110 Neb. 635, it was held: "Mandamus is not a proper remedy to obtain redress from errors in making assessments for special benefits by a board of equalization, when the statute affords an adequate legal remedy."

In *State v. Westover,* 2 Neb. (Unof.) 768, it was held: "An ultimate right of review by error or appeal is a plain and adequate remedy within the purview of section 646, Code of Civil Procedure (now section 9225, Comp. St. 1922).

"As an order setting aside a decree and granting a new trial, made without jurisdiction, may be reviewed on error or appeal as soon as it results in a new decree, a writ of mandamus will not issue to compel vacation of such order and reinstatement of the original decree."

In *State v. Graves,* 66 Neb. 17, this court, by writ of mandamus, required a district judge to vacate an order granting an injunction. In that case it appeared that an injunction had been granted at chambers, without hearing or notice, which had the effect of transferring the possession of property from one litigant to another. The court held:

"A court or judge has no authority by a provisional injunction to transfer the possession of real or personal property from one litigant to another.

"Such an order made by a judge at chambers, without

a hearing or any opportunity to be heard, *held* to be, not merely erroneous, but absolutely void."

The opinion in that case goes further than any other opinion of this court that we have been able to find, in controlling by mandamus the action of a district judge. In that case the opinion is based on the theory that the action of the district judge was wholly without jurisdiction or authority, absolutely void; that there was no adequate remedy at law, and, under this extraordinary situation, held that mandamus was a proper remedy to compel the cancelation of the order.

Turning to the views as expressed by other tribunals, we find the case of *Ex parte Roe,* 234 U. S. 70, 58 L. Ed. 1217, wherein an action had been removed from the state to the federal court and a motion there made to remand to the state court which was denied. Thereupon, application was made to the United States supreme court to compel the district court to remand the cause to the state court. It was therein held: "The refusal of a federal district judge to remand to the state court whence it had been removed a suit against a federal corporation involving the requisite jurisdictional amount, and therefore removable, unless made otherwise by the fact that it also arose under the employers' liability act, * * * cannot be reviewed by mandamus, since such ruling would be subject to appellate review after final judgment." In the course of the opinion it was said (page 73): "The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision. It does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially where in regular course the decision may be reviewed upon a writ of error or an appeal."

In *In re Isaac L. Rice,* 155 U. S. 396, 39 L. Ed. 198, it was held: "The writ of mandamus cannot be issued to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise

of legitimate jurisdiction; the writ cannot be used to perform the office of an appeal or writ of error, even if no appeal or writ of error is given by law."

In *Matter of Tiffany*, 252 U. S. 32, 64 L. Ed. 443, it was held: "Resort may not be had to the extraordinary writ of mandamus or prohibition where the petitioner has the right to a writ of error or appeal."

State v. First Judicial District Court, 24 Mont. 539, was an action in which an application for a writ of *certiorari* was made to the supreme court to review the action of the district court in releasing one from imprisonment on a writ of habeas corpus, on the theory that the court had exceeded its jurisdiction. In the course of the opinion (p. 553) it was said: "There are three indispensable requisites to the granting of the writ: (1) Excess of jurisdiction in the court making the order complained of; (2) absence of the right of appeal; and (3) lack of any plain, speedy, and adequate remedy other than *certiorari*. * * * Jurisdiction means the power to hear and determine the particular case presented for consideration, as well as to make such orders and to render such a judgment therein as the law authorizes in the class of cases to which it belongs; * * * in brief, it is the power to hear and determine the questions *coram judice* in the particular case. It therefore follows that the conclusion reached and the judgment rendered in the particular case may be either right or wrong, and still jurisdiction be in no wise exceeded; * * * otherwise, the making of an erroneous order or judgment in any case would be an excess of jurisdiction in the sense that it would be the determination of a question *coram non judice*. The district court was called upon to decide upon the legality of the imprisonment of Ramsey; having issued the writ, and caused the complainant to be produced before it, it was authorized and required to pass upon the question thus presented, and it is immaterial upon this inquiry, whether it decided the question right or wrong."

In *Ex parte State,* 208 Ala. 28, it was held:

"Mandamus will lie to command the exercise of judgment or discretion, but will not direct the manner of its operation.

"Mandamus will not lie for the correction of errors, such as an erroneous refusal to grant a change of venue, though upon a proper showing of abused discretion it is available to compel a proper exercise thereof."

In *Rose v. O'Brien,* 80 W. Va. 280, it was held: "While generally mandamus lies to compel an inferior tribunal to act upon matters presented for adjudication if within its jurisdiction, it is not available to require the exercise of judicial discretion or judgment in any particular manner, or to reverse a decision when made if erroneous. Its office is to compel the exercise of judicial action, but not to determine what the result of the adjudication shall be."

In *State v. Pollard,* 112 Wis. 232, it was said, concerning the exercise of supervisory control of inferior courts: "But this court will not exercise its jurisdiction when there is another adequate remedy, by appeal or otherwise, nor unless the exigency is of such an extreme nature as obviously to justify and demand the interposition of the extraordinary superintending power of the court of last resort of the state."

In *Ex parte Riddle,* 255 U. S. 450, it was held: "Ordinarily, at least, it (mandamus) is not to be used when another statutory method has been provided for reviewing the action below, or to reverse a decision of record."

In *Ex parte Wagner,* 249 U. S. 465, 63 L. Ed. 709, it was held: "Mandamus is an extraordinary remedy, to be resorted to for the purpose of securing judicial action, not for determining in advance what that action shall be."

A thorough discussion of the power to control by mandamus the actions of inferior courts may be found in 2 Bailey, Habeas Corpus, pp. 874 to 892; and also in Ferris, Extraordinary Legal Remedies, secs. 187 to 217.

There are opinions by courts of other states that go further than the cases above quoted in controlling, by the

writs of mandamus, prohibition and certiorari, the actions of inferior courts. Those decisions are mostly, if not entirely, from jurisdictions where constitutional provisions exist giving to the courts of last resort or general jurisdicion general supervisory powers and control over the actions of inferior tribunals. The Constitution of this state has no such provision. Those decisions are, therefore, of little value in this jurisdiction.

The authorities above quoted fully sustain the following propositions: Mandamus will lie to compel an inferior court to hear and determine a cause, if within its jurisdiction and when properly brought into the court. Mandamus will not lie to coerce judicial discretion of an inferior court, nor to predetermine the character of the judgment that the court shall enter. Mandamus will not issue to review the action of an inferior court where there is an adequate remedy at law, and the writ may not be used to usurp or take the place of an appeal or writ of error.

In the case wherein relator was defendant the county court was vested with jurisdiction of the parties and the subject-matter. Defendant in that action demanded a trial by jury. The state resisted the demand, relying upon a statute authorizing the court to proceed to trial in such cases without a jury. Defendant was contending that the statute was unconstitutional, and that the Constitution guaranteed to her a jury trial. There was presented to the county court a legal question for its decision. It was for that court to hear and decide. No other court had any jurisdiction to hear and decide the question in that case. If the county court erred in its decision, which we do not decide, there was an adequate remedy afforded the defendant, when judgment was entered, to proceed to review the court's action either by appeal or proceedings in error.

We are forced to the conclusion that the action of the county court in refusing to award the relator a jury trial cannot be reviewed in a mandamus proceeding. The district court, therefore, erred in granting the writ.

The conclusion reached renders it not only unnecessary but improper for us to pass upon the constitutionality of the statute, as requested by the parties. It is a general rule that courts will not pass upon the constitutionality of a statute unless it becomes necessary to a proper disposition of a case properly pending before the court. Since the proceeding instituted in the district court was not the proper remedy to review the action of the county court, the constitutionality of section 3287, Comp. St. 1922, was, therefore, not properly before that court for decision, nor does an appeal from that court bring such question here for decision.

The district court erred in granting the writ, and its judgment awarding the writ is reversed, the writ quashed, and the proceeding dismissed at relator's costs.

REVERSED AND DISMISSED.

EDMUND O. HASCHENBERGER, APPELLANT, V. CHARLES DENNIS ET AL., APPELLEES.

FILED APRIL 25, 1929. No. 26514.

