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E. G. MAUER V. STATE OF NEBRASKA.

FILED APRIL 16, 1925. No. 24229.

1. **Criminal Law:** INSTRUCTIONS. Mere nondirection by the trial court will not work a reversal, when proper instructions covering the point were not requested. *Edwards v. State*, 69 Neb. 386.
2. **New Trial:** NEWLY DISCOVERED EVIDENCE. "A new trial should not be granted a party on the ground of newly discovered evidence, unless he makes it appear that the newly discovered evidence is material for him, and that he could not by the exercise of reasonable diligence have discovered and produced it at the trial." *Neal v. State*, 104 Neb. 56.
3. **Evidence** examined, and found to support the verdict.

ERROR to the district court for Douglas county: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

John M. Berger and *Edwin C. Boehler*, for plaintiff in error.

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

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

EVANS, J.

The plaintiff in error (hereinafter termed the defendant) was convicted in the district court for Douglas county of the offenses of unlawfully having in his possession a still and mash, from which conviction and the judgment rendered thereon he prosecutes error.

The errors relied upon for a reversal are: (2) That the verdict is not sustained by sufficient evidence. (4) The court erred in overruling the motion for a new trial. (5) Newly discovered evidence material for the defendant in the court below, now plaintiff in error, which plaintiff herein could not with reasonable diligence have discovered and produced at the trial. (23) The court erred in failing to give instruction covering circumstantial evidence. (24) The court erred in failing to instruct the jury that the mere knowledge of a crime being committed was not sufficient to con-

vict, and that unless the defendant committed some overt act he could not be guilty of possession of intoxicating liquor and mash, as charged in the information. (25) The court erred in refusing to sustain the plaintiff's motion at the close of the evidence for a directed verdict against the defendant in error, State of Nebraska.

The assignment of error relative to the failure of the court to instruct the jury as to particular matters raised by assignments 23 and 24 were not presented to the trial court and will not be further considered. Mere nondirection by the trial court will not work a reversal, where proper instructions covering the point were not requested. *Johnson v. State,* 53 Neb. 103; *Maxfield v. State,* 54 Neb. 44; *Edwards v. State,* 69 Neb. 386.

The fifth assignment of error is based upon newly discovered evidence, which it is claimed, should entitle the defendant to a new trial. There was no application for a continuance at or during the time of the trial, although each individual whose evidence was desired by the defendant, so far as appears, was so situated that his attendance upon the trial court could easily have been secured, or depositions taken. There is no showing of diligence. It follows that this assignment is not well taken. Comp. St. 1922, secs. 10156, 10158; *Cunningham v. State,* 56 Neb. 691; *Neal v. State,* 104 Neb. 56.

The remaining assignments rest upon the alleged insufficiency of the evidence to support the verdict and will be considered together. The evidence of the state was given by three officers, who, under a warrant, made search of the premises, and was in substance as follows: The house where the still was found and where it was operated stood alone, at a distance of about 200 feet from the nearest building, and 5 or 6 blocks from any other building. It was a one and one-half story building, with nothing in the second or upper story but the still and what pertained to its use in the manufacture of intoxicating liquor, there being nothing there which could be used in, or with reference to, the home or dwelling. When the officers, on the day of the

search and arrest, arrived at the door, they could hear the still in operation, the portion thereof used in heating making a hissing noise plainly audible and distinguishable. There was considerable delay in gaining an entrance, repeated knocking upon the door being necessary to have an inmate open it. After three or four minutes the door was opened by a woman, to whom the search warrant was read by one of the officers, the other two going immediately to the upper story, where they found the defendant standing in the door of a room in which was located the still. The condition of the still at that moment was described by one officer as "in operation" and by the other as then very hot, and from which there was dripping the fluid being manufactured. All three officers said the still was very hot, and that the fluid was "moonshine whiskey" dripping from the coil which was a part of the still; that the defendant, so standing in the door of the room in which the still was located, was hatless and in his shirt sleeves. He gave his name as Mauer, and, when asked what he was doing, said he did not live there, but was "visiting," and answered no other questions. He requested several times to be permitted to go down-stairs. There was found up-stairs in the building and in close proximity to the still 15 barrels of corn mash and a 10-gallon can of liquor. The still, the mash and the liquor were identified and received in evidence. No person except the defendant was up-stairs. No persons but the woman, who gave the name of Vanderpool, and the defendant were in the house. It was stipulated that the defendant had no permit to manufacture intoxicating liquors. When the defendant became a witness in his own behalf he testified he had been there 15 minutes, that he was looking for a pair of pliers he had loaned to Mr. Vanderpool, in whose name the lease for the building stood. He did not find the pliers. He also testified that he had been there several times before and had seen the still operated, but made no report of the fact. The woman who opened the door to the officers gave her name as Mrs. Vanderpool. She was requested by the officers to notify her husband when he

came home to appear at the police station. He did not appear. On the following day, when examined by the officers, the premises were vacant. The search was made between 3 and 4 o'clock in the afternoon, and, when examined that night at 11 o'clock by one of the officers, it seemed to be vacant. From the foregoing facts the jury found the defendant guilty, and under the circumstances they were warranted in so doing. *Bush v. State*, 112 Neb. 384. There was no error in the overruling of the defendant's motion for an instructed verdict made at the close of the state's case, or in overruling his motion for a new trial.

The judgment of the district court is

AFFIRMED.

GEORGE W. STEWARD, APPELLEE, V. MRS. M. ELLIOTT, APPELLANT.

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Parent and Child: CUSTODY OF INFANT. "In a controversy for the custody of an infant of tender years, the court will consider the best interests of the child, and will make such order for its custody as will be for its welfare, without reference to the wishes of the parties." *Schroeder v. State*, 41 Neb. 745.

APPEAL from the district court for Douglas county: L. B. DAY, JUDGE. *Reversed in part, and remanded, with directions.*

Magney & Magney, for appellant.

John Adams, contra.

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

EVANS, J.

This is a habeas corpus proceeding brought by George W. Steward against Mrs. M. Elliott to determine and settle the custody and control of a minor child, called George W. Steward, Jr., by the appellee, and John L. Stewart, Jr., by the appellant. The chief issue presented by the evidence in

the trial court was the paternity of the child, the appellee claiming to be its father, while the appellant denied this and claimed one John L. Stewart to be the father. The trial court found the appellee was the father and awarded him the custody of the child. From this judgment the appellant appeals.

The facts, so far as necessary to a consideration of this case, are as follows: The appellee and the mother of the child were married on February 15, 1911. The wife of the appellee, the mother of the child, and the appellant were at that time personal friends and so continued until the death of the former on March 18, 1918. The child was born on January 18, 1917. The appellee was a waiter traveling over the country and only occasionally being at the home of his wife. After the death of the mother, who died from tuberculosis, the child was taken by the appellee for a time to Battle Creek, Michigan. Upon correspondence between the appellant and the appellee it was agreed that the appellant should take the child and keep him until appellee should be able to provide a home for him. Under this agreement the appellant has since retained custody and control of the child. The appellee has, during the time the child has been with the appellant, sent to her the sum of $385, and has also taken out on the child's life and for its benefit policies of insurance, the value of which is approximately $800. A short time previous to the suing out of the writ, and in objecting to appellee's request for the return to him of the child, the appellant denied that the appellee was the father of the child and refused to deliver it to the appellee. An examination of the record discloses evidence which sufficiently supports the finding of the trial court as to the paternity of the child. It is also found by the court, and fully supported by evidence, that the appellant, during the time that she has had custody and control of the child, has furnished him a good home, cared for him properly, and procured for him proper educational facilities and religious training. It is also established by the evidence that the appellee has again married, and that he

has a home and is engaged in business in Battle Creek, Michigan. The record is silent as to whether the child would be welcome in appellee's home and would be taken care of properly.

The parent is the natural guardian of his child, and this "court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide." *Norval v. Zinsmaster*, 57 Neb. 158. And a respondent "could only show himself entitled to the custody of the child by proof of the allegations of the parents' unsuitability." *In re Application of Thomsen*, 1 Neb. (Unof.) 751.

There is no evidence that the child will be welcome in the relator's home. The child is now in a home to which the relator committed it, and is well cared for. The relator proposes to remove the child from the jurisdiction of the court. Under such conditions the welfare of the child will be best served by allowing it to remain in its present home until it has been made to appear that it will be welcome and well cared for in relator's home. The judgment of the district court is therefore affirmed in so far as it finds and fixes the paternity of the child, but modified in so far as it awards the custody of the child to the relator, and the custody of the child is, for the time being, awarded to the appellant, without prejudice to any future application by the relator for the custody of the child, based upon a showing of his ability to care for and furnish to the child a proper home. The case is therefore remanded, with directions to enter a judgment in accordance with this opinion.

REVERSED IN PART, AND REMANDED, WITH DIRECTIONS.

GLADYS HANFORD, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED APRIL 16, 1925. No. 23045.

1. **Street Railways:** DUTY AT STREET INTERSECTIONS. It is the duty of the motorman in charge of a street car when approach-

ing a street intersection to keep a sharp lookout for travelers upon the street, and have his car under such control that it can be readily stopped.

2. ———: NEGLIGENCE: QUESTION FOR JURY. Where a motorman was momentarily unable to see, his eyes being filled with tears occasioned by being strangled by an insect blown into his mouth and throat, and took his handkerchief to wipe his eyes, and, while so doing, permitted his car to drift onward so that, when he could again see, he was so close to a car ahead of him that he was unable to avoid a collision, *held*, that the question of his negligence was for the jury.

3. ———: DAMAGES: QUESTION FOR JURY. Where a pregnant woman at a street intersection, standing within a few feet of the track upon which two of defendant's street cars collided, was greatly frightened thereby and jumped back, and immediately felt sick, and three days later suffered a miscarriage, the reasonableness of her fright and subsequent conduct were questions for the jury.

4. **Negligence.** Where one to whom another owes a legal duty is placed by the latter's negligence in a position of reasonably apprehended peril, and is injured in a reasonable attempt to escape, the negligent person is liable in damages.

5. **Damages.** Where a pregnant woman is placed in a position of reasonably apprehended peril by the negligence of one owing her a legal duty, and suffers a miscarriage as the proximate result of shock and fright produced by such negligence, she may recover damages from the wrongdoer.

6. ———: CAUSE OF ACTION. Physical injury proximately resulting from fright or terror, produced by negligence of another charged with a duty to the injured person, gives a cause of action.

7. ———. Verdict for $2,000 for miscarriage and attendant suffering *held* not excessive.

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

John L. Webster, for appellant.

Kennedy, Holland, DeLacy & McLaughlin, contra.

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

REDICK, District Judge.

Action for damages for personal injuries. The facts upon which plaintiff bases her action are, that as plaintiff approached the intersection of Twenty-fourth and H streets, city of Omaha, intending to take a street car going south, she observed one of defendant's cars stopping at the north side of the intersection and started running in an effort to catch it, but it started forward at about the time that she reached the east curb of Twenty-fourth street, when the motorman, perceiving her, beckoned her to come on and brought the car to a stop at the point where its rear end was about in the middle of the intersection. Plaintiff thereupon left the curb and approached the street car. At the same time a following street car was approaching from the north at a distance of one-half block to a block, the motorman of which saw the plaintiff, and plaintiff saw the following car. Plaintiff continued on her course until she was within two and one-half to four feet of the first car, when the following car crashed into the first car with sufficient force to break a two by two piece of oak wood, a part of the fender, and caused the breaking of a glass in the front vestibule of the first car by impact with the elbow of the motorman who was thrown against it. The negligence charged is negligently and recklessly running into the standing car in close proximity to plaintiff, and not maintaining a proper lookout. The first car was only moved a few inches by the collision, and the fender of the second car was only slightly damaged, so that by tying it up with a rope the car could proceed. The plaintiff alleges that by the collision occurring so close in front of her she was caused to jump backward, whereby she suffered a strain causing her to become sick within one hour and to suffer a miscarriage within three days after the accident; that she was compelled to go to a hospital and undergo medical and surgical treatment; that she suffered great pain and will continue to suffer in the future.

The answer of the defendant was a general denial. The jury found for the plaintiff and assessed her damages at

$2,000, and from judgment therefor defendant appeals.

The defendant alleges error in the giving of a number of instructions by the court. We have examined them carefully and, unless it exist in those hereafter noted, we find no error in them. They correctly presented to the jury the questions of negligence and proximate cause in accordance with the theory of the plaintiff.

Instruction Nos. 9 and 10 by the court, and No. 2 requested by defendant and refused, present the serious question to be determined on this appeal, and they are as follows:

"Instruction No. 9. You are instructed that the fact that the plaintiff was not struck by the street cars or by any part of said cars would not bar her from recovering against defendant, if you believe and find that the defendant was guilty of negligence as set forth in plaintiff's petition, and that such negligence resulted in the street cars in question running together, and that the plaintiff at said time while in the exercise of due care was in such close proximity to said collision as to cause her, in the exercise of reasonable care and as a proximate result of the collision to jump backwards, or step backwards suddenly, and if you believe and find further that the said sudden step or jump backwards, if you find she did so step or jump backwards, caused the plaintiff to suffer physical injuries."

"Instruction No. 10. If you find from a preponderance of the evidence that the collision was the result of negligence on the part of the employee or employees of the defendant, and that, as a natural and proximate cause thereof, the plaintiff, while in the exercise of reasonable care, was caused to jump or suddenly to step backwards because of the collision of the cars in such close proximity to her and because of a reasonable fear on her part of danger to herself, then you are instructed that for such physical injuries as you find, from a preponderance of the evidence, were suffered by plaintiff as the natural and proximate result thereof, the plaintiff would be entitled to recover against the defendant."

"Defendant's Request No. 2. You are instructed that if you believe from the evidence that, at the time of the collision in question, plaintiff became frightened, and received a nervous shock, and that the subsequent miscarriage of the plaintiff was due to and caused by the mental fright and nervous shock which the plaintiff suffered as the result of the collision, then, and in that event, the plaintiff cannot recover, and your verdict must be for the defendant."

By instruction No. 8 the court told the jury that, if the defendant was negligent as charged, and plaintiff had reasonable ground to believe that she was in a place of peril by reason of the collision, and in jumping back acted as a reasonably prudent person, and if as a proximate result of her movement back she suffered injuries, their verdict should be for the plaintiff. We do not deem it seriously contended that this instruction does not state the law applicable to the state of facts recited therein, and we think the evidence was sufficient to submit those questions to the jury.

But the defendant contends that it was a question for the jury whether the miscarriage suffered by the plaintiff was the result of her jumping backward or of the fright which she received on account of the collision, defendant's position being that in the latter event defendant would not be liable, and, therefore, the court erred in not presenting to the jury defendant's theory of the cause of the accident. Defendant's proposition is that the law does not award damages for mere fright, and, *a fortiori,* that it will not award damages for the consequences of fright. That damages may not be recovered for mere fright unaccompanied or followed by physical injuries proximately resulting therefrom is well settled. And it is also well established that fright and mental anguish and suffering following a physical injury caused by negligence are proper elements of damage to be considered by the jury. The authorities are divided upon the question whether damages may be recovered for physical injuries resulting wholly in consequence of fright, such as nervous prostration and its at-

tendant ills, and, in the case of a pregnant woman, a miscarriage. The question is new in this jurisdiction and must be determined from general principles and authoritative precedents based upon sound reasoning.

The industry and learning of counsel on both sides have presented for our consideration a multitude of cases quite sufficient to present a complete exposition of the holdings of the various courts and the reasons underlying them. We have examined most of them, but it would be impracticable to consider them in detail, and we must be content with a reference to a number of leading cases on both sides and a statement of our conclusions. For the purposes of the discussion, we will assume that the defendant owed a duty to the plaintiff, under the circumstances, not to negligently injure her, and that it failed in that duty; that defendant was justifiably frightened by the collision, and that the miscarriage and attendant suffering of plaintiff was the proximate result of her fright. Stripped of all details, then, the question is: If plaintiff had merely stood still and in the natural order of things suffered a miscarriage solely as the result of fright, may she recover?

We will now examine a number of leading cases cited by defendant. *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, was a case where the horses of one of defendant's street cars were negligently turned toward the plaintiff and were stopped in such close proximity to her that she stood between the horses' heads, but her body was not touched in any manner. As the result, she was very badly frightened, became unconscious, and suffered a miscarriage. It was held, as stated in the syllabus: "No recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury." The court said: "If it be admitted no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom." A recovery

was denied on principles of public policy, the danger of fictitious or speculative claims being presented, and that the damages were too remote. One of the cases cited in support of the opinion was *Lehman v. Brooklyn City R. Co.*, 47 Hun (N. Y.) 355, which merely announced the doctrine, but without discussion or citation of authority.

Ewing v. Pittsburgh, C. & St. L. R. Co., 147 Pa. St. 40, was also cited. In that case the woman plaintiff was in her house near defendant's railroad track, upon which there was a collision which threw the cars onto plaintiff's premises and against her dwelling-house, greatly frightening her, so that she became sick and disabled and suffered great mental and physical pain. It was held that no cause of action existed, for the reason that plaintiff had suffered no bodily harm, that defendant owed her no duty to protect her from fright, and that her injuries were too remote.

In *Phillips v. Dickerson*, 85 Ill. 11, plaintiff was in bed, but the defendant did not know that fact, or that she was within hearing, and the plaintiff was greatly frightened by the noise of a fight on the porch, near her bedroom, between plaintiff's husband and defendant. The case does not discuss the question under review but held the injuries, a miscarriage, too remote.

Morris v. Lackawanna & W. V. R. Co., 228 Pa. St. 198, held: "The rule is applicable to a miscarriage resulting from a nervous shock to a woman occasioned by an electric car in which she was riding bumping over the track at an open switch," there being no evidence to warrant a finding that the miscarriage was caused by any physical injury.

Reed v. Ford, 129 Ky. 471, was another case of fright occasioned by an assault by defendant upon a third person, the defendant not knowing of her presence in an adjoining room, and plaintiff suffering no physical injury, and it was held: "No recovery can be had for injuries resulting from mere fright caused by the negligence of another, where no immediate personal injury is received"—citing *Mitchell v. Rochester R. Co., supra*, and *Gulf, C. & S. F. R. Co. v. Hayter*, 93 Tex. 239. It was also held that negligence under the cir-

cumstances could not be imputed to defendant or regarded as the proximate cause of plaintiff's injuries.

Nelson v. Crawford, 122 Mich. 466, held that fright occasioned plaintiff by a practical joke played by defendant disguised as a woman and entering plaintiff's bedroom, her husband being present, plaintiff suffering a miscarriage from the shock, presented no cause of action, as plaintiff suffered no bodily injury.

St. Louis, I. M. & S. R. Co., v. Bragg, 69 Ark. 402, was where plaintiff and her children were put off a train on a dark night at a place where she was required to cross a cattle-guard to reach the depot, and it was held: "That nervous prostration and permanent ill health caused by fright on discovering that she had to cross the cattle-guard was not the natural and probable consequences of defendant's negligence," the court remarking: "If any fright existed, it must certainly have been over in a minute or two, when assistance arrived. We therefore feel compelled to hold that the long train of physical ills of which she complains was not the natural or probable consequence of defendant's negligence."

Hutchinson v. Stearns, 115 App. Div. (N. Y.) 791, applied the rule of the *Mitchell* case to the claim of the plaintiff to recover damages for being deprived of the services of his wife who suffered a miscarriage occasioned by becoming frightened during an assault by defendant upon her husband. A similar case was *McGee v. Vanover,* 148 Ky. 737, in which it was stated by the court that it seems to be well settled that the law allows no recovery for injuries resulting from mere fright, caused by the wrongful act or negligence of another, where no immediate personal injury is received.

A case much relied upon is *Spade v. Lynn & B. R. Co.,* 168 Mass. 285, holding: "In an action to recover damages for an injury sustained through the negligence of another, there can be no recovery for a bodily injury caused by mere fright and mental disturbance." The facts were that plaintiff was a passenger upon defendant's car, and that defend-

ant's agent, in attempting to remove an intoxicated person, negligently created a disorder and quarrel in the car, whereby plaintiff was subjected to a severe nervous shock by which she was physically prostrated and suffered great mental and physical pain. The case seems to be strictly within the language of the general principle, as no bodily injuries preceded, attended or followed the mental distress. After stating that the exemption from liability for mere fright, terror, alarm or anxiety does not rest upon the assumption that these do not constitute an actual injury, or may not be the direct and immediate consequence of the negligence, the court, by Allen, J., proceeds: "It must be admitted that a timid or sensitive person may suffer not only in mind, but also in body, from such cause. Great emotion may and sometimes does produce physical effects. The action of the heart, the circulation of the blood, the temperature of the body, as well as the nerves and the appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence, and if compensation in damages may be recovered for a physical injury so caused, it is hard on principle to say why there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects. It would seem, therefore, that the real reason for refusing damages sustained from mere fright must be something different; and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule." And further: "The logical vindication of this rule is, that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright; and that this would open a wide door for unjust claims, which could not successfully be met."

Among other cases cited by defendant are: *Victorian Railways Commissioners v. Coultas,* 13 App. Cas. (Eng.) 222 (criticized in *Dulieu v. White,* 2 K. B. (Eng.) (1901)

669, and disapproved in *Bell v. Great Northern R. Co.*, 26 L. R. (Ir.) 428; *Miller v. Baltimore & O. S. W. R. Co.*, 78 Ohio St. 309; *Huston v. Freemansburg Borough*, 212 Pa. St. 548; *Gulf, C. & S. F. R. Co. v. Trott*, 86 Tex. 412, mental suffering only; *Smith v. Gowdy*, 196 Ky. 281; *Braun v. Craven*, 175 Ill. 401, holding that St. Vitus' dance as a consequence of fright was not reasonably to be expected.

The above cases sufficiently show the theory upon which the mental anguish rule, if we may so term it, has been applied to cases where the mental disturbance proximately results in bodily or physical injuries, and the reasons supporting that rule made use of to deny recovery for such bodily injuries.

There is equally respectable authority sustaining the affirmative of our postulate. *Pankopf v. Hinkley*, 141 Wis. 146, was an action for damages for a miscarriage as the result of severe fright and shock. The petition alleged that plaintiff suffered an injury to her body, and the ruling was upon demurrer, but the opinion treats the miscarriage as the bodily injury. The occasion of plaintiff's fright was the negligent striking of the horses attached to the carriage in which she was riding, by the automobile of the defendant, and the allegation was that, as the result of said fright and shock, plaintiff suffered a miscarriage. The court held: "When physical injury flows directly from extreme fright or shock, caused by the ordinary negligence of one who owes the duty of care to the injured person, such fright or shock is a link in the chain of proximate causation as efficient as physical impact from which like results flow."

In *Lindley v. Knowlton*, 179 Cal. 298, the action was to recover damages for injuries to the physical health of the plaintiff occasioned by fright due to an attack upon her and her children by an escaped chimpanzee. She was not touched by the animal, and her ill health was due solely to fright, and the court, in distinguishing the case from those denying recovery for mere fright, remarked that those cases were only applicable where the fright alone is made the gravamen of the action, but that in the case at bar

physical detriment was pleaded and there was evidence in support thereof.

In *Baltimore & O. R. Co. v. Harris*, 121 Md. 254, a railway engineer, while his train was standing at a highway crossing and the plaintiff, a young woman, was passing in front of the engine, blew an unusually and unnecessarily loud whistle and permitted an unnecessary amount of steam to escape from the engine, greatly frightening plaintiff and causing her, as a direct result of the fright, to fall, striking her face upon one of the rails, injuring her teeth and breaking her jaw. The contention of the defendant was the same as here, that as there was no physical impact there could be no recovery, but the holding was otherwise, on the strength of the case of *Green v. Shoemaker & Co.*, 111 Md. 69, which will now be considered. In that case it was held: "When material physical injury has resulted from fright, caused by defendant's wrongful act, an action lies to recover damages therefor; but no action lies to recover damages for mere fright which does not result in a physical injury." The case was for throwing rocks and stones against the plaintiff's dwelling through blasting operations by defendant, and the question was stated to be: "Does a cause of action lie for physical injury resulting from fright and nervousness caused by the wrongful acts of the defendants?" The case is not strictly in point, as it is based rather upon defendant's acts constituting a nuisance, a direct tort, rather than mere negligence, but serves to distinguish between actions for mere fright and those for physical injuries resulting from fright.

A case squarely in point for the plaintiff is *Purcell v. St. Paul City R. Co.*, 48 Minn. 134, where plaintiff was a passenger on defendant's street car and suffered a miscarriage caused solely by great fright occasioned by the apparent imminence of a collision between the car and a cable-car at a crossing, which situation was due to defendant's negligence. The sudden fright and shock threw her into violent convulsions, resulting in a miscarriage and subsequent illness. No collision occurred, and plaintiff suffered

no immediate bodily injury; her only injuries were due to fright. The court, after reviewing two cases where the plaintiff was injured in an endeavor to escape an imminent peril, and discussing the question of proximate cause, said: "In such case, though there comes, as an intermediate cause between the negligence and the injury, a condition or operation of mind on the part of the injured passenger, the negligence is nevertheless the proximate cause of the injury." Defendant's counsel seeks to distinguish this case on the score of the increased care due from a carrier to a passenger, but we do not appreciate the distinction, for in any case of negligence the foundation is a breach of duty, and when such breach is shown it seems immaterial, upon the question of liability, whether ordinary or extraordinary care was required.

Morey v. Lake Superior T. & T. Co., 125 Wis. 148, was where the plaintiff without negligence approached within three or four feet of defendant's railroad track at a crossing, and was so severely frightened by the approach of defendant's train without having given any warning signal that he became unconscious and fell toward and partly on defendant's track and was struck by the train. It was held that plaintiff's injuries were proximately caused by the negligence of defendant.

In *Kimberly v. Howland*, 143 N. Car. 398, it was held: "Mere fright unaccompanied or followed by physical injury, cannot be considered as an element of damage; but where the fright occasions physical injury not contemporaneous with it, but directly traceable to it, a right of action for such injury, resulting from a negligent act, arises." Also: "Where the plaintiff's evidence shows that the wife was lying on her bed heavy with child at the moment the rock crashed through the roof of her home, and, though it did not strike her, it greatly shocked her nervous system, and nearly caused a miscarriage, and that she has never recovered from the effects of it: *Held*, that she has a right of action for the physical injury sustained — a wrecked

nervous system—resulting from negligence whether wilful or otherwise."

In *Simone v. Rhode Island Co.*, 28 R. I. 186, it was held: "Where the negligence of the defendant is such as to cause fright, and as a natural consequence of such fright a series of physical ills follow, or if the fright as a cause gives rise to nervous disturbances and those in turn to physical troubles, the defendant is liable for the physical results of its own negligence, although there was no actual physical injury at the time of the accident." The action was to recover for loss of services of plaintiff's daughter who was incapacitated through physical injuries resulting from fright and nervous shock caused by a collision on defendant's street railway. While this was a carrier case, no emphasis was laid upon that circumstance, and the New York and Pennsylvania cases and others cited by defendant are discussed and disapproved, and *Purcell v. St. Paul City R. Co.*, 48 Minn. 134, *Sloane v. Southern C. R. Co.*, 111 Cal. 668, and *Dulieu v. White, supra,* followed. In the *Dulieu* case the case of *Victorian Railways Commissioners v. Coultas, supra,* upon which the case of *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, was largely based, is learnedly discussed and held not to state the true doctrine, and the court held: "Damages which result from a nervous shock occasioned by fright unaccompanied by any actual impact may be recoverable in an action for negligence if physical injury has been caused to the plaintiff."

In *Arthur v. Henry,* 157 N. Car. 438, the following instruction was approved: "Mere fright is not actionable. Because a man or woman gets frightened at something, it is not actionable. If you find that the plaintiff in this cause was frightened, that she was put in fear, the court charges you that that is not actionable; but if you find that she was put in fear and frightened to such an extent that she suffered physical pain, suffered in body and mind, and was made sick, and that such fright and fear were brought about by the negligence of defendant and was its proximate cause,

then the law says it is actionable." The case followed *Kimberly v. Howland, supra.*

Sloane v. Southern C. R. Co., 111 Cal. 668, held that, while mental suffering alone gave no cause of action, a shock to the nervous system producing bodily suffering is a physical injury compensable in damages.

In *Sternhagen v. Kozel,* 40 S. Dak. 396, it was held: "When physical injury accompanies a fright as its effect, the injured party may recover for the fright, for the physical injury, and for any mental injury accompanying such fright and physical injury, the same as where fright results from physical injury."

Plaintiff also cites *O'Meara v. Russell,* 90 Wash. 557; *Dulieu v. White, supra; Gulf, C. & S. F. R. Co. v. Hayter,* 93 Tex. 239. Valuable notes discussing the subject will be found in *Huston v. Freemansburg Borough,* 3 L. R. A. n. s. 49 (212 Pa. St. 548), and 8 R. C. L. 525, sec. 80.

The rule contended for by defendant is a very narrow one, and, even in jurisdictions sustaining it, its harshness is recognized to such an extent that the slightest physical impact is sufficient to prevent its application. In *McGee v. Vanover,* 148 Ky. 737, two persons assaulted plaintiff's husband in her presence, by which she was greatly frightened, and one of them "struck or pushed" her aside that he might get at the husband. No bodily injury to plaintiff was thereby occasioned, but she was allowed to recover against the one pushing her for being immediately and continuously subjected to great physical and mental suffering, which caused a miscarriage, though recovery was denied against the other assailant of the husband.

In *Warren v. Boston & M. R.,* 163 Mass. 484, it was held that being compelled to jump out of a buggy through fright caused by defendant's negligence was a sufficient physical injury to prevent the application of the rule. See, also, *Armour & Co. v. Kollmeyer,* 161 Fed. 78.

The rule as announced in *Spade v. Lynn & B. R. Co.,* 168 Mass. 285, and *White v. Sander,* 168 Mass. 296, was frankly stated to be "not put as a logical deduction from the gen-

eral principles of liability in tort, but as a limitation of those principles upon purely practical grounds." *Smith v. Postal Telegraph Cable Co.*, 174 Mass. 576.

Let us then consider the reasons underlying the rule and their force when applied to the present situation. It is said that mental anguish is so easily simulated, and so wholly within the subjective consciousness of the plaintiff, that no adequate means exist for administering justice in such cases; that there is no rule for measuring the damage; this is the doctrine of expediency or public policy. This is quite persuasive in those cases definitely within the class described. Such cases are illustrated by *Long v. Chicago, R. I. & P. R. Co.*, 15 Okla. 512, and *Nichols v. Central V. R. Co.*, 94 Vt. 14, where damages were sought for mental anguish occasioned by the negligent dropping of caskets by which the corpses of relatives of plaintiff were exposed; *Kramer v. Ricksmeier*, 159 Ia. 48, the cause being use of violent language by defendant over the telephone; also in the telegram cases, where recovery is sought for mental suffering only—*Western Union Telegraph Co. v. Chouteau*, 28 Okla. 664, where they are exhaustively collated, and *Southern Express Co. v. Byers*, 240 U. S. 612, for delay in delivery of a casket and burial clothes. Whatever may be the true basis for it, the rule is no doubt salutary when applied to cases within its reasoning; but when we consider that the very matters for which recovery is denied upon such reasons are permitted to be considered and measured when they are the result of trauma, the force of the argument is somewhat diminished as the same difficulties are present. These difficulties disappear, however, when actual physical injury exists, either as a cause or result of fright; and the doctrine of expediency has no application. We do not deem it a logical deduction that because there can be no recovery for mere fright, *ergo*, there can be none for the consequences of fright. Because in the one case it is not possible to prove legal damage furnishes no reason for denying them when they may be proved. It is everywhere conceded that, if by negligence of defendant the plaintiff is placed in a posi-

tion of peril and is greatly frightened thereby, and in a reasonable effort to escape suffers physical injury, he may recover; and yet his injury is the consequence of fright. To illustrate: Plaintiff is driving over a railroad crossing and just escapes being struck by a train negligently operated by defendant. If he suffers severe nervous shock and mental agony, and no more, there can be no recovery. But, if in his effort to escape he jumps from his vehicle and breaks his leg, defendant is liable, if his act was reasonable under the circumstances. The most that can be said is that in some cases recovery may not be had for the consequences of fright; but this refutes the logic of the rule.

In *Dulieu v. White, supra,* Kennedy, J., aptly remarked: "It may, I conceive, be truly said that, viewed in relation to an action for negligence, direct bodily impact is, without resulting damage, as insufficient a ground of legal claim as the infliction of fright. That fright, where physical injury is directly produced by it, cannot be a ground of action merely because of the absence of any accompanying impact appears to me to be a contention both unreasonable and contrary to the weight of authority."

We think the situation is well stated by the annotator in the *Huston* case, 3 L. R. A. n. s. 49: "The courts which argue that, if there can be no recovery for fright alone, it must logically follow that there can be no recovery for the consequences of the fright, lose sight of the fact that in the first case the sole basis of the action is the fright, which the courts regard as too intangible and uncertain to be the foundation of a right to damages, while in the second case the basis of the action is not the fright, but the physical injury, a tangible, material harm, which the law has always regarded as a legal injury."

Some cases hold that the damages are too remote; that they cannot be considered the proximate result of the negligence because of the intervening fright; but before an intervening cause may operate to insulate the negligence, it must be an independent cause—one not set in motion by defendant. So we are of opinion, upon familiar principles,

that if defendant's negligence was the proximate cause of fright, and fright, in natural and probable sequence, the proximate cause of physical injury, the chain of causation is complete, and the fright is not an independent cause. *Purcell v. St. Paul City R. Co.*, 48 Minn. 134.

In the case at bar it is clearly established that the miscarriage may have been caused by the fright alone of plaintiff, or by the jump backward. It follows from what we have said that plaintiff was entitled to recover whether her injuries resulted from the jump backward or solely from the fright, and that the court did not err in refusing defendant's request No. 2, nor in giving instructions 9 and 10.