1. **Appeal: WAIVER.** Waiver of the right of appeal must be intentional, and is not waived by one who, as a result of a mistake or ignorance, attempts to pursue the wrong remedy without any benefit to himself, provided that the party claiming the waiver has not been injured or been placed in a worse position as a result.
2. **Estoppel in Pais.** "In order to create an estoppel *in pais* the party pleading it must have been misled to his injury; that is, he must have suffered a loss of a substantial character or have been induced to alter his position for the worse in some material respect. As otherwise expressed, where no available right is parted with and no injury suffered there can be no estoppel *in pais*. And *a fortiori*, an act clearly beneficial to the person setting up the estoppel cannot be relied on." 21 C. J. 1135, sec. 136.
3. **Bills and Notes: HOLDER IN DUE COURSE.** While section 4643, Comp. St. 1922, provides that "an indorsement which purports to transfer to the indorsee a part only of the amount payable * * * does not operate as a negotiation of the instrument," neverthe-

less, where the entire beneficial interest in the note is transferred to one who is a holder in due course for value, without notice of any infirmity, he is such holder to the extent of the amount theretofore paid by him at the time it is called to his attention that some infirmity exists, as provided by section 4665, Comp. St. 1922.

4. ———: PURCHASER FOR VALUE. An indorsee who takes a note in good faith before maturity and without notice of any defense thereto from a holder, who is not the maker, in payment of a preexisting debt, and credits it thereon, is a purchaser for value in the regular course of business.

5. ———: PURCHASER IN GOOD FAITH. A purchaser in good faith must be one who purchased with due regard for the rights of the maker and the circumstances surrounding the transaction must not show bad faith or want of honesty on his part.

6. **Evidence** in this case examined, and *held* to show that Aspegren was an innocent purchaser for value without notice of the $13,500 note in question to the extent of $5,363.19.

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

Sterling F. Mutz, for appellant.

Perry & Van Pelt, Richard O. Johnson and *Clark Jeary, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and DAY, JJ., and BLACKLEDGE and REDICK, District Judges.

DAY, J.

This is an action brought by Haschenberger against Dennis to recover possession of a note and mortgage of $13,500 in which Aspegren and the Independent Lumber & Coal Company were joined as defendants. Haschenberger was the owner of the note and the mortgage, which he traded to Dennis for a number of Lincoln properties. He indorsed the note. Dennis was indebted to the lumber company in the sum of $5,363.19. Dennis transferred the note and mortgage to the lumber company in payment of this indebtedness, which in turn transferred to Aspegren, one of the parties in the partnership lumber company.

The trial court found that Haschenberger was entitled to a decree of rescission as to his contract with Dennis because Dennis had not complied with his agreement to complete the building of the houses involved by April 1, 1927, as provided by said contract of exchange. As to Dennis, therefore, Haschenberger was entitled to a return of his $13,500 note. But the court further found that Aspegren was a holder in due course, without notice, of said note to the extent of $5,363.19, and since Haschenberger would eventually be liable to Aspegren on his indorsement for that amount, the court entered a judgment in his favor against Dennis for an identical amount. Dennis has not appealed from this judgment. Haschenberger has appealed from the finding and judgment of the court against him in favor of Aspegren.

Prior to the submission of this case appellee Aspegren filed a motion to dismiss the appeal because the appellant had recognized the validity of the judgment and therefore waived his right to appeal therefrom. This motion was submitted with the case. As against Dennis the appellant prevailed in the lower court. He was found to be liable to Aspegren upon his indorsement of the note transferred from Dennis to the extent of $5,363.19. In order that Haschenberger might have the relief to which the court found him entitled as against Dennis, the decree provided that he should have a judgment against Dennis for the amount he was required to pay Aspegren. At that time Haschenberger had two methods of procedure open to him—he could prosecute his appeal or he could levy upon the property of Dennis. He undertook to save his right to appeal. He also caused an execution to issue upon his judgment against Dennis, when Dennis did not supersede. If he had succeeded in collecting from Dennis, he could have applied it upon the Aspegren judgment against him and then he would not need to avail himself of an appeal. Dennis claimed a homestead exemption as to the property levied upon by the sheriff. Haschenberger then petitioned the district court for the appointment of appraisers to determine whether the

homestead claim was valid. The execution was issued February 9, 1928, and on April 15, following, Haschenberger dismissed the proceedings without prejudice and abandoned his efforts to collect the judgment from Dennis. He had not been paid and had not received anything on his judgment.

The question presented by this phase of the case is whether Haschenberger has waived his right of appeal because he undertook to avail himself of a fruitless remedy. It is conceded that if appellant Haschenberger had received any benefit from the execution proceeding against Dennis or had accepted payments on the judgment, then a different situation would present itself.

"In order to create an estoppel *in pais* the party pleading it must have been misled to his injury; that is, he must have suffered a loss of a substantial character or have been induced to alter his position for the worse in some material respect. As otherwise expressed, where no available right is parted with and no injury suffered there can be no estoppel *in pais*. And *a fortiori*, an act clearly beneficial to the person setting up the estoppel cannot be relied on." 21 C. J. 1135, sec. 136.

There must be a clearly expressed intention of the appellant to abandon his appeal. The waiver of the right must be intentional. It cannot be waived by one who, as a result of a mistake or ignorance, attempts to pursue the wrong remedy. He may, when he finds that he has made the wrong selection, without prejudice dismiss his proceeding and pursue another remedy, which he has not abandoned intentionally nor waived. *Theisen v. Peterson*, 114 Neb. 150; *Lamb v. Rooney*, 72 Neb. 322; *La Borde v. Farmers State Bank*, 116 Neb. 33. In the instant case, when Haschenberger undertook to enforce payment to be made upon some real estate belonging to Dennis, the said Dennis moved into and claimed it as his homestead. When Haschenberger found that his effort to collect from Dennis was thwarted, he dismissed the proceedings and continued the prosecution of his appeal against Aspegren. The appellee

places great reliance upon the authority of the case of *Merchants Nat. Bank v. Quinton,* 9 Kan. App. 882. This case and the cases cited in the decision are not controlling in this case. This case might apply, if Dennis, against whom the execution was issued, were complaining; if the appellee had suffered any loss or had been misled to his injury. But where there was a mistake as to the remedy pursued and nothing was collected and the proceeding was dismissed without prejudice; where the appellee has not been misled to his injury and his position is not worse in any material respect; where the act, if it had been successful, would have been clearly beneficial to the appellee, this court will not dismiss an appeal upon his motion.

We now proceed to consider this case upon the merits as presented by the appeal. If Aspegren is the purchaser of the note in good faith, for value, before maturity, and without notice of any defense thereto, from Dennis, a holder and not the maker, the judgment of the trial court is correct and should be affirmed. Section 4643, Comp. St. 1922, provides: "An indorsement which purports to transfer to the indorsee a part only of the amount payable * * * does not operate as a negotiation of the instrument." The purpose of this statute is to prevent portions of the note from being assigned to and divided into parts so as to subject the party liable to several actions. In this case the whole note was indorsed to Aspegren. The court found that he was a holder in good faith and for value only to the extent of the debt of Dennis to the lumber company at the time of the indorsement. However, in this case, the whole note was transferred by indorsement to Aspegren. No one but Aspegren could have maintained an action upon it against the maker or the indorser. *Haas v. Bank of Commerce,* 41 Neb. 754. Only when the question arose as to whether Aspegren was a holder in due course, before maturity, for value, without notice of any infirmity, could he be considered an innocent holder of a part of the note. He was not in fact the holder of a portion of the note, but the holder of the entire note, but only to the extent of the

amount theretofore paid by him without notice of any infirmity. In other words, he had paid the amount Dennis owed him for the note and in addition thereto he was to pay Dennis the difference between that amount and the face value of the note when he collected it, or, in lieu thereof, to furnish Dennis material to complete the houses. This is a vastly different transaction from indorsing a portion of a note. Therefore, while a portion of a note cannot be negotiated by indorsement, where the whole note is transferred, the transferee will be deemed a holder, in due course, to the extent of the amount theretofore paid by him. Comp. St. 1922, sec. 4665; *Howells State Bank v. Hekrdle*, 113 Neb. 561. Haschenberger contends that, if Aspegren is a *bona fide* purchaser for value, it can only be so to the extent of the amount for which he has paid prior to notice. He cites *Nebraska Moline Plow Co. v. Blackburn*, 74 Neb. 246, in which our court held: "One is not a *bona fide* purchaser for value until he has actually paid the purchase price or become irrevocably bound for its payment." This note came to Aspegren, through the lumber company, in which he was a partner, and which company at the time owed him more than Dennis owed the company, so that, so far as the negotiability of the note is concerned, the situation of Aspegren and the lumber company is identical. They took the note in payment of a preexisting debt, and it is urged that they did not part with anything. "An indorsee of a negotiable instrument, who takes it before maturity in part payment of a preexisting debt, and credits it thereon, is a purchaser for value in the due course of business." *Smith v. Thompson*, 67 Neb. 527; *Second Nat. Bank v. Snoqualmie Trust Co.*, 83 Neb. 645. It is vigorously urged that, at the time this suit was brought, Aspegren and the lumber company could still have filed their mechanics' liens, and said suit was notice to them of an infirmity, and they could have filed their mechanics' liens against the property. It is clearly evident from the record that they accepted this note as a settlement of the account. Such a course would have been inconsistent to their posi-

tion in this case. If they accepted this note as payment for their account, they had no account against Dennis for which to file a lien.

Since we have determined that Aspegren is a purchaser for value of the note in question to the extent of the amount he had paid for said note, which was the amount of the pre-existing debt of Dennis to the lumber company, it is now necessary to consider whether he was a purchaser in good faith. We read in the record that Dennis was indebted to the lumber company for material used and that Aspegren and his partner, Skold, had been exerting themselves to collect the account. Dennis told them that he had traded certain houses, which he was building, for this note for $13,500; that he did not have any money and nothing of value except this note. He offered them this note in payment of his account. The account was for material used by Dennis for the purpose of building the houses involved herein, which he had traded to Haschenberger for this note. Skold of the lumber company took this note to more than one party in an effort to dispose of it. One of them was their banker who was also banker for Haschenberger. Aspegren and the lumber company inquired of the banker as to the genuineness of the signature and the liability of the indorser, Haschenberger. Let it be noted that there is no evidence of fraud in the transactions between Haschenberger and Dennis. The trial court based the rescission, and rightly so, upon the failure of Dennis to complete the houses upon April 1, 1927. On March 30, 1927, the note and mortgage were sold, assigned and delivered to the lumber company and by it to Aspegren. At that time the lumber company was indebted to Aspegren in a sum in excess of the consideration passing from them to Dennis, and this note and mortgage were accepted by Aspegren as part satisfaction of said indebtedness.

The appellant contends that Skold, a partner in the lumber company, had notice of the infirmity in this note, and that his knowledge was that of the lumber company and also of Aspegren. To determine whether Aspegren was a

purchaser in good faith, it is necessary to examine the history of the transaction immediately preceding the transfer of the note. When this note was first offered to the lumber company, Skold proceeded to investigate. He accompanied Dennis to at least one financial institution in an effort to sell the note and mortgage. Then, he did a very natural thing, he consulted his banker with reference to the note. He inquired from him of the ability of Haschenberger to pay and as to the genuineness of the signature of the indorser. He satisfied himself upon these two points and in addition he knew about the trade of the houses made by Dennis for it. This would account for the possession in Dennis of this note. Much is made of the fact that he learned from the banker that Haschenberger had intended to indorse the note without recourse. Skold took the note to the bank for the purpose of offering it for discount. Mr. Weil, the banker, talked to Haschenberger about the note, but the conversation had more to do with the banker's objection to his indorsement of paper. In his own language: "If I said anything it was in effect that if he was indorsing a large amount of paper in the trades it might effect his credit at the bank." There was other conversation between the banker and Haschenberger about the transaction, not entirely or clearly recalled by the banker. He did not talk to Skold or Haschenberger after the talk to Haschenberger, except to tell them they were not interested in them, but he did not remember that he told them the reason for his lack of interest. The testimony does not lead us to the conclusion that it was ever called to the attention of Skold or Aspegren that Haschenberger had been imposed on or over-reached by the indorsement.

This note was indorsed by a man of business experience, who was accustomed to the use of notes and who uses the language pertaining to notes, apparently with a knowledge of its significance. In addition, it seems to have been understood that the note was to have been hypothecated by Dennis to raise money to complete the building of the houses in this controversy. We are of the opinion that Skold and

Aspegren made more than the usual investigation in regard to this note. They did not ascertain facts and circumstances which should have excited suspicion in the mind of a prudent man. That alone would not have been sufficient to defeat a recovery. *Howells State Bank v. Hekrdle,* 113 Neb. 561.

The evidence in this case has been examined and stated in this opinion at some length, and does not show that Aspegren took this note under circumstances showing bad faith; that is necessary to impute bad faith. *Riverton State Bank v. Walker,* 113 Neb. 718. A purchaser in good faith must be one who purchased with due regard for the rights of the maker. Was the purchaser in this case required to talk the matter over with Haschenberger to determine whether he intended the legal effect of his act? Haschenberger, himself, had not decided that he wished to rescind with Dennis until some time later.

As suggested by the appellant, we have at all times been mindful that the central proposition may be stated thus: "Is Aspegren an innocent purchaser for value without notice of the $13,500 note, to the extent of $5,363.19, as held by the district court?" We have so concluded, and that the judgment of the trial court should be affirmed.

AFFIRMED.

Note—See Notes, 3 R. C. L. 1032; 6 R. C. L. Supp. 214.

STATE OF NEBRASKA V. FRANK C. PIELSTICKER ET AL.

FILED APRIL 25, 1929. No. 26885.

1. **Partnership.** A partnership is an entity, distinct and apart from the members composing it, and for the purpose for which it was created, it is a person having its own assets and liabilities. Any benefit or liability attaching to a member of a partnership results from the partnership relation.

2. **Banks and Banking:** LOANS. Where officers and directors of a state bank in good faith form a partnership, which partnership borrows money from the bank without first securing the approval and consent of the board of directors of the bank, such

borrowing does not constitute a borrowing by the officers and directors of said bank within the provisions of section 8012, Comp St. 1922, as amended by section 11, ch. 30, Laws 1925.

3. ———: ———. Where the officers of a state bank are members of a partnership, the borrowing by the partnership from the bank is not prohibited by section 8012, Comp. St. 1922, as amended by section 11, ch. 30, Laws 1925.

4. ———: ———: QUESTION FOR JURY. Whether or not in such a case the partners used the partnership as a subterfuge and a blind to borrow indirectly from the bank, in violation of the statute, is a question of fact for the jury to determine under proper instruction by the court.

5. **Evidence** examined, and *held* insufficient to sustain a finding by the jury that the defendants used the partnership as a subterfuge to borrow indirectly from the bank in violation of law.

ERROR to the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Exceptions overruled.*

George N. Gibbs, Halligan, Beatty & Halligan and *C. S. Beck,* for plaintiff in error.

Bernard McNeny, James T. Keefe and *Beeler, Crosby & Baskins, contra.*

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and LIGHTNER and REDICK, District Judges.

DAY, J.

The county attorney of Lincoln county has presented to this court a bill of exceptions, in this a criminal case, for a decision upon the points presented therein. Pielsticker was the president and a director and Scott a director of the Maxwell State Bank. A partnership consisting of defendants and James C. Moore, doing business under the name of North Platte Feeding Company, hereafter called the partnership, on September 27, 1925, borrowed $2,000 from the bank, and subsequently on April 30, 1926, borrowed an additional $3,000. No approval of the board of directors of said bank was secured for the making of said loans. This borrowing of money by the partnership was charged to be in violation of section 8012, Comp. St. 1922,

as amended by section 11, ch. 30, Laws 1925, which, as far as applicable, reads as follows:

"No officer other than a director, who is not an officer, and no employee of any corporation transacting a banking business, under this article, shall be permitted to borrow any of the funds of the bank, directly or indirectly, and no director of a bank, nor a corporation in which an officer of a bank is an officer, shall be permitted to borrow any of the funds of the bank without first having secured the approval of the board of directors at a meeting thereof, the record of which shall be made and kept as part of the records of said bank."

In November, 1928, the cause was tried, and upon the conclusion of the state's evidence the trial court sustained defendant's motion for an instructed verdict and instructed the jury to return a verdict finding defendants not guilty, which was done.

(1) The learned trial judge took the view that a partnership was a distinct legal entity. There has been considerable conflict of authority as to whether or not a partnership is a legal entity, separate and distinct from the individuals who compose it. The common law did not recognize a partnership as an entity. However, "the theory that a partnership is a legal entity distinct from and independent of the persons composing it has been repeatedly affirmed." 20 R. C. L. 804, sec. 6. Our own court held in *Clay, Robinson & Co. v. Douglas County,* 88 Neb. 363: "A partnership is an entity distinct and separate from that of its members, and is recognized in law as a person." It has been held by some courts that a partnership is not a legal being distinct from the members who compose it, but there is a general tendency today to complete the recognition of a partnership as a body of itself with its own means appointed to its own debts. 30 Cyc. 423; *Fitzgerald v. Grimmell,* 64 Ia. 261. This state has held the entity theory of partnerships in a number of cases. *Richards v. Leveille,* 44 Neb. 38; *Roop v. Herron,* 15 Neb. 73.

This court is committed to the doctrine that a partner-

ship is a legal entity by a long line of cases. This has been held particularly in cases involving the marshalling of assets. However, the partnership relation is such that the separate property of a partner cannot be subjected to the payment of partnership debts until the property of the firm is exhausted. *Leach v. Milburn Wagon Co.*, 14 Neb. 106. Firm property must also be subjected to the payment of the firm debts before it can be applied to the debts of the individual members of the firm. *Roop v. Herron*, 15 Neb. 73; *Steele v. Kearney Nat. Bank*, 47 Neb. 724. The partners are personally, jointly, and severally responsible for partnership liabilities. But the benefits and liabilities of a partner arise from and are the result of the partnership relation. Therefore in this state a partnership is an entity, distinct and apart from the members composing it, for the purpose for which the partnership exists. *First Nat. Bank v. Sloman*, 42 Neb. 350.