It is further contended that defendant was guilty of no negligence. The evidence for defendant is to the effect that the motorman in charge of the second car, upon observing the first car start forward from the usual stopping place, released his brake and allowed the car to drift southward about half a block in the rear of the first car; that an insect was blown into his mouth and throat, strangling him and causing his eyes to water, whereupon he took his handkerchief to wipe his eyes, and when he was able to open them discovered that the first car had stopped about 20 feet in front of him; that he used all proper efforts, but was unable to prevent the collision. We think the question was for the jury. The motorman was not so incapacitated as to relieve him from all responsibility in the control of his car. It was his duty to keep a lookout for travelers when approaching the intersection, and he had seen the plaintiff. He might have collided with her instead of the car. The jury might well conclude that, if he was momentarily unable to keep a proper lookout, he might, in the exercise of ordinary care, have applied the brake until he *could* see, instead of assuming that the first car would continue on its way and allowing his car to proceed. Counsel for defendant states he would have been guilty of negligence if he had permitted himself to become blinded; but, having become blinded without his fault, the question is not whether he was negligent in attempting to wipe his eyes, but in allowing his car

to drift while so doing. It is suggested that there was no obligation upon defendant to protect plaintiff from fright. This was stated in *Ewing v. Pittsburgh, C. & St. L. R. Co.* 147 Pa. St. 40, in a case where plaintiff was in her house a distance from the railroad. The true rule is stated in *Smith v. Gowdy,* 196 Ky. 281: "The law imposes no obligation to protect from fright and the consequences thereof when disconnected with and unaccompanied by a legal duty." In this case, as we have seen, there was a legal duty to keep a lookout for plaintiff.

It is urged that the motorman on the second car was not aware of the delicate condition of plaintiff, and therefore the miscarriage could not have been anticipated by him as the natural or probable consequence of a failure on his part to exercise ordinary care. We think the correct rule for actions for negligence is that the wrongdoer is liable for all injury directly resulting from the wrongful acts, whether their particular form or character could or could not have been foreseen by him, and therefore the fact that the motorman did not know of the delicate condition of plaintiff does not relieve the defendant from liability for the actual, direct consequences of such wrong. *Brown v. Chicago, M. & St. P. R. Co.,* 54 Wis. 342; *Cowan v. Western Union Telegraph Co.,* 122 Ia. 379; *Mann Boudoir Car Co. v. Dupre,* 54 Fed. 646; *Colorado Springs & I. R. Co. v. Nichols,* 41 Colo. 272; *Morris v. St. Paul City R. Co.,* 105 Minn. 276.

Lastly, it is urged that the damages are excessive. The court is in no better situation than the jury to determine the damages; in fact, not so favorably placed, not having the benefit of seeing the plaintiff and the witnesses. The question is peculiarly for the jury, and the amount awarded ($2,000) warrants no inference of passion or prejudice on their part. Neither is it out of line with verdicts in similar cases as collected in 17 C. J. 1119, sec. 460. The jury were properly instructed that they should not allow any damages for the death of the unborn child, or mental suffering, sorrow or regret thereby occasioned plaintiff. Under these

circumstances we do not feel warranted in reducing the judgment.

AFFIRMED.

RALPH CLARE, APPELLEE, V. EDWARD SEWELL ET AL., APPELLANTS.

FILED APRIL 16, 1925. No. 23058.

Attachment: DAMAGES. Evidence examined, and found insufficient to sustain the verdict for damages to a growing crop of corn by reason of a wrongful levy of an attachment.

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

Fred H. Free and *W. A. Meserve,* for appellants.

J. F. Green and *M. F. Harrington, contra.*

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

REDICK, District Judge.

Action upon the attachment bond for damages for wrongful issuance and levy of an attachment. Defendant Edward Sewell brought suit for damages against Ralph Clare, and procured the issuance of an attachment for the sum of $5,000 and had the same levied upon a drug store operated by Clare and 100 acres of growing corn, on August 16, 1920. The defendants N. A. Sewell and Frank McColley were sureties upon the bond. On November 6, 1920, upon motion of the defendant in that case, the attachment was dissolved and the property levied upon returned to the defendant herein. Later on, a demurrer was sustained to the petition in the damage suit and the same was dismissed. The plaintiff claims damages in the sum of $500 attorney's fees in securing discharge of the order of attachment, $1,800 depreciation in the value of the corn crop, and damages to the stock of goods and interruption of business, all in the total sum of $5,000, with interest from November

6, 1920. The defendants admitted the issuance and levy of the attachment and denied each and every other allegation of the petition. The case was submitted to the jury, which returned a general verdict for the sum of $2,936.19, and a special verdict under an instruction of the court finding the damages to the drug stock to have been the sum of $1,200. Judgment was rendered on the general verdict, and defendants appeal.

It was agreed upon the trial that $500 was a fair amount of damages to be allowed as attorney's fees, and the jury found that the damage to the drug store was $1,200 which, with interest to the date of the judgment $136.19, would be $1,336.19, or a total of $1,836.19. Appellants contend, therefore, and we think correctly, that the jury allowed the sum of $1,100 as damages to the crop of corn, and, further, that there is no competent evidence to sustain the verdict on this item. This is the only question presented by the appeal, the appellants contending that plaintiff should be required to remit the sum of $1,100 or that a new trial should be granted.

We think the point is well taken. We find it difficult to perceive how the value of a growing crop of corn could be injured by levying a writ of attachment upon it. The crop had not matured; it was not interfered with; it was left in the field; all the labor had been performed upon it; no portion of it was lost or destroyed, and its possession after about 75 days was returned to the owner in the same condition as when levied upon, except as it had been matured by the process of nature. The measure of damages for the destruction of a growing crop, as by flood or fire, is its value as such at the time of its destruction, taking into consideration the labor and expense of planting it and cultivating it, and the market value of the probable yield in bushels or pounds if it had matured, and the value of the use of the ground, and perhaps other similar items. But this crop was not destroyed or injured in any way. The plaintiff testified it was worth $30 an acre on the date of the levy, and was worth only $12 an acre when the at-

tachment was dissolved; but this latter figure is based upon the number of bushels gathered and the price per bushel at which it was sold in February, 1921. The proposition is ridiculous. The plaintiff seeks to sustain it upon the theory that the market price of corn had fallen from what it was in August to what the corn sold for in February, but if this is true the plaintiff has failed to convince us that the levy of the attachment had any potential effect upon the price of corn, and, of course, if it had not, the defendants would not be responsible for plaintiff's loss occasioned by the drop. It is further contended that plaintiff might have hedged his corn on the Chicago market and thereby protected himself from loss. He had never done that, and, while he says he would have done it in this instance, we think such consideration is entirely too speculative as a basis for the assessment of damages. We think the verdict is unsupported by the evidence to the extent of $1,100, and plaintiff will be required to remit that sum from the judgment within 30 days from the filing of this opinion, or the judgment will be reversed and new trial granted; otherwise, affirmed for the sum of $1,836.19, with interest from the date thereof.

If plaintiff files in this court, within 30 days, remittitur of $1,100 of the judgment, as of the date thereof, judgment of the district court will be affirmed for the sum of $1,836.19, with interest as of the date thereof; otherwise, said judgment of the district court will be reversed and the cause remanded.

AFFIRMED ON CONDITION.

GEORGE H. ALLEN ET AL., APPELLEES, V. PERCY JAMES LOWE ET AL., APPELLANTS.

FILED APRIL 16, 1925. No. 23119.

Replevin: ACTION ON BOND. Under section 9446, Comp. St. 1922, the obtaining of a judgment against the plaintiff in replevin and return of an execution thereon for want of sufficient property

whereon to make the amount of such judgment are conditions precedent to the bringing of an action upon the replevin bond.

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

John E. Lowe and *H. C. Lowe,* for appellants.

Sterling F. Mutz and *William C. Parriott, contra.*

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

REDICK, District Judge.

This is an action upon a replevin bond in which the plaintiffs recovered judgment in the lower court, and the defendants appeal. The facts are that the defendants instituted an action in replevin against the plaintiffs to recover the possession of an automobile in the justice court of Lancaster county, and obtained possession of the car upon giving the bond in suit. It having been ascertained upon the appraisal that the property was of a value greater than the jurisdiction of the justice court, an order was made transferring it to the district court, but the transfer was not effected without delay, as required by the statute, and upon motion of the defendants in that action the transcript was stricken from the files on the ground that the court was without jurisdiction, and nothing further has been done looking to the prosecution of the action. Thereupon this action was brought upon the replevin bond, which was conditioned as required by statute, that the plaintiff shall duly prosecute the action and pay all costs and damages which may be awarded against him. There seems to be no question but that the failure of plaintiffs in the replevin suit to have the action transferred and docketed in the district court in time to give that court jurisdiction of the case was a breach of the condition of the bond to duly prosecute the action. It is also well established that this is an independent condition of the bond and becomes effective regardless of the other conditions. *Budracco v. National Surety*

Co., 182 N. Y. Supp. 590; *Biddinger v. Pratt*, 50 Ohio St. 719; *Siebolt v. Konatz Saddlery Co.*, 15 N. Dak. 87. Therefore, the action is well brought, unless section 9446, Comp. St. 1922, is applicable. That section is as follows:

"No suit shall be instituted on the undertaking given under the provisions of this article before an execution, issued on a judgment in favor of the defendant in the action, shall have been returned that sufficient property whereon to levy and make the amount of such judgment cannot be found in the county."

In *Hershiser v. Jordan*, 25 Neb. 275, it was held under a similar statute that a petition which failed to allege a judgment and issue and return of execution was demurrable. In that case the replevin action had been properly transferred to the district court, but was dismissed because the right to the possession of the property in controversy had been determined in a former action to be in the defendant, and although the property had been delivered to the plaintiff under the writ. The above case was followed in *Mulhall v. McVay*, 2 Okla. 534, the section in question being in force in the territory at that time in a case in which there had been a judgment for the return of the property, but not for its value in case it could not be returned. The lower court found that the property could not be returned and rendered judgment upon the bond for $90 and costs, but the supreme court reversed the judgment holding that under the section in question the obligee in the bond was absolutely precluded from bringing action against the surety until he had first reduced the claim for damages growing out of the subject-matter of the original replevin action to judgment against the principal and had execution issued thereon and returned unsatisfied—citing *Cutler v. Roberts*, 7 Neb. 4. It was held that the statute entered into and became a part of the bond. In *Scott v. Scott*, 50 Mich. 372, where the replevin action abated and suit was brought upon the bond, it was held under a similar statutory provision as that of this state that the action could not be maintained, and that the sureties could only be called upon to respond

in damages after judgment rendered, and execution issued and returned as the statute provides.

The appellees cite in support of the judgment of the lower court a number of cases from different states, to wit, Missouri, Iowa, Indiana, California, Illinois, Rhode Island, Montana, Minnesota, and Kansas, but in none of these states is there a statute similar to ours prescribing conditions for the bringing of an action upon the undertaking. He also cites two cases from New York, *Budracco v. National Surety Co.*, 182 N. Y. Supp. 590, and *Verra v. Constantino*, 84 N. Y. Supp. 222. The statute of New York provided: "A defendant, who has recovered a final judgment, cannot maintain an action against the sureties in the plaintiff's undertaking, given to procure a replevin, until after a like return (wholly or partly unsatisfied) of a similar execution against the plaintiff." Section 1733, Code Civ. Proc. It was held that this section did not preclude action upon the bond in cases where no judgment had been rendered. The statute of this state above quoted, however, is not open to construction, and in effect requires a recovery of judgment against the plaintiff and return of execution as conditions precedent to an action upon the bond. There are no exceptions in it. Each condition of the bond is subject to the inhibition. To insert an exception into it under guise of construction would violate the plain language and intent of the act.

The judgment of the district court is reversed and the cause remanded, with instructions to dismiss the action without prejudice.

REVERSED.

CHARLES E. LINN, APPELLEE, V. DODGE COUNTY BANK, APPELLANT.

FILED APRIL 16, 1925. No. 23134.

1. **Mortgages**: PLEDGE OF MORTGAGE. A pledge of a real estate mortgage without the note which it secures is void.

2. **Pledges:** POWER TO SELL. In absence of special authority or agreement permitting him to do so, a pledgee has no right to sell commercial paper held as a pledge, either at public or private sale.

3. **Conversion:** DAMAGES. The measure of damages for conversion of a promissory note is its market value, or its present value to its owner at the time of conversion, with legal interest.

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

Courtright, Sidner, Lee & Gunderson, for appellant.

Dolezal, Spear & Mapes, contra.

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

REDICK, District Judge.

August 1, 1911, plaintiff gave his promissory note to defendant for $2,000 due one year after date, with interest at 10 per cent. Following the signature to the note and as a part of the same instrument was the following:

"I hereby deposit with the above obligation, as collateral security therefor, real estate mortgage for three thousand dollars at 6 per cent., date May 6, 1911, due March 1, 1916, on the N. E. qr. of Sec. 24, Twp. 24, Range 2 in Madison county, Nebraska, signed Knud Nelson & Marie Nelson. With authority to sell the same without notice either at public or private sale at the option of the holder or holders hereof on the nonperformance of this promise, he or they giving ——— credit for any balance of the net proceeds of such sale remaining after paying all sums due from ——— to the said holder or holders. * * * And it is further agreed that the holder or holders hereof may purchase at sale.

"(Signed) Charles E. Linn."

The mortgage referred to as collateral security, together with the note for $3,000 for which it was given as security, were delivered to the bank at the time the principal note was given.

The note of plaintiff not having been paid, the defendant, after due notice of its intention to do so, advertised in a newspaper that on October 2, 1914, it would sell said Nelson note, secured by said mortgage, at public auction to the highest bidder. The sale took place as advertised, and, there being no other bidders, the defendant bought said note and mortgage for the sum of $2,117, being the full amount then due upon plaintiff's note. Subsequently but before the maturity of the collateral note, defendant procured the Nelsons to execute a new note and mortgage to the bank for an extended period of time, at an expense to the bank of $150. It is conceded that the Nelson note and mortgage were worth their face value. Some eight months after the sale, plaintiff demanded the difference between the amount due upon his note and the value of the collateral, which was refused. This action is brought by the plaintiff to recover such difference as for conversion, and asking for an accounting. There was a judgment for the plaintiff for $1,373, from which defendant appeals.

The judgment of the lower court went upon the holding that the written pledge, above set forth, of the mortgage alone was void because the mortgage was a mere incident to the debt it secured and had no separate existence (citing *Webb v. Hoselton*, 4 Neb. 308); and, secondly, there was no authority in the pledgee to sell the note. We see no escape from these conclusions, with the result that the sale of the collateral by the bank was void. The law is well established that in the absence of special authority or agreement permitting him to do so, a pledgee has no right to sell commercial paper held as a pledge, either at public or private sale. 31 Cyc. 839. But, even though the assignment of the mortgage were valid, no authority is contained in the writing to sell the note, with reference to which the defendant is in a plight like unto that which confronted our Hebrew friend when the learned Portia in construing the bond in suit remarked, "This bond doth give thee here no jot of blood;" so, to paraphrase, "This writing doth give thee here no right to sell the note." It is argued by the learned

counsel for defendant that, inasmuch as the petition of plaintiff contained the following: "And the said note and mortgage were given by plaintiff to defendant at its request, as security under the said writing, exhibit A, for the security of said $2,000 indebtedness"—the plaintiff is precluded from making the point. We think, however, that the written contract must be construed strictly in accordance with its terms. There is no suggestion that it is not in the language intended by the parties, and no request has been made to reform it; therefore, we must take it as it is. The situation was a pledge of the mortgage and note with authority to sell the mortgage; but no authority to sell the note is given by the writing which contains the whole agreement of the parties.

Lastly, it is urged by defendant that the judgment is excessive, in that no allowance was made for the expense incurred by the bank in procuring a new mortgage, $150, or for the difference between 10 per cent. interest on the note of plaintiff and 6 per cent. the interest named in the collateral note. As to the first item, it seems sufficient to suggest that this was an expenditure entirely voluntary on the part of the bank, for its own benefit, and, being based upon the unauthorized sale of the collateral, plaintiff is not chargeable therewith. As to the difference in interest, the action being for conversion, the measure of damages is the value of the property converted with legal interest. *Woodworth v. Hascall,* 59 Neb. 124. By the conversion, plaintiff's debt was paid and the excess of the value of the collateral with lawful interest was due the plaintiff.

Judgment of the district court

AFFIRMED.

Note—See Mortgages 27 Cyc. 1286; Pledges 31 Cyc. 872, 882.

GEORGE MARODOLAC ET AL., APPELLANTS, V. FRED UHE ET AL., APPELLEES.

FILED APRIL 16, 1925. No. 23024.

1. **Pleading**: AMENDMENT. An amendment to the petition may be properly permitted upon trial, if it does not substantially change the cause of action; but the amendment moved for in this case, made at the end of the testimony, would not only have completely changed the original cause of action, but would have been subversive and destructive of the same, and was properly refused by the trial court.
2. **Homestead**: CONVEYANCE. A contract for the sale of a homestead, signed by both husband and wife, but not acknowledged, if performed by the making and tender of a deed properly signed and acknowledged on settlement day, may be enforced, provided no renunciation of said contract has been declared by either party, and that at the time of such tender the purchaser makes no objection because the contract is not acknowledged.

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

George H. Merten and *William McDonnell*, for appellants.

E. S. Nickerson and *H. A. Collins, contra.*

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

SHEPHERD, District Judge.

This was a suit to recover $3,000 paid by plaintiffs on a purchase by them of an eighty in Sarpy county, on the theory that the contract of purchase and sale was breached by the defendants. The defendants, who were man and wife, alleged in their answer that plaintiffs themselves breached the contract of purchase and refused to take the land, thereby damaging them in the sum of $5,000, for which they prayed judgment.

The case was tried to a jury and the trial resulted in a verdict and judgment for the appellees (defendants) in the sum of $543.16. The plaintiffs appealed, assigning as error

on the part of the trial court the overruling of their motion at the conclusion of the evidence to allow them to amend their petition by alleging as an additional cause of action that the said contract was for the sale of defendants' homestead, was not acknowledged, and was consequently void; also the giving of instructions Nos. 6 and 7, and various rulings of the court.

The contract was in writing, made and signed by all of the parties on the 8th day of September, 1920. It provided that plaintiffs purchased for the sum of $27,650; that they should pay $3,000 down, and $14,650 on the 1st day of March, 1921, when the deed was to be delivered; and that they should assume $10,000 of mortgages then on the place. But it was not then acknowledged, though defendants did acknowledge it on said 1st day of March, and tendered it, together with an unimpeachable deed, on that day.

The district court was right in refusing to permit the amendment, for two sufficient reasons: First, the amendment desired would have been in conflict with the cause of action originally alleged. The proof to support it would have disproved the allegations of said original cause, which was based upon the contract, and an alleged breach of the same by the defendants. By the statute (section 8656, Comp. St. 1922), amendment may be permitted if it does not substantially change the cause, but the amendment proposed would not only have been a substantial change of such cause, but would have been subversive and destructive of it. Such amendment is not to be allowed. *Western Cornice & Mfg. Works v. Meyer*, 55 Neb. 440; *Johnson v. American Smelting & Refining Co.*, 80 Neb. 256; *Westover v. Hoover*, 94 Neb. 596. Authorities might be multiplied upon this point.

In the second place, the defendants tendered a deed, which was duly signed and acknowledged by both husband and wife, upon the day set for delivery. The statute was not intended to protect purchasers, nor to furnish them technical defenses. *Farmers Investment Co. v. O'Brien*, 109 Neb. 19; *Bigler v. Baker*, 40 Neb. 325; *Perry v. Ritze*, 110 Neb.

286; *Lennartz v. Montgomery,* 138 Minn. 170; *Epperly v. Ferguson,* 118 Ia. 47; *Smith v. Kibbe,* 104 Kan. 159.

Space does not permit an extended statement of the pleadings and evidence, both of which are voluminous. It appears by the record, however, that defendants not only pleaded, but proved sufficiently to support the verdict, that they were in full compliance with the terms of the contract on March 1, 1921; that it was plaintiffs, and not they, who failed and refused to perform; that thereby they suffered damages—largely because the land had declined in value—to the extent of the $3,000 paid down, plus the amount awarded in the verdict. Consequently, unless there was an error committed upon trial, the verdict and judgment must stand.

Instruction No. 6, which is challenged by the appellants, is not a misstatement of the law, nor could it have been misleading to the jury. It was to the effect that the defendants had, by their sale to Beier (such a sale was made in September), elected to treat the contract as broken and rescinded. In so stating, the court did not settle the question as to who broke it, or say or intimate that the breach was by the plaintiffs. It only said that the defendants had elected to so consider. The instruction does not pretend to determine the right of defendants to so assume and consider, but only to state their theory and to settle the matter of their remedy. This being the case, and we hold that the conclusion is not to be gainsaid in reason, the objection to instruction No. 7 is likewise without good ground.

The case was tried upon the theory that defendants had elected their only ground of defense and recovery, namely, that the plaintiffs had breached the sale, and that unless they proceeded by action for damages upon breach, and proved damages in excess of the $3,000 received, the recovery had to be in favor of plaintiffs. It is true that defendants also offered specific performance in their pleadings. That might have been eliminated by timely motion, but plaintiffs' motion came too late when made upon trial. The reason is that they had joined issue in their reply to defend-

ants' answer and cross-petition which stated a case of damages. In any event, the ruling of the court upon said motion could be no more than harmless error. *Vernon v. Union Life Ins. Co.*, 58 Neb. 494. And, in any event, the remedy of damages was the only one that remained to defendants.

It remains to be said that there was abundant testimony to show that the parties agreed, on and after the time of entering into the contract, that certain taxes and a mortgage of $5,000 on the land would be discharged on settlement day out of the $14,650 then to be paid by the plaintiffs. Plaintiffs denied this and testified to the contrary, basing their refusal to perform upon the proposition that said taxes and mortgages were not paid, and shown to be paid on the abstract. This was the question of fact to be decided by the jury. It was properly submitted by the court and the verdict upon the evidence seems fair.

The objections of the plaintiffs to certain specific rulings of the court upon trial are disposed of in our determination of the questions above considered, and the judgment of the district court must be, and is,

AFFIRMED.

CARL NELSON, APPELLANT, V. ALVILDA NELSON ET AL., APPELLEES.

FILED APRIL 16, 1925. No. 23110.

1. **Aliens: RIGHT OF INHERITANCE.** A child born to a citizen of the United States during his residence abroad, and residing there in her minority, is not a nonresident alien, and may inherit the lands of her father in Nebraska.
2. ———: ———. A nonresident alien who married a citizen of the United States in 1908 while the latter was residing in her country became by that act a citizen of the United States, and, as such, entitled to inherit, even though she continued to live abroad, provided she complied with the federal law enabling her to retain her citizenship.
3. **Citizens: EXPATRIATION.** Section 3959 of the federal statutes (4 U. S. Comp. St. 1916) establishing a presumption that a naturalized citizen of the United States expatriates himself by

two years of residence in the country of his nativitiy was enacted to relieve this country from the duty of protecting its citizens long abroad in certain cases; and this presumption is rebuttable, not only by the presentation of evidence to a diplomatic or consular officer, but by other sufficient means and circumstances.

4. **Judgment**: JURISDICTION. *Held*, in this case, that the petition filed by the appellees, and positively verified by the next friend of one of the defendants, was sufficient to perform the function of the jurisdictional affidavit and answer required by section 8590 of the Compiled Statutes of 1922, and that the trial court committed no error in so holding, and in the judgment rendered.

APPEAL from the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Beeler, Crosby & Baskins, for appellant.

I. J. Nisley, W. A. Stewart and *J. A. Williams, contra.*

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

SHEPHERD, District Judge.

Chris Nelson was a naturalized citizen of the United States, who had accumulated about $12,000 worth of personal property and a half-section of land in Frontier county.

In May of 1908 he sailed for Denmark. On the 18th day of December of the same year he was married to his wife, Alvilda, in that country; and by her he had a daughter, Hertha Oman, born on the 28th day of May, 1910. In 1913 he returned to Nebraska to attend to some legal business in connection with his land, after which he went back to Denmark, where he died, November 21, 1915. Afterward, by proceedings in the county court of Dawson county, his estate was duly settled and his personal property was distributed to his widow and daughter, the court adjudging that these persons were his sole heirs, and entitled to his real estate by descent.

This lawsuit was brought on the 18th of February, 1919, by Carl Nelson, a brother of the deceased, who resided in America, to quiet the title to said land in himself. In his

petition, which named the widow and child as defendants, he alleged that he was the owner of the property, and that he was in possession of the same; that Chris had verbally agreed to deed it to him if he would pay the costs and expense of a certain lawsuit then pending upon it, pay certain other claims against him, and pay him in addition the sum of $800; that he had fully performed his contract and was entitled to the property; and that the widow, Alvilda, had, as a matter of fact, conveyed it to him by deed dated in March of 1917, but that the interest of the child clouded the title, though the latter had received payment therefor. Service was by publication. Plaintiff had decree according to the prayer of his petition.

A year later, the widow and her daughter filed a petition in the case, alleging that only constructive service was had upon them, and that they had no actual notice of the pendency of the suit; that they duly inherited the land from Chris Nelson, and that they had a good defense to the action of the plaintiff; that plaintiff and their decedent never entered into any contract of the kind described in plaintiff's petition, and that the plaintiff paid no consideration, as alleged therein; that plaintiff had procured his decree by false and fraudulent allegations and testimony, and that he had likewise obtained the described deed from the defendant Alvilda Nelson, *i. e.*, by falsely representing to her, through his brother, Niels Nelson, that the land was of no value, and that the deed desired was to the three surviving brothers of the deceased to enable them to sell said land and out of the proceeds thereof to satisfy a surety indebtedness contracted by the deceased during his lifetime. They also alleged in their said petition that the plaintiff had collected rents on the land in the sum of $1,000. They prayed vacation of the plaintiff's decree, an accounting with him, the setting aside of the deed to him, and a partition between themselves.

After demurrer, which was overruled, plaintiff answered, alleging the insufficiency of defendant's petition to vacate; denying all of the hereinbefore set out allegations of such

petition; alleging that he had expended upon the land, over and above receipts therefrom, the sum of $1,819.82; alleging further that the defendants Alvilda and Hertha Oman were in any event nonresident aliens who never did, and never could, inherit said land; and praying for a dismissal of defendant's petition and for a confirmation of the decree already entered, or, in case this could not be granted, an accounting and a judgment in his favor, together with a sale of the land to satisfy the sum found due him.

The decree of the court upon trial was in favor of the defendants, awarding them the land in equal shares, subject to judgment in favor of plaintiff and against all of it in the sum of $73.28, with interest thereon at 7 per cent. per annum, and subject to a judgment for $891 with interest at 7 per cent. in favor of plaintiff and against Alvilda Nelson's undivided half. It also provided for the setting aside of the deed to the plaintiff and for the partition of the property as prayed.

The appeal is upon five assignments of error, which will be considered in order.

Complaint is made by the appellant that the district court erred in refusing to quash the depositions. It is grounded, as appears from the motion made upon trial, upon the assumption that there was a translation of the evidence, and that there was no certification that the translating officer was sworn to truly translate. But the depositions were taken by competent authority and at the place named in the notice. The plaintiff cross-examined. The certificate was in due form. No objections seem to have been made before entering upon the trial. As a matter of fact, though there are indications tending to support the statement of fact in plaintiff's motion, it does not conclusively appear that any translation was involved. Under these circumstances, the trial court committed no error in overruling the motion and in receiving the depositions in evidence.

Another contention on the part of the appellant is that the defendants or appellees were nonresident aliens and could not take the land in question by descent from Chris

Nelson. He relies upon the federal statute of March 2, 1907, the pertinent part of which is as follows:

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the department of state may prescribe. And provided, also, that no American citizen shall be allowed to expatriate himself when this country is at war." 4 U. S. Comp. St. 1916, sec. 3959.

The theory of the appellant is that this statute in connection with section 3961, also of the federal statutes, which provides that a foreign woman who acquires citizenship by marriage to an American shall only be permitted to retain such citizenship in case she resides abroad by registering before a United States consul within a year after the termination of her marital relation, absolutely prevented the defendant Alvilda Nelson from inheriting. And they say that this results the more certainly, as far as Nebraska real property is concerned, because of the Nebraska statute, section 5687, Comp. St. 1922. And they further urge with respect to the child Hertha Oman that, since she was born on the 28th day of May, 1910, she did not become a citizen of the United States, because on that date her father had resided abroad and in the country of his nativity for two years immediately theretofore.

In regard to the latter, it is to be observed that, while the evidence shows that Chris Nelson left the United States for Denmark about the middle of May, or in the latter part of that month, it does not follow that he arrived in Denmark during the month in question. He may have stopped in England. He may have traveled on the continent before taking up his abode in the country of his birth. The record

shows that he was married in Denmark during December of 1908, and there is no proof of his residence there prior to that time and after he left the United States.

But granting, for the sake of the argument, that he arrived in Denmark before the 28th day of May, 1908, and made that country his place of abode for two full years prior to the birth of his daughter Hertha, it is not to be concluded that he had lost his citizenship on the date mentioned. True, the federal statute states that the presumption of expatriation arising from such residence may be overcome by the presentation of satisfactory evidence to a diplomat or consular officer of the United States, but this does not deny the existence of other methods by which to rebut the said presumption. Any sufficient evidence indicating that he did not intend to renounce his allegiance and to give up his citizenship would have the same effect.

A similar question arose in connection with the case of Jebran Gossin. Opinions of Attorneys General, U. S., vol. 28, 504. Gossin, who was a native of Syria, had been naturalized in the United States. Later he returned to Syria and married a wife there, and after a period of two years of residence in his native land came back to this country, bringing his wife with him. She was afflicted with trachoma, and the authorities held her at Ellis island for deportation, relying on the construction of the statute that only by presenting evidence to a diplomatic or consular officer could the presumption that Gossin had ceased to become an American citizen be rebutted. But the attorney general held that the object of the statute was to relieve the United States from the duty of protecting its citizens abroad after the lapse of a reasonable period, and that the presumption was rebuttable in other ways than by application to such officials, chief among which was a return to America. The opinion strongly indicates that the evidence presented by the record in the case at bar was enough to justify the court in finding and adjudging that Nelson did not expatriate himself by his residence in Denmark. He kept his land in the United States, he returned to look after it

in 1913, and he told his wife that he considered the United States the best country in the world, asking her to go there with him and declaring that he intended to retain his American citizenship. A fixed purpose to terminate his allegiance to the United States was necessary, under the circumstances, to work a forfeiture of his citizenship. *State v. Jackson*, 79 Vt. 504. We have no difficulty in deciding that Chris Nelson was to his death a citizen of this country. Nor can we conclude otherwise than that his daughter Hertha was born a citizen of the United States, and so remains. Children of citizens of the United States who are born in foreign countries are citizens of the United States. The citizenship of the child is determined by that of the father, and though the latter reside in another country the child will be a citizen of this if the father has not forfeited or surrendered his allegiance thereto. *Wolff v. Archibald*, 14 Fed. 369; *Ware v. Wisner*, 50 Fed. 310; *State v. Adams*, 45 Ia. 99; 4 U. S. Comp. St., sec. 3963.

Turning our attention to Alvilda Nelson, the widow of the deceased and the mother of his child, and to the question of whether or not she inherited, it may be conceded that in order to retain her right to take and to hold by descent she should, under section 3961 of the federal statutes, *supra*, have registered before a United States consul within a year after the death of her husband. But there is nothing in the record to show affirmatively that she did not. If the plaintiff asserts the fact, the burden is upon him to prove it. *Buckley v. McDonald*, 33 Mont. 483. She became a citizen at the time that she married Chris Nelson. *United States v. Williams*, 173 Fed. 626. And we must so consider her at present, in the absence of proof to the contrary. It may be true that she will not be permitted to hold the disputed land because of the Nebraska statute above referred to, section 5687, Comp. St. 1922; but if by our law the same is ever escheated to the state it must be by appropriate proceedings and upon full compensation.

A third assignment of error is that the court erred in overruling the plaintiff's objection to the introduction of

any testimony, for the reason that the petition to vacate the judgment failed to state facts sufficient to constitute a defense, the appellant taking the position that neither under section 8590, nor section 9160, of the Compiled Statutes of 1922, could the first judgment of the court be set aside, and the defendants be let in to litigate. The former section provides for the setting aside of a judgment obtained upon service of summons by publication, where the defendants do not have actual knowledge of the pendency of the proceedings. On three grounds the appellant urges that the requirements of the statute were not observed: First, because there was no sufficient affidavit showing to the satisfaction of the court that defendants were without actual notice; second, because an answer was not tendered; third, because there was no proof adduced upon trial that the defendants did not have such notice.

As stated before, the application of the defendants to vacate the judgment was by way of petition. No affidavit, aside from said petition, was presented. The petition, however, was verified positively by I. J. Nisley, one of the attorneys for defendants and the next friend of the defendant Hertha Oman, a minor. The petition contains all of the essential averments of a jurisdictional affidavit, and, being verified positively, it would ordinarily be considered as performing the function of the affidavit required. But the objection is that the affidavit was not made by the defendant herself, but by her attorney, and that the latter failed to show that he had personal knowledge that the defendants were without notice. Usually, as the court said, in *Cass v. Nitsch,* 81 Neb. 228, the fact that a party had no actual notice of the pendency of an action in time to appear and defend is one of which he alone is cognizant, and such fact will best appear from the affidavit of the party himself. The maker of the affidavit, if not the party himself, must show in it that he had the means of knowing, and did know. In the cited case the affidavit which was considered was no more than upon information and belief. The sufficient cause for its condemnation was that it was not positively verified.

In view of this the additional expression employed approaches dictum. But, even as it is, the verification in the case at bar fairly meets the requirements of the rule, for it is not only positive, but it affirmatively states that the maker is the next friend of the defendant. This imports proximity and source of knowledge. It sufficiently sets forth the means by which the maker knew.

Because of these views, we believe and hold that the district court was justified in his ruling that the positively verified petition of the defendant was sufficient to perform the function of the statutory affidavit.