(2) Where officers and directors of a state bank form a partnership, which partnership borrows money from the bank, without first securing the approval and consent of the board of directors of the bank, does such borrowing constitute a borrowing by the officers and directors of said bank within the provisions of section 8012, Comp. St. 1922, as amended by section 11, ch. 30, Laws 1925? In brief, we must determine whether or not the borrowing by the partnership is the direct borrowing of the individual members. The cases cited by the county attorney, viz., *Nebraska Railway Co. v. Lett*, 8 Neb. 251, *Stone v. Neeley*, 42 Neb. 567, *Ruth v. Lowrey*, 10 Neb. 260, and *First Nat. Bank v. Sloman*, 42 Neb. 350, go no further than to hold that a member of a partnership is personally responsible for the partnership contracts, and that is the only principle of law decided in any of the above cases. Furthermore, in order to hold partner A liable for the acts of partner B, there must be an averment and proof of partnership. It is also necessary, in order to maintain an action for the partnership liability against an individual member, that the petition allege, and it must be proved, if

denied, that partnership property is insufficient to satisfy judgment. *Ruth v. Lowrey,* 10 Neb. 260.

The state relies upon *People v. Knapp,* 206 N. Y. 373, as authority for the proposition that the borrowing by the partnership, of which defendants were members, was the borrowing of the defendants. The New York law prohibited a certain indebtedness, and provided that no person nor firm should incur a liability to the bank in excess of a certain amount. By the borrowing of the partnership in that case, an indebtedness in excess of the amount provided by law was created, a thing clearly and positively prohibited by the statute. The court further based its decision upon the fact that in New York a partnership was not considered a legal entity, separate and distinct from the members thereof.

We find no authority which sustains the proposition that a borrowing of a partnership is the borrowing of the individual members thereof within the meaning of the criminal statute. One partner cannot be held for a crime committed by another partner unless he personally participates in the act. *Levin v. United States,* 5 Fed. (2d) 598.

(3) The trial judge held in this case that the information in fact charged an indirect borrowing by the defendants from the bank. The information in substance charged that the defendants borrowed from the bank through the partnership. Is the borrowing by the partnership an indirect borrowing prohibited by the statute?

"Indirectly" signifies the doing by an obscure circuitous method something which is prohibited from being done directly, and includes all methods of doing the thing prohibited except the direct one. *Farmers State Bank v. Mincher,* 267 S. W. (Tex. Civ. App.) 996. There is no question but if the defendants in this case had used this partnership as a subterfuge for the purpose of borrowing money from the bank in reality for themselves, such an act would constitute an indirect borrowing. The trial judge well said in his memorandum: "If the word 'indirectly' as used in the statute under consideration is confined to include only

those acts by which the officer of the bank uses some other person, firm or corporation as a subterfuge or a blind to make a loan in reality to himself, then it is given not only its ordinary and plain meaning, but also a definite and certain meaning which would be readily understood by any layman reading the statute."

The money borrowed from the bank by the partnership in this case was used by it in the usual course of business. The partnership was not used as a blind or subterfuge by the defendants to borrow money from the bank for their own personal use. The thing done is *mala prohibita* and until the act was passed it was perfectly proper and legal for the officers and directors of a bank to borrow from it. It was an act passed to correct abuses and to promote sound banking.

We are of the opinion that the acts of the defendants in this case are as dangerous to sound banking as those expressly prohibited. Probably this case demonstrates the wisdom of such a prohibition. However, no act is criminal unless the legislature has in express terms made it so and no person can be punished for an act or omission which is not made penal by the plain import of the written law. *State v. De Wolfe*, 67 Neb. 321. It will be noted that the statute prohibits the borrowing from a bank by a corporation in which an officer of the bank is an officer. But the act does not prohibit the borrowing by a partnership, the individual members of which are officers of the bank. In order to hold the defendants in this case liable criminally, it would be necessary for the court to add the following words to the statute, "and no partnership in which an officer of a bank is a member," after the prohibition relative to corporations in which an officer of the bank is an officer. If as a matter of public policy in the interest of sound banking these words should be added to the statute, it is the province of the legislature rather than the court to add them.

Another reason occurs to us which forces us to reject the interpretation desired by the county attorney. Section

8013, Comp. St. 1922, as amended by section 45, ch. 191, Laws 1923, which also deals with loans made by banks, uses the words, "corporation," "firm," or "individual," thereby indicating by the language of a section of the statute immediately following in the Compiled Statutes of 1922 the one with which we are concerned in this case, and upon a similar subject used the word firm when they intended to refer to partnership. It is argued that the court would not approve a sale made by a guardian to a partnership of which he was a member. That statute, as well as others cited, prohibits the guardian from directly or indirectly purchasing the property, or to be interested in the purchase. We do not hold that the partnership could not be used by the officers and directors of a bank to borrow money from their own bank. They could use the partnership for the purpose of a circuitous method of indirectly borrowing from the bank. Whether they did or not is a question of fact for the jury to determine from the evidence, considered under proper instructions by the court. The real test is to whom did the bank loan the money, the partnership, or to the individuals through the circuitous instrumentality of the partnership.

We have examined the evidence in this case and find that it was not sufficient to sustain a finding by the jury that the defendants borrowed the funds of the bank indirectly through the partnership. Therefore it was not error for the trial court to sustain the defendants' motion and direct the jury to return a verdict of acquittal. The exceptions should not be sustained.

EXCEPTIONS OVERRULED.

FIRST NATIONAL BANK OF FAIRBURY, APPELLEE, V. HERMAN E. FAIRCHILD, APPELLANT.

FILED APRIL 25, 1929. No. 26433.

1. **Money Paid:** VOLUNTARY PAYMENT. "Money paid to a third person in discharge of the debt of another cannot be recovered back when the payment was made voluntarily, without any

legal obligation on the payor, without any duress, compulsion, or deceit, without any previous request from the debtor, and without any subsequent promise of repayment." *Boyer v. Richardson*, 52 Neb. 156.

2. **Principal and Agent:** AGENCY: QUESTION FOR JURY. Where it is alleged that at the request of a person money was loaned and used for his benefit, and it is claimed that such request was made by an agent of such person and there is a conflict in the evidence upon the question of such agency, and as to the authority to make such request, and where there is no evidence of a ratification of such act of the alleged agent by his alleged principal, or any promise, express or implied, on the part of said principal to repay the same, it is error to direct a verdict in favor of the party seeking to recover in such an action.

3. **Pleading:** ACTION FOR MONEY PAID: GENERAL DENIAL. In an action where it is alleged in the petition that plaintiff at the request of defendant loaned money for his use and benefit and that defendant agreed to repay same, and the answer is a general denial, all of such matters alleged are put in issue, and the burden is upon the plaintiff to prove such a request by the defendant or by some one having authority from him to make it, or a subsequent ratification or promise to repay.

APPEAL from the district court for Jefferson county: ROBERT M. PROUDFIT and LOUIS LIGHTNER, JUDGES. *Reversed.*

E. A. Wunder and *Perry & Van Pelt*, for appellant.

Denney & Denney and *John C. Hartigan, contra.*

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

HASTINGS, District Judge.

This is an action in assumpsit brought by the First National Bank of Fairbury, Nebraska, against Herman E. Fairchild, Arthur R. Nichols and Henry L. Duval, as defendants, to recover for money alleged to have been loaned at their request and used for their benefit. The defendant Nichols was not served, and the defendant Duval died before service was had upon him. The case proceeded to trial against Fairchild, and at the close of the evidence,

on motion of plaintiff, a verdict was directed in favor of the bank for the full amount claimed. Judgment was entered on the verdict, and the defendant Fairchild appeals.

Of the grounds urged for a reversal the only one that need be considered is: Did the trial court commit error in directing a verdict?

The facts disclosed by the record pertinent to a determination of the question involved show that the defendant Nichols was the cashier of the Farmers & Merchants National Bank of Fairbury, Nebraska, the defendant Fairchild was vice-president, and the defendant Duval was one of its directors. On the 28th day of October, 1922, the defendant Fairchild, at the request of Nichols, signed a promissory note for $8,100 with Nichols and Duval, due in six months from date, bearing 8 per cent. interest, payable to the Burnes National Bank of St. Joseph, Missouri. The note, so far as Fairchild was concerned, was given for the accommodation of the Farmers & Merchants National Bank. The note was delivered to that bank and discounted by it with the Burnes National Bank, for which it received credit in its account in the Burnes National Bank for the face of the note less the discount. The Farmers & Merchants National Bank had, prior to the discounting of said note, been carrying an account with the Burnes National Bank, and continued to carry such account until its failure in March, 1924.

The makers of notes discounted by the Farmers & Merchants National Bank with the Burnes National Bank were not notified by that bank of the maturity of said notes, but notice thereof was given to the Farmers & Merchants National Bank, and under arrangements between said banks, if not paid when they became due, the notes were charged to the account of the Farmers & Merchants National Bank and returned to that bank.

About the time the note given by Nichols, Duval and Fairchild became due, Nichols made arrangements with the plaintiff bank to carry the indebtedness evidenced by that

note. Pursuant to said arrangement on the 28th day of April, 1923, Nichols delivered or caused to be delivered to plaintiff bank a note for $8,100 purporting to be signed by Fairchild and Duval and due in six months from date. On the same day the plaintiff bank issued a draft payable to the Farmers & Merchants National Bank which was indorsed by it and forwarded to the Burnes National Bank. The Farmers & Merchants National Bank was given credit in its account in the Burnes National Bank for the amount thereof. The note signed by Fairchild, Nichols and Duval to the Burnes National Bank was, on April 30, charged to the account of the Farmers & Merchants National Bank and returned to that bank and by Nichols turned over to the plaintiff bank. It appears that at the time the Farmers & Merchants National Bank was given the $8,100 draft, and at the time the Burnes National Bank received it, there were sufficient funds in its account without the draft to have paid the note given by Nichols, Duval and Fairchild, and if the draft had not been sent the note would have been charged to that account.

The note to plaintiff bank purporting to have been signed by Fairchild and Duval and delivered at the time the $8,100 draft was issued by plaintiff bank was renewed on July 29, October 27, 1923, and January 29, 1924, and the interest paid, together with $100 of the principal; such payment of interest and payment on the principal being made by either Nichols or the Farmers & Merchants National Bank. The name of Fairchild was forged on all of said notes and he denies having had any knowledge of their execution and delivery or the payments made thereon. In March, 1924, the Farmers & Merchants National Bank failed, and in April following, about the time the last note became due, the president of plaintiff bank, in a conversation had with Fairchild, learned that Fairchild claimed he had not signed the note in 1923 or any of the renewals thereof, and denied liability thereon. This is the first notice that Fairchild appears to have had that plaintiff bank claimed to have had any note signed by him.

There is a conflict in the evidence as to the authority of Nichols to make the arrangements with the plaintiff for the carrying of the indebtedness owing to the Burnes National Bank by it. Nichols testified that, about the time the note given by Nichols, Duval and Fairchild to the Burnes National Bank became due, he had a talk with Fairchild and told him:

"We have been notified by the Burnes National Bank that our $8,100 note was maturing, and that the First National Bank of Fairbury had been taking some of the outstanding paper of borrowers of the bank and I thought they would take this $8,100 note for us. He said that will be fine if they will; they might as well have the paper as the Burnes National; glad to let them have it."

Fairchild denies that he ever had any such conversation with Nichols or that he ever knew that any arrangement had been made with the plaintiff bank to carry said indebtedness, and denies that Nichols had any authority whatsoever to make any such arrangement.

Under this state of facts it is the contention of counsel for the defendant that the defendant Fairchild, having denied that he ever authorized or consented to Nichols making any arrangements with the plaintiff bank to take up and carry their indebtedness to the Burnes National Bank, the question of such authority or consent should have been submitted to the jury.

It is manifest, if the authority or consent of Fairchild was necessary to authorize Nichols to make the arrangement with plaintiff bank to pay and carry the indebtedness of Nichols, Duval and Fairchild owing the Burnes National Bank, that the trial court erred in directing a verdict for plaintiff.

The fact that they signed the note as joint and several makers to the Burnes National Bank established no mutual agency between them whereby any one of them, without the authority or consent of the others, might enter into an agreement with plaintiff bank to pay and carry such indebtedness and thereby render the others liable. *Mayberry*

v. Willoughby, 5 Neb. 368; *Dwire v. Gentry,* 95 Neb. 150; *Hall v. Rogers,* 113 Neb. 290.

It is the contention of counsel for plaintiff that, even though such arrangements were made by Nichols with plaintiff bank without consent or authority from Fairchild, yet, as he received the benefit of it by the cancelation of his valid obligation, the law created a quasi contract and implied a promise to pay. While an action in assumpsit will lie upon the breach of an express contract or one implied in fact, there is also a large class of obligations to enforce which the action of general assumpsit is a well-established remedy. This class of obligations is known as quasi contracts, and the principle upon which they rest is equitable in its nature and derived from the civil law.

"In quasi contracts the obligation arises not from consent, as in the case of contracts, but from the law or natural equity. * * * The liability exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. In this class of cases the notion of a contract is purely fictitious. There are none of the elements of a contract that are necessarily present. The intention of the parties in such case is entirely disregarded, while in cases of express and implied contracts in fact the intention is of the essence of the transaction. In the case of contracts the parties fix their terms and set the bounds upon their liability. As has been well said, in the case of contracts the agreement defines the duty, while in the latter class of cases the duty defines the contract." 2 R. C. L. 749, sec. 8.

See, also, *Board of Highway Commissioners v. Bloomington,* 253 Ill. 164, Ann. Cas. 1913A, 471; *Schaeffer v. Miller,* 41 Mont. 417, 137 Am. St. Rep. 746; *Lawson, Ex'r, v. Lawson,* 16 Grat. (Va.) 230, 80 Am. Dec. 702; *Estate of Devries v. Hawkins,* 70 Neb. 656.

Under the facts in this case, we are unable to agree with the contention of counsel for plaintiff that plaintiff is entitled to recover upon a quasi contract. The plaintiff bank was not compelled to pay the note upon which the defend-

ant Fairchild was joint maker. The money was not paid by plaintiff bank under such circumstances that any option was allowed such defendant to adopt or decline the benefit. If he had been allowed such option and adopted the benefit he would be liable to repay the money expended, but if he declined the benefit he would not be liable. The money was expended under such circumstances that he could not help accepting the benefit; in fact, he was bound to accept it. He had no opportunity of exercising any option as to whether he would accept or reject the benefit and as to him the payment by plaintiff bank must be regarded as entirely voluntary.

If we assume, as we must for the determination of the question involved, that Fairchild did not consent or authorize the advancement of the money and the payment by plaintiff bank to the Burnes National Bank, we have an unsolicited payment of the debt for which he was jointly liable with his comakers, and it is not enough to create a liability against him that he had the benefit thereof by reason of it being expended in the payment of the debt. Under such facts the payment by plaintiff bank of the joint debt of Nichols, Duval and Fairchild was, so far as the defendant Fairchild was concerned, a voluntary payment, and the law does not permit it to thus make itself a creditor of Fairchild. If any other rule prevailed it would put every person "who owed a debt at the mercy of an enemy, who might choose to make himself his creditor without his consent or authority, for the purpose of harassing and distressing him; and to deprive him of defenses which he might have had to a suit by his original creditor, of which he would not be able to avail himself against such newly created liability." 2 R. C. L. 776, sec. 33. Also, *Turner v. Egerton,* 1 Gill & J. (Md.) 430, 19 Am. Dec. 235; *Kelley v. Lindsey,* 7 Gray (Mass.) 287; *Spooner v. Thompson,* 48 Vt. 259.

By the payment of the joint note to the Burnes National Bank the defendant Fairchild was deprived of a valuable right, in that the undisputed evidence shows that he

signed the note to the Burnes National Bank for the accommodation of the Farmers & Merchants National Bank; that there was sufficient money in the account of the Farmers & Merchants National Bank in the Burnes National Bank at the time the note became due to have paid it, leaving out of consideration the $8,100 draft of the plaintiff bank that went into that account. The evidence is also undisputed that it would have been paid out of that account if the draft for $8,100 had not been received. That being true, the defendant Fairchild's obligation would have been paid and canceled by the bank for whose accomodation he signed the note and he relieved from any further liability. Under such circumstances he received no such benefit by the payment of the note by money advanced by plaintiff bank as would imply a promise to repay.

In the case of *Boyer v. Richardson,* 52 Neb. 156, this court held: "Money paid to a third person in discharge of the debt of another cannot be recovered back when the payment was made voluntarily, without any legal obligation on the payor, without any duress, compulsion, or deceit, without any previous request from the debtor, and without any subsequent promise of repayment."