It is quite apparent, upon a perusal of the petition filed by the defendants, that the said petition contained every denial and every allegation necessary to a complete answer to the original petition filed by the plaintiff. The mere fact that it was designated as a petition, rather than an answer, is unimportant.

In the third place, the vacation of the decree and the opening of the case for trial must be held to be antecedent to the trial itself, and dependent upon the affidavit and counter affidavits filed. "The adverse party, on the hearing of an application to open a judgment or order, as provided by this section, shall be allowed to present counter affidavits, to show that during the pendency of the action the applicant had notice thereof, in time to appear in court and make his defense." Comp. St. 1922, sec. 8590. And since the affidavit or petition contained the necessary averments to satisfy the court that the defendants were without actual notice of the pendency of the case upon which the original decree was entered, and the court found in favor of the defendants upon that point, it was unnecessary for the defendants to prove it in the trial of the case upon its merits.

It is also probable that the petition and proceedings of the defendants were sufficient to entitle them to relief under section 9160 of the statutes. But this we do not discuss, because it is unnecessary in view of what has already been said, and because to do so would unduly consume time and space.

Some question remains as to whether or not the defendant Alvilda Nelson should be allowed to recover her interest in the land in any event. The evidence shows that shortly before the death of Chris Nelson there was pending in the Nebraska courts a suit on his behalf involving a portion of said land claimed by one Johnson. It is quite plain from the testimony of Alvilda Nelson herself that she executed her deed of conveyance to the plaintiff, Carl Nelson, upon the understanding that he was to pay the costs of this litigation, and also that he was to hold her harmless from liabiltiy upon the contract of suretyship hereinbefore referred to. It is also clear that Nelson not only discharged his obligations in these respects, but paid her the sum of $660 on account of the execution and delivery of said deed. On the other hand, it appears that there were representations on the part of said Carl Nelson, through his brother Niels Nelson, that the land was of little or no value, when the fact was, as he well knew, that it was worth upwards of $5,000. Compared with this sum, the obligations assumed and the payments made by Carl Nelson were a mere bagatelle, amounting to considerably less than one-fifth of the value of the land. Such disparity between the consideration and the real value of the thing sold and conveyed is so great as to be a badge of fraud. And this, in connection with the fraudulent representations referred to, inclines the court to the same judgment that was rendered by the district court.

Error is assigned because the decree of the court was not supported by the evidence and was contrary to law, but the foregoing discussion covers the assignments so made.

The decree of the district court was right, and without error, and it is accordingly

AFFIRMED.

Note—See Aliens, 2 C. J. sec. 28; Citizens, 11 C. J. secs. 12, 18 (1926 Ann.); Judgments, 34 C. J. secs. 569, 570.

EFFA BROWN BLODGETT ET AL., APPELLEES, V. FRANCES MAY COX ET AL., APPELLANTS.

FILED MAY 1, 1925. No. 23080.

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

Pemberton & O'Keefe, for appellants.

Sackett & Brewster, contra.

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

PER CURIAM.

All the parties to this suit claim through a common ancestor. Plaintiffs are the children of LaFayette P. Brown by his first wife, and defendant Frances May Cox is the child of LaFayette P. Brown by his second wife. Plaintiffs seek to enforce a written agreement made and entered into by the members of the family March 24, 1915, and to have decreed to each of them a one-third interest in the northwest quarter of section 5, township 3, range 6, in Gage county, Nebraska. The trial court entered a decree granting plaintiffs substantially the relief prayed, and defendants have appealed.

The trial court wrote a memorandum opinion which is set out at length in the transcript. This memorandum opinion discusses every point properly presented by the record. We approve the reasoning and affirm the conclusions reached in that opinion, and therefore find it unnecessary to write a formal opinion. The judgment of the district court is

AFFIRMED.

JOHN RASP, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

FILED MAY 1, 1925. No. 24659.

1. **Municipal Corporations:** ISSUANCE OF BONDS. Section 3610, Comp. St. 1922, construed, and *held* to confer power upon metro-

politan cities to issue bonds to secure funds with which to pay for lands condemned for parkways, when duly authorized by a vote of the electors.

2. ———: ———: MAJORITY VOTE. Under that section a majority of votes cast on the proposition is sufficient to carry the bonds.

3. ———: ———. An instruction contained in the ordinance submitting the proposition to the electors to the canvassing officer to certify the bonds carried in case 60 per cent. of the votes are in the affirmative, when the statute required a majority only, will not invalidate the election and will be treated as surplusage, as the duty of such officer is to certify according to law.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

John P. Breen, for appellant.

Dana B. Van Dusen, contra.

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

PER CURIAM.

The question involved in this case is the validity of certain bonds issued by the city of Omaha to pay damages assessed in proceedings in eminent domain for the condemnation of certain lands for parkways outside the corporate limits of the city. The action is to enjoin the sale of the bonds, and, the injunction having been denied and case dismissed by the district court, plaintiff appeals.

Our decision rests upon the proper construction of two sections of the charter of metropolitan cities, the relevant portions of which are as follows:

"The city council may purchase or acquire by the exercise of the power of eminent domain, in this section granted, private property * * * for the purpose and uses in this section specified.

"(1) For streets, alleys, avenues, parks, parkways, playgrounds, boulevards, sewers, public squares, market-places,

and for other needed public uses or purposes authorized by this act, and for the purpose of adding to, enlarging, widening or extending any of the foregoing named." Comp. St. 1922, sec. 3610.

It is then provided that the power may be exercised within the limits of the city or within 75 miles thereof. After requiring an ordinance declaring the necessity of the appropriation, the appointment of appraisers to assess the damages and report thereof to the city council, it provides:

"If the award is confirmed it shall be paid as in this act provided, but, if rejected, proceedings anew may be commenced."

The next paragraph authorizes the city council, in cases where the damages do not exceed $100,000, to confirm the report, levy special taxes to the extent that any properties are specially benefited by the improvement, and issue bonds of the city for "the excess of the costs of the improvement over the fund provided by special assessment." By the next paragraph, in cases where the damages exceed $100,000, the council is required to appoint a committee to determine the amount which may be assessed upon property specially benefited, and the paragraph then proceeds:

"If the amount (special benefits) so determined and found and finally approved does not equal or exceed 90 per cent. of the amount of the appraisal as reported and tentatively approved by the council, then such proceedings shall be abandoned, unless and until authority has been obtained from the electors to issue bonds to pay the excess of the costs of the improvements, as determined by the appraisal, over the amount which may be assessed as special benefits against the property specially benefited, as determined by the approved report of the committee.

"Authority to submit such proposition to the electors is hereby granted either at a general city election or a special election called for that purpose, as in the act provided. Tentative approval of the appraisal and awards shall not be binding upon the city unless the electors by the majority vote of those voting thereon ratify the same and authorize

the issuance of bonds to pay the excess of costs of the improvement over the amount which may be raised by special assessments.

"The proposition to be voted upon shall be for ratification of the appraisal and award tentatively made by the council and the issuance of bonds to pay the difference between the amount of the appraisal of damages and the amount which may be raised by special assessments. Both the amount of the appraisal of damages and the approved amount found by the committee which may be raised by special assessment shall be stated upon the ballot in connection with the proposition in such a manner as to advise the voter of the need of the amount of bonds proposed to be issued.

"If the proposition to issue bonds is authorized by the electors, as in this act provided, the council may issue bonds in the amount and for the purpose so authorized and it shall levy special taxes upon the property specially benefited, and to the extent to which specially benefited, for the purpose of paying the remaining balance of the appraisal of damages."

The next paragraph permits the council to issue bonds without an election in case the benefits exceed 90 per cent. of the cost of the improvement.

It appears from the record that the city took all the proper and necessary steps to condemn the property, and the damages were reported at $242,000. Thereupon a committee was appointed by the council to determine the amount which might be raised by special assessment of property benefited, and the committee reported that no property was specially benefited by the improvement, and therefore no special assessments could be levied. Thereupon the city council submitted to the electors the question of the issuance of bonds in the sum of $242,000 to pay the damages for the property taken. The bonds were carried by a majority of the vote cast, but less than 60 per cent. of the vote (which presents a question to be discussed later), and thereupon the bonds in the question were issued.

The plaintiff's first contention is that, under these provisions as above quoted, no authority exists in the city

council to issue bonds except for an excess of the damages over and above an amount which may be assessed upon property specially benefited. If this contention is to be upheld, the city would be without the power of eminent domain in any case which does not admit of special assessment for benefits; for without the right to issue bonds the power would be practically useless. We do not think the sections in question will bear such construction. It will be noted that the section confers upon the city the power of eminent domain, both for improvements which may be paid for in whole or in part by special assessment and for improvements to which the principles governing special assessments have no application whatever, to wit, "market-places, and for other needed public uses or purposes," which includes a city hall, city jail, hospital, library, and many others not enumerated. While ordinarily grants of power to municipal corporations are to be strictly construed, an intention of the legislature to so cripple the authorities of metropolitan cities in the performance of absolutely necessary public duties is not to be inferred, by construction, from indefinite or doubtful expressions in the statute, but only when the legislative intent is stated in clear and positive language. By the first paragraph and subdivision 1 of section 3610, the full power of eminent domain is granted, and the subsequent provisions where the damages awarded do or do not exceed the sum of $100,000 were inserted, in our view, for the purpose of defining and limiting the power of the council to act without a vote of the people, but not for the purpose of limiting the general powers of eminent domain granted the city by the earlier part of the section. It is true that the word "excess" as applied to figures involves the idea of a comparison between two amounts, but may not one term of the comparison be zero, and therefore $10 is in excess of zero by $10? If one man has nothing and another has a million dollars, is any violence done to either grammar or syntax by the expression "that the latter has so much wealth in excess of the former?" We think appellant's position is hyper-technical, and that,

where, as in the present case, the clear intent of the legislature was to limit the legislative powers of the council in certain cases, the use of such term should not be construed as a limitation upon the power of the electorate to vote bonds to pay for property condemned for a concededly public purpose. The argument *reductio ad absurdum* may not be a very valuable aid to logic, but it would seem, as no minimum is fixed as regards special benefits to be assessed, a finding in good faith of a trivial amount would satisfy the statute, even if appellant's construction be adopted; in fact, it is quite conceivable that only one abutting lot might be specially benefited, *e.g.*, converted from an inside into a corner lot, thus reducing the bond issue by only a few dollars. We think it unnecessary to resort to such niceties, and consider the construction we have adopted the logical one.

Plaintiff's next contention is that 60 per cent. of the votes cast upon the proposition was requisite to authorize the bonds. This contention is based upon section 3527, Comp. St. 1922, which requires "that, whenever the question and proposition of issuing bonds is submitted, it shall require sixty per cent. of the electors voting thereon to carry same, except where in this act it is otherwise provided." The proposition in question is clearly within the exception. In this connection attention is called to the language of the portion of section 3610 last above quoted, "Tentative approval of the appraisal and awards shall not be binding upon the city unless the electors by *the* majority vote of those voting thereon ratify the same," and it is suggested that the use of the article "the" refers to the provision of section 3527 requiring a 60 per cent. vote, but we think the word "majority" has a definite meaning in our institutions and laws, and that the word "the" is evidently used in the same sense as "a."

The ordinance instructed the canvassing officer to certify the proposition "carried" if 60 per cent. of the votes were "yes," whereas, as we have seen, only a majority was required, and plaintiff contends the bonds were invalid for

this reason. Neither the statute nor any ordinance governing the submission of the question to the electors, so far as we are advised, required any statement on that subject, and it was not a matter material to the elector in determining his vote and may properly be treated as surplusage, as such officer's duty is to certify according to law. That one provision of an ordinance is void for being in conflict with the statute will not invalidate the entire ordinance; and when the illegal portion does not affect the integrity of the election, which, in all other respects, is in conformity with law, the election will be sustained. *Blakey v. City Council of Montgomery,* 144 Ala. 481. See, also, *North v. McMahan,* 26 Okla. 502; *Hamilton v. Village of Detroit,* 83 Minn. 119.

We conclude that the bonds are valid obligations of the city, and that the district court was right in denying the injunction.

AFFIRMED.

Note—See Municipal Corporations, 28 Cyc. pp. 1578, 1588, 1589.

AGNES STEPHAN, APPELLEE, V. PRAIRIE LIFE INSURANCE COMPANY, APPELLANT.

FILED MAY 1, 1925. No. 23026.

1. **Insane Persons:** SUIT BY NEXT FRIEND. When a person is not actually insane, but is incapable, through age or weakness of mind, to conduct his own affairs, a suit may be maintained on his behalf by his next friend, and neither section 1599, nor section 8531, Comp. St. 1922, are in derogation of this right.

2. **Insurance:** CONTRACT: LAW GOVERNING. When an insurance policy is issued by a Nebraska company upon the life of one living in Iowa, where the application for the insurance was written, the premium paid, and the policy delivered, the policy is an Iowa contract and must be construed according to the laws of that state.

3. ———: LIABILITY: EXEMPTION. Under the law of Iowa the military or naval clause forming a part of the policy in suit and set out in the opinion does not exempt defendant from

liability upon the contract under the record presented in this case.

4. Trial: INSTRUCTIONS. The instructions complained of have been examined, and, when construed as a whole, are found free from error.

5. ———: RULINGS ON EVIDENCE. The rulings of the trial court on the admission of evidence have been examined, and *held* free from error.

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

Blackburn & King, for appellant.

McKenzie, Burton & Harris, contra.

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

MORRISSEY, C. J.

This is an action on a policy of life insurance issued by defendant on the life of one Floyd E. Stephan in the sum of $5,000. Plaintiff, Agnes Stephan, mother of the insured, is the person named as beneficiary. The policy was issued March 20, 1918, and contained what is commonly denominated a military and naval clause, which reads as follows:

"If the insured at any time engage in military or naval service in time of war (the militia or national guard not in active service excepted) and death shall occur during such engagement or as a result thereof, the liability hereunder shall be limited to the cash surrender value of the policy at the date of death, unless the insured shall have obtained the company's written consent and paid the extra premium therefor at its established rate."

At the time the policy was issued, insured was a farmer, and, under the federal statute as it then existed, he was exempt from the operation of the selective service act, May 18, 1917, 40 U. S. St. at Large, ch. 15, sec. 4, p. 78. The statute was modified soon thereafter so as to make subject to its terms the class of persons to which insured belonged. In August, 1918, insured was inducted into the military

service and sent to a training camp at Fort Dodge, Iowa, where in October, 1918, he died. The cause of insured's death is shown to have been influenza and pneumonia. Proof of death of insured was made in the usual way. The company asserted its exemption from payment of any sum in excess of the cash surrender value of the policy because the insured had entered the military service without having first "obtained the company's written consent and paid the extra premium therefor at its established rate," but offered to return the premiums paid. The beneficiary was a resident of Iowa, and it was agreed between the officers of the company and Frank C. Stephan, the son of the beneficiary, who was acting for her, that the insurance commissioner of Iowa should be consulted as to the liability of the company under the policy. Accordingly Frank C. Stephan wrote to the insurance commissioner of Iowa, and inclosed the policy. He said:

"In behalf of my mother, the beneficiary, I wish you would take this matter up with the company and see what can be done in the matter."

Subsequently the president of defendant company visited Mrs. Stephan's home at Ida Grove, Iowa, and, after a conference with the beneficiary, the following letter was written:

"Ida Grove, Iowa, March 5, 1919.

"Hon. A. C. Savage,
Insurance Commissioner,
Des Moines, Iowa.

Dear Sir: You have in your office a policy of insurance issued on the life of Floyd E. Stephan by the Prairie Life Insurance Company of Omaha, Nebraska, on which he did not apply for nor obtain a permit to engage in military or naval service. He died while so engaged. If in your opinion the company is not liable for the face of the policy, you may consider this as a full instruction to receive for me the company's check for $120.35. Send same to me and deliver the policy to Dr. W. R. McGrew, president of the company.

"Agnes Stephan, Beneficiary.

"Frank C. Stephan, Witness."

We understand that this letter was composed by the president of the company, but it bears the genuine signature of the beneficiary. Apparently the insurance commissioner reached the conclusion that the company was not liable for the face of the policy, and accordingly the company's check for $120.35 was sent to the beneficiary and the policy delivered to the company. It may be noted that in Mrs. Stephan's letter there is no stipulation or agreement binding the insurance company to do anything or to pay any amount, but it is now claimed by the company that, at the time this letter was written, its president told the beneficiary that, if the commissioner should rule that the company was liable, the company would accept his decision as final and pay the face of the policy. Nearly two years subsequent to the acceptance of the check by the beneficiary and the delivery of the policy to the company, this action was instituted in the district court for Douglas county, Nebraska.

The original petition was filed by James E. Stephan, as guardian of his mother, Agnes Stephan, but the third amended petition, the petition on which the cause was tried, is signed by James E. Stephan, as next friend of Agnes Stephan. In this petition it is alleged that James E. Stephan is the son of plaintiff, the beneficiary; that he brings this action for her and in her behalf, as her next friend; and "that said Agnes Stephan is incompetent and a non-resident of the state of Nebraska; that there has been a guardian appointed for said Agnes Stephan in and for the state of Nebraska." By a subsequent allegation the petition alleged that a guardian had been appointed for the beneficiary in the state of Iowa, and that the beneficiary was incompetent. The petition alleged, also, and at considerable length, negotiations between the insured and an agent of the insurance company which culminated in the issuance of the policy in suit and the payment therefor by the insured, and alleged that, before payment was made, the insured had been informed by defendant's agent that the

company so construed and interpreted the clause of its policy pertaining to military service that it did not apply unless the death of the insured was caused by the performance of some duty in the military service, and that it did not apply while insured was in a training camp, or within the borders of the United States. And it alleged the issuance and delivery of the policy to the insured under the interpretation pleaded; the payment of the premium; and the death of insured by influenza at Fort Dodge, Iowa, on October 15, 1918, "while he was in the service of the United States as a soldier." It is alleged that the policy was delivered in the state of Iowa; the premium paid in that state; and that the contract is governed by the laws of Iowa, which are alleged to be:

"That the words, 'death while engaged in military service in time of war,' in that clause of an insurance policy pertaining to military or naval service means that the death must occur while doing, performing or taking part in some military service in time of war. In other words, it means death caused by performing some duty in the military service, and in order to exempt the company from liability, death must have been caused while the insured was doing something connected with the military service in contradistinction to death while in the service due to causes entirely or wholly unconnected with such service."

And there was the usual prayer for judgment.

After hearing upon and disposition of demurrers and motions, defendant answered. It admitted that plaintiff was a nonresident of the state of Nebraska, and that a guardian had been appointed for plaintiff in the state of Iowa, and alleged that under the statutes of Nebraska, in an action by an incompetent person, where there is a duly qualified and acting guardian, an action cannot be maintained by a next friend; and challenged the right of James E. Stephan, as next friend of the incompetent person, to maintain the action. The answer set out the clause of the policy relating to military or naval service, and alleged that, by reason thereof, defendant had fully complied with all the

terms and conditions of the contract; that the insured entered the military service of the United States without first obtaining the consent of defendant company; that he did not pay the extra premium as provided in the policy in case he entered military service; and that, at the time the insured died, the policy had no cash surrender value because it had not been in force for a sufficient period to give it such value as provided by the terms of the policy. It further pleaded that the application was received at the home office of the company in the city of Omaha, Nebraska; that the application and medical examination which accompanied the same were approved in Nebraska, and set out the conditions of the contract for the payment of any sum due thereunder at its home office, and alleged that the policy was, and is, a Nebraska contract, to be construed and governed by the laws of Nebraska. It denied the power of its agent to interpret the policy or to bind the company in any way beyond the plain terms of the written contract. In conclusion, the answer set out the negotiations for a settlement and the submission of the matter to the insurance commissioner of Iowa; that he had, by the acts of the parties, been constituted an arbiter to settle the questions in controversy, and that he had found and determined that defendant was not liable on the policy in suit; and that, pursuant thereto, the policy had been surrendered to defendant and defendant had paid to the beneficiary the sum of $120.35 "in accordance with the terms of said contract and agreement of settlement." It alleged that the submission to arbitration was voluntary and made with the approval of Frank C. Stephan, son of the beneficiary, and denied that, at the time the alleged settlement was made, the beneficiary was incompetent, and alleged that the settlement had been made in good faith, and that defendant had been released from all liability arising upon the policy.

By reply plaintiff denied that she had ever entered into an agreement with defendant to submit the question of defendant's liability under the policy to arbitration, and denied that the letter written to the insurance commis-

sioner of Iowa was an agreement to arbitrate or an agreement to constitute the insurance commissioner an arbiter; but alleged that the letter to the insurance commissioner and the purported release and settlement, relied upon by defendant, were signed by beneficiary when she was wholly incompetent to execute an agreement, and that she had been induced to sign the same through the fraud and misrepresentation of defendant. The cause was submitted to a jury, which returned a verdict for plaintiff for the amount prayed, and, from the judgment entered on the verdict, defendant has appealed.

The first assignment challenges the right of plaintiff to maintain the action by James E. Stephan, her next friend. It is said: "There being a guardian, suit should not have been permitted by next friend." It is true that the petition makes the statement in paragraph 1 that a guardian had been appointed in Nebraska, and in paragraph 13 it is said that a guardian had been appointed in Iowa. Counsel for appellant in their brief cite sections 1599, and 8531, Comp. St. 1922, in support of their objection. These sections provide for the bringing of suits in behalf of an infant by a next friend, but there is nothing said in either section which is controlling in a suit brought by an incompetent person by a next friend. In *Wager v. Wagoner*, 53 Neb. 511 it is held: "One who is insane, but has not been so adjudged, and who has no guardian, may sue by his next friend." It is a general rule that, where a person is actually insane, but has not been judicially so declared, both actions at law and suits in equity may be maintained on his behalf by his next friend. The authorities are also harmonious in holding that, in all cases where a person is not actually insane, but is incapable, through age or weakness of mind, to conduct his own affairs, suits may be maintained on his behalf by his next friend. But it has been held that it is in the discretion of the court to allow an action so instituted to proceed or not, and it may order a stay of proceedings to await the due appointment of a general guardian, or order the

same to be discontinued, as it may be advised. 14 R. C. L. 611, sec. 63.

We must next determine whether the policy is to be construed under the law of Iowa or under the law of Nebraska. Insured was a resident of Iowa, and the application was taken, the premium paid, and the policy delivered in that state. Under these circumstances the policy became an Iowa contract and will be construed according to the law of that state. 25 Cyc. 747, 748; 13 C. J. 580, sec. 581; 14 R. C. L. 892, sec. 69.

We come now to what may be considered as the controlling question. What is the effect of the military or naval clause heretofore quoted? If given the construction contended for by the insurer, no recovery can be had by plaintiff in this action. Insured had entered the military service in time of war without having "obtained the company's written consent and paid the extra premium therefor at its established rate." Death occurred during such service, although not as a result thereof, and defendant, prior to the bringing of this action, had paid to plaintiff a sum greater than the cash surrender value, if, indeed, the policy had a cash surrender value. Plaintiff introduced in evidence the opinion of the supreme court of Iowa in *Boatwright v. American Life Ins. Co.* (191 Ia. 253) 180 N. W. 321, wherein there was presented substantially the same defense presented in this action based upon the military or naval clause of the policy. After an exhaustive review of many authorities, the court held:

"Death of an enlisted man in the navy at the Great Lakes Naval Training Station in Illinois from influenza, which at that time was prevalent not only in the navy, but also in the army and in civilian life, *held* not within a clause limiting insurer's liability for death of insured while 'engaged in military or naval service in time of war' without having obtained insurer's permit, although the United States government at that time was at war with the Central European powers."

We see no logical way of differentiating that case from

the one before us. It is apparent that under the law of Iowa the military or naval clause of the policy pleaded as a defense by defendant does not exempt it from liability to plaintiff.

Objections are made to instruction No. 2, instruction No. 3, and instruction No. 4. Certain clauses of these instructions are singled out and said to be prejudicial to defendant. The rule is well settled that instructions must be read and considered as a whole. When so read and considered, the instructions are without prejudice to defendant. There is further complaint of the rulings of the court on the admission of evidence. These rulings have been examined, but when considered in the light of the issues before the court, they cannot be held to be prejudicial, and the judgment of the district court is

AFFIRMED.

Note—See Insane Persons, 32 C. J. sec. 571; Insurance, 32 C. J. sec. 8; Life Insurance, 37 C. J. sec. 294.

WINFIELD SPONSLER ET AL., APPELLEES, V. FRED M. MAX, APPELLANT.

FILED MAY 1, 1925. No. 23098.

1. **Vendor and Purchaser:** CANCELATION OF CONTRACT. "A vendee who demands the cancelation of a contract to purchase real estate for nonperformance by vendor must show compliance with its terms or tender of performance on his part." *Olson v. Woodhouse*, 112 Neb. 527.
2. **Evidence** examined, and *held* sufficient to sustain the judgment.

APPEAL from the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

W. L. Minor, for appellant.

Butler & James, contra.

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

DAY, J.

This is an action by plaintiffs for a strict foreclosure of a contract for the sale of real estate, wherein the plaintiffs are vendors and the defendant, Fred M. Max, is vendee. The defendant filed a cross-petition in which he sought a cancelation of the contract and a return of $1,000, which he had paid upon the contract. The trial court found, upon an accounting between the parties, there was due on the contract from the defendant $3,900, and decreed that, unless the defendant paid said sum within 60 days, the defendant should be forever barred from any rights under the contract, and that the title to the lands be quieted in the plaintiffs as against the defendant. The court also found and decreed against the defendant on his cross-petition. From this decree the defendant has appealed.

The record shows that on March 10, 1920, the plaintiffs and defendant entered into a written contract by which the plaintiffs agreed to sell and the defendant agreed to buy a certain tract of land, specifically described, together with certain items of personal property, for $10,700. By the terms of the contract $1,000 was to be paid on April 1, 1920, $4,800 on March 1, 1921, at which time the vendors were to deliver a warranty deed to the defendant for the premises, subject to a mortgage of $4,900, which the vendee was to assume and pay. The contract also provided that the vendors were to furnish to the vendee, on or about February 1, 1921, an abstract of title showing a valid and marketable title to the lands in the vendors. Time was made the essence of the contract.

The defendant paid the $1,000 due April 1, 1920, but failed to make the payment of $4,800 which by the terms of the contract was due March 1, 1921.

While the contract is silent as to the place where the final settlement and delivery of the deed was to be made, the evidence satisfies us that the parties understood that the settlement was to be made at the Bank of Cambridge where the original papers were drawn and executed. Under the issues presented, we think the case must turn upon the question as to which one of the parties breached the contract.

The evidence is clear that defendant did not go to the bank on March 1, 1921, or at any other time, and offer to perform his part of the contract. He attempts to excuse his failure to pay the amount due on March 1, 1921, and to demand a deed for the premises, upon the ground that plaintiffs had failed to furnish him an abstract of title, as provided in the contract.

It will be noted that the contract provided that the plaintiffs should furnish an abstract of title on or about February 1, 1921, showing a valid and marketable title in the plaintiffs. The record shows that the Bank of Cambridge, acting for the plaintiffs, sent to the defendant in January, 1921, an abstract of the title. Through an error of the defendant this abstract was returned by the defendant's wife to the bank, without comment, instead of being sent to the attorney for defendant, as intended by the defendant. On February 12, 1921, defendant's attorney wrote the bank stating, in effect, that the abstract had been erroneously returned to it and requesting that the abstract be sent to him for examination. This was done. On February 24, 1921, the attorney returned the abstract to the bank suggesting some corrections to be made and refusing to accept the abstract as a compliance with the terms of the contract.

On February 26, 1921, the bank wrote a letter to defendant's attorney stating that the abstract would be in the bank on March 1, 1921, with all corrections made to put the title in a merchantable condition, and that vendors would be present to make settlement on March 1, 1921. The testimony shows that the vendors were present at the bank on March 1, 1921, with a deed to the premises properly executed, and were then ready, able and willing to carry out the contract, but that defendant failed to appear. On March 7, 1921, the bank, for the plaintiffs, wrote a letter to defendant stating in effect that, if the defendant would pay $2,400 in cash on the contract, the plaintiffs would extend the time of payment of $2,400 for one year without interest. The defendant made no response to this letter. His testimony with reference to this letter is that

he never received it. It is quite evident that the defendant was not relying on a strict performance of the contract as to time, because as late as December 9, 1921, he wrote a letter to the plaintiffs concerning this transaction, in which he says: "Well, I went to see my man twice last week and he didn't tell me what he was going to do, but I will be honest with you, if he don't get the money I can't get it for you."

Considering the entire testimony, we are quite convinced that the defendant was the one who breached the contract.

Defendant claims that the abstract did not show a merchantable title. The objections to the abstract are not very well founded. The testimony is not clear as to what objections were made upon the trial, but the evidence shows the objections were met, and that on March 1 the plaintiffs were in a position to complete the contract in accordance with its terms.

The defendant also urges that the plaintiffs sold the land and thus put it out of their power to carry out the contract. In this respect the testimony shows that the plaintiffs had entered into a contract of sale for the land and had delivered a deed in escrow to the bank, but it is shown that the plaintiffs were still in a position to perform the contract with defendant. The vendee in the second sale testified that he was willing to surrender his rights under his contract.

The rule is established in this state that—"A vendee who demands the cancelation of a contract to purchase real estate for nonperformance by vendor must show compliance with its terms or tender of performance on his part." *Olson v. Woodhouse,* 112 Neb. 527.

From a review of the entire record, we are quite convinced that the judgment of the district court is right, and it is therefore

AFFIRMED.

GEORGE R. CLINE, APPELLANT, V. FIDELITY PHENIX FIRE INSURANCE COMPANY, APPELLEE.

FILED MAY 1, 1925. No. 23128.

1. Insurance: CONTRACT BY AGENT. An insurance company is bound by a contract of its agent which is within the scope of his real or apparent authority, notwithstanding it is in violation of private instructions or limitations upon his authority, of which a person dealing with him, acting in good faith, has neither actual nor constructive knowledge.
2. ———: ORAL CONTRACT. An oral contract of insurance which is certain as to parties, time, amount, rate, and property is valid.
3. ———: CONTRACT BY AGENT: QUESTION FOR JURY. Evidence examined, the substance of which is set out in the opinion, and *held* to present a question for the jury to determine whether the contract of insurance of the agent was within the scope of his apparent authority.

APPEAL from the district court for Hamilton county: GEORGE F. CORCORAN, JUDGE. *Reversed.*

Hainer, Craft, Edgerton & Fraizer, for appellant.

J. J. Reinhardt and *Crow & Newman, contra.*

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

DAY, J.

Action by plaintiff, based upon an alleged oral contract of insurance with defendant, to recover for the loss of a barn by fire. The defendant denied the existence of the contract and denied the authority of its agent to make such a contract in its behalf. At the close of the testimony the trial court directed the jury to return a verdict for the defendant, which was done, and thereupon rendered judgment for the defendant. Plaintiff appeals and now urges that the question of the authority of the agent to make the contract should have been submitted to the jury.

The record shows that in November, 1913, the plaintiff applied to Wentz Company of Aurora, Nebraska, agent of the defendant insurance company, for insurance upon a

barn owned by the plaintiff, located upon the southwest quarter of section 31, township 10, range 6, in Hamilton county, Nebraska. The defendant accepted the application and issued to the plaintiff two policies, one covering loss by fire and lightning, and the other covering loss by windstorms, cyclones and tornadoes. The windstorm policy referred to the fire policy, so that the two policies and the application constituted a single transaction. Both policies stipulated $700 on the barn, $250 on grain, and $50 on hay. By an arrangement between plaintiff and the agent, the latter was to keep the policies in its vaults. By express terms these policies expired on November 22, 1918. Shortly before the expiration of the policies the agent wrote the plaintiff that his insurance would soon expire, and requested him to come in and renew the insurance. On November 22, 1918, the plaintiff called upon defendant's agent and stated that he wanted his insurance on his barn renewed to cover loss by fire, lightning and windstorm; that he wanted $700 insurance on the barn, but did not care for further insurance on the grain or hay. The plaintiff then signed an application prepared by the agent, paid $19.25 premium, and was told by the agent "You are insured now for five years," and added, "You don't need to bother any more about the insurance." Plaintiff then requested the agent to keep the "papers," as had been done before.

In March, 1920, this barn was slightly damaged by a windstorm. At the same time another barn owned by the plaintiff located on another quarter section of land was also damaged. On being notified of this loss, the agent of defendant came to plaintiff's home, examined the barn in question, and later plaintiff received defendant's check in settlement of the loss on this barn.

In September, 1920, the barn was totally destroyed by fire. Meanwhile Wentz Company, the agent of the defendant, had failed in business, and other parties were appointed agents for the company. After the fire the plaintiff for the first time learned that no policies had been issued by the defendant based on the application of November 22, 1918.

The record further shows that Wentz Company was the duly authorized agent of the defendant, that it had authority to issue policies on property located in town, but as to farm property was authorized only to take applications for insurance and forward the same, together with the premium, to the defendant's office in Chicago.

For some reason, which is not explained, Wentz Company did not send to the defendant the plaintiff's application dated November 22, 1918, but on February 11, 1919, it sent an application for insurance on the property in question to the defendant, signed: "George R. Cline, Applicant, by Wentz Co., Agents." On the back of this application was an indorsement showing that the premium, $19.25, had been paid in cash. This application was rejected by the defendant and returned to Wentz Company February 21, 1919. Plaintiff was never notified until after the loss that a policy had not been issued nor was the premium which he paid ever returned to him.

While it is true that, as between the defendant and its agent, Wentz Company, the latter was not authorized to make a contract of insurance on farm property which would bind the defendant, yet we think, under the peculiar facts disclosed by this record, that the question of the agent's apparent authority to make such a contract should have been submitted to the jury. The rule is well settled that an insurance company is bound by all acts, contracts or representations of its agent, whether general or special, which are within the scope of his real or apparent authority, notwithstanding it is in violation of private instructions or limitations upon his authority, of which a person dealing with him, acting in good faith, has neither actual nor constructive knowledge. In *Rankin v. Northern Assurance Co.*, 98 Neb. 172, it was held:

"The contracts of a local agent of an insurance company are binding upon the company if within the apparent authority of the agent and are entered into in good faith by the insured."