In the opinion in that case at page 161 it is said by Judge Irvine: "It is elementary law that in order to recover money paid to the use of another, where the party paying was under no obligation so to do, the payment must have been moved by a previous request from the party to whose use the money was paid. In some cases a previous request will be implied, as where the money was obtained by duress either of person or property, or by deceit, or where there has been a subsequent express promise to repay the money, as was the case in *Stuht v. Sweesy,* 48 Neb. 767. But where the payment is entirely voluntary—where there is no subsequent promise to repay—a previous request must be proved."

Under the rule announced in that case, there being no evidence of a ratification by defendant Fairchild of Nichols' acts or of any promise, express or implied, on his

part to repay, it was necessary for the plaintiff bank to prove a request by either Fairchild personally or some one authorized by him, for the advancement of the money and the payment of the note to the Burnes National Bank.

In this connection it is urged by counsel for plaintiff that under the issues presented by the pleadings there were no controverted facts to submit to the jury. Plaintiff in its petition alleged generally: "Defendants and each of them are indebted to the plaintiff for that on the 28th day of April, 1923, the plaintiff loaned to the defendants at their request and for their use and benefit the sum of $8,100 which defendants agreed to repay, together with interest at 8 per cent. per annum."

The answer was a general denial. It is contended that such denial does not put in issue the authority of Nichols to obtain the money to pay the obligation of all three defendants, nor that the money was used to pay the valid obligation of all three. In support of his contention counsel cites *Smith v. Wigton,* 35 Neb. 460, which was an action to recover for money had and received. It was held in that case that a general denial only put in issue the receipt of the money. This is not an action for money had and received, but rather an action for money advanced and paid for the use and benefit of defendants at their request and with an agreement to repay. All of these matters were put in issue by the general denial. The burden was upon the plaintiff to prove a request by the defendant Fairchild, or some one having authority from him to make it, for the money advanced, or a subsequent ratification or promise to repay. This view is supported by authority. *Ball v. Beaumont,* 66 Neb. 56; 5 C. J. 1405, sec. 75; 2 Bancroft, Code Pleading, 1373, sec. 921; *Shearer v. Shearer,* 84 Colo. 234.

It follows from what has been said that the case should have been submitted to the jury and error was committed by the trial court in directing a verdict for the plaintiff.

We do not deem it necessary to discuss the other alleged errors assigned by the defendant. We have examined the same and find no error prejudicial to the defendant.

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

REVERSED.

EBERLY, J., dissents.

ETTA D. MCGUIRE, APPELLANT, V. RUDOLPH RIX ET AL., APPELLEES.

FILED MAY 3, 1929. NO. 26473.

1. **Physicians and Surgeons:** SKILL REQUIRED. In an action for malpractice in reducing a comminuted fracture of an astragalus, defendants are not held to a higher degree of skill than that ordinarily possessed and exercised by physicians and surgeons in the community.
2. ———: TREATMENT: QUESTION OF JUDGMENT. Where physicians and surgeons made unsuccessful efforts by manipulation and extension to replace a dislocated fragment of an astragalus, it was a question of professional judgment whether to proceed further by that method or resort to an operation, under circumstances outlined in the opinion.
3. ———: MALPRACTICE: PRESUMPTION. In an action against licensed, skilful physicians and surgeons for malpractice, the presumption is that they performed their professional duties with the requisite degree of skill and care, in absence of evidence to the contrary.
4. ———: ———: INSUFFICIENCY OF EVIDENCE. In an action for malpractice in reducing a comminuted fracture of an astragalus, plaintiff does not raise a question for the jury by proving that defendants immediately resorted to an operation after unsuccessful efforts by manipulation and extension, where they pursued a course sanctioned by the weight of evidence and authority as shown by testimony of experts and standard works on surgery, though it was the opinion of another expert that there should have been a delay of several days before the making of an incision.
5. ———: CONSENT TO OPERATION. Consent of a patient to an operation by surgeons may be implied from circumstances.
6. ———: MALPRACTICE: BURDEN OF PROOF. To make a case for damages in an action for malpractice, the burden is on plaintiff to prove actionable negligence that was the proximate cause of an injury pleaded.

7. ———: ———: EXPERT WITNESSES. In an action for malpractice, a trial court may permit an expert witness to give reasons for an opinion expressed by him.

8. ———: ———: NEGLIGENCE. In an action for malpractice, physicians and surgeons are not liable for negligence because they pursue one rather than the other of two generally recognized methods of practice or treatment.

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

John A. McKenzie and *Seymour Smith,* for appellant.

McGilton & Smith, Kennedy, Holland, DeLacy & McLaughlin and *Gaines, Van Orsdel & Gaines, contra.*

Heard before ROSE, GOOD, EBERLY and DAY, JJ., and REDICK and SHEPHERD, District Judges.

ROSE, J.

This is an action to recover $100,000 in damages resulting from alleged malpractice by John E. Simpson and Rudolph Rix, physicians and surgeons, defendants, in reducing and treating a comminuted fracture of the astragalus of plaintiff's right ankle and for alleged negligence of the Lord Lister Hospital, defendant, in caring for plaintiff while a patient therein. In the answers of defendants, the actionable negligence pleaded by plaintiff in her petition was denied. At the close of the evidence after a protracted and spirited trial, the district court directed a verdict in favor of defendants. From a judgment of dismissal, plaintiff appealed.

It is clear that actionable negligence of the Lord Lister Hospital, defendant, was not shown and for that reason the dismissal as to it is affirmed. The word "defendants," when hereinafter used to designate parties to the action, will refer to Simpson and Rix.

In the brief for plaintiff and at the bar, her counsel made a formidable argument on the assignment that the district court erred in directing a verdict in favor of defendants for the asserted reason that the evidence was sufficient to sus-

tain a finding against them on the controverted issue that they negligently failed to make proper efforts to reduce the fracture by external manipulation and extension before resorting to a surgical operation which they performed. This and other questions depending for solution upon the evidence required a careful reading and a critical examination of the entire record, consisting as it does of more than 800 pages.

The conditions confronting defendants and what plaintiff might reasonably expect of them under the circumstances in view of her injuries are material inquiries. Between 8 and 9 o'clock in the forenoon, March 27, 1924, plaintiff was thrown from a wagon drawn by a runaway team of horses. In her fall the astragalus or ankle bone of her right foot was split in two and a large portion, perhaps half of it, was forced out of the ankle joint or socket. The dislocated fragment lodged under and distended the outer skin of the foot. She was carried into her house. Simpson was called immediately, responded promptly, examined the injured ankle, administered an anæsthetic and by external manipulation and extension made a futile attempt to force the dislocated fragment of the astragalus back into place. Being unable to reduce the fracture in that manner, he put plaintiff in his automobile and drove rapidly to the Lord Lister Hospital, Omaha, where she received hospital care. To assist him Simpson called Rix, an expert in surgery. Shortly after plaintiff's arrival a hospital expert made X-ray pictures of the injured ankle and afterward explained them and the nature of the injuries to both defendants. The pictures disclosed the dislocated fragment and also several fractures of that part of the crushed astragalus remaining in the socket. Simpson was a learned and skilful physician having a long experience in his profession. Rix was likewise qualified as an expert in surgery. They were confronted with a rare, complicated, serious injury. The exercise of the highest possible degree of professional skill and care in a case like plaintiff's might nevertheless result in a stiff ankle or in the loss of the entire foot. Infection

or blood poisoning might result fatally in spite of professional services performed with the requisite degree of skill and care regardless of the course pursued. In view of the known injuries after an examination of the X-ray pictures, the professional learning of defendants warned them in advance that the fascia or capsule of the ankle joint already contained a slit through which a dislocated fragment with a rough edge had been violently forced as a result of plaintiff's fall—injuries involving other bones of the foot and also of the leg, including the tibia or shinbone which supports the weight of the body. The lacerations caused by the fracture and dislocation gave their own warning of injury to muscles, ligaments and tendons essential to the articulation of the ankle joint. Thus partially outlined, the situation confronting defendants and appreciated by them is conclusively shown by uncontradicted evidence.

After Simpson gave Rix a history of the case and explained the unsuccessful effort in the first instance to replace the dislocated fragment of the astragalus and after both defendants had studied the X-ray pictures with the X-ray expert, the ankle was examined about 5:30 in the afternoon on the day of the accident, while plaintiff was on the operating table under the influence of an anæsthetic. Witnesses called by plaintiff herself testified that Simpson in the presence of Rix worked on the ankle in the operating room of the hospital before any incision had been made. Defendants testified in effect that without success they exhausted the remedy by manipulation and extension and that further efforts by that method would have improperly exposed the injured muscles, ligaments, tendons and other tissues to the danger of additional lacerations and of infection. Defendants testified also that they used their best judgment in proceeding with the surgical operation after they had made requisite efforts without success to reduce the fracture by manipulation and extension. In these respects bad faith or negligence is not shown. It is nevertheless argued by plaintiff that Rix, who had been called as an expert in surgery, did not make any serious effort to

reduce the fracture by manipulation and extension before using the knife, that Simpson made only a feeble effort in that direction, and that therefore the issue was one of fact for the jury. This view of plaintiff is based on testimony of lay witnesses that they were present and did not see Rix manipulate the injured ankle or assist Simpson in doing so and on opinions of expert witnesses to the effect that surgeons should exert themselves to the utmost to reduce the fracture without an operation; that an incision would increase the danger of infection since the outer skin was not broken and that the operation was premature. The argument is inconclusive because the evidence will not sustain a finding that defendants were guilty of actionable negligence in failing to make further efforts by manipulation and extension. Simpson tried that remedy in vain before he took plaintiff to the hospital and renewed his efforts in the presence of Rix in view of what the X-ray pictures disclosed. Evidence of these facts is uncontradicted. How far such efforts should have been pursued under all the circumstances was a question of professional judgment which defendants exercised. In this respect there is nothing to show that they were prompted by unworthy motives or that they acted in bad faith or that they did not possess and exercise the degree of skill and care ordinarily possessed and exercised by physicians and surgeons in Omaha. A capable physician and surgeon in active practice would naturally hesitate to treat a case like plaintiff's, if he could be held liable in damages for abandoning treatment by external manipulation, after having earnestly tried it until his judgment told him that further efforts of that kind would be hazardous and unavailing, before resorting to a surgical operation that is the only alternative. If such were the law, a person in dire need of professional skill in a distressing emergency might be left without necessary attention. The presumption is that a licensed, skilful physician in active practice performs his duties with the requisite degree of skill and care, in absence of evidence to the contrary.

An expert witness called by plaintiff expressed the opin-

ion that the operation in any event should have been postponed several days and that consequently the surgeon's knife was prematurely used. The overwhelming weight of evidence as shown by standard works on surgery, and by the expert witnesses who testified at the trial below, with one exception, was in favor of the immediate reduction of the fracture by an operation after proper efforts by external manipulation failed. Conceding that delay was sanctioned by an expert and by a standard text-writer, defendants, in the exercise of a wise judgment, were not chargable with actionable negligence for pursuing the better course. The district court did not err in declining to submit the case to the jury on the issue that defendants negligently failed to make proper efforts to reduce the fracture by external manipulation and extension before resorting to a surgical operation.

On behalf of plaintiff there was also a serious argument on the proposition that the trial court erred in declining to submit to the jury the controverted issue that plaintiff did not consent to a surgical operation. In this connection it was insisted that there was testimony by plaintiff tending to show that Rix was introduced to her at the hospital before the anæsthetic was administered; that he did not tell her he would perform an operation; that he told her he would do no more than reduce the fracture and put the foot in a cast; that she could probably go home to-morrow; that Simpson had said he would like to have an X-ray and wanted to reduce the fracture under an anæsthetic; that Simpson told plaintiff she would probably be home to-morrow; that cutting would not be necessary; that Rix, because of his skill in surgery, was called by Simpson. Reference is also made to other testimony of a similar import. Each defendant, however, denied the giving of assurance that an operation would not be performed; but, accepting as true her version of what defendants said to her, it does not follow that she did not consent to a necessary operation. She admitted defendants were called to reduce the fracture. At the time of the conversations defendants had not together

attempted to reduce the fracture by manipulation. If they made the remarks attributed to them, they may then have considered an operation unnecessary, though they had discreetly prepared for one. Their responsibility for an operation accrued when manipulation failed. The law did not require defendants to restore plaintiff to consciousness for the purpose of procuring consent to surgery—the only alternative in the line of professional duty for which they were called. The use of anæsthesia in modern surgery has modified to some extent the ancient rule of the common law requiring consent. Of course the general rule requires consent of the patient, but consent may be implied from circumstances and an operation may be demanded by an emergency without consent. *Delahunt v. Finton,* 244 Mich. 226; *Mohr v. Williams,* 95 Minn. 261, 1 L. R. A. n. s. 439, and cases cited in note; *Luka v. Lowrie,* 171 Mich. 122, 41 L. R. A. n. s. 290, and cases cited in note; *King v. Carney,* 85 Okla. 62, 26 A. L. R. 1032, and cases cited in note. Plaintiff knew that she had a serious injury demanding immediate attention; that her ankle bone was broken; that her foot had been forced out of its natural position; that Simpson alone had been unable to reduce the fracture while she was under the influence of an anæsthetic at her home. She willingly accompanied him to the hospital for the purpose of having the fracture reduced. She knew that X-ray pictures had been taken and that Rix, a specialist in surgery, had been called into the case. Appreciating serious consequences, she told Rix not to cut her foot off. With her husband and two or three neighbors present in the hospital, she consented to an anæsthetic for the purpose of having the fracture reduced. If necessary for that purpose, the circumstances implied consent. The evidence on this issue, when properly considered, will not support any other conclusion and the trial court did not err in so holding.

It was also contended that the case should have been submitted to the jury for the asserted reasons that defendants in performing the operation and in treating the injured ankle were negligent in failing to follow the usual and or-

dinary method of draining the injured ankle and wound; in failing to remove devitalized tissue; in failing to treat promptly necrosis of the ankle bones; in permitting ankylosis of the ankle joint with the foot in a deformed position. On these issues the burden of proof was on plaintiff to prove that defendants did not possess and exercise the degree of skill and care ordinarily possessed and exercised by physicians and surgeons in Omaha and vicinity. To make a case for damages, plaintiff was required to prove actionable negligence that was the proximate cause of an injury of which she complained. A cure or the restoration of the injured ankle to its normal condition was not warranted or implied by the relation of physician and patient. The drainage of which complaint is made consisted of drains extending through the ankle joint after the dislocated fragment of the crushed astragalus had been replaced by means of an incision. The weight of expert testimony shows conclusively that this was a usual and ordinary method practiced in Omaha by physicians and surgeons of the school to which defendants belong. In addition, expert witnesses, with permission of the court properly granted, gave cogent reasons for the system adopted and practiced in view of the lacerations caused by the dislocation. One of the experts called by plaintiff, however, condemned this system of drainage and approved another. Conceding that he testified to a proper method not followed by defendants, the difference in expert opinion did not raise a question of fact for the jury, for the reason that one of two recognized methods may be used without negligence. *Holton v. Burton,* 197 Wis. 405. Actionable negligence in other instances charged is not shown. Plaintiff's injuries and suffering make a strong appeal to sympathy, but the evidence fails to show that they are attributable to actionable negligence of defendants.

AFFIRMED.

Note—As to degree of skill and care required of physician and surgeon, see 37 L. R. A. 835—As to liability for performing surgical operation without consent, see 1 L. R. A.

n. s. 439; 7 L. R. A. n. s. 609; 50 L. R. A. n. s. 880; 21 R. C. L. 381; 3 R. C. L. Supp. 1152; 4 R. C. L. Supp. 1413; 7 R. C. L. Supp. 709.

NORTHWESTERN STATE BANK OF HAY SPRINGS, APPELLANT, V. DEWITT C. HANKS ET AL., APPELLEES.

FILED MAY 3, 1929. No. 26559.

1. **Appeal.** On appeal of a case to this court, we are mindful of the fact that the district court saw and heard the witnesses and therefore has had better opportunity to observe their demeanor and their means of discovering the facts to which they testify, and their apparent probity, or the lack of it, than has a reviewing court.
2. **Forcible Entry and Detainer.** Where the particular interests of contesting parties in certain described real estate is the question presented by the pleadings and the proofs, and not the mere right of possession, the action of forcible entry and detainer will not lie.
3. **Courts: JURISDICTION: TITLE TO REALTY.** Where the title to land, which is sought to be recovered in a forcible detention case, is drawn in question and evidence thereon is submitted in the county court, the district court, on appeal therefrom, is without jurisdiction to hear and to determine the controversy and, in such case, the action stands for dismissal.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

E. D. Crites and *F. A. Crites*, for appellant.

A. C. Plantz, contra.

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

DEAN, J.

This is an action in forcible detention commenced in the county court for Dawes county by the Northwestern State Bank of Hay Springs, plaintiff, against DeWitt C. Hanks and Lydia J. Hanks, his wife, defendants. The plaintiff bank prevailed and, on appeal by defendants to the district

court, the action was dismissed on the ground, as stated, that the county court was without jurisdiction of the action from the fact that the title to real estate was drawn in question, and that, on appeal, on the same grounds, the district court was also without jurisdiction. The bank appealed.