Numerous cases supporting this rule are cited in 32 C. J. 1063, sec. 140.

Besides this, it may well be considered that the defendant, by keeping the premium and paying the damage to the barn occasioned by the windstorm, has ratified the acts of its agent in making the contract. Defendant knew that the premium had been paid by the plaintiff, and if it declined to accept the risk it was its duty to see that the money was returned. It is not sufficient that it may have directed Wentz Company to return the premium. Wentz Company was its agent and its failure to do this was the failure of the defendant.

It is urged by the defendant that an oral contract for insurance is invalid. This court, however, is committed to the rule that an oral contract for insurance, certain as to parties, time, amount, rate, and property, is a valid contract. In *Clark v. Bankers Accident Ins. Co.*, 96 Neb. 381, it was held:

"Ordinarily it is within the power of an insurance agent to make an oral contract of insurance, or to agree that the insurance shall be in force after the application is signed, and the premium paid, and before a policy is actually written, unless the assured is, or should be held to be, apprised in some manner, either in the application or otherwise, that the insurance will not be in force until the application is approved at the home office and the policy issued and delivered."

See, also, *Bridges v. St. Paul Fire & Marine Ins. Co.*, 102 Neb. 316; *Glatfelter v. Security Ins. Co.*, 102 Neb. 464; *Kor v. American Eagle Fire Ins. Co.*, 104 Neb. 610.

Not infrequently applications for insurance contain a stipulation to the effect that the insurance will not become effective until the application is approved at the home office and a policy issued thereon and delivered. The application signed by the plaintiff contained no such provision, and there was nothing in it to apprise him that the agent could not accept the application and issue a policy thereon.

In view of the entire record, we think the question of the

apparent authority of the agent, Wentz Company, to make the contract as claimed by plaintiff should have been submitted to the jury.

In the case of *Johnston v. Milwaukee & Wyoming Investment Co.*, 46 Neb. 480, it was held:

"Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority. Whether or not an act is within the scope of an agent's apparent authority is to be determined under the foregoing rule as a question of fact from all the circumstances of the transaction and the business."

See *Thomson v. Shelton*, 49 Neb. 644; *Phœnix Ins. Co. v. Walter*, 51 Neb. 182; *Holt v. Schneider*, 57 Neb. 523.

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

REVERSED.

Note—See Insurance, 32 C. J., secs. 140, 180, 181, 209.

BERNARD PRAEST, APPELLANT, V. ERNEST QUESNER ET AL., APPELLEES.

FILED MAY 1, 1925. No. 23144.

1. **Mortgages**: CONSIDERATION. Evidence examined, and *held* to establish a full, valid consideration for the notes and mortgage in controversy.
2. **Bills and Notes**: INTEREST. A promissory note which, by its terms, provides for interest from date, without any specified rate, bears interest at the rate of 7 per cent. per annum from its date.

APPEAL from the district court for Thurston county: GUY T. GRAVES, JUDGE. *Affirmed as modified.*

A. R. Oleson, for appellant.

W. M. Cain and *Otto H. Zacek, contra.*

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

GOOD, J.

Action by plaintiff to quiet title to a half section of land in Thurston county, Nebraska, and especially to cancel the lien of a certain mortgage for $22,000 in which the defendant is named as mortgagee. Plaintiff alleged that there was no consideration for the mortgage. Defendant answered, and filed a cross-petition, praying for a foreclosure of the same mortgage. A trial of the issues resulted in a finding and decree adverse to plaintiff and in favor of defendant, foreclosing his mortgage, but for a less amount than defendant claimed was due thereon. Plaintiff has appealed, and defendant has filed a cross-appeal.

It appears that defendant Quesner is, and for many years has been, an officer of the Howells State Bank, at Howells, Nebraska, and that plaintiff was a customer of said bank, being both a depositor in and a frequent borrower from the bank. Much of the time his bank account was overdrawn. Many times, when his loans were excessive, a part thereof was carried by defendant Quesner in his individual capacity. Plaintiff's theory is that in executing notes to the bank or to the defendant he accepted the latter's statement and representations as to the amounts due, and executed notes for whatever amount was requested by defendant, believing at the time that such amounts were justly due. On or about the 28th of February, 1920, he executed three notes, aggregating $22,000, and a mortgage to secure the same. At the time he supposed and believed that he was indebted to the bank or to the defendant in that amount, but later discovered that nothing was due the bank or defendant, and, therefore, the notes and mortgage were without any consideration. He claims he did not discover the mistake or fraud until he had paid $1,000 upon one of the notes and interest on all of them for one year.

Plaintiff contends that in an action upon a negotiable instrument by the payee against the maker, when consideration is denied by the latter and evidence is introduced tend-

ing to show want of consideration, then the burden is upon the payee to show a valid consideration for the instrument. The rule contended for is conceded by the defendant and is undoubtedly the law. Plaintiff insists that defendant has not met the burden thus imposed upon him. So far as plaintiff's appeal is concerned, the sole question for determination is whether the evidence is sufficient to show a consideration for the notes and mortgage in controversy.

From plaintiff's testimony it appears that he was obsessed with the idea that each time he gave a promissory note to the defendant or to the bank he should have a corresponding credit for the amount in his bank account and in his pass-book. In many instances no credit appears on his pass-book for the amount of the note he had given, and he therefore concluded that he had been defrauded and had not received any consideration for many of the notes which he had executed prior to February 28, 1920, that being the date on which the mortgage in controversy and the notes thereby secured were executed. However, from a careful examination of all the evidence, we are satisfied that plaintiff was in error, and that he received credit in his bank account for each note executed when he was entitled thereto.

Plaintiff also testified that he had delivered to defendant a check for $3,500, drawn on another bank, and for which he should have been entitled to credit in his bank account, and that no credit was given for the check. The evidence clearly shows, however, that, while plaintiff did not receive credit in his bank account, he did receive credit therefor upon his obligation to Smith and Hancock, from whom he had purchased a tract of land in Thurston county, and that this check was transmitted to them by defendant for plaintiff and was received by Smith and Hancock as a part of the purchase price of the land. Plaintiff's contention that the notes secured by the mortgage in controversy were given in settlement of previous notes, for which he had not received any consideration, seems to be utterly unfounded.

From the evidence it fairly appears that the mortgage in controversy and notes thereby secured were not given

in settlement of plaintiff's previous indebtedness to the defendant and the bank. In November, 1919, defendant purchased from Hancock and Smith a half section of land in Thurston county for which he was to pay $100,000, and of which $10,000 only was paid at the time the contract was made, the remaining $90,000 being due on the 1st of March, 1920. The mortgage in controversy and the notes were given to raise a part of the $90,000 due, and the evidence fairly shows that the entire proceeds were remitted to Hancock and Smith as a part of the purchase price due from plaintiff. From the facts disclosed by the record, it satisfactorily appears that defendant has established, by a preponderance of the evidence, that there was a full, valid consideration for the notes and mortgage.

The trial court, however, treated the action as one for a general accounting, and in so doing refused to allow interest upon four notes which had been previously given by plaintiff to defendant or the bank, because, as the court interpreted the notes, they did not bear interest. Sixty-four notes, which had been given by defendant previous to the transaction in controversy, were received in evidence. These notes contained the following printed clause: "With interest payable annually at the rate of ten per cent. per annum from———until paid." In all of these notes, with but a single exception, the word "date" was written in the blank space in the quoted clause, and in most of the notes the word "ten," indicating the rate of interest, was stricken out and the figure "8" inserted in lieu thereof. In four of these notes the word "ten" was stricken out and no other word or figure inserted in its place, so that the interest clause in the four notes read: "With interest payable annually at the rate of .... per cent. per annum from date until paid." The trial court allowed plaintiff credit upon the notes, secured by the mortgage in controversy, in an amount equal to the interest on these four notes from their date until maturity. This action of the trial court constitutes the basis of defendant's cross-appeal.

Under sections 2835, 2837, Comp. St. 1922, a promissory

note, which, by its terms, provides for interest without any specified rate, bears interest at the rate of 7 per cent. per annum from its date. This court has heretofore held that a promissory note, containing a similar interest clause, bears interest from its date at 7 per cent. *Hornstein v. Cifuno*, 86 Neb. 103. This question we do not regard as material, because the action was not one for a general accounting, but to cancel a specific lien upon real estate. Defendant was entitled to a decree of foreclosure for the amount due upon the notes and mortgage, less payments that had been made thereon.

There is another matter which requires attention. The decree below awards defendant 10 per cent. interest on the entire amount found due. An examination of the notes shows that the $10,000 note, on which $1,000 had been paid, bears interest after maturity at 10 per cent. per annum, while the other two notes bear interest at the rate of 8 per cent. from date until paid. On August 14, 1922, the date of the decree, the amount then due on the $10,000 note, bearing the default rate of 10 per cent. interest, was $10,310, and the amount due on the other two notes at that time was $13,397.33. The decree of the district court should be and is modified so as to award the defendant a decree of foreclosure for $23,707.33 as of the date of August 14, 1922, of which amount $10,310 bears interest at 10 per cent. per annum from August 14, 1922, and $13,397.33 bears interest at the rate of 8 per cent. per annum from the same date.

The judgment of the district court, as herein modified, is affirmed.

AFFIRMED AS MODIFIED.

HOUSE OF THE GOOD SHEPHERD, APPELLEE, V. BOARD OF EQUALIZATION OF DOUGLAS COUNTY, APPELLANT.

FILED MAY 1, 1925. No. 24555.

1. **Taxation: EXEMPTIONS.** Under section 5821, Comp. St. 1922, a laundry property is exempt from taxation, where it is owned

and used by a religious, educational and charitable institution in carrying on its educational and charitable work, and where the income from the laundry is used for the support of the institution and its inmates, and no financial gain or profit inures to the owner.

2. ———: ———. Under the facts set out in the opinion, *held*, that the laundry property of the House of the Good Shepherd is used exclusively for educational, religious and charitable purposes, and is not used for the financial gain or profit of the owner or user.

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

W. W. Slabaugh and *Henry J. Beal*, for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

Heard before ROSE, GOOD and EVANS, JJ., REDICK and SHEPHERD, District Judges.

GOOD, J.

The board of equalization of Douglas county appeals from a judgment of the district court for that county, holding exempt from taxation a laundry property, owned and operated by the House of the Good Shepherd, appellee herein.

Appellee is a corporation organized by members of the religious and charitable order of the Good Shepherd. As stated in its articles of incorporation the object of the corporation is "to reform fallen women, to afford protection to other females whose circumstances in life might endanger their virtue, to surround such females with virtuous influences, and accustom them to habits of industry and self-respect." The corporation has no capital stock, and no dividends have ever been distributed to its members; nor do they receive any salary or other financial recompense for their charitable and humanitarian labor. The corporation has acquired title to a tract of ground, a little more than a city block in extent, in the city of Omaha, on which it has erected a number of buildings, including a chapel, buildings for housing, caring for

and educating the inmates of the institution, and teaching them habits of industry. Connected with one of these buildings is a modern laundry, equipped for doing general laundry work. It is this laundry, and the lots on which it is located, that appellant seeks to hold subject to taxation.

There are nearly 300 inmates in the House of the Good Shepherd, ranging in age from 2½ to 95 years, but the great majority of them are girls between the ages of 14 and 20 years. Religious services are held daily, and a school is maintained for the education of the younger inmates. Most of the girls are subnormal in intellect and in need of moral training and the acquisition of habits of industry, so that when they leave the institution they may be fitted to earn a living and become useful members of society. Because of their limited ability, there is open to them but a limited line of employment. Among these are sewing and laundry work. Therefore, to provide them suitable employment, the institution owns and operates a laundry and teaches the girls to do laundry work and sewing, and thereby accustom them to habits of industry and fit them to become self-supporting members of society.

In the operation of the laundry, a considerable revenue is received from hotels, restaurants and others for whom laundry work is done. This work comes in competition with commercial laundries of the city of Omaha. The entire revenue derived from sewing and laundry work is used for the support of the institution and its inmates. About 10 per cent. of the inmates pay something for their maintenance, care and training, while about 90 per cent. of them pay nothing, except as revenue is derived from their labor.

Appellant insists that the trial court erred in holding that the laundry and lots on which it is located are owned and used exclusively for religious, charitable and educational purposes, and not for profit.

Section 5820, Comp. St. 1922, provides: "All property in this state, not expressly exempt therefrom, shall be subject to taxation." Section 5821, Comp. St. 1922, enacted pursuant to the provisions of section 2, art. VIII of the

Constitution of this state, provides: "The following property shall be exempt from taxes: * * * Property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user."

Appellant argues, first, that the facts established in this case do not show that appellee's laundry property is used exclusively for educational, religious or charitable purposes; and, second, that the evidence shows that the property is used as a separate commercial enterprise for profit or gain, and the fact that the income therefrom is used for educational or charitable purposes does not render the property from which such income is derived exempt from taxation.

The rule is settled in this jurisdiction that statutes, exempting property from taxation, should be strictly construed. *Young Men's Christian Ass'n v. Douglas County*, 60 Neb. 642; *Watson v. Cowles*, 61 Neb. 216. Under the law of this state, the use of the property is the criterion by which to determine whether it is or is not exempt from taxation. *Young Men's Christian Ass'n v. Lancaster County*, 106 Neb. 105. Property of a religious, educational or charitable institution which is leased to others and used as a commercial enterprise is not exempt from taxation, even though the income from such property is devoted to educational, religious or charitable purposes. The test is the use of the property itself, and whether it may be fairly and reasonably said to be used for such purposes. It was held in *First Christian Church v. City of Beatrice*, 39 Neb. 432, that property owned by a religious society, separate and distinct from that on which its church edifice stood, and which was rented to others, was not exempt from taxation; and in *Young Men's Christian Ass'n v. Lancaster County, supra*, where certain floor space in a building, owned by a charitable organization, was leased to outside parties for the operation of a cafeteria, opened to and patronized by the general public as well as the membership, rentals being applied for the purposes of the organization, it was held that the portion of the building so leased was

not exempt from taxation, although the maintenance of the cafeteria therein was not only financially helpful to the organization, but promoted its charitable purposes by attracting people to the building. To the same effect are *Young Men's Christian Ass'n v. Douglas County, supra; Sisters of Peace v. Westervelt,* 64 N. J. Law, 510, affirmed in 65 N. J. Law, 685.

Keeping in view the principles thus announced, we will proceed to examine the facts disclosed by the record. That appellee is an educational, religious and charitable organization is established beyond question. Its main purpose is to care for and rehabilitate fallen women and to educate and train a class of girls who, but for such care, would become moral delinquents and a charge upon society at large. It is necessary that such girls should be educated, should become accustomed to habits of industry and trained in some occupation that will make them useful citizens, and also receive moral training. To provide for this class of girls, appellee has established an institution and erected a laundry in which the girls are employed, and where they are taught an occupation and trained to become useful citizens and accustomed to habits of industry. Under such circumstances, we think the laundry may be fairly said to be used exclusively for educational and charitable purposes. It is necessary to give these girls training in industry. The fact that an income is derived from the laundry work does not militate against the fact that the property is used for the purposes indicated. So long as the income derived does not inure to the benefit of the owners or the users, it does not transgress the statute providing for exemption from taxation.

In *St. Elizabeth Hospital v. Lancaster County,* 109 Neb. 104, it was held that, notwithstanding a charge was made for the greater proportion of the patients cared for at the hospital, it was used exclusively for religious and charitable purposes and was exempt from taxation. And in *Central Union Conference Ass'n v. Lancaster County,* 109 Neb. 106, it was held that a farm and dairy property, used for school

purposes, was not subject to taxation. In that case the farm and dairy property was used in connection with the college for giving instruction in dairying and agriculture, and considerable income was derived from the dairy and applied to the support of the school. We think that the situation in that case is controlling in the case under consideration. The laundry is used as a means of rehabilitating fallen women and teaching habits of industry to girls who might otherwise become a public charge, and the income derived from the laundry does not inure to the financial benefit of the corporation or its members.

After a careful examination of the record, we have reached the same conclusion, as did the trial court, viz., that the laundry property of appellee is used exclusively for educational, religious and charitable purposes, and is not used for the financial gain or profit of the owner or user, and is therefore exempt from taxation.

AFFIRMED.

REDICK, District Judge, dissenting.

I am unable to agree in the majority opinion in this case. Only "property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user" (Comp. St. 1922, sec. 5821) is exempt from taxation. The appellee is carrying on a commercial business in competition with other persons and corporations subject to tax; the only relation of the laundry business to the admirable philanthropic and charitable purposes of the organization is that it furnishes a useful occupation for the inmates of the home. But the indisputable purpose of carrying on the commercial enterprise in question is to make a profit and thus secure the necessary funds to carry on the philanthropic work and purpose of the institution. It seems to me that the underlying principle of exemptions such as the one in question is the encouragement of benevolence and the sentiment of brotherly love toward the unfortunate, misguided and needy, and the major benefit derived from the cultivation of these senti-

ments is lost when philanthropic institutions are placed upon a purely commercial basis. No doubt the aims and purposes of the appellee are of the highest and noblest character and the results of their work of incalculable social and humanitarian value, but to exempt from taxation a competitive commercial business for the sole reason that the entire profits therefrom are devoted to charitable and benevolent purposes, it seems to me, is most unjust and not within the intention of the makers of the Constitution or the laws enacted in pursuance thereof. As was well said by Dean, J. in *Sunday School Union v. City of Philadelphia,* 161 Pa. St. 307, 314:

"Every dollar the society expends is some charitable contributor's gains or profits from some business not charitable; if such contributor devoted the whole of his profits from the sale of drygoods, groceries or books to promote this particular charity, that fact would not make the source of such profit a purely public charity. And if, as the master has found, the society was compelled to put a part of its operations on a basis that was self-supporting, by starting a book-store to sell books only of a high moral character, and standard publications, that is trade. That the entire profits of this branch of the business are devoted to the purpose of the charity, no more changes its business nature than if, instead of a book-store, the society had established and carried on a shoe-store. It might have operated a farm or rolling mill with the same end in view, to put the society, as the master aptly says, on a basis that was self-supporting; but the end would not have exempted the business from taxation."

So here, appellee might have established a knitting mill or a cotton factory. What chance of exemption from taxation would it stand in Massachusetts or Alabama? To permit appellee to carry on the laundry business free of taxes in competition with others who pay their full share of the cost of government, in effect, levies a forced contribution for the support of the institution and indirectly commits the administration of a part of the public revenues to non-

officials; it would seem that appellee's competitors have made their full contribution to the public weal as regards this charity, when they are required to meet the competition which pays no wages other than bed and board.

The only cases in point cited in the briefs are in their reasoning against the position of appellee: *Young Men's Christian Ass'n v. Keene*, 70 N. H. 223; *Young Men's Christian Ass'n v. Douglas County*, 60 Neb. 642; *Young Men's Christian Ass'n v. Lancaster County*, 106 Neb. 105; *Sisters of Peace v. Westervelt*, 64 N. J. Law, 510. See, also, *Sunday School Union v. City of Philadelphia, supra.*

The case of *St. Elizabeth Hospital v. Lancaster County*, 109 Neb. 104, is not in point for the reason that the profits there arise out of the carrying on of the particular work for which the charity was organized; if the hospital should install in one of its buildings a general drug-store for the purpose of making a profit on the sale of drugs to its patients and the public, to secure funds for the maintenance of the institution, then we would have a case analogous to the one at bar. In *Lutheran Hospital Ass'n v. Baker*, 40 S. Dak. 226, the statute exempted all property belonging to any charitable society or used exclusively for charitable purposes, and the case announces the same principle as in the *St. Elizabeth* case. In *Central Union Conference Ass'n v. Lancaster County*, 109 Neb. 106, the maintenance of a farm and dairy by an agricultural college were held proper activities and the fact that a profit was made by the dairy department and used exclusively for the purposes of the college did not subject that department to taxation. The principle there announced has no application here; while one of the purposes of the institution is said to be the inculcation of habits of industry, it is in no sense an institute of technology—the purpose is not to fit the girls to enter the service of laundries; if so, a course of a few weeks would suffice. No, the *purpose* is to carry on a profitable business for the support of the institution—this is trade, and it should bear its share of the burden of taxation. In *Dakota Wesleyan University v. Betts*, 47 S. Dak. 618, the nature of

the property or its use does not appear but the exemption was sustained upon the authority of a number of cases cited holding the rectory of a church, or houses occupied by professors of colleges, exempt. The case of *Trinidad v. Sagrada Orden,* 263 U. S. 578, is not in point as it involved only the taxability of the *income* of an educational institution, not the property from which the income was derived; and the court remarked that the exception in the law "says nothing about the source of the income, but makes the destination the ultimate test of exemption." If appellee owned a business block the rentals from which were used exclusively for charity, such rentals would be exempt, but would the real estate be exempt?

The exemption of our statute extends only to property *exclusively* used for the purposes mentioned, and from which no financial profit inures to the owner. Under all our decisions the part of the premises used for conducting a competitive business is not exclusively used for charitable, etc., purposes. *Young Men's Christian Ass'n v. Douglas County,* 60 Neb. 642; *Young Men's Christian Ass'n v. Lancaster County,* 106 Neb. 105. But even if that point is conceded, how fares it with the second requirement? How can it be said that no "financial profit inures to the owner" from the conduct of the laundry business? The fact that such profits are used by appellee for a charitable purpose does not change their character as financial profits, any more than in the case of a private individual—they are still profits to the owner.

The judgment should be reversed.

STATE, EX REL. CLARENCE A. DAVIS, APPELLANT, V. FARMERS STATE BANK: H. C. PETERSON, RECEIVER, APPELLANT: THOMAS E. WILLIAMS, CLAIMANT, APPELLEE.

FILED MAY 1, 1925. No. 24544.

1. **Banks and Banking: LIABILITY OF STOCKHOLDERS: ENFORCEMENT.** The double liability of stockholders in a state bank, pro-

vided for in sections 4 and 7, art. XII of the Constitution, cannot be enforced until the property of the bank has been exhausted, and the amount due thereon has been judicially determined. *Bodie v. Pollock*, 110 Neb. 844.

2. ———: ———: ———. When a bank has become insolvent, a receiver appointed, the assets of the bank sold and applied, and the amount due on stockholders' liability judicially determined, the receiver of such bank may prosecute an action to recover same, under the supervision of the court. That part of the opinion in *Hamilton Nat. Bank v. American Loan & Trust Co.*, 66 Neb. 67, which is in conflict herewith, is overruled.

3. **Judgment:** EQUITABLE SET-OFF. "Where peculiar equities intervene between the parties, a court of equity may enjoin the collection of a judgment until the debtor litigates an unliquidated claim against his creditor, and if the debtor succeeds the court may set off the judgments so far as one may equal the other." *Wells v. Cochran*, 88 Neb. 367.

APPEAL from the district court for Morrill county: P. J. BARRON, JUDGE. *Reversed.*

T. F. Neighbors and *C. M. Skiles*, for appellants.

Hainer, Craft, Edgerton & Fraizer and *McDonald & Erwin, contra.*

Heard before ROSE, DEAN, GOOD, THOMPSON, and EVANS, JJ., REDICK and SHEPHERD, District Judges.

THOMPSON, J.

In this case, the record shows that on or about June 27, 1916, in Bayard, Morrill county, the Farmers State Bank of Bayard was incorporated under the state banking laws, with a capital stock of $25,000. It continued to do a general banking business up to February, 1922, when it became insolvent, and the department of trade and commerce took possession. Lawrence A. Fricke was duly appointed receiver thereof by the district court for such county, and he proceeded to wind up its affairs as by law provided. On or about February 18, 1924, the receiver applied to the court for an order directing him, as such, to sell all remaining assets of the bank, which order was granted, sale had, report made, which was in all things approved.

Williams, appellee herein, who will hereinafter be referred to as claimant, at the time of the organization of the bank, became the owner of 80 shares of the capital stock thereof, of the face value of $100 a share, and has been ever since the owner of such stock. He was also a depositor in such bank in due course, to the amount of $2,244.73 in cash. He presented a claim for this amount to the receiver for payment, which was not granted, and he then, by apt pleading, lodged his claim with the district court, praying that the same be allowed and judgment entered against such bank and ordered paid out of its funds in the hands of the receiver, if sufficient, and, if not, then out of the guaranty fund.

The state, through the receiver, answered, in substance, alleging the foregoing facts as to the history, condition, and the situation of the bank and its assets, and the ownership of the 80 shares of stock by claimant, the insolvency of the bank and of claimant, and that, owing to such condition, it will be necessary to enforce, as against each stockholder, the double liability imposed by the Constitution; that claimant assigned the claim to the receiver, to be applied on his stock liability; that the only property had or held by claimant out of which such stock liability can be satisfied is this claim which he seeks to have allowed; that he is also liable to the bank as indorser on two notes of $5,000 each. The answer prays, in substance, that, in the event the assignment referred to is held to be no bar to claimant's right to recovery, and it is found that under the present status of the trust the amount due claimant on the deposit cannot be offset against the amount owing by him on the stockholder's liability or indorsed notes, he be enjoined from collecting the amount due him until his stockholder's liability is judicially determined, and, on the final determination thereof, the one be offset against the other, and for other equitable relief.

The reply is, in substance, a general denial, with an allegation that the sale of the remaining assets does not in

any way affect the rights of claimant, he being a general depositor.

The record further shows that the total liabilities to creditors found unpaid were nearly $200,000, with all assets exhausted, the stockholders' liability being the only remaining asset holden for the payment of creditors; that the deposits covered by the guaranty fund and paid out of it were about $125,000.

Trial was had to the court, judgment entered finding generally for claimant and against the state, and ordering the judgment paid by the receiver from the assets of the bank, if sufficient, and, if not, from the guaranty fund. To reverse this judgment, the state appeals, presenting as grounds for reversal:

That the court erred in not finding that claimant's assignment of his claim was valid; in not finding him holden as indorser on the $5,000 notes; in not offsetting the amount due from him on his stock liability; and in not enjoining the collection of the judgment until suit could be brought on the stockholders' liability, wherein all questions involved could be considered by the court, and the amount found due creditors thereon offset against such claims.

As to the assignment of the claim, the record discloses that claimant, from his close association with the management of the bank, was possessed of full knowledge of its condition at the time of such assignment, and before, and knew that the trust was without assets to meet its liabilities to its creditors, and that the stockholders would be called upon to pay the constitutional double liability; hence, when asked by the receiver, he voluntarily executed the assignment, in order to expedite the closing of the trust. While this was done without legal consideration running to him, it was in fact an indication of his view of what in good conscience he should do under the then circumstances, which were afterwards disclosed in evidence, as heretofore indicated, and was competent evidence tending to support the state's contention that the deposit should be offset against his stock liability, if in a proper proceeding it was con-

sidered that he was liable thereon to the bank's creditors. Thus, the same will be held in mind when we are considering the last proposition presented for reversal.

As to the indorsement of the $5,000 notes, we find that the consideration for such indorsement failed, and the state was not entitled to recover by reason thereof, and the court did not err in so finding.

Taking up the third point, we have held in *Bodie v. Pollock*, 110 Neb. 844: "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."

In the case before us, the remaining assets, as we have seen, had been legally determined, sold, and the proceeds exhausted, prior to the trial hereof, and the amount of the liabilities remaining unpaid shown in evidence. However, the amount justly due and unpaid had not then been "judicially determined." Hence, the foundation necessary to the making of the offset of stock liability on the deposit was not present, and the court did not err in so considering. If the amount due on the stockholders' liability had been judicially determined, one creditor, in behalf of himself and all other creditors, or the receiver of such bank, under the direction of the court, could prosecute an action to recover same. Section 8038, Comp. St. 1922, provides: "Every receiver, immediately upon taking possession, * * * may, if necessary, enforce the liabilities of stockholders, officers, or directors." See, also, *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353; *State v. German Savings Bank*, 65 Neb. 416. That part of the opinion in *Hamilton Nat. Bank v. American Loan & Trust Co.*, 66 Neb. 67, wherein it is held that "a receiver can proceed to the enforcement of such liability only at the instance of the creditors themselves" is out of harmony with our holdings above cited, and is in direct

conflict with section 8038, *supra*, and to that extent is overruled.

This brings us to the last contention of appellant, that the court erred in not enjoining the collection of the judgment until suit could be brought on the stock liability of the different stockholders, wherein all questions involved could be considered by the court, and the amount found due the creditors by claimant offset against the judgment in his favor herein.

Among the creditors is the guaranty fund, in the amount of $125,000, for, by reason of such payment, it became subrogated to the rights of creditor depositors in that amount, as provided in section 8035, Comp. St. 1922, and announced in *State v. Farmers State Bank*, 103 Neb. 194. It should not be required to pay claimant, when at the same time he is indebted to it in a greater amount, is insolvent, and unable to pay the debt to the trust owing by him, at least until a reasonable time and opportunity are given for a hearing on that question. To permit such would be to aid fraud, rather than prevent it, and would serve to defeat the ends of justice. Courts are instituted to administer justice to protect the rights of litigants, and not hold one in abeyance while the other robs him of rights guaranteed under the law. Such cases may be without statutory protection, yet equity, through its inherent powers, "has jurisdiction to restrain a judgment creditor from collecting his judgment against the judgment debtor, until a claim of the latter against the former has been judicially established, and then to permit an equitable offset of the one against the other, where the judgment creditor is either insolvent, or has no property out of which the judgment debtor can collect his claim, or has secreted his property in order to defeat the claim of the judgment debtor, the judgment debtor, in asserting his claim, being free from negligence." *Wells v. Cochran*, 88 Neb. 367, note to 35 L. R. A. n. s. 142. We followed the rule announced in *Thrall v. Omaha Hotel Co.*, 5 Neb. 295, wherein it is held: "The insolvency of a party against whom a set-off is claimed is a sufficient ground for

a court of chancery to decree such set-off in cases not provided for by statute." This rule was quoted with approval in *Richardson v. Doty*, 44 Neb. 73. The third paragraph of the syllabus in *Stone v. Snell*, 86 Neb. 581, is as follows: "A court of equity may in its discretion allow a set-off of a claim against a judgment upon the ground of insolvency of the judgment creditor." And in *Wells v. Cochran*, 88 Neb. 367, we held: "Where peculiar equities intervene between the parties, a court of equity may enjoin the collection of a judgment until the debtor litigates an unliquidated claim against his creditor, and if the debtor succeeds the court may set off the judgments so far as one may equal the other." In *Central Appalachian Co. v. Buchanan*, 90 Fed. 454, it is held: "That a claim is unliquidated is no objection to its being made the subject of a set-off in equity, where the party against whom it exists is insolvent. Under such circumstances, the court will restrain the enforcement of the demand against which it is to be applied, until the cross-demand can be liquidated."

It is therefore considered that the district court erred in not enjoining the collection of the judgment in favor of claimant, until his stockholder's liability could be judicially determined, and offset had, and its judgment should be, and hereby is, set aside, and the cause is remanded for further proceedings in harmony with this opinion.

REVERSED.

Note—See Banks and Banking, 7 C. J. secs. 89 (1926 Ann.), 110.

STATE, EX REL. CLARENCE A. DAVIS, APPELLANT, V. FARMERS STATE BANK: H. C. PETERSON, RECEIVER, APPELLANT, JOHN A. CAVETT, CLAIMANT, APPELLEE.

FILED MAY 1, 1925. No. 24545.

APPEAL from the district court for Morrill county: P. J. BARRON, JUDGE. *Reversed.*

T. F. Neighbors and *C. M. Skiles*, for appellants.

Hainer, Craft, Edgerton & Fraizer and *McDonald & Erwin, contra.*

Heard before ROSE, DEAN, GOOD, THOMPSON and EVANS, JJ., REDICK and SHEPHERD, District Judges.

THOMPSON, J.

This case was tried in the district court, submitted and argued in this court, at the same time as the case of *State v. Farmers State Bank, ante,* p. 497, and on the same evidence and similar pleadings. Thus, as it appears from the record that the facts and questions of law involved are the same as in the above case, it is *held* that the decision and directions in that case control in this one.

REVERSED AND REMANDED.

SILAS M. TYSON, APPELLEE, V. MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA, APPELLANT.

FILED MAY 1, 1925. No. 23142.

Railroads: CROSSINGS: DUTY OF TRAVELER. It is the duty of a traveler on a highway in an automobile, when approaching a railroad crossing with which he is familiar and where his view is obstructed until he gets within a short distance of the railroad track, to look, where, by looking, he could see, and listen, where, by listening, he could hear, and to keep his car under control and drive at a speed which will enable him to stop in time to avoid a collision after discovering a train; and where, under circumstances such as are testified to by the plaintiff in this case, he has neglected these precautions and a collision occurs, he is guilty of more than slight negligence as compared with the negligence of the defendant, and he cannot recover.

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

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

D. W. Livingston, contra.

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

EVANS, J.

In this action the plaintiff and appellee sues the defendant and appellant to recover damages, alleged to have been suffered by the plaintiff and caused by the defendant, resulting from a collision between the defendant's train and plaintiff's automobile, the latter, at the time, being driven by the plaintiff. The plaintiff alleges the negligence of the defendant in running the train at a high rate of speed, failure to ring the bell or blow the whistle when approaching the crossing, and the failure of the defendant to maintain a signal at the crossing where the accident occurred, or to have a watchman stationed there to warn travelers of the approach of trains. The defendant alleges that the accident was due to the contributory negligence of the plaintiff. At the close of plaintiff's evidence the defendant moved to instruct the jury to return a verdict for the defendant, which motion was overruled by the court, and the defendant excepted. The trial concluded with a judgment for the plaintiff, from which the defendant appeals.

A number of errors are assigned, only one of which—the overruling of defendant's motion for an instructed verdict made at the close of plaintiff's evidence—is necessary to be considered in the determination of the case.