The following material evidence appears in the record: The defendants were the owners and in possession of 600 acres of land in Dawes county, and the bank held an unsecured claim against the defendants for $1,000, or about that sum. In consideration of a proposed cancelation of the above indebtedness, and the assumption by the bank of certain other debts owing to other parties by defendants, Hanks and his wife executed and delivered to the bank a deed of conveyance of the above mentioned land. Defendants, in turn, received from the bank a lease of the above named premises for one year with an option to repurchase the land within a year at a price then to be agreed upon by the parties.

In their answer, the defendants allege that "the only interest of the plaintiff in said premises or any part thereof is as a mortgagee by virtue of a certain warranty deed and defeasance in writing executed by these defendants to said plaintiff on or about February 23, 1926, * * * as security for the debt of these defendants due said plaintiff and to further secure advancements to be made by said plaintiff in paying certain specified debts of the defendants due to other persons."

Defendant Hanks testified that at the time the lease and deed were drawn he understood the deed was the same as a mortgage on the property. He testified in respect of certain alleged representations made by J. H. Denman, the bank's cashier, when the deal was consummated: "Well, he (Denman) said it was just the same as a mortgage, only I had a right to sell the place, and he wanted me to get something out of the place; he said it wasn't no deed, but was just the same as a mortgage, only I had the exclusive right to sell the place;" that he read the deed and lease over and that the lease was made out in duplicate; that the deed

was to secure "what they paid until I sold the land;" that the bank "never said a word about buying the land," and he considered the land was always his, and that at all times material to this inquiry the deed was represented to him as a mortgage. To substantially the same effect is the evidence of Mrs. Hanks.

Cashier Denman testified: "Q. Now, Mr. Denman, did you hear the testimony of the witnesses who appeared on the witness-stand in this case? A. Most of it. Some of it I didn't understand exactly. Q. Did you hear Mr. and Mrs. Hanks testify, in substance, that you told them that this deed and lease were the same as a mortgage, or anything of that kind? A. Yes; I heard that testimony. Q. State what the facts are in regard to that. A. Well, there was absolutely no truth in that statement. There was nothing said about any mortgage, or any comeback. It was to be an absolute deed."

Where the particular interests of contesting parties in certain described real estate is the question presented by the pleadings and the proofs, and not the mere right of possession, the action of forcible entry and detainer will not lie. *Grohousky v. Long*, 20 Neb. 362. In an opinion in a like case it is said: "If it should appear from the evidence that the question involved was one of title and not for possession of the premises alone, the case should be dismissed." *Lipp v. Hunt*, 25 Neb. 91, citing *Pettit v. Black*, 13 Neb. 142. And in *Stone v. Blanchard*, 87 Neb. 1, we held that, while the title to land, which is sought to be recovered in a forcible detention case, is drawn in question in the county court, the district court, on appeal therefrom, is without jurisdiction to hear and to determine the controversy and, in such case, the action stands for dismissal. In *Sanders v. Ayres*, 63 Neb. 271, in an opinion by Sullivan, J., we held to the following proposition: "Whether a deed absolute on its face is a sale or a mortgage depends upon the intention of the parties, and such intention is to be gathered from their declarations and conduct, as well as from the papers which they subscribed."

On appeal of a case to this court, we are mindful of the fact that the district court saw and heard the witnesses and therefore has had better opportunity to observe their demeanor and their means of discovering the facts to which they testify, and their apparent probity, or the lack of it, than has a reviewing court. We do not, however, express an opinion in respect of the merits of the controversy as to title.

Upon an examination of the entire record, we conclude that the judgment of the district court is right, and that it must be and hereby is

AFFIRMED.

Note—See Forcible Entry and Detainer, 26 C. J. 812 n. 52; 11 R. C. L. 1157.

ERNEST C. BAADE, APPELLANT, V. OMAHA FLOUR MILLS COMPANY ET AL., APPELLEES.

FILED MAY 3, 1929. No. 26907.

1. **Master and Servant:** EMPLOYERS' LIABILITY ACT: PAYMENT OF COMPENSATION. Where an employer furnishes medical, surgical, and hospital services to an employee, as in the present case, the payments therefor constitute payment of compensation within the meaning of the employers' liability act.
2. ——: ——: CONSTRUCTION. The employers' liability act is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it. *Parson v. Murphy*, 101 Neb. 542, L. R. A. 1918F, 479.

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

Waldron, Silverman & Newkirk, for appellant.

E. L. Murphy and *Kennedy, Holland, DeLacy & McLaughlin, contra.*

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

DEAN, J.

This action was appealed by Ernest C. Baade, plaintiff, from an order of the district court for Douglas county reversing an award of $15 a week, which the compensation commissioner, on September 29, 1928, ordered paid to plaintiff by the defendants, Omaha Flour Mills Company and its insurer, the London Guarantee & Accident Company, from August 8, 1928, until disability shall have ended, or until the further order of the compensation commissioner. The commissioner found, upon submission of the facts, that plaintiff was injured February 22, 1925, and that he had been paid compensation by the defendants from the date of the injury until May 3, 1926, at which time plaintiff returned to work. As a culmination of the above mentioned disability which arose from the accident, plaintiff was temporarily totally disabled from August 25, 1928, to and at the time of the trial. Through inadvertence, the award of the compensation commissioner made the period of disability date from August 8, 1928, instead of August 25, 1928, and plaintiff thereafter filed a remittitur for that period.

Plaintiff alleged that he "suffered a compound fracture of the fibula and tibia bones of the left leg, between the knee and the ankle, the broken surfaces of said bones being crushed and splintered," and that continuously from thence until May 3, 1926, he was totally disabled. He also alleged that, while under the care of his doctors, and upon their advice and that of the defendants, and though still suffering pain from his injuries, he returned to his work as an employee of the defendant. Afterward, however, when the cast and splints and supporting brace which he had worn, under the direction of his doctors, were removed it was impossible for him to perform any manual labor whatsoever.

The record shows that plaintiff, pursuant to the advice of his physicians, as noted above, were a heavy steel supporting brace, and by this means he was enabled to perform some work. And it also appears that plaintiff, under the direction of his employer's physician, did not release or

waive his right to compensation. From plaintiff's evidence the fact appears that, after he went back to work for the defendant company, he was under the doctor's professional care, and that he worked for the company continuously except for such time as he was allowed by his employer to be away to consult his physician during the day, and that nothing was said to him by any one representing the company about discontinuing medical treatments. He testified that the company, or its insurer, paid all the bills for his medical attention, and that only one statement was sent to him and this he turned over to the manager of the defendant company and heard nothing more about it. Subsequently plaintiff was informed by the doctor that his foot had to be straightened and it would be necessary to break a bone and reset it. Plaintiff filed his claim for compensation August 24, 1928, just before the operation, to which reference is hereinbefore made. At the time of the trial his leg was in a cast and he got about by the aid of crutches.

There is no controversy over defendant's liability for payment of compensation to plaintiff under the act in question prior to May 3, 1926. The main question here is whether plaintiff's claim for compensation from August 25, 1928, is barred under the statute of limitations applicable to actions brought under the workmen's compensation act. Defendants contend that he is barred from recovering compensation because more than a year had elapsed from the date of last payment of compensation before the filing by plaintiff for additional payments.

Section 3061, Comp. St. 1922, reads: "In case of personal injury, all claim for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 3680 (3062) hereof. * * * Where, however, payments of compensation have been made in any case, said limitation shall not take effect until the expiration of one year from the time of the making of the last payment."

Without going more into detail, we think the defendants by their conduct recognized liability, and this, in part, from the fact that their physician had not released plaintiff, and also because the expenses for medical and hospital services were paid by the defendant's insurance company almost up to the time that plaintiff filed his claim for compensation. The payments made by plaintiff's employers to his physician for hospital expenses and the like clearly constitute payments of compensation within the meaning of section 3061, Comp. St. 1922, above cited, which provides, *inter alia,* that "said limitation shall not take effect until the expiration of one year from the time of the making of the last payment." To substantially the same effect is the workmen's compensation act of Illinois. *Goodman Mfg. Co. v. Industrial Commission,* 316 Ill. 394; *Yellow Cab Co. v. Industrial Commission,* 315 Ill. 235, and the decisions thereunder.

This jurisdiction has repeatedly held that the workmen's compensation act "is one of general interest, not only to the workmen and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it." *Parson v. Murphy,* 101 Neb. 542; *McGuire v. Phelan-Shirley Co.,* 111 Neb. 609.

In a very recent case we said: "Where a party to an equity action in the district court files a motion for a new trial alleging errors of law occurring at the trial, he has three months after the overruling of said motion within which to file a transcript on appeal to this court." *Algermissen v. Crete Mills, ante,* p. 72.

In view of the facts and the law applicable thereto, we conclude that the judgment of the trial court must be and it hereby is reversed and the cause is remanded for further proceedings in accordance with law.

REVERSED.