The plaintiff testified, in substance, that he approached the crossing from the south through a cut which obstructed the view of approaching trains until he was at the point where the right of way fence is located and within 50 feet of the center of the defendant's railroad track, from which point to the crossing of the rails there is a clear view of the railroad track for 900 feet in the direction from which the train approached the crossing; that he was riding in a Ford car with a winter top; that he was traveling from 8 to 10 miles an hour, and, traveling at such rate, he could stop his car in from 12 to 15 feet; that when he was 300 feet from the crossing he heard a noise and looked to see if it was occasioned by the falling or sliding of guns he carried in his car, and then, thinking of the train at or about the time he reached the right of way fence, he looked to

the west and saw no train; that he then looked to the east, and so continued until he was approximately 15 feet from the track or rails, when he again turned and looked to the west and saw the train about 40 or 50 feet west of the crossing approaching at a very high rate of speed; that he did not hear the whistle blow or the bell ring; that he was familiar with the crossing and knew it was about train time; that he has since made experiments at this crossing with a car similar in construction to the one he drove at the time of the accident, and that, traveling at the rate he was at the time of the accident and applying the usual methods to stop the car at a point where he says he was when he saw the train, he was not able to bring the car to a standstill until it was on the track.

It is apparent that the plaintiff did not look westerly along the track at any time within the time the train was within sight from the highway near the crossing until he looked and saw it when it was 40 or 50 feet from the crossing and when he was at a point about 15 feet from the track; that he disregarded a danger plainly apparent and negligently drove his car in front of the train.

Accepting his testimony as true, if the train were approaching at a rate of 80 miles an hour, or 10 times as rapidly as his car was running, it must have been not more than 500 feet west of the crossing when he came upon the right of way 40 feet from danger, and was in clear view from where he was until he was struck.

In *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266, it is held:

"It is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear; and if he fails without reasonable excuse to exercise such precautions he is guilty of negligence.

"It is the duty of one approaching in an automobile a railroad crossing with which he is familiar, where his view is obstructed until he gets within a short distance of the

railroad track, to keep his car under control and drive at a speed which will enable him to stop in time to avoid a collision after discovering a train. A speed which prevents such control under the circumstances is negligence as a matter of law.

"Failure of the railroad company to ring the bell or blow the whistle as the train approached the crossing, even though it may have been negligent, would not make the railroad company liable for the death of the automobile driver in a collision at the crossing, if he recklessly failed and neglected to have his car under control and by looking and listening at the proper time and place could have seen the approaching train in time to stop before reaching the track, but recklessly failed and neglected to do so, whereby there was a collision."

And where, as in this case, it is shown beyond reasonable dispute by plaintiff's own testimony that the plaintiff's negligence is more than slight as compared with that of the defendant, it is the duty of the court to enter a judgment of dismissal. *Haffke v. Missouri P. R. Corporation,* 110 Neb. 125; *Stanley v. Chicago, R. I. & P. R. Co., ante,* p. 280; *Seiffert v. Hines,* 108 Neb. 62; *Bauer & Johnson Co. v. National Roofing Co.,* 107 Neb. 831; *Frye v. Omaha & C. B. Street R. Co.,* 106 Neb. 333; *Oliver v. Union P. R. Co.,* 105 Neb. 243; *Morrison v. Scotts Bluff County,* 104 Neb. 254.

Under the plaintiff's own evidence, he is not entitled to recover, and the trial court should have sustained the defendant's motion made at the close of the plaintiff's evidence. The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

JAMES M. PRIME, APPELLEE, V. WAITE H. SQUIER, APPELLANT.

FILED MAY 1, 1925. No. 23081.

1. Appeal: RESCISSION: PLEADING AND PROOF. *Held,* in this case that a cause of action in rescission was alleged and proved

prima facie, both on fraudulent representation and on contract of guaranty; and *held*, further, that both theories were submitted on proper instructions by the trial court, and without error in the reception or rejection of evidence.

2. Contracts: TIME OF PERFORMANCE: PAROL AGREEMENT. At any time before breach, the parties to an executory agreement may change its terms as to time of performance by subsequent parol agreement, without new consideration.
3. ———: RESCISSION: TENDER. That which the attitude of the party to whom tender is due unmistakably shows to be vain and useless may be dispensed with in the making of tender in rescission cases.
4. Appeal: CONFLICTING EVIDENCE. In law cases, a finding of fact upon conflicting evidence will not be disturbed by the court of review unless the same is clearly wrong.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Modified and remanded, with directions.*

Montgomery, Hall & Young, for appellant.

Kennedy, Holland, DeLacy & McLaughlin, contra.

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

SHEPHERD, District Judge.

Though he had been solicited by Squier for more than a year, Prime refused to buy stock in the Onahman Iron Company until the former agreed in writing to return the purchase price, less dividends, if upon inspection he was not entirely satisfied that the property was as he had been led to believe. Then he bought 1,250 shares at $3 a share, paying $3,750 for the block. Within the time agreed upon, as extended, he visited the mine and was not satisfied. He immediately so reported to Squier, and, having asked in vain for the return of his money, he tendered back the stock and sued in rescission. A jury gave him a verdict, but upon appeal to this court his judgment was reversed because the trial court instructed that naked proof that he was not satisfied upon inspection was enough to entitle him to recover, while a proper instruction in that regard would

have required him to prove, in addition thereto, that he had reasonable ground for his dissatisfaction. *Prime v. Squier*, 105 Neb. 766.

A second trial, in which he attempted to show that the representations made were false, and that his inspection disclosed good grounds for dissatisfaction, resulted in a similar verdict and judgment, which are now here for review.

It was alleged by plaintiff in the petition that, among other things, the defendant falsely represented to him when he purchased the stock, July 12, 1917, that the company was well managed, prosperous, and successful; that it had cash earned and in hand out of which to pay dividends of 5 per cent. a month for the rest of the year; and that none of the stock could be bought at less than three for one. The petition further stated what appears to be a good cause of action in and of itself on the letter or contract in writing above referred to, which letter and contract reads as follows:

"Dear Doctor: In consideration of the purchase through me of 1,250 shares of the stock of the Onahman Iron Company, for which you have paid me $3,750, I hereby guarantee to return to you the amount so paid me, less any dividends on the stock you may have meantime received, if prior to October 1, 1917, after a visit to the mine and a careful inspection of same, you are not entirely satisfied the property is all that you have been led by me and others to understand it is. The same to be paid to you upon due transfer to me of your said stock. Very truly, Waite H. Squier."

It is further alleged in connection with this writing that the time of visiting the mine was duly extended to the time when the same was actually visited and inspected. Then followed appropriate allegations as to plaintiff's dissatisfaction and cause of dissatisfaction, his fruitless demand upon Squier, and his tender, etc.

The assignments of error of the defendant and appellant include a complaint that the trial court refused to permit

defendant to introduce photographs of stock-piled ore at the mine in April and August, 1917. There was no reversible error in this. The time in question was July 12, while the pictures were taken in April and August. There was no sufficient foundation for the introduction of the pictures by showing the manner of taking them, the setting of the camera, the distances, the directions and other things necessary to an understanding of the same. But, even if this were not so, even if the photographs should have been received, the presence of such ore at the times when the photographs were taken was established by oral evidence without dispute. The court must conclude, in the absence of anything to indicate otherwise, that what was established by undisputed evidence would not be subject to doubt in the mind of the jury.

It is also assigned that the court erred in instructing that the time for visiting and inspecting the mine was duly extended. This question seems to have been disposed of adversely to the appellant in the decision of this court heretofore referred to. It is probably as much the law of the case that due extension was had as it is that the plaintiff could not arbitrarily decide that he was not satisfied upon inspection of the mine. The court said: "The plaintiff did not inspect the mine until May, 1918, his trip having been deferred by mutual consent." *Prime v. Squier*, 105 Neb. 766. But, in addition to this, the parties may change the terms of an executory agreement before breach by subsequent parol agreement, and without new consideration. *Bowman v. Wright*, 65 Neb. 661; *Moore v. Markel*, 112 Neb. 743. Moreover, the defendant did not refuse to return plaintiff's money on the ground that this agreement in regard to inspection had been broken. He ought not to be permitted to assert such a reason at this time. *Ballou v. Sherwood*, 32 Neb. 666. Squier gave the plaintiff a letter expressly stating that he might make his visit and inspection at the time he did. He should not be permitted to repudiate his letter and agreement. *Teasdale Commission Co. v. Keckler*, 84 Neb. 116.

In another assignment defendant declares that the court erred in describing in one of its instructions a representation that "dividends of 5 per cent. a month would commence immediately" as an actionable representation, because it was a statement of something to take place in the future, and not a statement of existing fact. If there was error in this, which we somewhat doubt because the representation was said to have been made in connection with the further representation that money was earned and set apart to pay dividends at 5 per cent. a month for the rest of the year, it was not reversible error; for it appears without question that such dividends were immediately commenced, though not continued through succeeding months. There was a dividend payment in the month of July. The jury could not have been misled to the defendant's detriment by this instruction.

In tendering back the stock and the dividends received thereon, the plaintiff had the stock with him, told the defendant so, and offered to give it to him and to pay back the dividends which he had received. But defendant refused to accept the same and said that he would not return plaintiff's money. Plaintiff did not manually offer the certificate to the defendant and did not produce and hand him any money. It is insisted in a further assignment of error that this was not a sufficient tender. This court has many times held that under similar circumstances such a tender was sufficient, it being unnecessary to press the thing tendered upon a party when the party declares that he will not receive it. And in all of the Nebraska Building & Loan Association cases, practically without exception, though the dividends were not produced and tendered back, it was held by the court that such tender was not required. That which the attitude of the party to whom tender is due unmistakably shows to be vain and useless may be dispensed with in rescission cases of this kind.

The point is made in appellant's brief, upon due assignment of error, that the phrase, "if you are not entirely satisfied the property is all that you have been led to be-

lieve," limited the matter of inspection to the mine itself, and that the guaranty had reference only to the physical conditions of the mine, and not to the management of the company or the financial condition of the same. This is too narrow a construction. The word "property" refers, we think, to the whole thing, the company, its mines, its assets, and its management. Upon this view, the assignment of error in connection with instruction No. 6 falls to the ground.

In close relation to this is the contention of the appellant that the court erred in permitting the plaintiff to testify to the statement of McLaren, who told him upon his inspection of the mine, if his testimony be taken as true, that if he would not demand his money back they would take him in on their next promotion project. Objection is made to this upon the ground that it was prejudicial, and not competent or proper testimony in the case. It has its bearing, however, upon the question of sound and safe management, and was entitled to be received for what it was worth in showing the nature of the management and the character of the concern.

We are also of opinion that the court committed no error in receiving the testimony of the plaintiff in regard to the value of the stock on the 12th of July, 1917, the date of his purchase from Squier. It appeared that within a few months after that time he could and did buy such stock at from $1.65 to $2.50 a share. As in the other instance, this evidence was admissible for what it was worth, the time not being too remote to render it altogether valueless in determining whether or not the stock of the company could be purchased on the 12th day of July for less than $3 a share.

Very ingeniously, and at great length, the appellant argues in his brief that the evidence was insufficient to sustain the verdict, insisting that the company was a strongly going concern when plaintiff purchased the stock; that there was no proof at all that at that time it did not have all of the money, all of the property, all of the business, and all of

the prospects for the future which the defendant had claimed; also, that the plaintiff had no more to support him in his suit than that, after a lapse of time, the general depression had overtaken the mine and made it unprofitable. But the court entertains no doubt, after a careful consideration of the record, that there was evidence enough to support the verdict upon either of the two theories pleaded in the petition and considered in the instructions.

There was no evidence that the company had money set aside or in the treasury for the payment of dividends of 5 per cent. a month for the rest of the year 1917. There was evidence that it did not have this money. Indeed, the court might well say from the record that it had no such sum at the time that said representations were made. Without regard to the guaranty, therefore, there was sufficient evidence, supposing that steps to rescission were duly taken, to warrant the jury in returning the verdict rendered. In a law case, a finding of fact upon conflicting evidence will not be disturbed by this court unless the same is clearly wrong.

On the other branch of the case, it appears from the evidence that, when the plaintiff visited the mines in May of 1918, he found that some of the workings were full of water, and that only about 15 men were employed; that there was no accumulation of ore on hand, and that very little was being produced. Again, taking the testimony of the plaintiff as true, as the jury had a right to do, there was not enough in sight to satisfy him that the concern was a rich, prosperous, and successful concern such as he had been led to believe it to be. There was enough to be seen to justify him, as a reasonable man, in not being satisfied that the concern was all that he had been led to believe it was. And the significant conversation with its president, before alluded to, gave him further reasonable ground for dissatisfaction.

We have examined the instructions carefully in connection with the objections raised by the appellant and are convinced that they properly, and indeed admirably and

without confusion or contradiction, present the dual theory upon which plaintiff was entitled to recover. Not only was he permitted to prevail if false representations of material existing fact with respect to the company were made to him by Squier to induce him to purchase, but he was likewise permitted to prevail if upon inspection he was not satisfied that what he had been led to believe was true, provided there was a reasonable basis for his conclusion in this regard. He presented ample proofs to support a recovery upon the latter theory. For it is not to be doubted that the guaranty greatly enlarged the ground of his recovery, basing his right thereto, not narrowly upon fraudulent representations of material fact, but broadly upon reasonable disbelief (upon inspection) of anything which he had in any manner been led to believe, either by the defendant or others.

Having determined that the trial was without error in the reception of the evidence and in the giving of the instructions, it follows that the verdict must stand in the main. It appears from the record, however, that the plaintiff did not return to the defendant the dividends which were received upon the stock purchased. These dividends amounted to the sum of $562.50, which, with interest at the rate of 7 per cent. per annum from July 12, 1917, should be deducted from the judgment entered. So modified, the order appealed from is affirmed, and the cause is remanded to the district court, with instructions to correct the judgment in accordance with this opinion.

MODIFIED, AND REMANDED, WITH DIRECTIONS.

YOHO-VENNER MOTOR COMPANY, APPELLANT, V. ANDERSON MOTOR COMPANY, APPELLEE.

FILED MAY 23, 1925. No. 23108.

Pleading: VARIANCE. When an action has been commenced in an inferior court and by agreement of parties the action is dis-

missed without prejudice, the plaintiff may thereafter commence the action in the district court without regard to the issues pleaded in the inferior court.

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

Harry R. Ankeny and *A. Moore Berry*, for appellant.

Brogan, Ellick & Raymond, contra.

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

PER CURIAM.

This is an appeal by plaintiff from an order dismissing the second and third causes of action from plaintiff's amended petition. It appears that an action was originally commenced in the municipal court of Omaha by the plaintiff to recover from the defendant $1,000. The petition alleged, in substance, that on August 15, 1919, the plaintiff and defendant entered into a contract by the terms of which the plaintiff was required to and did deposit with the defendant the sum of $1,000 as a guaranty for the faithful performance of the plaintiff's part of the contract; that the defendant failed to comply with the terms of the contract; that thereupon the plaintiff, in May, 1920, rescinded the contract and demanded a return of the $1,000, which the defendant refused to return.

A few days later the defendant entered its voluntary appearance. Still later the defendant filed an amended answer, alleging a breach of the contract on the part of the plaintiff, and asking for damages in the sum of $1,584.40. The amount thus claimed was in excess of the jurisdiction of the municipal court.

On May 22, 1922, a stipulation was entered into between the parties, reciting: "That said action now pending in the municipal court of the city of Omaha, Douglas county, Nebraska, may be dismissed without prejudice, each party paying its own costs herein, and that said action may be promptly filed in the district court of Douglas county, Ne-

braska, and that defendant will promptly make up said pleadings without the issuance and service of summons upon said defendant."

On August 22, 1922, the plaintiff filed a petition in the district court which was in substance the same as the petition in municipal court. Defendant filed its general appearance and a motion to make the petition more definite and certain. Thereupon the plaintiff filed an amended petition containing three counts. The first count was substantially the same as the original petition, and sought to recover the $1,000 which plaintiff had deposited with the defendant. The second count claimed $15,000 damages for defendant's failure to ship to the plaintiff the automobiles as stipulated in the contract. The third count claimed $75 for the failure on the part of the defendant to properly wrap the automobiles which were shipped, whereby the cars became damaged in shipment. To this amended petition the defendant filed a motion to strike the second and third counts, on the ground that the matters set out in these causes of action constituted a variance from the cause of action filed in the municipal court.

The trial court sustained the motion, the record reciting: "That the court is of the opinion that the facts before the court and the written stipulation of the parties on file transferring this case from the municipal court to this court have the same effect and should be considered as if the same had been appealed from the lower court to this court and should be treated accordingly."

The court thereupon dismissed the second and third counts of the amended petition.

It is now urged by the appellant that in so ruling the district court erred. It is clear that the action filed in the district court cannot be regarded as an appeal from the judgment of the municipal court. The issues between the parties were never tried. No judgment on the issues was ever rendered. By stipulation of the parties the action was to be dismissed without prejudice. Presumably this was done. It was evidently the theory of the trial court that the

parties had agreed that the case should be tried in the district court upon the same issues as were tendered in the municipal court. The stipulation simply recites that the action should be dismissed without prejudice, each party to pay its own costs, and that, upon the filing of the action in the district court, the defendant would promptly make up the issues. There is nothing in the stipulation limiting the parties to the issues presented in the municipal court. The right to bring the action anew in the district court was probably advantageous to both parties. It enabled the plaintiff to set forth its complete demands, and also enabled the defendant to have adjudicated its entire claim. In the municipal court any judgment that the defendant might recover would have been limited to the jurisdiction of that court. We are of the view that the interpretation placed by the trial court upon the stipulation was too restrictive, and that the court was in error in dismissing from plaintiff's amended petition the second and third counts thereof.

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

REVERSED.

CHARLES E. ABBOTT V. STATE OF NEBRASKA.

FILED MAY 23, 1925. No. 24489.

1. **Criminal Law:** PLEA IN BAR. A plea in bar to the effect that a prosecution for a felony was based on the identical facts charged in a former prosecution for a misdemeanor of which defendant was convicted may be overruled, where the accusations do not disclose identity of offenses and there is sufficient evidence of separate criminal acts charged.
2. **Indictment:** SUFFICIENCY: SODOMY. A complaint charging sodomy in the language of the statute and showing that defendant was a male person capable of committing that felony is not fatally defective, for the purposes of a preliminary examination and a plea in abatement, merely because it fails to charge in direct terms that he was a male person over 21 years of age.
3. **Criminal Law:** SPECIAL COUNSEL. It is within the discretion of the trial court to permit the employment of special counsel to assist in a criminal prosecution, and as a general rule it is only

for misconduct on his part that a conviction will be reversed on account of his employment and services.

4. ———: SODOMY: EVIDENCE. In a prosecution for sodomy, former instances tending to show that accused had indulged sexual depravity essential to an act like that charged may, in the discretion of the trial court, under exceptional circumstances, be admitted in evidence in connection with direct proof of his guilt.
5. **Witnesses**: COMPETENCY. Where a preliminary examination by the trial court shows that a female child is a competent witness, she should not be prevented from testifying merely because she is only six years of age.
6. **Criminal Law**: EVIDENCE: OPINION OF PSYCHOLOGIST. In a criminal prosecution, it is within the discretion of the trial court to exclude the opinion of a psychologist as to the effect of parental suggestion on the imagination of a child who testified as a witness at the age of six years.
7. **Information**: FELONY: DATE. Where an information charges the commission of a felony on a specific date, it may be shown by the evidence that the felonious act was committed on an earlier date within the statute of limitations.
8. **Sodomy**: CORROBORATIVE EVIDENCE. In a prosecution for sodomy, testimony by a female child as to the principal fact may be corroborated by circumstantial evidence of other witnesses.
9. **Criminal Law**: INSTRUCTIONS: NONPREJUDICIAL ERRORS. In giving and in refusing instructions, errors which do not prejudice defendant in a criminal prosecution are not sufficient grounds for the reversal of a conviction.

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

King & Bracken, Charles A. Chappell, and *Stewart, Perry & Van Pelt,* for plaintiff in error.

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

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

PER CURIAM.

This was a prosecution for sodomy as defined by a recent

statute. Comp. St. 1922, sec. 9777. In the information, carnal copulation *per os* was charged, the alleged victim being a female child not quite five years of age. The venue was Kearney county and the date of the alleged felony was May 19, 1923. Defendant was a physician practicing his profession and conducting a hospital in Minden. He pleaded not guilty, but was convicted and sentenced to serve a term of ten years in the penitentiary. As plaintiff in error he seeks a reversal of his conviction.

Among the questions presented for review and argued by defendant are the following:

Did the trial court err in overruling a plea in bar? In the county court of Kearney county May 26, 1923, defendant was accused of an assault May 19, 1923, upon a female child, and for that misdemeanor was sentenced to pay a fine of $100. While the prosecution for the assault was pending in the district court upon appeal, the information for sodomy alleged to have been committed May 19, 1923, was filed in the county court September 4, 1924. To answer the latter charge defendant was bound over to the district court, where he interposed the plea that the information for sodomy was based on the identical facts charged in the complaint for assault. He contends that the assault charged was included in the information for sodomy, that the two offenses could not have been committed by a single criminal act, and that therefore the second prosecution was barred by the first. The facts constituting the plea in bar were put in issue by a reply in which the state took the position that the misdemeanor charged was not based on the facts evidencing the felony of which defendant was accused. By consent, the issues raised by the plea in bar and the reply thereto were tried to the district court without a jury. The decision was in favor of the state. The accusations themselves do not disclose that the unlawful acts charged in the two prosecutions were identical. An examination of the evidence from every standpoint shows that there is a logical view in which the ruling against defendant on his plea in bar is correct. While it is charged in each of the two ac-

cusations that the criminal act was committed May 19, 1923, a prior date for each separate offense within the statute of limitations was provable. There is testimony to the effect that the assault occurred May 8, 1923, and the graver offense at an earlier date. The ruling below is free from error, and it follows that a subsequent motion to require an election between charges was properly overruled.

Did the trial court err in overruling a plea in abatement? The affirmative of this question seems to be based on the following propositions: The original complaint in the county court for sodomy did not contain a valid charge thereof. It failed to state that defendant was a male person over the age of 21 years. While the information in the district court for sodomy was sufficient as such, defendant was deprived of his right to a preliminary hearing under a real accusation. The position thus taken by defendant does not seem to be tenable. The new law says nothing about the age or the sex of the offender. The complaint, however, accused defendant by the name of "Charles" E. Abbott, showing that he is a male person. The revolting act constituting the statutory offense is charged in direct terms as having been committed by him "unlawfully, wickedly, and feloniously," indicating criminal capacity to do so. In any event, the charge was made substantially in the language of the statute. The plea in abatement was properly overruled. For the same reasons a refusal to quash the information was free from error.

Did the trial court err in permitting special counsel to assist the county attorney? For that purpose a capable lawyer was selected and he participated to some extent in the prosecution. It is insisted that this step was unnecessary for the reason the county attorney was able and experienced and that the selection made was objectionable because the special counsel employed was attorney for the father of the child named in the information. It is further contended that special counsel attempted to procure a conviction by means of incompetent testimony prejudicial to defendant. If the trial judge anticipated the vigor of the

defense, the subtle questions of law involved, the objections to evidence and the difficulty of proving sodomy without any eye-witnesses except accused, an experienced physician, and his alleged victim a defenseless little girl, the propriety of selecting special counsel to share the duties and responsibilities of the county attorney, however well equipped, was obvious. Society for its own protection calls for the services of able attorneys for the state in criminal prosecutions and the law permits the employment of assistants. An examination of the entire record fails to show error in permitting the employment of special counsel or misconduct on the latter's part. A substantial reason for setting aside the conviction on this ground has not been given.

Did the trial court err in permitting proof of similar acts of defendant at other times with different victims? A young man was permitted to testify that, when a child, several years earlier, he had been induced by defendant to submit to pederasty, giving details. A little girl stated on the witness-stand that recently, while riding with defendant, he made indecent inquiries. There were objections to testimony of this kind on the ground that it was incompetent. The objections were argued on review at considerable length and there were references to many cases applying the rule that in a prosecution for a crime evidence of a similar crime at another time is inadmissible. There is no doubt about the existence of the general rule, but the admissibility of such testimony under an exception is the test in the present instance. The felony charged is one of peculiar and shocking enormity, the victim a female child of tender years. The criminal impulse which makes such an act possible is unnatural and unusual. The felony itself suggests a carnal pervert. Under exceptional circumstances former instances tending to show that accused had indulged sexual depravity essential to an act like that charged may, in the discretion of the trial court, be admitted in evidence in connection with direct proof of his guilt. This principle is founded in reason and is supported by precedent, though there are opinions to the contrary. See note in 46 L. R. A.

n. s. 266 (*State v. Start,* 65 Or. 178), and 62 L. R. A. 193 (*People v. Molineux,* 168 N. Y. 264). In admitting this testimony the trial judge does not seem to have abused his discretion. He made it clear to the jury that defendant was not being tried for these collateral incidents and that they were not admitted as proof of the principal fact.

Was the child named in the information a competent witness? She was nearly six years of age in May, 1923, and almost seven when she testified. She was subjected to a preliminary examination by the trial court, and her answers showed a mental development, an intelligence and an understanding of her obligation to tell the truth under oath sufficient to qualify her as a witness. In addition, her testimony on the witness-stand justified the ruling of the trial judge in permitting her to testify. The law does not arbitrarily close the door of disclosure on a little girl who is the victim of, and the only available witness to, carnal violence. In a recent opinion it was said:

"In this state no age is fixed by the statute below which a child is presumed to be incompetent to testify, and there is no rule of law outside of the statute that a child six years of age is incompetent." *Evers v. State,* 84 Neb. 708.

Did the trial court err in preventing a psychologist from expressing an opinion as to the effect of parental suggestion on the imagination of the child while between the ages of five and seven years? The obvious purpose of evidence of that kind was to discredit the child as a witness. The trial judge ruled that competency of the witness was a preliminary question for his own determination in the exercise of judicial discretion and that the weight, if any, to be given to her testimony was a question for the jury. In conducting the trial the presiding judge thought the rejected testimony would carry a collateral inquiry beyond proper bounds, and in his ruling there does not appear to be any error prejudicial to the rights of defendant.

Is the evidence insufficient to sustain the conviction? It is argued that there is no competent evidence of criminal conduct on the part of defendant except uncorroborated

and contradicted testimony relating to the alleged assault May 8, 1923, an offense charged in a former prosecution and not cognizable in the present case. With what was said to have occurred on that date excluded, defendant insists that evidence of sodomy at any time and place in Kearney county was wholly wanting. Evidence of the time and place of the alleged assault May 8, 1923, was definite because the parents then suspected for the first time that their child had been abused. The child testified that while alone with defendant he previously on several different occasions committed the felonious act charged. He admitted on the witness-stand that he had been alone with the child in his automobile while making professional calls. Some of the patients upon whom he called in making these trips were shown to have resided in Kearney county. It did not appear that he went out of the county in any instance. He had called for the child at her home and with the consent of her parents took her with him on short professional calls. Several months, perhaps a year or more prior to May 8, 1923, she had been for a time a patient under his care in his hospital. Mistreatment then or earlier was not intimated. From the direct testimony and the circumstantial evidence the principal fact, the venue of the crime and a date within the statute of limitations were fairly inferable.

Was the conviction erroneous for want of evidence corroborating testimony of the child as to the principal fact? The offense of which defendant was convicted had been recently defined by statute. Comp. St. 1922, sec. 9777. In this state there is no legislative enactment requiring the corroboration which defendant deems essential to a conviction. The rule of evidence invoked by him does not come from the common law. The child was too young and innocent to be a criminal participant in the loathsome act charged. For the same reason she was incapable of being a black-mailer, or a conspirator or an adventuress. In law she was incapable of consenting. In her case reasons for corroboration were generally wanting. In a prosecution

for sodomy a conviction has been sustained on the uncorroborated testimony of a child. See cases collected in a note on page 1224, L. R. A. 1915E (*State v. Stalker*, 169 Ia. 396). The state, however, was not driven to the point of relying solely on uncorroborated evidence. There is testimony tending to show in substance the following facts: On May 11, 1923, the child's father, who had himself been treated professionally by defendant, called at the latter's office and asked for his bill. Defendant presented a bill for which he at the time received a check. Upon intimation that the child divulged what had occurred, defendant became confused, asked if the matter could be settled, and offered to return the check, but was told in substance that wrongs of that kind could not be compensated in money. The check, given and accepted in payment of a legitimate debt, was never cashed. The intimation as to what the child told was not by its terms limited to the assault. Within a few days defendant left Minden and did not return for more than a year. While absent he had been in Canada for a time and had traveled from one place to another in the United States. On the witness-stand he explained his absence by testimony that his health failed and that he needed rest and recreation. From all the circumstances, however, the jury were free to infer that his long absence was prompted by a desire to escape prosecution and punishment. Evidence of these circumstances did not come from the child. The principal fact is corroborated by circumstantial evidence.

Error crept into some of the instructions, but, in view of conclusions reached on the principal questions presented, prejudice to defendant does not appear in any ruling of the trial court.

AFFIRMED.

The following opinion on motion for rehearing was filed December 8, 1925. *Former judgment of affirmance vacated, and judgment of district court reversed.*

1. **Criminal Law: EVIDENCE OF DISTINCT CRIMES: ELECTION.** In a criminal action, where the information charges but a single

offense, and the state on the trial introduces evidence tending to prove several distinct criminal transactions, to any one of which the offense charged in the information might relate, and the defendant moves to require the state to elect on which transaction it will rely for a conviction, it is error to deny such motion.

2. ———: EVIDENCE OF DISTINCT CRIMES: ADMISSIBILITY. It is a general rule that, on the trial of one accused of crime, proof of distinct and independent offenses, even of a similar nature, is inadmissible. To this rule there are exceptions; but, in order to make evidence of other independent offenses admissible, it must appear that the evidence offered falls within one of the recognized exceptions.

3. ———: SODOMY: EVIDENCE OF FORMER CRIME: ADMISSIBILITY. On the trial of one charged with the offense of sodomy, it is error to permit a witness to testify that on an occasion, more than a year previous to the time charged, the defendant had asked her an improper or indecent question, where it appears that such question had no relation to the offense charged.

4. **Sodomy**: VENUE: WANT OF EVIDENCE. Evidence examined, and *held* not to affirmatively show that the offense charged was committed in the county where the action was instituted.

5. **Criminal Law**: EVIDENCE OF DISTINCT CRIMES: INSTRUCTIONS. Upon the trial of one charged with a single criminal offense, where evidence has been introduced as to several criminal transactions, to any one of which the information might relate, it is error to so instruct the jury that they may found their verdict on any one of the criminal acts disclosed by the evidence.

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

GOOD, J.

Defendant was convicted in the district court for Kearney county of the crime of sodomy upon Anna June Lynn, a little girl not quite five years of age. Defendant prosecuted error to this court, and the judgment of the district court was affirmed in *Abbott v. State, ante,* p. 517. The case is now before us on motion for rehearing. For a statement of the facts and issues, see *Abbott v. State, supra.*

The information charged but a single act, and that it was committed on the 19th day of May, 1923. The evi-

dence of the little girl was to the effect that the defendant committed the act on five different occasions, all of which were prior to the 19th of May, 1923. When this evidence was introduced, the defendant moved to require the state to elect upon which one of the several acts testified to the state would rely for a conviction. The motion was overruled. This point seems not to have been decided in the former opinion. No specific date was fixed by the little girl as to when any of the alleged acts occurred. It was impossible for the defendant to know which one of the acts he was required to meet, and it is uncertain upon which one of the acts testified to the verdict was founded. In fact, it is possible that some of the jurors may have believed it was the first; some, the last; and some, intermediate acts. Were another prosecution had for any of the acts, the defendant would not be enabled to plead the present prosecution in bar.

The general rule applicable to the situation is stated in *Palin v. State*, 38 Neb. 862, wherein it is held: "Where a single crime is charged in an information, and the state on the trial, for the purpose of proving the offense alleged, introduces testimony tending to prove similar, but distinct crimes, the proper practice is for the accused to move the court to require the prosecutor to elect on which transaction he will rely for a conviction." We think that, under the rule, it was error to refuse to require the state to elect.

On the trial the state was permitted to introduce evidence, over objection, tending to show that 12 or 14 years prior to the act complained of defendant committed a similar offense on another person. In the former opinion, it is held:

"In a prosecution for sodomy, former instances tending to show that accused had indulged sexual depravity essential to an act like that charged may, in the discretion of the trial court, under exceptional circumstances, be admitted in evidence in connection with direct proof of his guilt."

We think that the rule stated is correct, but a careful reexamination of the record does not disclose any exceptional circumstances which would permit the evidence to be re-

ceived. It is a general rule that, on the trial of a person accused of crime, proof of a distinct and independent offense, even of a similar nature, is inadmissible. *Nickolizack v. State,* 75 Neb. 27; *People v. Molineux,* 168 N. Y. 264, 62 L. R. A. 193, and note thereto. Other cases following this rule are *Smith v. State,* 17 Neb. 358; *Cowan v. State,* 22 Neb. 519; *Berghoff v. State,* 25 Neb. 213; *Davis v. State,* 54 Neb. 177; *Morgan v. State,* 56 Neb. 696; *Phillips v. State,* 99 Neb. 187; *Clark v. State,* 102 Neb. 728.

To this general rule there are many exceptions. It would unduly prolong this opinion to undertake to enumerate or review all of the exceptions to the general rule. The authorities, as to the rule and the exceptions thereto, are collated and reviewed in an elaborate note to *People v. Molineux, supra,* 62 L. R. A. 193. Suffice it to say that we find in the record none of the exceptional circumstances which would justify the admission of this evidence.

The state offered the evidence of another witness that on one occasion, more than a year prior to the act complained of, the defendant had asked an improper and, perhaps, indecent question of the witness. This act was in no way related to or connected with the offense charged. It did not tend in any manner to prove the offense charged, or in any way to corroborate the evidence of the little girl, Anna June Lynn. The admission of this evidence was incompetent and clearly prejudicial.

We have reexamined the evidence with reference to the venue of the offense, and fail to discover any affirmative showing that any of the several criminal acts testified to by Anna June occurred in Kearney county. The evidence tends to show they were committed while Anna June was riding with defendant in his car, and that on some occasions they drove beyond the boundaries of Kearney county.

The twelfth instruction informed the jury that the offense of sodomy included an assault, and that, if they were not convinced that the crime of sodomy was committed, but were convinced that the defendant committed an assault upon the said Anna June Lynn, then they should find the

defendant guilty of an assault. The court inadvertently omitted to inform the jury that they must be convinced *from the evidence, beyond a reasonable doubt.* The instruction, while erroneous, was not prejudicial, since defendant was found guilty of the graver instead of the minor offense.

The eleventh instruction inferentially told the jury that the disarrangement of the little girl's clothing and her personal appearance on the return from an automobile ride, if caused or produced by defendant's conduct, might be considered as the corroboration of her testimony which the law requires in such a case. The only occasion shown by the evidence where the clothing of Anna June was disarranged, or where her personal appearance was unusual, was on their return from an automobile ride on May 8, 1923. The state conceded that the act charged did not occur on that date. The evidence referred to in the instruction could not be corroborative of the testimony of Anna June as to any of the acts relied on by the state for a conviction. The instruction was not applicable to the facts shown.

Upon another trial, if evidence is offered as to more than one criminal act, the state should be required to elect on which act it will rely for conviction, and the instructions of the court should limit the jury, in their consideration of the case, to the act upon which the state relies for conviction. The instructions, as given, would permit the jury to consider and base a conviction on any of the acts, testified to, within the period of three years prior to the filing of the complaint.

The judgment of affirmance in our former opinion is set aside, and our former opinion, in so far as it conflicts with the views herein expressed, is withdrawn.

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

REVERSED.

FRANK V. THORNTON, APPELLEE, V. JAMES C. DAVIS, APPELLANT.

FILED MAY 23, 1925. No. 23116.

1. **Evidence**: WEIGHT OF EVIDENCE. "The weight to be given to evidence cannot be determined alone by the number of witnesses who testify to a given state of facts, but rather by the character of each witness, his appearance and demeanor upon the witness-stand, his bias or prejudice, his relationship, if any, to the parties, the reasonableness or unreasonableness of the story told, and by those intricate tests that are either consciously or unconsciously applied by triers of fact as they observe the witness upon the stand and hear his testimony as it is uttered from his own lips." *Moore v. Williams*, 111 Neb. 342.
2. **Evidence** outlined in the opinion *held* sufficient to support the verdict.
3. **Appeal**: REVIEW: ARGUMENT OF COUNSEL. Where it is claimed that an attorney is guilty of misconduct in arguing a case to a jury, and it is desired to raise a question on that point for decision in the supreme court, it is necessary that objection be made to the trial court at the time, and an adverse ruling had thereon, and that the same be made a part of the record by a proper bill of exceptions.
4. ———: ———. Matters not pleaded nor called to the attention of the trial court will not be considered on appeal.
5. ———: RULINGS. The rulings of the trial court on the admission of evidence have been examined, and *held* free from error.
6. ———: ———. Rulings of the court on instructions to the jury have been examined, and *held* free from error.
7. ———: REMITTITUR. On the record presented, it is *held* that the judgment is not so excessive as to require a remittitur.

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

William Baird & Sons, Helsell & Helsell and *W. S. Horton*, for appellant.

John J. Shannon and *William R. Patrick, contra.*

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

MORRISSEY, C. J.

This action was brought by plaintiff, under the federal employers' liability act, against defendant as director general of railroads.

Plaintiff alleged that, on March 5, 1918, he was employed by defendant as a watchman on an interstate bridge which crosses the Missouri river, extending from Omaha, Nebraska, to Council Bluffs, Iowa, and which forms a part of the Illinois Central railroad system; that on the date mentioned an ice gorge, which threatened the security of the bridge, had formed in the river; that, in an effort to break up the ice gorge, the foreman in charge of the bridge, and under whose immediate directions plaintiff worked, prepared a number of sticks of dynamite for use in blasting the ice gorge; that plaintiff, at the direction of the foreman, handed him a detonator which he negligently let fall upon a steel rail; that the detonator was thereby exploded, and, as a result of the explosion, plaintiff suffered the injury set out at length in his petition.

Defendant denied all negligence on his part, and specifically alleged that whatever injuries plaintiff received were the result of plaintiff's own negligence; that plaintiff was experienced in his work and knew and appreciated the risk assumed in handling the explosives, and by remaining in the employment without complaint assumed the risk; that at the time of the injury he was acting without authority or direction, and was, therefore, a volunteer. The reply was in the nature of a general denial of the new matter contained in the answer.

The cause was tried to a jury, which returned a verdict for plaintiff, and from the judgment entered upon this verdict defendant has appealed.

The first assignment deals with the sufficiency of the evidence to support the verdict. Plaintiff testified that the foreman had called him to assist in procuring dynamite which was buried near the bridge; that this dynamite was taken to the tower on the bridge, and there it was left in proximity to the heating plant for some time that its

efficiency might be increased and that it might be more readily and safely prepared for use; that the foreman and plaintiff finally took several sticks of dynamite, some fuses, and a box of detonators and descended to the deck of the bridge, where, with the assistance of plaintiff, the foreman prepared two or three sticks of dynamite for use; that, in doing this work, plaintiff, under the direction of the foreman, took from the box a detonator and handed it to the foreman; that the foreman dropped it upon a steel rail; that it exploded and seriously and permanently injured plaintiff.

That plaintiff was injured by the explosion of a detonator at the time and place alleged is not open to dispute, but the manner of bringing about the explosion of the detonator is seriously questioned. The foreman testified, explicitly denying that he dropped the detonator or that plaintiff, when the explosion occurred, was assisting him in preparing the dynamite for use. According to his version of the affair, when he returned to the bridge at about 2 o'clock in the afternoon, the ice gorge mentioned by plaintiff had formed; and that he and plaintiff went to a box, which was buried on the bank of the river, and procured several sticks of dynamite; that they took the dynamite to the tower of the bridge, prepared it for use, as detailed by plaintiff, and that a few sticks thereof were thrown upon the ice gorge, and that he then went to the tower, leaving plaintiff upon the deck of the bridge; that he looked over the deck and saw plaintiff lay a detonator upon a steel rail and strike it with another piece of steel. His statement that he saw plaintiff strike the detonator is qualified, if not entirely withdrawn, by subsequent statements. Perhaps his testimony, as a whole, may more accurately be said to be that he claims to have looked over the deck of the tower immediately upon hearing the explosion. He testified that he then descended to the deck of the bridge, and that he was then told by plaintiff that plaintiff had placed the detonator upon the rail and that he had struck it with a short piece of steel rail. No person was present at the time except

plaintiff and this witness, and there is a direct and irreconcilable conflict in their testimony as to the cause of the explosion. While plaintiff was in the hospital, a claim agent of the employer procured from him a written statement, which, speaking generally, corroborates the foreman. On the trial, defendant produced the testimony of witnesses who claimed to have talked with plaintiff soon after the accident, and they testified to plaintiff's having said to them he had struck the detonator with the piece of steel rail mentioned by the foreman. Defendant also produced the testimony of two witnesses, who are said to have had much experience in the handling of dynamite and dynamite detonators, and each of them expressed the opinion that the detonator could not have been exploded in the manner testifield to by plaintiff.

In rebuttal, plaintiff testified that, when he made the signed statement offered in evidence by defendant, which read in part as follows, "As I was going to hand this cap to Mr. Kleinlien, it slipped out of my fingers and dropped," he was in bed suffering from the effects of the injury; that the paper was written by the claim agent, who did not read it to plaintiff, and that plaintiff did not read it. Plaintiff also testified that the foreman asked plaintiff not to disclose the manner of receiving his injury because to do so might cause the foreman to lose his job. On behalf of plaintiff there was also offered the evidence of his mother, sister, and brother-in-law, that the foreman had admitted in their presence that the detonator had been dropped by him as alleged by plaintiff. There is also testimony in behalf of plaintiff to the effect that, on the evening of the day plaintiff suffered the injury, the foreman told the brother of plaintiff that he, the foreman, had accidentally shot plaintiff with a revolver, and later changed that statement and said that plaintiff was injured by falling over a coal bucket, and finally changed that statement again by saying that he, the foreman, had dropped a detonator which exploded and caused the injury to plaintiff, and that he expressed fear lest this incident might cause him to "lose his job."

In weighing the evidence offered by the respective parties, it may be mentioned that, on cross-examination, the foreman was evasive in many of his answers. When asked as to whether or not he had, on the evening of the accident, told plaintiff's brother that he, the witness, had accidentally shot plaintiff, he failed to make an explicit denial, nor did he deny that a short time thereafter he undertook to explain plaintiff's injury by saying that plaintiff had fallen over a coal bucket. Again, he was asked the question whether or not, on the same evening, he had stated that he, the witness, had dropped the detonator and that its explosion had injured plaintiff. In place of making a denial, as might be expected in view of his direct testimony, he said that he knew nothing about it. Plaintiff's counsel, summarizing the cross-examination, put the question: "Q. Well, what I am getting at, did you or did you not make those statements, or any of them, to Dick Thornton on the evening of March 5, 1918? A. Well, that would be a hard question for me to honestly answer, whether I did or whether I didn't. That has been four years ago."

Defendant put in evidence the written statement procured from plaintiff by its claim agent wherein plaintiff said that the detonator slipped out of his fingers and dropped to the rail, thereby exploding. Unless it be held that this statement merely convicts plaintiff of making inconsistent claims, or statements, the testimony of the experts called by defendant is in conflict with defendant's own theory. It is clear that, if the explosion occurred as recited in the written statement, the conclusions of the experts are unsound. On the other hand, if the experts are correct in their conclusions, the explosion was not produced in the manner described in the written statement. The testimony throughout is in irreconcilable conflict. It was the function of the jury to determine its truth or falsity.

"The weight to be given to evidence cannot be determined alone by the number of witnesses who testify to a given state of facts, but rather by the character of each witness, his appearance and demeanor upon the witness-stand, his

bias or prejudice, his relationship, if any, to the parties, the reasonableness or unreasonableness of the story told, and by those intricate tests that are either consciously or unconsciously applied by triers of fact as they observe the witness upon the stand and hear his testimony as it is uttered from his own lips." *Moore v. Williams,* 111 Neb. 342.

The evidence is sufficient to support the verdict.

Complaint is made of alleged misconduct of plaintiff's attorney in his closing argument to the jury, but as the record is silent as to the nature of the argument this assignment cannot be considered. *Hamblin v. State,* 81 Neb. 148.

Plaintiff was a minor at the time he received his injuries, and the point is now made that it was error for the court to permit the jury, in assessing plaintiff's damages, to take into account his loss of earnings during his minority, it being said that the father was entitled to plaintiff's wages. There is no direct evidence in the record as to whether plaintiff had been emancipated or not, although it does appear that he made his own contracts of employment and the father made no claim to the wages earned. This point was neither pleaded nor called to the attention of the trial court and will not be further considered.

Complaint is made as to certain rulings of the trial court on the admission or exclusion of evidence; but, when these rulings are considered in the light of the issues before the court, no error prejudicial to appellant is apparent. The issues were comparatively simple, and counsel for the respective parties and the court seem to have kept these issues plainly in view, and, as it appears to us, neither party was prejudiced in the manner of proving his cause of action or his defense.

Complaint is made of the instructions of the court, notably because the court did not instruct on the doctrine of contributory negligence. Contributory negligence was not pleaded, nor would the proof support such a plea. There is no error in the instructions given, nor did the court err in refusing the instructions defendant tendered.

Finally, it is urged that the recovery is excessive. The

evidence as to plaintiff's injuries, while not without dispute, is sufficient to support a finding that he is permanently disabled from following railroad work, to which apparently it was his ambition to devote himself. Prior to the trial he had endured much pain and suffering as a result of the injury and it may reasonably be inferred that he will continue to suffer throughout his life. His earning capacity has been greatly reduced and there is no showing of his ability to take up an intellectual pursuit where the active use of his injured leg may not be required. He is young, the years of his expectancy are many, and, under the circumstances, we do not feel warranted in reducing the amount fixed by the jury.

As the record is free from error, the judgment is

AFFIRMED.

HOME PATTERN COMPANY, APPELLEE, V. CHARLES A. GORE, DEFENDANT.

RICHARDSON DRY GOODS COMPANY, APPELLEE, V. CHARLES A. GORE, DEFENDANT:
CHARLES CROCKER ET AL., APPELLANTS.

FILED MAY 23, 1925. No. 23141.

Fraudulent Conveyances: SALE IN BULK. One who obtains possession of a stock of merchandise pursuant to a purchase thereof in bulk, without having complied with the provisions of section 2561, Comp. St. 1922, commonly known as the "Bulk Sales Law," will be held to be a trustee for the benefit of the creditors of his vendor and liable as garnishee.

APPEAL from the district court for Gage county: LEONARD W. COLBY, JUDGE. *Affirmed.*

E. O. Kretsinger, for appellants.

Hazlett, Jack & Laughlin, contra.

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

MORRISSEY, C. J.

These two cases were consolidated and tried together below, and, since both cases present the same issues and the decision in one will be controlling in both, it is not necessary that a full discussion be given each case. For convenience we will discuss only the case of the Richardson Dry Goods Company.

This action was brought to recover for merchandise sold by plaintiff to Charles A. Gore, doing business under the trade name of the "Gore Mercantile Co.," in the village of Liberty, Nebraska. Plaintiff recovered judgment against Gore for the amount of its claim and now seeks to enforce that judgment by this proceeding in garnishment brought against defendants Charles Crocker and Charles Doty who purchased the stock of goods and business of Charles A. Gore after the debt on which the judgment is based was contracted.

Upon hearing in the garnishment proceeding, the evidence showed that Charles A. Gore had been engaged in the general retail mercantile business, and that in October, 1921, Charles Crocker and Charles Doty bought his stock of goods and took over the business. At the time the sale was made, Charles A. Gore was indebted to the Richardson Dry Goods Company for merchandise purchased and placed in his general stock. In the contract by which Gore sold his stock of goods to Crocker and Doty it was provided that an appraisement should be made, to ascertain the wholesale value of the goods, by a representative of some wholesale company. For the purpose of making this appraisment, one Chapman, who was in the employ of the Richardson Dry Goods Company went to Liberty, at the request of Gore, and spent several days invoicing the stock. After the appraisement was completed, Crocker and Doty took possession of the merchandise.

The court found for plaintiff and against the garnishees, holding that the parties to the sale had not complied with the provisions of section 2561, Comp. St. 1922, known as the "Bulk Sales Law," in that no notice of the sale or terms

thereof had been given to the creditors of the Gore Mercantile Company. From this finding and the judgment entered thereon, garnishees have appealed.

It is the contention of appellants that appellee, receiving a request that a representative be sent to invoice the stock of goods, was sufficiently apprised of the sale as required by the statute, and that, by allowing this representative to participate in the work of valuing the stock, appellee waived any rights it may have had under the bulk sales law.

Section 2561, Comp. St. 1922, among other provisions, contains this requirement:

"The purchaser shall, at least five days before taking possession of such merchandise, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are stated in said list, of the proposed sale, trade or other disposition and of the price, terms and conditions thereof."

The record nowhere shows that the purchaser sent the required notice to any creditor, as the statute plainly says he should do, for the only communication between any of the parties to the sale and the creditor was the request made by Gore, the seller, that a representative of the creditor be sent to make the appraisment. This request by Gore cannot be construed to be a notice sufficient to comply with the statute, for it does not appear that this communication contained any notice of the price, terms or conditions of the sale. Nor does the participation of Chapman in the routine work of appraising the stock amount to a waiver on the part of appellee of its rights under the bulk sales law. The record shows that, in performing these duties, Chapman was acting, not as the agent of appellee, but as the agent of both the parties to the sale in enabling them to arrive at the fair value of the stock of goods. Further, it is not shown that Chapman's position with appellee was such that, even *had* he had full knowledge of all the terms of the transaction, such knowledge would be chargeable to his employer and his subsequent acts amount to a waiver by them of the protection afforded them by the statute.

From the above, we conclude that the parties to the sale, Charles A. Gore and Crocker and Doty, did not comply with the provisions of section 2561, Comp. St. 1922, and that full compliance was not waived by any act of appellee. The court did not err in entering judgment against garnishees. *Appel Mercantile Co. v. Barker*, 92 Neb. 669; *Interstate Rubber Co. v. Kaufman*, 98 Neb. 562.

The judgment of the district court is right in each case, and is

AFFIRMED.

Note—See Fraudulent Conveyances, 27 C. J. sec. 892 (1926 Ann.).

EDWARD L. MCCREA ET AL., APPELLEES, V. WILBUR W. DAY, APPELLANT.

FILED MAY 23, 1925. No. 23099.

1. **Process**: SUMMONS TO ANOTHER COUNTY. Where a suit is properly begun in any county in this state, and among other things plaintiff prays that the title to real estate be quieted, process may issue to any other county in the state to bring in a person resident therein who has or claims an adverse interest in the real estate.
2. **Trial**: REFERENCE: ASSERTION OF CLAIM AFTER DISTRIBUTION. Certain funds were distributed by a referee, pursuant to the court's order, among certain parties to a pending suit. Subsequently a defendant, who filed his original answer long prior to the appointment of the referee, set up a claim, in a supplemental answer, for the fund which had been distributed. The claim so pleaded was not referred to in the original answer, nor was the court, at any time before the referee's appointment, advised of claimant's alleged rights. No fraud or other circumstance is pleaded, or called to the court's attention, by which the claimant was prevented from asserting his alleged rights in apt time. *Held*, that the court did not err in denying the claim set up in the supplemental answer.
3. **Appeal**: REVERSAL IN PART. Under the pleadings and the evidence herein, *held*, that the judgment against defendant Day must be reversed, except as to the court's denial of his right to all or any part of the fund which was distributed to other

parties to the suit, and as to this exception the judgment is affirmed.

APPEAL from the district court for Pawnee county: JOHN B. RAPER, JUDGE. *Affirmed in part, and reversed in part.*

Peterson & DeVoe and *Max V. Beghtol,* for appellant.

Good & Good and *A. M. Bunting, contra.*

Heard before ROSE, DEAN, GOOD, THOMPSON and EVANS, JJ., REDICK and SHEPHERD, District Judges.

DEAN, J.

December 14, 1918, certain subscribers entered into a written "Agreement and Declaration of Trust," hereinafter called the declaration, whereby the "Cooperative Garage and Delivery," hereinafter called the organization, was brought into being. The object of the organization, as disclosed by the declaration, was to install a system of highway motor transportation, for the carrying of freight to market, such as grain, live stock, and farm produce, and to make door to door delivery of merchandise and the like, all for hire, by the use of motor transportation trucks, in Nebraska and adjoining states, "for members only of Cooperative Garage and Delivery." The declaration also provided for the election of three or more trustees and for the election of a president, vice-president, treasurer and secretary upon whom should devolve the duties incident to like offices in corporations. Shares in the enterprise were denominated "certificates of interest." On the face of each certificate appears the statement that the organization is "an unincorporated company," and that it is "organized and existing under and by virtue of the common law." The organization was denominated "a common-law trust," and it is alleged that it was not subject to control by the state railway commission nor to the provisions of the "Blue Sky Law." Within a few months after the organization was completed it was discovered that the project was not then workable and operations ceased.

Thereupon this suit was begun by upwards of 40 plaintiffs in the district court for Pawnee county, to bring the affairs of the organization to a close and to recover judgment against the defendants for the money paid by plaintiffs for certificates of interest. Plaintiffs had severally purchased one or more of the certificates, so that each one of the numerous parties who joined in the petition herein was, respectively, individually, and severally, the owner of one certificate or more. That is to say, no owner of a certificate or certificates had or claimed any right, title, interest or ownership in the certificate or certificates owned by any other party to this suit. Wilbur W. Day and 12 others were named as defendants. Plaintiffs alleged, among other things, that Day was one of the main promoters of the enterprise and, charging that the subscribers were induced to purchase the certificates by fraudulent representations, they demanded judgment against Day and five of his codefendants for the several amounts represented by the certificates of interest which they owned. The organization was the owner of certain real estate in Table Rock, which approximated $1,000 in value, which was bought for a terminal station. Plaintiffs prayed for an accounting, and also that the Table Rock property, which was the only property it owned, be sold and the proceeds be paid over to the plaintiffs as their respective rights should appear, in partial satisfaction of their several demands, and for general equitable relief.

In his separate answer Day pleaded generally that he and three others were trustees of the organization; that early in 1919, at a Table Rock meeting of citizens, he informed them, in substance, that the organization papers were drawn up and that its legality had been carefully guarded by able and competent counsel; that one of these was a former attorney general of Nebraska; that the others were prominent Lincoln lawyers; that their advice was that each owner of certificates "would be liable only to the amount of his holdings; * * * that no person other than a member and holder of certificates of interest would be

entitled to enjoy the transportation facilities." Day further alleged that two motor trucks were subsequently bought on which $1,550 was paid; but, as soon as it was discovered that the project was not then practicable, they were surrendered to the sellers in satisfaction of the purchase price liens; that four or five months after operations began defendant "requested these plaintiffs or some of them to relieve him of his duties under said trust agreement and to undertake the operation and management * * * themselves, which plaintiffs and each of them refused to do;" that defendant acted in the utmost good faith; that the organization was cooperative in fact; that it was well known to all parties concerned that money for the establishment of the enterprise "was to be raised by selling the requisite amount of certificates of interest to parties who would have merchandise to move between the points where the trucks were to operate;" and that it was clearly understood that much would depend on road and weather conditions, and that the business would be slow at first, but it was generally believed it would ultimately be successful; that there was no waste nor improper expenditure of money, and that he was ready and willing to give a full account of his acts to the court.

The court found generally that the "Cooperative Garage and Delivery" not only ceased operations, but that it was insolvent and should be dissolved; that 125 "certificates of interest" were fraudulently obtained by the pretended owner of a Lincoln garage for a lease thereof, and that the certificates, being without consideration, should be and they were canceled; that the sole and only share owned by Day and the shares owned by nine others be canceled; that no personal liability attached to any defendant except Day, and that 12 or more of the purchasers of "certificates of interest" were entitled to recover from Day the several amounts respectively paid by them therefor, approximating $4,300, with interest and costs; that 31 of the plaintiffs should be, and were, denied the relief for which they prayed; that the sale of the Table Rock property, which was sold

for $1,000, and netted $943.36, should be and accordingly was confirmed. Continuing the court found "for the (thirteen) plaintiffs and (one) defendant below named and against the defendant Wilbur W. Day because of misrepresentations as alleged in the petition and in the amounts as set forth" in the decree. Here follows a recital in the decree of the names of 13 or 14 purchasers of certificates, in sums ranging from $100 and upwards, being approximately $4,300, as noted above, "said several amounts being the subscription price paid for their respective shares, * * * less the distribution amount heretofore paid by the special commissioner for the *pro rata* share ($10.72 for each share) resulting from sale of the (Table Rock) property as heretofore decreed." The court further found and decreed that Day recover nothing by reason of his counterclaim and the facts pleaded in his supplemental answer. Day has appealed from the judgment rendered against him. The 31 plaintiffs, who were denied any relief, have filed a cross-appeal.

As tending to support their contention, plaintiffs introduced in evidence an instrument purporting to be a partial copy of the garage lease, hereinbefore mentioned, wherein certain personal property is described, which is ordinarily found in a repair garage, but no consideration is named therein nor is a signature appended thereto. The contention is that the lease-hold interest in the garage was bought by Day, when it was already mortgaged for its full value, and that by his carelessness and negligence this fact was not discovered until after the purchase price thereof, namely, 125 "certificates of interest" were given in exchange therefor. In this connection it may be noted that plaintiffs called Day as a witness and he testified that the lease was prepared before he became a trustee, and that, about 30 days after it was obtained, the prior incumbrances were discovered. It further appears that, because of the alleged fraudulent act of the vendor of the lease, he fled from the state and was then a fugitive from justice. On his own behalf Day testified that he obtained an affidavit from the seller of the

garage lease wherein he averred that the property was free from incumbrances and that one of the organization's counsel informed the trustees that the title to the garage property was good. But when it was found that it was incumbered the trustees "ordered the stock all canceled, unless he (the seller) could fix it up." None of this evidence was denied. This feature, however, may be dismissed with the observation that, in view of the evidence, it is obvious that no financial loss was occasioned by the transaction.

By leave of court Day amended his original answer, and therein alleged that the court had no jurisdiction over his person, nor did it have jurisdiction to render a personal judgment against him. The argument is that he was, at all times material to this action, a resident of Lancaster county, and that process issued out of Pawnee county was irregularly served on him in Lancaster county. He contends that there is no joint liability between him and any defendant resident of, or served with process in, Pawnee county. However, it is shown by the county records that Burow, one of the resident Pawnee county defendants, was the record owner of a part of the Table Rock premises in question here when it was purchased by the organization. True, in his answer Burow disclaimed any present interest in the real estate, and averred that he, by an unrecorded instrument, has disposed of all his interest therein. Nevertheless, it seems to us that, in order to clear the title to the Table Rock real estate, Burow was properly made a party defendant. It therefore follows that Day, even though a non-resident of Pawnee county, was properly served with processes in Lancaster county.

Day, besides amending his answer, filed a supplemental answer wherein he alleged that W. R. Fay, an employee of the organization, recovered a judgment against him in the district court for Lancaster county, for $957.93, for money advanced and for services performed for the organization upon his solicitation. On appeal to this court a remittitur was filed, and a judgment for $787.13 was thereupon affirmed, the costs being taxed to plaintiff therein.

Day argues that, "as shown by said pleadings and by the opinion of said court," in *Fay v. Day*, 106 Neb. 370, the case "was based entirely upon the fact that this defendant was a trustee for the Cooperative Garage and Delivery," and not for the benefit of Day, and that he "will eventually be compelled to pay the same" and is therefore now entitled to recover in this suit the amount thereof, with interest and costs, out of the net proceeds arising from the referee's sale of the Table Rock property, or from any money in the hands of, or controlled by, the court. But Day's supplemental answer was not filed until January 24, 1922, and in their reply thereto, which was filed eight days thereafter, plaintiffs point out that in July, 1921, the court had already appointed a "special master commissioner" to sell the real estate in question, and that about three months thereafter, namely, October 29, 1921, the court ordered a distribution of the proceeds of the sale and, pursuant thereto, the money was distributed by the commissioner "among the plaintiffs and other persons entitled thereto." It appears to us that from the foregoing facts the court did not err in denying Day's claim for relief, so far as it is made to depend upon such funds as had once been under the court's control but were, by the court's order, distributed before the supplemental answer was filed. And on this feature of the case we base our decision solely on this ground. For obvious reasons, and in view of our decision on the merits, further comment is deemed unnecessary in respect of the *Fay* case and the argument of counsel relating thereto.

A review of the record convinces us that the judgment must be affirmed so far as it relates to the causes of action pleaded in Day's amendment to his answer and in his supplemental answer. But in all else, so far as the findings are adverse to Day, the judgment must be reversed. It may be added that other questions are raised which we do not discuss and do not find it necessary to decide.

The evidence, when considered in its entirety, fairly supports the allegations of defendant's answer. Day testified that he did not profit a single dollar by reason of his con-

nection with the organization; and this is not denied by any witness. He further testified that he expended $300 or $400 in behalf of the organization, and that, besides, he paid his own expenses to a distant city on business relating to the organization's affairs, and that none of this money was recovered by him. And there is no proof to the contrary in respect of any of these matters. It appears, too, from the undisputed evidence, that Day lost more money, by far, in the enterprise than any plaintiff or other party to this suit. Day further testified that the single "certificate of interest" which he owned, and which he voluntarily surrendered, was given him so that he might qualify as trustee.

Several causes worked together to bring about a cessation of the activities of the enterprise. In the natural order of things the expected happened and, in consequence, public interest waned. The rain descended and the floods came on the earthen roads, as the plaintiffs and every one else in this latitude knew they would.

Plainly speaking, the net result was that, somewhere between Pawnee City and Lincoln, two motor-propelled freight trucks were tied up in the mud. And here the end began. But on unpaved highways could anything else be expected by reasonable men? Was Day to blame because the traveled road from Lincoln to Pawnee City was not topped with gravel nor surfaced with cement? The mischief is that the enterprise, in itself feasible, was prematurely launched by a few years, and only by a few. To argue that Day made the Pawnee defendant citizens believe that a fleet of heavily loaded motor-propelled freight trucks could skim over hub-deep mud roads to and from their county seat town is plainly absurd. It is everywhere well understood in Nebraska that, in the absence of paved or graveled highways, neither passenger automobiles nor freight trucks can overcome the untoward road conditions which attend an excessive rainfall. And this contingency was talked over at their public meetings. They all took it into account and all of this was well known to plaintiffs and all parties here concerned. True, Day used trade talk.

He was apparently an enthusiast. But the record does not disclose a dishonest act on his part. From the amount of money he invested it is evident that he believed that success would follow their joint efforts. And others were like-minded. It appears that one of the plaintiffs, a prominent and influential citizen of Pawnee county, went out and held public meetings and invited his neighbors and friends to join in the progressive enterprise. But when the project collapsed he excused himself by saying, among other things, that he heard Day say that the project was workable and that he believed what Day said because he was associated in business with good men in Lincoln. And no one thought of making this citizen a party defendant.

We conclude that, under the pleadings and evidence, Day was properly made a party defendant. We further conclude that the judgment against Day must be and is reversed, except as to the court's denial of his right to all or any part of the fund which was distributed to other parties to the suit, and as to this exception the judgment is affirmed. The judgment is also affirmed as to the cross-petitioning appellants. In view of our decision, we do not find it necessary to decide whether plaintiffs were properly joined. Comp. St. 1922, sec. 8535.

AFFIRMED IN PART, AND REVERSED IN PART.

EDWARD PETERSON ET AL., APPELLEES, V. STATE OF NEBRASKA ET AL., APPELLANTS.

FILED MAY 23, 1925. No. 24376.

1. **Venue**: SUIT AGAINST STATE. Under provisions of section 1105, Comp. St. 1922, the state may be sued in the district court of the county where the capital is situated, in any matter founded upon or growing out of a contract, expressed or implied, originally authorized or subsequently ratified by the legislature, or founded upon any law of the state.
2. **States**: ACTION AGAINST: CONTRACT WITH DEPARTMENT OF PUBLIC WORKS. An action founded upon a contract with the

department of public works, which has been previously authorized by the legislature, is essentially a contract with the state, and when a claim arising out of such a contract has been presented to the auditor of public accounts, and disallowed by him, in whole or in part, an action may be brought thereon against the state.

3. Appeal: FINDINGS BY COURT. "Where the district court acts in the place of a jury in determining an issue of fact on conflicting evidence sufficient to support a judgment in favor of either party, the finding on that issue will not be reversed on appeal unless clearly wrong." *In re Estate of Kane*, 109 Neb. 449.

4. Evidence examined, and *held* sufficient to support the judgment.

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

O. S. Spillman, Attorney General, and *Lloyd Dort;* for appellants.

Jacob Fawcett, Thomas S. Allen and *D. W. Merrow, contra.*

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

DAY, J.

Action by plaintiffs to recover from the state of Nebraska a balance of $47,428.72, alleged to be due upon a contract for the construction of a public road. By agreement of parties a jury was waived, and trial had to the court, resulting in a judgment in favor of the plaintiffs for $30,305.54 with interest thereon, aggregating $33,459.41. Defendant appeals.

It appears that on May 5, 1921, the plaintiffs entered into a contract with the department of public works, acting for the state of Nebraska, to construct a road designated as Federal Aid Project, No. 102 A, in Sioux county. In the notice to contractors calling for bids for the construction of the road, the quantities of materials to be removed, such as earth, solid rock, loose rock, and other materials, were stated as estimates and were to be used only as a basis for bids.

The plaintiffs submitted a bid in which they proposed to remove the earth for 39 cents a cubic yard, the solid rock for $1.80 a cubic yard, the loose rock for 90 cents a cubic yard, and other materials for prices a cubic yard set forth in the proposal. Based upon the estimated amount of material to be moved in the various classifications, the plaintiffs bid $68,613.97.

The proposal, submitted by plaintiffs, contained a stipulation as follows:

"This proposal is made with the understanding that the various items of work may be necessarily increased or decreased, and that these unit prices will apply to the increased or decreased quantities as fully as to the estimates of quantities as given herein."

The plaintiffs' proposal was accepted, and a contract embodying the terms of the proposal entered into.

There is no dispute about the total number of cubic yards of material removed. The controversy arises over the classification of certain quantities of material removed. The plaintiffs claim that, in the performance of the contract, they were required to excavate and remove 52,000 cubic yards of solid rock, 15,000 cubic yards of loose rock, 58,198 cubic yards of earth, and other smaller items not necessary to set out in detail, for which, under the contract, they were entitled to receive $129,296.01, of which sum the plaintiffs have been paid $81,867.29, leaving a balance due of $47,428.72.

The specifications, which were a part of the contract, defined the various materials to be removed, and, so far as pertinent to the present controversy, were as follows:

"Solid rock excavation will include all rock in masses which cannot be removed without blasting, also all detached rock or boulders measuring not less than one cubic yard each. Brule clay and shale and all such material that cannot be handled with grading machinery and which necessitates the use of explosives will be classified and paid for as solid rock."

Two main contentions are made on behalf of the state for a reversal of the judgment: First, that the court was without jurisdiction to hear and determine the cause; and, second, that the evidence does not support the judgment.

It is urged by counsel for the state that the court was without jurisdiction because permission was not granted by either branch of the legislature to sue the state.

It appears that before the action was brought the plaintiffs presented their claim to the department of public works for approval, which was denied. The board, by its secretary, indorsed upon the claim: "This bill is disapproved by reason of a disagreement as to classification." Plaintiffs then presented the claim to the auditor of public accounts, and demanded that he issue the usual warrant in payment thereof. The auditor indorsed on the back of the claim:

"Filed Dec. 26, 1922. This claim is disallowed for the reasons as stated by the secretary of public works on the face of the voucher, this 26th day of December, 1922. Geo. W. Marsh, State Auditor."

The Constitution, article V, sec. 22, provides:

"The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suit shall be brought."

Acting upon the mandate of the Constitution, the legislature of 1877 passed an act entitled: "An act to provide in what courts the state may sue and be sued." Laws 1877, p. 19. The provisions of this act, in so far as they affect the question now being considered, are set forth in sections 1100, 1105, Comp. St. 1922.

Section 1100 provides:

"The several district courts of the judicial districts of the state as now provided for and established by the Constitution of the state, and of such judicial districts as may hereafter be provided by law, shall have jurisdiction to hear and allow the following matters:

"First. All claims against the state filed therein which have previously been presented to the auditor of public

accounts, and have been in whole or in part rejected or disallowed."

Section 1105 provides:

"The state may be sued in the district court of the county wherein the capital is situated, in any matter founded upon or growing out of a contract, expressed or implied, originally authorized or subsequently ratified by the legislature, or founded upon any law of the state."

In *State v. Stout*, 7 Neb. 89, the court had under consideration a case involving the construction of the provisions of the statute above set out. The opinion in the case clearly recognizes the right to maintain an action against the state based upon contract, expressed or implied, but denied the right of the plaintiff to recover upon the ground that he had failed to present his claim to the auditor of public accounts for adjustment. In that case it was said: "The state can be sued only on claims that have been first presented to the auditor of public accounts for adjustment, and which have been in whole or in part rejected." The same principle was announced in *State v. Mortensen*, 69 Neb. 376.

In the instant case the plaintiffs duly presented their claim to the auditor of public accounts, and the same was disallowed. The plaintiffs have complied with all of the requirements of the statute as a condition precedent to their right to bring the suit. The action was one growing out of a contract originally authorized by legislative enactment. Under the circumstances presented by the record, it was not necessary that they obtain permission of the legislature, or at least one branch thereof, to bring the action.

Is the evidence sufficient to support the judgment?

As before stated, the principal dispute arises over the classification of the materials removed in the performance of the work. It is earnestly insisted, on behalf of the state, that the great weight of the evidence supports the state's contention that, in the performance of the contract, the plaintiffs removed approximately 24,652 cubic yards of solid rock, and 3,687 cubic yards of loose rock, and that the re-

mainder of the material removed should be classified as earth.

The testimony bearing upon the classification of the materials is very voluminous and covers more than 700 pages of the record. It will serve no useful purpose to discuss the evidence in detail and we will not attempt to do so.

In behalf of the state the project engineer, who was present when the work was being done and made observations for the purpose of classifying the materials, testified that plaintiffs removed 24,652 cubic yards of solid rock, 3,689 cubic yards of loose rock, and that the balance of the material removed came within the classification as earth. The testimony of the project engineer was supported in part by the testimony of other witnesses.

The testimony shows that, in performing the contract, it was necessary to remove a large quantity of material designated by some of the witnesses as "packed sand" and by others as "sand rock," "butte rock," and "brule clay." Whether this material came within the classification of solid rock was the principal item in dispute.

The specifications defined the various materials for classification purposes as follows:

"Solid rock excavation will include all rock in masses which cannot be removed without blasting, also all detached rock or boulders measuring not less than one cubic yard each. Brule clay and shale and all such material that cannot be handled with grading machinery and which necessitates the use of explosives will be classified and paid for as solid rock.

"Loose rock excavations will include all slate or other rock which can be quarried or removed without blasting, also detached rock and boulders measuring not less than one cubic foot nor more than one cubic yard each.

"Ordinary excavation will include all loose stones, boulders, and other material of every description as found, which are not included in the above specifications as solid and loose rock, special excavation, or channel excavation."

In behalf of the plaintiffs a number of engineers, who had examined the completed work, testified that from an examination of the cuts they were able to compute with approximate accuracy the amount and classification of the materials removed, as defined by the specifications. One of the engineers, after making an extensive examination, testified that the project contained 46,720 cubic yards of solid rock and 9,441 cubic yards of loose rock. With slight variations as to yardage, other engineers agreed with these figures.

Witnesses for the plaintiffs testified that the so-called "packed sand" or "brule clay" was so hard that it could not be handled with ordinary grading machinery, and that it had to be "shot" in order to be removed.

As a part of the trial and by agreement of parties, the trial judge personally examined the project, and, upon consideration of all of the evidence, came to the conclusion that in the performance of the work the plaintiffs removed 44,565 cubic yards of solid rock, 3,689 cubic yards of loose rock, and the balance of the yardage removed was earth.

The testimony given by the engineers, based upon their examination after the work was done, was competent testimony on the point under consideration. The weight of such testimony was a question for the trial court acting in place of the jury in determining the issue of fact presented. The rule is well established that—

"Where the district court acts in the place of a jury in determining an issue of fact on conflicting evidence sufficient to support a judgment in favor of either party, the finding on that issue will not be reversed on appeal unless clearly wrong." *In re Estate of Kane,* 109 Neb. 449.

A number of other questions are argued in the brief for the state, but they all center around the main question of the sufficiency of the evidence to support the judgment. We deem it unnecessary to discuss the other questions suggested in the state's brief. We have considered them and they do not affect the conclusion reached. Upon an examination of the entire record, we are quite convinced

that the evidence supports the judgment of the trial court. The judgment is

AFFIRMED.

Note—See States, 36 Cyc. 901, 914.

JOSEPH C. NELSON, APPELLEE, V. NATIONAL AUTOMOBILE INSURANCE COMPANY, APPELLANT.

FILED MAY 23, 1925. No. 23193.

1. **Evidence** examined, and *held* sufficient to support the verdict.
2. **Insurance**: LOSS BY THEFT: EVIDENCE. Evidence examined and outlined in the opinion, *held* sufficient to warrant a finding that, without the owner's consent, one Hall, with the intent to steal it, took plaintiff's automobile.
3. **Appeal**: HARMLESS ERROR. The admission of incompetent evidence which does not prejudice the complaining party is harmless error.

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

Richard F. Stout and *McIntosh & Martin,* for appellant.

Radcliffe & Hyde and *W. K. Hodgkin, contra.*

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

GOOD, J.

Action to recover on a policy of insurance, insuring plaintiff against loss of his automobile by theft. Defendant denied loss of the car by theft, and alleged that it had been delivered by plaintiff, under a contract of sale, to J. B. Hall, and that the failure of Hall to return the automobile or pay for it created no liability under the policy. Plaintiff denied the affirmative allegations of the answer. A trial of the issues resulted in a verdict for plaintiff. From a judgment thereon, defendant appeals.

Defendant assails the verdict as not sustained by sufficient evidence, and as being contrary to law and contrary to the

court's instructions, and also alleges error in receiving certain evidence over objection.

Plaintiff, a farmer, lived at Gurley, Cheyenne county, Nebraska. In July, 1921, he became acquainted with and engaged J. B. Hall to work for him for about two weeks. At that time plaintiff owned an Auburn car, covered by the insurance policy upon which this action is founded. Hall represented that he possessed a considerable estate in the hands of his guardian, from whom he would soon receive about $30,000 in cash. He made overtures to the plaintiff for the purchase of his car, and the price of $1,400 was agreed upon. Hall went, or claimed that he went, to Smith Center, Kansas, to meet his guardian and to receive the $30,000. He came back, so far as disclosed by the record, without receiving any money. Apparently, the talk of Hall's purchasing the car was dropped. Hall then went to work for a Mr. Filben, one of plaintiff's neighbors, and on a few occasions borrowed and used plaintiff's car. Some time about the 20th of August he stated to plaintiff that he wanted to, or would, take plaintiff's car on Monday, the 22d of August, for the purpose of taking Miss Filben, his employer's daughter, and another lady to some point a few stations distant, along the line of the railroad. Plaintiff says that he neither consented nor refused consent to the use of the car. Hall did not go on Monday, but did go on the following day and took the car, when plaintiff was absent, and, with his employer's son and daughter and another lady, drove away. The next day he sent a telegraphic message to plaintiff from North Platte, Nebraska, saying that he would be back with the car in a few days. Hall and his companions proceeded to Heartwell, in Kearney county, Nebraska, and there stopped for a few days, and Hall announced to the other members of the party that he was going to drive to Smith Center, Kansas. Young Filben suggested going with him, but Hall put him off by saying that he might be gone overnight. He left Heartwell with the car ostensibly for Smith Center, since which time neither Hall nor the car has been seen or heard from by

plaintiff. Filbin and his sister waited three or four days for Hall, and then returned to Gurley by train and reported the facts to plaintiff. Plaintiff thereupon notified the local agent of the insurance company and wired the sheriff at Smith Center, Kansas, giving a description of Hall and the car, but never received any information concerning either one. Plaintiff's theory is that it was Hall's intention, when he took the car on the 23d of August, to steal and appropriate it to his own use, and it was upon this theory that the case was submitted to the jury.

Defendant's contention that the automobile was delivered to Hall under a contract of purchase is not sustained by the evidence. The jury were instructed that, unless they found from the evidence that when Hall took the car on the 23d of August he had the intent to steal it, plaintiff could not recover. Defendant argues that the verdict is contrary to this instruction and to the law.

The facts proved are sufficient to indicate and warrant a finding that Hall from the start was playing a confidence game to get possession of the car. He borrowed it two or three times for short trips and returned it. This would tend to inspire confidence in his honesty. His statement that a large sum of money was due him from his guardian was no doubt made for the purpose of creating the impression that he possessed considerable property and was financially responsible. The fact that when he took the car he also took with him three reputable young people in the neighborhood would tend to dispel any thought of a felonious purpose in taking the car, and the sending of the telegram from North Platte would tend to allay any suspicion of a felonious purpose for a period of several days. Taking all the facts proved, we think the jury were justified in finding that Hall took plaintiff's car with intent to steal it.

Defendant complains of the admission of the evidence of one Smith as to the value of the car, on the ground that no sufficient foundation was laid. The evidence respecting Smith's competency to testify was rather meager, but we think it was sufficient to make his evidence competent to

go to the jury and for the jury to determine its weight. In any event, the evidence was not prejudicial to the defendant. The evidence of plaintiff was to the effect that the car was worth $1,400 or $1,500, and this was not controverted. There was no other evidence as to the value of the car. The amount of insurance was $1,000. If Smith's testimony had been eliminated the jury would not have been justified in finding the car to be of less value than $1,400. The admission of incompetent evidence, unless prejudicial to the complaining party, is not cause for reversal.

Defendant argues that, if the car was, in fact, stolen, possession thereof was gained by trick or artifice, and that it was necessary, to entitle plaintiff to recover, to allege the fraud or artifice. The proposition finds some support in the authorities. It is our opinion, however, that it was sufficient for plaintiff to allege the ultimate fact that his car was stolen, and that it was unnecessary to allege the means by which the thief obtained possession of the car. However that may be, the evidence fairly shows that plaintiff did not consent to Hall's taking the car. Hall never asked for or obtained permission to take the car on the 23d of August. He took it without the owner's knowledge or consent. The proof supports the allegations of the petition.

We find no prejudicial error. Judgment

AFFIRMED.

MARY C. RIGGS, APPELLANT, V. JESSE A. SUTTON, SHERIFF, APPELLEE.

FILED MAY 23, 1925. No. 24540.

1. **Criminal Law**: SENTENCE. Where no time is fixed by statute for the beginning of a sentence of imprisonment in a criminal case, it does not, ordinarily, begin until the prisoner is taken into custody by, or offers to surrender himself to the custody of, the proper officer.
2. ———: ———. The time for the beginning of a sentence of imprisonment in a criminal action is not an essential part of

the judgment. The essential element in such a judgment is the kind and amount of punishment, without reference to when it is to be inflicted.

3. ———: ———. When a defendant in a criminal action has been convicted and sentenced to a term of imprisonment, and a warrant of commitment has been issued, and delay occurs before it is executed, if defendant asks for or acquiesces in the delay, then the time which elapses before he is actually taken into custody will not be regarded as a part of the sentence.

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

Lyle E. Jackson and *Letton, Brown & Dibble,* for appellant.

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

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

GOOD, J.

The wife of Warren Riggs brought *habeas corpus* proceedings, seeking the discharge of her husband from the custody of the sheriff. The trial court overruled a demurrer to the sheriff's return to the writ, and rendered judgment of dismissal. Petitioner appeals.

From the petition and return to the writ, it appears that on December 8, 1923, in a prosecution for unlawfully keeping for sale intoxicating liquor, Riggs was found guilty and, on the overruling of his motion for a new trial, the following order was entered:

"It is therefore ordered, adjudged and decreed by the court that the defendant, Warren Riggs, be confined in the common jail of Antelope county, Nebraska, for a period of sixty (60) days and that the defendant, Warren Riggs, pay the costs of prosecution. Thereupon the court gave the defendant forty (40) days in which to submit a bill of exceptions, said defendant having given notice of his intention to apply for a writ of error, and the court fixed supersedeas bond in the sum of $500, and it is further ordered that upon

the defendant giving said supersedeas bond in the sum of $500 that the execution of the sentence heretofore pronounced be suspended."

Riggs did not give the supersedeas bond and did not prosecute error from the judgment of his conviction. The order for suspension of execution of sentence was conditioned upon the giving of a bond. The condition was never complied with, so there was never any valid suspension of sentence.

Section 10197, Comp. St. 1922, makes it the duty of the court, when one has been convicted of a criminal offense, to order the defendant into the custody of the sheriff and to order the issuance to him of a warrant for defendant's commitment; thereupon, the sheriff should immediately execute the warrant. The court, did not, however, order the defendant into the custody of the sheriff, and no warrant of commitment was issued until the 13th day of September, 1924, and long after the term of defendant's incarceration would have expired, if it had begun on the day of sentence. It also appears that after the warrant of commitment was delivered to the sheriff he was requested by Riggs, the defendant, to delay execution of the warrant because of illness in the family of Riggs and because the latter needed time in which to harvest his crops. Finally the sheriff, at a time not definitely disclosed by the record, took Riggs into custody, and thereupon this proceeding was begun to obtain his discharge. Petitioner contends that Riggs' sentence began to run from the date sentence was pronounced and expired 60 days thereafter, though he may have suffered no actual imprisonment, and that, therefore, his incarceration at a later date is without legal authority.

A number of cases from this and other jurisdictions are cited and relied upon to sustain petitioner's position. The cases cited and relied upon from this jurisdiction are *In re Fuller*, 34 Neb. 581, and *McGinn v. State*, 46 Neb. 427.

In the *Fuller* case it was held that "the term of imprisonment of one sentenced to the penitentiary dates from the sentence and not from the delivery of the prisoner to the

warden of the penitentiary." In determining what effect should be given to the language used in the opinion, consideration should be given to the facts then before the court. Fuller had been convicted of an offense and sentenced to 14 months' imprisonment in the penitentiary. From the date of the sentence he was in custody and imprisoned in the county jail, where he remained for some weeks before being transported to the penitentiary. The warden of that institution refused to discharge Fuller from imprisonment at the expiration of 14 months from the date of sentence, allowing for good time earned, and contended that the time elapsing between the date of sentence and the receiving of the prisoner at the penitentiary should not be counted as a part of the term of imprisonment. The only question properly before the court and decided in the case was that the time Fuller was in the county jail, awaiting transportation to the penitentiary, should be counted as a part of his sentence. The *Fuller* case is cited in the *McGinn* case, but the latter is not a similar case and has no bearing upon the question in controversy. There are a number of decisions cited from other jurisdictions which support the contention of petitioner. Among them are the following: *In re Markuson,* 5 N. Dak. 180; *In re Webb,* 89 Wis. 354, 27 L. R. A. 356.

We are of the opinion that the better view, the one supported by the stronger reason and the greater weight of authority, is that, in the absence of statute fixing the time when a sentence of imprisonment in a criminal action shall begin, it does not begin until the defendant is taken into custody or offers to surrender himself to the custody of the proper officer, and that, when a warrant of commitment has been issued and delay occurs before its execution, if defendant asks for or acquiesces in the delay, then he cannot take advantage of it. The time for executing a sentence of imprisonment, or for commencement of its execution, is not an essential element of the sentence. The essential part of the sentence is the punishment, including the kind and amount thereof, without reference to the time that it is to be inflicted.

A discussion of the question here involved may be found in 8 R. C. L. 259, sec. 267, in the following language: "The judgment is the penalty of the law, as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution. Where the penalty is imprisonment, the sentence of the law is to be satisfied only by the actual suffering of the imprisonment imposed, unless remitted by death or by some legal authority. Therefore, the expiration of time without imprisonment is in no sense an execution of the sentence. Accordingly where the judgment and sentence is imprisonment for a certain term, and from any cause the time elapses without the imprisonment being endured, it will still be a valid, subsisting, unexecuted judgment. And where a convict is permitted to absent himself from prison the time when he is absent is no part of the sentence. And therefore where a convicted defendant is at liberty and has not served his sentence, if there is no statute to the contrary, he may be arrested as for an escape, and ordered into custody on the unexecuted judgment, and the result is the same if he escapes to another jurisdiction and is brought back, though by illegal means."

A case very similar to the one under consideration is that of *Miller v. Evans*, 115 Ia. 101. There the sentence was for a term in the county jail and the sheriff neglected to execute the mittimus until after the term of defendant's incarceration would have expired, had it begun on the day of sentence, and it was held "that the expiration of the time without imprisonment would not be considered in satisfaction of the judgment—the time at which the sentence is to be carried out being directory, and not a part of the judgment—and a subsequent commitment to jail was authorized." Other authorities sustaining the views herein expressed are: *Ex parte Eldridge*, 3 Okla. Cr. Rep. 499, 27 L. R. A. n. s. 625; *State v. Cockerham*, 24 N. Car. 204; *State v. Abbott*, 87 S. Car. 466; *Neal v. State*, 104 Ga. 509, 42 L. R. A. 190; *Gray v. State*, 107 Ind. 177; 16 C. J. 1335, sec. 3142.

It is apparent that Riggs has not suffered the punishment which his offense merited, and which was adjudged against him. It would be a mockery to hold that the mere neglect of ministerial officers to enforce the judgment of a court could annul it and hold it for naught. The court itself was powerless, after the expiration of the term, to set aside or suspend the judgment rendered, and, if petitioner's contention should be sustained, it would permit a ministerial officer to do what the court itself is not authorized to do. It would permit ministerial officers, through neglect or for any other reason, to nullify the judgment of the court and render the criminal law without force or effect. We are satisfied that the trial court properly refused to discharge Riggs from the custody of the officer until he had served his sentence in jail.

The judgment of the district court is

AFFIRMED.

HOWELLS STATE BANK, APPELLANT, V. THOMAS HEKRDLE, APPELLEE.

FILED MAY 23, 1925. No. 23001.

1. **Sales**: CONTRACT: RESCISSION. A purchaser of property is entitled to the specific thing bought, and where, by fraud or false representations made as an inducement by one receiving an advantage by reason thereof, he is led to accept property other than that covered by his agreement with such person, he may rescind such contract with him without showing pecuniary damage by reason of the transaction.
2. **Banks and Banking**: DISCOUNTS: PURCHASER FOR VALUE. Where a bank discounts a customer's negotiable paper and places the consideration to his credit in his checking account, it becomes a purchaser for value only as such credit is exhausted by payment of checks drawn against such account. In determining how much of such credit has been exhausted, the rule to be applied is that, as checks are paid, the amounts thereof are to be charged against the oldest item of such credit.
3. **Bills and Notes**: HOLDER IN DUE COURSE. "Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid

the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him." Comp. St. 1922, sec. 4665.

4. ———: FRAUD: BURDEN OF PROOF. "Where fraud in the inception of a note is pleaded as a defense, and proof has been offered sufficient to make out a *prima facie* case, in an action by an indorsee against the maker the burden is on the plaintiff to show he is a *bona fide* holder." *Stephenson v. Perry*, 112 Neb. 294.

5. ———: ———: PROOF. It is not sufficient to show that the indorsee took the note under circumstances which ought to excite suspicion in the mind of a prudent man, but it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part.

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

George A. Eberly, for appellant.

D. C. Chase, Frank Dolezal and *A. E. Wenke, contra.*

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

THOMPSON, J.

Plaintiff seeks to recover of defendant the sum of $1,600 by virtue of a certain negotiable promissory note, executed and delivered by defendant to one Kunhart, who sold it to plaintiff, and, as plaintiff alleges, in due course before due, without notice of any infirmity in Kunhart's title, and for a valuable consideration, to-wit, $1,510.

Defendant, to avoid such recovery, after admitting the execution and delivery of the note, alleges that there was fraud in its inception, in that he was the owner of a half section of land in Madison county; that he employed Kunhart to trade such land for a quarter section to be found by Kunhart and approved by defendant, for which he agreed to pay Kunhart $1,600; that Kunhart accepted the employment, and shortly thereafter informed him that he had found a quarter section in Dodge county, about six miles from the town of Dodge; that he and Kunhart, at the

latter's request, went and saw the land, and that Kunhart again told him it was in Dodge county, six miles from the town of Dodge; that he asked Kunhart to drive to Dodge, but the latter refused; that relying upon Kunhart's statements that the land was in Dodge county, six miles from the town of Dodge, and believing the same to be true, he entered into a contract for the exchange of such lands, and in furtherance thereof the note in question was then executed and delivered to Kunhart; that afterwards he discovered that such quarter section was in Colfax county, and was nine miles from the town of Dodge; that he immediately notified Kunhart, as well as Drahota, with whom the exchange was had, that he rescinded the contract of exchange, as well as the note in question, and repudiated each; that there was no other consideration for the note, and that plaintiff, before purchasing it, had full knowledge and notice of the before-mentioned facts.

Upon issues thus joined, case was tried to a jury. Verdict and judgment for defendant. Plaintiff appeals, relying for reversal upon the following grounds, among others: The court erred in giving instructions numbered 4, 7, 7½, and 8, respectively, on its own motion; the judgment is not supported by the evidence.

Instruction 4 is as follows: "The burden of proof is on the defendant to prove by a preponderance of the evidence that the said Kunhart represented to defendant that the land for which he was trading was situated in Dodge county, Nebraska, and represented that the same was not more than six miles from the village of Dodge, and to prove that he had no knowledge that the land was situated in Colfax county, Nebraska, and more than six miles from the village of Dodge, and also to prove that he, the defendant, relied upon said representations, believed the same to be true, and was thereby induced to sign said promissory note for the sum of $1,600. The undisputed evidence in this case shows that the land for which defendant was then trading is situated in Colfax county, Nebraska, and is eight miles from the village of Dodge."

The rule announced in this instruction is supported by the greater weight of authority. One is entitled to that which he has in fact purchased, and it is not incumbent upon him to show that he was pecuniarily damaged by receiving something different. Thus, if in this case defendant's agent, Kunhart, informed him that the land he was presenting for his consideration was situated in Dodge county, six miles from the town of Dodge (which we do not decide), and he relied on that statement and believed it to be true, and thus accepted the proposition, and gave Kunhart as his commission the note for $1,600, this condition is not met, in law, by an offer to convey the same amount of land in Colfax county, eight or nine miles from the town of Dodge, unless the latter land is accepted with knowledge of its location, or an estoppel, based on sufficient facts, is pleaded and proved. In *Jakway v. Proudfit*, 76 Neb. 67, we held:

"A purchaser of real or personal property is entitled to the benefit of his bargain, in other words, to receive the identical property purchased; and where the vendor by fraud or false representations has conveyed to him or induced him to accept something not contemplated by his contract, he may rescind the sale and recover what he has paid, without showing that he has sustained any pecuniary injury or damage thereby."

As to instruction 7, the record shows that on the 14th day of August, the date upon which plaintiff bank alleges it bought the note in question, Kunhart was owing it $300, and $12 interest, which was deducted from the purchase price, to wit, $1,510, and Kunhart was then given credit on his checking account for the balance, $1,198. This, added to the $175.21 which he then had on deposit, gave him a checking account of $1,373.21. After this time Kunhart issued numerous checks and made several deposits. The record further shows that, if the subsequent checks drawn by Kunhart and paid by the bank had been each time charged against his account of $1,373.21, it would have been exhausted by September 29, 1920, whereas, because

of such additional deposits, the account was not exhausted until October 23, 1920, on which date it was overdrawn. Upon this record, the court gave such instruction, as follows:

"If you find from a preponderance of the evidence that the said Anton Kunhart did make said alleged false representations to the defendant and that the defendant was induced thereby to execute and deliver to said Kunhart the said note for $1,600 as payment of commission for negotiating said contract for the exchange of said land, then the burden of proof is on the plaintiff to prove by a preponderance of the evidence that it purchased of said Kunhart for a valuable consideration the said note before the maturity thereof, to wit, March 1, 1921, without notice that said note was obtained by said Kunhart by reason of said alleged false representations. In order to do this, the plaintiff must prove by a preponderance of the evidence that it paid to the said Kunhart before it had notice of the claim of defendant of said alleged false representations the sum of money claimed to have been credited on the deposit account of said Kunhart with plaintiff by payment of checks drawn by said Kunhart on said deposit account and before the maturity of said note which exhausted the credit so given to said Kunhart for said note and left nothing to the credit of said Kunhart in his deposit account in said bank. And if you do find from a preponderance of the evidence that plaintiff purchased the said note and paid a valuable consideration therefor in the ordinary course of business as above specified before it had notice of said claims of defendant of said defense thereto, then you will find for the plaintiff."

This instruction does not correctly state the law applicable to the facts. The jury should have been told that—"In determining whether such credit has been exhausted, the rule is to be applied that as checks are paid the amount is to be charged against the oldest item of deposit or credit of the customer." *First Nat. Bank. v. McNairy,* 122 Minn. 215. See, also, *Northfield Nat. Bank v. Arndt,* 132 Wis. 383; *Oppenheimer v. Radke & Co.,* 20 Cal. App. 518.

Then it should have been further instructed as provided in section 4665, Comp. St. 1922: "Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him."

The facts in *First State Bank v. Borchers*, 83 Neb. 530, cited by appellee, did not call for a construction of this statute, and neither was it construed. In that case, the bank had given full value, to wit, a draft for the full consideration for the note at the time of purchase and before it received notice of an infirmity in the indorser's title. But in the case before us, under this statute, plaintiff became a holder in due course to the extent of the $300 note and $12 interest paid at the time of purchase, and checks afterwards drawn by Kunhart on the account, and paid by it before it received notice of facts constituting the fraud charged, if it did in fact ever receive such notice, which we do not decide. It was reversible error not to so instruct.

Instructions 7½ and 8 are similar to instruction 7 in substance and form, and vulnerable to the same criticism. Hence, our conclusions as to 7 apply to each.

Complaint is also made as to the burden of proof, where fraud in the inception of the note is pleaded by the maker in an action thereon by a holder in due course. The correct rule in such a case was recently announced by us in *Stephenson v. Perry*, 112 Neb. 294, as follows:

"Where fraud in the inception of a note is pleaded as a defense, and proof has been offered sufficient to make out a *prima facie* case, in an action by an indorsee against the maker the burden is on the plaintiff to show he is a *bona fide* holder."

As to what constitutes notice sufficient to prevent recovery, we are controlled by our holding in *Dobbins v. Oberman*, 17 Neb. 163: "To defeat a recovery thereon it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man.

To have that effect it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part." This rule is approved in *Norwood v. Bank of Commerce*, 77 Neb. 205; *Douglass v. Burton*, 98 Neb. 832; *Benton v. Sikyta*, 84 Neb. 809; *Piper v. Neylon*, 88 Neb. 253. In the two latter cases it was held that section 4667, Comp. St. 1922, has not changed the above rule.

The challenge to the sufficiency of the evidence is not entirely without merit. Yet, as the case must be reversed, and as we are loath to encroach on the province of the jury, we refrain from a further discussion thereof.

For the foregoing reasons, judgment is

REVERSED.

RIVETT LUMBER & COAL COMPANY, APPELLEE, V. ANTON P. LINDER ET AL., APPELLANTS: JOHN J. HEALY, APPELLEE.

FILED MAY 23, 1925. No. 23152.

1. Mechanics' Liens: ENFORCEMENT: GOOD FAITH. "Where a claimant" for a mechanics' lien, "by gross carelessness or by design, puts upon record a statement which he knows, or which by the exercise of reasonable and proper diligence he might have known, to be erroneous and unjust, either by including items not furnished for the particular building or by failure to give credit for payments made, the law will not aid him in enforcing his lien. On the other hand, if the errors are trifling and immaterial, or if they are readily explainable as the result of mistake, and no element of wilfulness appears, regard will be had for the imperfections of human machinery, and the recovery of a just debt will not be denied where nothing but fair dealing was intended." *Consolidated Stone Co. v. Union P. R. Co.*, 96 Neb. 521.
2. ———: ———: ITEMS. Where a materialman's lien is made to depend upon a contract for the erection of a particular building or buildings mentioned in his sworn statement claiming a lien, he is not entitled to a lien on such building or buildings for the value of material furnished for use and used in the erection of a different structure or improvement.
3. ———: ———: ———. "Under the mechanics' lien law the lien of a materialman for materials furnished for the erection of

a building under an agreement with a contractor extends only to such materials as were used in or delivered at the building for use therein." *Foster v. Dohle*, 17 Neb. 631.

4. ———: ———: ———. "All the materials for which there are charges in a claim for a mechanics' lien must have been furnished as parts of one transaction or under one contract for a building or job of work." *Nye & Schneider Co. v. Berger*, 52 Neb. 758, followed.

5. ———: ———: ———. Where, in the materialman's sworn statement of the items of materials furnished, made for the purpose of securing a lien, is included, as one item, the value of a list of materials furnished under an accepted bid thereon, the fact that a number of items included in the list were not actually furnished, if due credit is given therefor, will not invalidate the lien.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

Anson H. Bigelow, for appellants.

Brome, Ramsey & Crawford and *McKenzie, Cox & Harris, contra.*

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

EVANS, J.

This is an action to foreclose a mechanics' lien. There was a judgment for the plaintiff, from which the defendant Anton P. Linder (hereinafter called the owner) appeals. The defendant John J. Healy (hereinafter called the contractor) entered into a contract with the owner for the erection of three dwelling-houses on lots No. 10, No. 11, and No. 12, block 5, in Kirkwood addition to Omaha, and described in the evidence as Nineteenth and Manderson streets. At the time of entering into the contract the three lots had thereon three dwellings and a garage. One of the old buildings was on lot No. 10, and two were on lot No. 12. The garage was on lot No. 11. Two of the new dwellings were placed on lot No. 12 and one on lot No. 11. During the performance of the contract for the construction of the dwellings a garage was constructed by the contractor on

lot No. 10 and certain repairs made upon the old dwellings. The contract for the construction of the dwellings did not, in express terms, provide for the building of a garage. The contract, however, by its terms fixes the second payment thereunder, and provided for therein, as due upon completion of the garage; and, with the plans, which were in contemplation at the time the contract was made, is a sketch or outlined plan for a garage, and the specifications fix certain requirements as to it. The contract in no way affects or mentions the repairs made on the old dwelling-houses. The plaintiff furnished the material required for the construction of the three new dwelling-houses, the new garage, and for the repairs to the old dwelling-houses, and on January 7, 1920, filed a written statement under oath, in the office of the register of deeds of Douglas county, claiming a mechanics' lien upon the three lots above described, and charges therein the material used in erecting the garage and in repairing the old dwellings. In that statement or mechanics' lien it is set forth: "That said labor was performed and said materials were furnished in good faith for the purpose of erecting certain dwellings standing on the land hereinafter described."

In plaintiff's petition there is an allegation that the plaintiff and contractor, "who was agent of, and general contractor for," the owner, on July 31, 1919, entered into a contract "to furnish and deliver to said defendant Anton P. Linder a quantity of lumber and building material for the erection of certain dwellings and other improvements upon said real estate." In the statement and lien filed by the plaintiff, after certain items of material charged, is the word "garage." There is no other mention of the garage in the petition of the plaintiff or the lien filed by it except as it might be included in the words "other improvements" mentioned above. All materials furnished for the erection of the dwellings, for the repair of the old dwellings, and for the erection of the garage, were charged to the contractor and are included in the items charged in the lien attempted to be foreclosed in this action. The defendant owner, Linder,

in his answer admits that certain materials were furnished by the plaintiff for the contractor for the construction of said dwelling-houses, and alleges that the plaintiff has been fully paid, and denies each and every other allegation. The evidence was taken before a referee, who reported the same to the court, together with his findings of fact and conclusions of law, which report found there was due to the plaintiff $2,428.41, with interest; that the plaintiff was entitled to a lien therefor upon the property described, and recommended the entry of a decree of foreclosure in its favor for that amount. The owner filed exceptions to the report, which were overruled, and the report was approved by the court. A motion for a new trial was filed and overruled, and judgment rendered upon the findings and report of the referee, and a decree of foreclosure conformable to the recommendations of the referee was entered in plaintiff's favor. The owner appeals. The decree, so far as it affects the issues between the owner and the contractor, is not appealed from.

The owner challenges the plaintiff's right to any lien because of its erroneous and unjust claims put upon record which are the result of gross carelessness or design, and which it knew, or by the exercise of reasonable and proper diligence it might have known, to be erroneous, and that a lien based on such a claim so made ought not to be enforced. The owner assigns as error that the material furnished the contractor was not furnished upon the credit of the buildings being erected by the appellant, but upon the general credit of the contractor; that the allowance of a lien for the entire balance of material of the bill charged for in a lump sum is improper; that the allowance of a lien for the full $2,428.41 upon the three buildings already owned by the appellant before the contract was entered into, as a part of the entire property covered by the lien, was error, because the material furnished for repairs was not furnished in pursuance of the contract for the erection of the three new buildings; and that no mechanics' lien attaches if the materials for which the lien is credited do not enter into the improvements.

The appellant strongly urges that, by reason of the numerous errors as to items charged therein and credits improperly omitted, the plaintiff is not entitled to any lien.

In *Consolidated Stone Co. v. Union P. R. Co.*, 96 Neb. 521, it is held: "Where a claimant, either by gross carelessness or by design, puts upon record a statement which he knows, or which by the exercise of reasonable and proper diligence he might have known, to be erroneous and unjust, either by including items not furnished for the particular building or by failure to give credit for payments made, the law will not aid him in enforcing his lien." We have examined the record, and while it appears there are mistakes, some of which are the result of carelessness, we cannot say that the carelessness was gross or the mistakes wilful, and as both the referee and the district court find that there was no bad faith apparent, and that the mistakes are to be explained and accounted for by "the imperfections of human machinery," this court would not be warranted in holding the entire lien unenforceable.

There is, however, a more serious question as to the evidence supporting the finding of the amount due the plaintiff and secured by the lien.

The statute, so far as material to this case, is as follows: "Any person who shall * * * furnish any material * * * for the construction, erection, improvement, reparation or removal of any house, * * * or building or appurtenance by virtue of a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such house * * * building or appurtenance and the lot of land upon which the same shall stand." Comp. St. 1922, sec. 3207.

"Any person or subcontractor who shall * * * furnish any material * * * for any of the purposes mentioned in the first section of this chapter, to the contractor or any subcontractor who shall desire to secure a lien upon any of the structures mentioned in said section, may file a sworn statement of the amount due him or them from such contractor or subcontractor for such * * * material, * * *

together with a description of the land upon which the same were done or used, within sixty days from * * * furnishing such material, * * * with the register of deeds of the county wherein said land is situated; and if the contractor does not pay such person or subcontractor for the same, such subcontractor or person shall have a lien for the amount due for such * * * material * * * on such lot or lots and the improvements thereon from the same time and in the same manner as such original contractor." Comp. St. 1922, sec. 3208.

A mechanics' lien is purely statutory, but is remedial and should be liberally construed. *Rogers v. Omaha Hotel Co.*, 4 Neb. 54. But, "one who claims the benefits of a mechanics' lien law must show a substantial compliance with each essential requirement thereof." *Bell v. Bosche*, 41 Neb. 853; *Holmes v. Hutchins*, 38 Neb. 601. And a materialman cannot tack one contract to another. *Nye & Schneider Co. v. Berger*, 52 Neb. 758. The evidence in this case discloses that prior to the 29th day of July the contractor presented to the plaintiff a list of lumber and materials which would be necessary for the erection of one of the three dwellings provided for in the contract between the owner and the contractor, also a list of mill-work, requesting prices thereon, and advising the plaintiff that there would be three buildings each of the same character. Nothing was said, so far as the evidence discloses, with reference to the garage or the material to be used in its construction, nor was the material used therein included in the lists submitted to the plaintiff, and upon which it bid. The bids made by the plaintiff on these lists of material were accepted with the understanding they were to be furnished in triplicate. The garage was completed more than 60 days before the lien was filed. Neither was there any mention made with reference to proposed repairs on the old dwellings already upon the premises. The referee's finding with reference thereto is as follows:

"That prior to John J. Healy, the contractor, entering into the contract with the Linders for the construction of

the three houses, he furnished to the plaintiff a *list of lumber for one house,* which was to be duplicated for the other two houses, and asked for estimates of cost of material; that the plaintiff furnished said Healy with an estimate of the cost of material as shown by exhibits 175, 176, and 177, received in evidence, and that after said contract was entered into said *Healy let the contract to plaintiff to furnish the material for the construction of said houses,* and that the plaintiff did furnish the material for the construction of said houses, and that on the 25th day of February, 1920, the plaintiff filed with register of deeds of Douglas county, Nebraska, an itemized statement purporting to contain a list of all materials furnished the said defendant Healy for the construction of said houses *and garage,* showing the amount due the plaintiff after giving defendant credit for payments made and materials returned, which was duly verified, and wherein plaintiff claims a lien against the property described in plaintiff's petition in the sum of $2,733.60, which itemized statement was received in evidence and is marked 'exhibit 1.' "

As the lien is based upon the furnishing of lumber and building materials for the erection of certain dwellings, and where, as in the case, the garage is a separate structure included in neither the materialman's contract for the material that entered into the dwellings nor his claim for a lien, the building materials used in the erection of the garage cannot be made the basis for a lien claimed by reason of the erection of certain dwellings, nor can they legally be charged therein.

While it is alleged in plaintiff's petition that the contractor is the agent of the owner, no evidence of that fact is in the record except such inferences as flow from the fact of his being the contractor and the right of a materialman to a lien does not result from the contractor being the agent of the owner, but from having furnished such contractor materials which were used in the erection of the building. *Pomeroy v. White Lake Lumber Co.,* 33 Neb. 240.

The plaintiff bid on a bill or list of lumber and materials which was to be, and was, supplied in triplicate and entered into the construction of the three dwellings, and materials included in such bill or list and the extras furnished in connection with the erection of these dwellings, and furnished within the limitations of the statute, creating the right to a lien, are proper items in the lien and their payment is secured thereby. But those items which went into the construction of the garage are not so protected, and, in so far as they are included in the amount found due the plaintiff, such finding and decree are not supported by the evidence. The finding of the court quoted above is not sufficient to support the decree. It is pertinent to the inquiry to note that—"Where labor or material has been furnished by a party under distinct contracts, the claim for a mechanics' lien under each contract must be filed within the time limited by the statute for that purpose." *Henry & Coatsworth Co. v. Halter,* 58 Neb. 685. While this does not prevent the joining in one statement or claim for lien the items of labor performed or material furnished under separate contracts for the same plant or structure where, as to those items, the provisions of the statute are complied with as to the items furnished under each contract, it does prevent a materialman from tacking one contract to another by filing one statement which secures a lien for material furnished under one contract, and at the same time securing a lien for material furnished under another contract as to which he has not complied with the statute.

From the record it would seem that the last item furnished to the garage was on August 21, 1919, and, as the lien was filed on January 7, 1920, much more than 60 days had elapsed between furnishing this material and the filing of the lien.

"The mechanics' lien law of the state should not be so construed as to enable a materialman to tack one contract to another and procure a lien for all the material furnished under all the contracts by filing in the office of the register of deeds an itemized account of such material" within the

time limited by the law after "the date of furnishing the last item of material furnished in pursuance of the last contract." *Central Loan & Trust Co. v. O'Sullivan,* 44 Neb. 834. See *Hansen v. Kinney,* 46 Neb. 207; *Nye & Schneider Co. v. Berger,* 52 Neb. 758; *Grove-Wharton Construction Co. v. Clarke,* 86 Neb. 831.

The rule of construction applied in these cases would likewise prevent a lien, claimed under a contract for the erection of a dwelling, from securing payment for material used in the erection of a garage when no mention of the latter is made in the lien, and as has been held by this court: "Under the mechanics' lien law the lien of a materialman for materials furnished for the erection of a building under an agreement with a contractor extends only to such materials as were used in or delivered at the building for use therein." *Foster v. Dohle,* 17 Neb. 631. See *Drexel v. Richards,* 48 Neb. 322.

What has been said as to the material used in the erection of the garage applies with even greater force to the material furnished for the repairs on the old dwellings already on the lots covered by the liens and charged in the liens sought to be foreclosed as furnished under the contract "for the erection of certain dwellings." It follows that the finding of the referee and the trial court, so far as it is based upon the value of materials used in the erection of the garage and the repairs of the old dwellings, is unsupported by evidence. The appellant is entitled to have deducted from the amount of the lien the amounts charged therein for materials that entered into the garage and for the materials used in the repair of the old dwellings and which were charged in the lien.

It is urged by the owner that, as the lien in question is made to cover the three lots, and as the houses were erected, two on lot No. 12 and one on lot No. 11, and there was already on lot No. 12, at the time the contract for the new buildings was entered into, two dwellings, the lien cannot be made to apply to the three lots, and that it can only apply to those parts of lot No. 12 and lot No.11 upon which

the new dwellings stand, and cannot apply to lot No. 10, as none of the new dwellings were erected thereon. The contract between the contractor and the owner was for three dwellings to be erected on lots No. 10, No. 11, and No. 12. As between the contractor and the plaintiff the bid was on a list of material for one house, with the understanding that it was to be furnished in triplicate to be used in erecting the three dwellings on lots No. 10, No. 11, and No. 12, block 5, Kirkwood addition to Omaha.

In *Doolittle & Gordon v. Plenz*, 16 Neb. 153, it is held: "Where a mechanic enters into a contract to erect a building or buildings for a specified sum, the contract being entire, he need not make a detailed statement of his labor and materials, but the entire job may be set down as a single item." And, as the interests of third parties do not intervene, the plaintiff is entitled to a lien on the three lots described in the lien. *Wakefield v. Latey*, 39 Neb. 285. See, also, *Bohn Sash & Door Co. v. Case*, 42 Neb. 281; *Lehmer v. Horton*, 67 Neb. 574.

The case is reversed and remanded for further proceedings in conformity with this opinion.

REVERSED.

Note—See Mechanics' Liens, 27 Cyc. 46, 47, 144, 203-205.

HARVEY MCKENZIE V. STATE OF NEBRASKA.

FILED MAY 23, 1925. No. 24518.

1. **Information.** When an information alleges all the facts or elements necessary to constitute the offense described in the statute and intended to be punished, it is sufficient.
2. **Blackmail: THREAT.** To constitute the offense of blackmail as defined in section 9582, Comp. St. 1922, it is not necessary that the threat "of exposure for crime" shall relate to and be made with reference to an alleged act of the individual from whom the extortion is attempted, but the threat of exposure may be with reference to an act or acts of any person or persons whose relation to the threatened individual, either by ties of blood or affection, is such that the threatened exposure thereof and the fear of disgrace, humiliation, or ridicule consequent therefrom,

does overcome the will of the individual so threatened, and from whom the extortion is attempted, and causes him to pay money or give property, which, but for such threat or threats and exposure, would not have been paid or given.

3. **Constitutional Law:** ACT DEFINING BLACKMAIL. The act of 1909 (Laws 1909, ch. 162, Comp. St. 1922, sec. 9582), defining blackmail and providing a penalty therefor, does not violate that part of section 14, art. III of the Constitution, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed."
4. **Blackmail:** DEFENSE. It is no defense in a prosecution for extortion under section 9582, Comp. St. 1922, that the owner of the money paid or property delivered was indebted to the wrongdoer in an amount as great as the sum taken or the value of the property taken, and which amount was then legally due.
5. **Instructions** examined, and approved as correct statements of the law under the circumstances presented by the record.
6. **Information.** Count 1 of the information *held* to have properly and sufficiently charged a crime under section 9582, Comp. St. 1922.
7. **Evidence** examined, and *held* to support the verdict.

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

Samuel A. Dravo and *Edward J. Lambe,* for plaintiff in error.

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

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

EVANS, J.

The plaintiff in error (hereinafter called the defendant) was convicted in the district court for Gosper county under an information charging him, in count 1, with a violation of section 9582, Comp. St. 1922, and, in count 2, with a violation of section 9579, Comp. St. 1922. At the close of the state's evidence, on the defendant's motion, the court

required the state to elect upon which count it would rely, and it elected to rely and proceed under count 1. All evidence pertaining to count 2 was properly withdrawn from the jury and it will not require further consideration. The defendant was sentenced "to pay a fine of $300 and costs of prosecution and to stand committed to jail until the fine and costs are paid."

The errors assigned are: (1) The information is fatally defective, in that it does not charge a crime under either section 9579 or section 9582, Comp. St. 1922; (2) the evidence does not support the verdict; (3) the court's instructions Nos. 1 to 7, inclusive, severally are foreign to the issues, erroneous, and prejudicial to the defendant; (4) the court erred in overruling defendant's motion in arrest of judgment and the defendant's motion for a new trial.

Assignment No. 1. The count of the information under which the defendant was tried, excluding the formal parts, is in the following language:

"In Gosper county, Nebraska, on or about the 11th day of March, 1924, Harvey McKenzie, the defendant, maliciously, feloniously, and unlawfully under threats of exposure for crime, in this, to wit, said Harvey McKenzie threatened to accuse and expose one Dick Miles the minor son of J. M. Miles for the crime with others on or about the first day of March, 1924, in the county of Gosper and state of Nebraska, of stealing, taking and carrying away the sum of $500 in money property of Harvey McKenzie and did then and there extort and demand of the said J. M. Miles, that unless he did then and there promise to pay to the said Harvey McKenzie the sum of $500 as follows, $100 cash money and $100 on the first day of each month thereafter, until the full sum of $500 was paid by said J. M. Miles to the said Harvey McKenzie, that he the said Harvey McKenzie would cause the said Dick Miles to be arrested and prosecuted for said crime of stealing, taking and carrying away the sum of $500, that said charge was false, and to avoid the said false charges and exposure the said J. M.

Miles, then and there and by reason of said threats, did pay to the said Harvey McKenzie the sum of $100, the property of the said J. M. Miles, which the said Harvey McKenzie then and there under threats of exposure for crime extorted of and from the said J. M. Miles, contrary to the statutes in such case made and provided and against the peace and dignity of the state of Nebraska."

This charges that the defendant, "under threats of exposure for crime"—the larceny of $500 by Dick Miles, son of J. M. Miles—did extort and demand money from J. M. Miles. This, it is claimed, did not charge a crime under the statute. The information charges the crime in the language of the statute, and this is sufficient so far as the formal presentation of the facts, existing in this case, are concerned. *Sandlovich v. State,* 104 Neb. 169; *Goff v. State,* 89 Neb. 287; *Cordson v. State,* 77 Neb. 416. And, unless the phrase, "under threats of exposure for crime," etc., is confined to a threat to expose the particular person from whom it is sought "to extort money or pecuniary advantage," this information is sufficient.

The gist of the crime described in section 9582, Comp. St. 1922, is the extortion of "money or other valuable consideration." *Green v. State,* 157 Ind. 101, See, also, *State v. Debolt,* 104 Ia. 105; *Lee v. State,* 16 Ariz. 291, Ann. Cas. 1917B, 131; *State v. McGee,* 80 Conn. 614; *Eacock v. State,* 169 Ind. 488.

The threats of exposure do not constitute the crime. Rather, it is the duty of the individual to make the exposure, and if he, in fact, is instrumental in causing a prosecution for a criminal act, it will not constitute an offense and probably will merit commendation.

"Extort" means to gain by wrongful methods; to obtain in an unlawful manner; to compel payments by means of threats of injury to person, property, or reputation. *State v. Richards,* 97 Wash. 587. See, also, *State v. Adams,* 30 Del. 335.

"Threat," in criminal law, is a menace or declaration of one's purpose or intention to work injury to the person,

property, or rights of another (*State v. Cushing*, 17 Wash. 544), with a view to restrain a person's freedom of action (Standard Dictionary), and the act of extortion is complete, when one by such threat has produced, in the mind of the person against whom it is made, a fear of such a nature as to affect his mind so as to influence his conduct in such manner that he decides to pay that which he otherwise would not have paid, or to give that which he otherwise would not have given; or, if the result described is brought about under threats of exposure for crime, every element to constitute the crime of blackmail, described in section 9582, *supra*, is present. It follows that whether the threat relates to the conduct of the person from whom it is sought to extort the money or property, or to that of a member of his family, his church, or any group, through or by reason of which his will may be overcome, all the elements of the crime described in this statute appear, and the evils which the legislature sought to cure, and the acts described in the statute, unquestionably are present in every case that could arise under such a construction of the statute. To narrow the construction would do violence to the language used by the law-making body. It will be observed that, while the gist of the act is the securing of another's money or property, another element is the attempt to unduly influence the conduct of another and overcome his will as to a particular course of action.

The defendant urges that the effect of this threat, as alleged, was that he would institute a prosecution for larceny, and hence it was not a threat of exposure, but of accusation, and only applicable to a charge under section 9579, *supra*. In so doing defendant fails to recognize that "expose" is a broader and more comprehensive term than "accuse," and that exposure may be brought about by accusation as well as by the various ways he describes, and be none the less exposure. There may frequently be states of fact constituting an offense under either section 9579 or 9582, *supra*. The present case is such an one.

The threat was to have Dick Miles arrested for stealing, which must, of necessity, bring publicity and hence "exposure for crime," and it did extort money from J. M. Miles. In section 10074, Comp. St. 1922, it is expressly provided that no indictment shall be in any manner affected because of "any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime or person charged; nor for want of the averment of any matter not necessary to be proved."

If we assume that section 9579, *supra,* was nonexistent, the information would charge a crime under section 9582, *supra.* It is alleged that the defendant "threatened to accuse and expose one Dick Miles," etc., but the most that can be said with reference to the words "accuse and" is that they are surplusage. *Hase v. State,* 74 Neb. 493. See, also, *Smith v. State,* 109 Neb. 579. "The test by which to determine the sufficiency of an indictment" or information "is whether enough remains after rejecting all unnecessary averments thereof to satisfy the requirements of the statute." *Blodgett v. State,* 50 Neb. 121. If, therefore, the words "accuse and" are omitted, there remains sufficient to charge the crime of blackmail under section 9582, *supra.* There is alleged in the information all the facts necessary to bring the charge within the intent and meaning of the statute, and when this has been accomplished the information is sufficient.

Assignments No. 2 and No. 4 will be considered together. The theory of the defendant was that he was robbed by the son of the complaining witness of $500, and that he was seeking a return of that which had been wrongfully taken from him, and that he had made no threats to expose and did not attempt to extort money. This was the issue to the determination of which the evidence of both state and defendant was directed. The evidence was conflicting, and the issue was fairly submitted to the jury and its verdict should not be disturbed.

"If a finding of a jury is attacked as not sustained by sufficient evidence, it will not be disturbed by the appellate court unless manifestly wrong." *Ward v. State,* 58 Neb.

719. See, also, *Shannon v. State*, 111 Neb. 457; *Whitman v. State*, 42 Neb. 841; *Palmer v. People*, 4 Neb. 68.

It will be observed that this rule was adopted by this court early in its history and has been consistently followed until the present time, and no good reason is assigned for a departure therefrom.

In the second division of defendant's argument authority is cited to the effect that, where a threat is made merely in sport, it will not constitute the offense of blackmail. There is nothing in the record in this case which would authorize or warrant the inference that the defendant had made the threat charged in the information in sport. Further, he denied having made the threat and admitted having received the money.

Assignment of error No. 3 is the giving of instructions No. 1 to No. 7, inclusive, given by the court on its own motion. They have been examined and compared with the information and evidence and no error is found therein. The defendant complains that the instructions did not submit the question of intent. On one page in his argument he calls attention to the fact that under section 9582, *supra*, it is not essential that the threat be made with intent to extort from the person to whom the threat is addressed, and on another page of his argument complains that the court did not so instruct. There is no error in the instructions.

In subdivision 4 of plaintiff's argument the information is attacked as not charging a crime because it attempts to set forth the specific facts, and that facts set forth are not those described in section 9582, *supra*. As has been heretofore pointed out, the threat need not refer to some act of the person threatened, but may relate to a member of his family or any one through whom the one threatened may be reached; hence, the allegation that the defendant threatened J. M. Miles is within the limitation of the offense described as to the manner and person to be affected by the threats.

The defendant urges that, because the evidence shows that the arrest of Dick Miles was threatened, it was a threat

to accuse, and if not, then that section 9582, *supra,* is unconstitutional, in that it is, in effect, an amendment of section 9579, *supra,* and that section 9579, *supra,* is not mentioned in the title to the bill by which section 9582, *supra,* was enacted. Section 9579, *supra,* makes it unlawful to maliciously threaten to accuse another of a crime, or to maliciously threaten to injure another or his property, done with intent to extort from or to compel action against the will of the person so threatened. It will be observed that two distinctly different acts are made unlawful by the provisions of this section. The first is a malicious threat to accuse of crime; and, second, a malicious threat to injure the person or property of the person threatened. The latter act is so entirely dissimilar from the act described in the first count of the information, and in section 9582, *supra,* that it is unnecessary to further distinguish it with reference to section 9582, *supra,* and the offenses described therein. If the contention of the defendant is to avail, it must appear that section 9582, *supra,* amends or changes the law as it stood prior to 1909, the time of the passage of section 9582, *supra.*

The consideration of the question presented makes necessary to some extent an analysis of the section so far as material to the offense charged in count 1 of the information in this case. To maliciously threaten to accuse of crime is not the same as a malicious accusation. The latter is to procure the accusation or prosecution of another from improper motive and without probable cause, and is very similar to malicious prosecution. To maliciously threaten to accuse of crime does not necessarily mean that the prosecution is intended at all, but means that one acts with evil intent and evil motive by threats of criminal prosecution, through fear of which prosecution the will of the individual threatened is intended or attempted to be overcome. The act made criminal is the intent to extort money or to compel action against the will of the person threatened because of fear of prosecution for a criminal offense, the fear being induced because of apprehended accusation

and punishment in a court, or by or through a prosecution therein. In section 9582, *supra,* the offense described is the extortion or attempted extortion of money or property from a person by threats of exposure, making public, a crime, misdemeanor, indiscretion, or scandal. In the latter case the will of the individual threatened is overcome through his fear of disgrace, humiliation, or ridicule of himself, his family, or someone near to him by ties of blood or affection. In section 9579, *supra,* the motive under which a threatened individual acts is fear of punishment administered through a court. In section 9582, *supra,* the motive which impels the action is fear of publicity. Under the former section malice is an essential element in the crime, and it need not be present in the latter. While, in this case, the threatened exposure was to be by a prosecution or arrest, and if the jury, under proper instruction, had found from the evidence that the threats were maliciously made, it would have supported a verdict under count 2 charging the offense under section 9579, *supra.* The facts alleged and found none the less constitute a threat of exposure. *State v. Arnold,* 31 Neb. 75.

It is well recognized that frequently two offenses may grow out of the same transaction. A single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either does not exempt the defendant from prosecution and punishment under the other. It is apparent that these two sections illustrate this principle or rule. 16 C. J. 272, sec. 453.

The defendant under division 3 of his argument urges his right to receive such money or property as he claimed was due him. But this proposition was fairly and correctly submitted to the jury by paragraph No. 7 of the court's instruction, as follows:

"You are instructed that, where property is stolen or taken from the owner against his will and consent, the owner has the legal right to receive or accept a return of the same from the party who stole it, or from another act-

ing for his interests, if the same can be secured without resorting to threats of exposure or prosecution; and in this case, if you believe from the evidence that the defendant lost five-hundred dollars, on or about the 1st day of March, 1924, and that the son of J. M. Miles took the same from the defendant against his will and consent, and if you further believe that the defendant peaceably, and without threats of exposure or prosecution for crime, did obtain a return of the money stolen, if you so find, or some part thereof, from the said J. M. Miles, then you should find the defendant not guilty."

It makes no difference that the money sought to be extorted in violation of the act was legally due. *Murphey v. Virgin*, 47 Neb. 692. See, also, *Tuyes v. Chambers*, 144 La. 723. That is, an individual cannot, by threats of exposure as to some criminal or scandalous act not connected with the transaction out of which the debt arose, compel its satisfaction without becoming liable to a prosecution under this provision. J. M. Miles was not legally liable for the $500, even though his son may have taken it, and for the defendant to extort from J. M. Miles by threats of exposure was to make the defendant liable to a prosecution under section 9582, *supra*.

The court find no error in the record, and the judgment is

AFFIRMED.

WILLIAM A. SCHELL, APPELLEE V. GRAND LODGE, A. O. U. W., APPELLANT.

FILED MAY 23, 1925. No. 23150.

Judgment reversed and cause dismissed on the authority of *Haner v. Grand Lodge, A. O. U. W.*, 102 Neb. 563.

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

John Stevens, Ralph S. Moseley and *J. C. McReynolds*, for appellant.

W. C. Parriott, contra.

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

REDICK, District Judge.

This is an action to compel appellant, a fraternal beneficiary society, organized under the laws of this state, to pay appellee the total amount of beneficiary assessments paid by him, with interest, in accordance with the terms of section 170 of the by-laws adopted in 1907 by the society, which provided for such payment to any member in good standing 70 years or more of age. This by-law was declared void by this court in *Haner v. Grand Lodge, A. O. U. W.*, 102 Neb. 563, but plaintiff grounds his action upon a letter from the grand recorder, which he claims constitutes a promise to pay the amount demanded, in reliance upon which he ceased paying assessments, withdrew from the order, and thereby lost the benefit of the insurance provided for in his certificate.

The letter referred to was in response to a demand of payment under the terms of the by-law, and is as follows:

"Dear Bro. Workman:

"You were notified that your application had been filed for settlement in my former letter. As there is no funds to make these payments with, the grand lodge instructed the grand recorder that no further payments should be made until all death claims on his table were paid and a surplus in banking fund. Just when that time will be, I cannot say. No one is disputing your right to file an application whatever, and to the computation, it is impossible for me without having at least three more clerks to make computations exact and forward them to the membership. The approximate sum that you have paid in is $496. Interest computed at 4 per cent. is $221.

"Yours in ————,

"Frank L. Evans, Grand Recorder."

The contention of appellee (plaintiff) is that the society is estopped by this letter to assert the invalidity of the by-law. A large part of appellant's brief is devoted to the

question whether the letter constitutes a promise to pay, but we will not discuss this question, as it is too plain for argument that, if the corporation had no power to make the contract, its officer was equally powerless. We think on the question of estoppel the case is ruled by *Haner v. Grand Lodge, A. O. U. W., supra,* where it is held: "A fraternal beneficiary society is not estopped from pleading *ultra vires* as to a contract which is beyond the powers conferred upon it by the statute under which it is organized." Plaintiff must be held to have had notice of the by-law and its invalidity, and, having been a member at the time it was passed, is a party to it.

The language of Morrissey, C. J., in the *Haner* case is apt:

"The association could not directly write a contract for this class of insurance, and the law will not permit the association to evade the statute and do by indirection what it may not directly do. 22 Cyc. 1417. The holdings seem to be that a fraternal society may waive its own by-laws or any of the provisions made for its management, but it cannot waive the provisions of the statutes made for its government."

Cases cited by appellee are not in point.

Judgment reversed and cause remanded, with instructions to dismiss.

REVERSED AND DISMISSED.

DORA HAECKER, APPELLANT, V. GEORGE HAECKER ET AL., APPELLEES.

FILED MAY 23, 1925. No. 23151.

1. **Evidence**: DECLARATIONS: COMPETENCY. Evidence of declarations by the grantee, after the death of the grantor, as to the delivery of the deed, is hearsay and incompetent as against a claimant under the grantor, not present at the time they were made.
2. **Witnesses**: COMPETENCY: CONVERSATIONS WITH TESTATOR. One having a direct legal interest in the result of the suit is an in-

competent witness to conversations with a testator, as against a claimant through a devisee under the will, she being a representative of the deceased. Comp. St. 1922, sec. 8836.

3. **Deeds:** DELIVERY: EVIDENCE. Evidence examined, and *held* insufficient to establish delivery of a deed.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed, with directions.*

Drake & Drake, Dorsey, Randall & Baldrige and *Rosewater, Mecham & Burton,* for appellant.

Pratt, Hamer & Beynon, Dryden & Dryden and *H. M. Sinclair, contra.*

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

REDICK, District Judge.

This is an action brought by the plaintiff for the partition of two tracts of land containing 160 acres and 20 acres, respectively, but there is no dispute as to the 20 acres. The controversy as to the 160-acre tract presents the question of the sufficiency of the evidence to establish a delivery of a certain deed referred to later, and this is the only question to be decided. George Haecker was the ancestor of all the defendants and was the owner of the 160 acres in dispute, living upon it with his family until his death on August 12, 1914. On April 19, 1900, he made and executed a deed for the 160 acres to Christine Haecker, his wife, and placed it in a tin box where he kept other papers and some small amount of money, the box being ordinarily kept in a cupboard in the dining-room of the house. The deed remained in the box until after his death, the death of his son John, February 4, 1922, and the death of his wife Christine, May 29, 1922, and was not recorded until June 16, 1922.

On April 27, 1900, George Haecker duly executed a will, whereby he devised all his real and personal property to his wife during her life, and after her death the remainder and residue, subject to certain charges and legacies in favor of his other children, he devised and bequeathed to his three

sons, John, George, and Peter. At the date of the will the only real property owned by the testator was the 160-acre tract in dispute. John Haecker died testate without issue February 4, 1922, willing all his property in equal shares to his wife Dora, plaintiff, and a nephew, Edward Wellman, The plaintiff claims a one-sixth interest in the tract through the will of George Haecker devising a one-third interest to her husband John, and through John's will devising her one-half thereof. The defendants claim under the deed in question as the heirs at law of Christine Haecker. John, having predeceased Christine, took nothing as her heir, and, if the deed in question is sustained, Dora, of course, would have no interest in the disputed tract.

It is conceded that the deed is of no validity unless it is established by the evidence that the same was delivered to Christine by the grantor in his lifetime. The evidence tending to establish delivery is quite meager. The defendants rely upon the presumption of delivery said to arise from the fact that the deed was at one time in the possession of the grantee, upon declarations of the grantee that it had been so delivered on the day of its date, and upon the testimony of one of the sons, George, that some 35 years prior to the trial, which would be in 1887, the grantor had expressed an intention to deed the property to his wife, and upon the testimony of Peter that his mother Christine had told him several times before his father's death that she had a deed to the 160 acres.

On the other hand, the plaintiff contends that all of the evidence received tending to establish delivery is incompetent, and otherwise insufficient, in view of the facts established that the receptacle in which the deed was placed (a tin box) was under the control of the grantor, although the grantee had access thereto as a common place of deposit used by the family; that the deed was not recorded until after the death of both parties to it, although the deed for the 20 acres subsequently purchased was recorded promptly; that the grantor remained in possession, control and management of the property after the execution of the

deed the same as before; that eight days after the execution of the deed he made a will purporting to devise his real estate, having none other than the tract in question; that the tract was inventoried as belonging to the estate of the grantor, and one-third of it inventoried as part of the estate of John, all without objection from any of the heirs or devisees of George Haecker; that it does not appear that the grantee paid any taxes upon the tract or insurance premiums or took any part in the control or management of the property before or after the death of the grantor, and that all of the defendants up to the time of recording the deed treated the property as belonging to the estate of George Haecker.

Under the above facts and circumstances shown by the evidence, was there a delivery of the deed? The only competent evidence received to establish delivery was that of Katherine Wilder, a daughter, to the effect that she saw the deed in the possession of the grantee in October, 1914, after the death of the father, when the mother took it out of the tin box referred to and showed it to her. Her testimony as to the declarations of Christine regarding the delivery of the deed, as well as the testimony of Peter as to what his mother told him about having a deed, are mere hearsay and clearly incompetent. The testimony of George that 13 years before the execution of the deed his father had expressed his intention of giving the property to Christine, if of any probative value whatever, was incompetent under section 8836, Comp. St. 1922, it being as to a conversation and transaction with a deceased person, George having a direct legal interest in the controversy and the plaintiff being a representative of such deceased person claiming under his devisee, her husband.

The case for delivery, therefore, rests entirely upon the presumption thereof arising from the fact of the possession of the deed by the grantee. The rule on this point is stated in *Roberts v. Swearingen,* 8 Neb. 363, as follows: "A deed takes effect only from the time of delivery. The posesssion of a deed by the grantee, *in the absence of oppos-*

ing circumstances, is *prima facie* evidence of delivery, and the burden of proof is on him who disputes this presumption." This statement of the rule was approved in *Wilson v. Wilson,* 85 Neb. 167, although in that case there was ample evidence of circumstances tending to establish delivery.

We think the fact that the deed was deposited in a receptacle belonging to the grantor and under his control and the other facts and circumstances shown in the evidence are sufficient to rebut the presumption, if ever there was one of delivery of the deed. In truth, if the only facts shown were the deposit of the deed in the box, and possession of the deed by the grantee after the grantor's death, she having access to the box, we are not prepared to hold that any presumption of delivery would arise; but, assuming such presumption, it is completely overthrown by the other circumstances shown.

The evidence must warrant a finding of an intention on the part of the grantor to deliver the deed as a present conveyance of the land. In the absence of evidence of any act of grantor evincing such intent other than the execution of the deed, coupled with conduct clearly inconsistent with such intent, the evidence is insufficient to establish delivery. The following cases cited by plaintiff sustain our conclusions: *Reichart v. Wilhelm,* 83 Ia. 510; *Hooper v. Vanstrum,* 92 Minn. 406; *McGuire v. Clark,* 85 Neb. 102; *Flannery v. Flannery,* 99 Neb. 557.

The district court erred in dismissing plaintiff's petition, and the judgment is reversed, with instructions to enter a decree establishing in the plaintiff the title to an undivided one-sixth interest in the tract in controversy and grant partition as provided by law.

REVERSED.

JOHN L. SWISHER, APPELLEE, V. FIDELITY & CASUALTY COMPANY, APPELLANT.

FILED MAY 23, 1925. No. 23179.

1. **Brokers**: CONSIGNMENT FOR SALE ON COMMISSION. A consignment to a commission merchant of grain to be stored, the intention being that the consignee shall sell the same when so instructed by the consignor, is a consignment for sale on commission within the protection of the commission merchant's bond required by section 7472, Comp. St. 1922.
2. ———: BOND: BREACH. Obtaining advances upon the consignment without the knowledge and consent of the consignor, within the term of the bond, constitutes a breach of the bond, although the amount of consignor's loss is not discovered nor determined until after such term.
3. ———: COSTS. A commission merchant's bond is within the operation of section 7811, Comp. St. 1922, authorizing the taxation of attorney's fees as costs in certain cases.

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

Crossman, Munger & Barton, for appellant.

Hugh A. Myers, contra.

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

REDICK, District Judge.

Action upon a commission merchant's bond. The facts are not disputed. One C. P. Moriarty, under name of Moriarty Grain Company, was in the business of a commission merchant selling grain upon commission on the Omaha Grain Exchange, and gave the bond in suit with defendant, the Fidelity & Casualty Company of New York, as surety. With the exception of some immaterial verbal variations, the condition of the bond was in the language of the statute requiring it, as follows:

"Now therefore if said license (commission merchants') be granted, and the said Moriarty Grain Company as such commission merchant, shall well and truly perform all

agreements entered into with the consignors with respect to the receiving, handling, selling and making payments for consignments made to them and shall faithfully comply with the laws of the state of Nebraska governing sale of merchandise upon commission then this bond to be null and void otherwise to be in full force and effect."

October 15, 1921 plaintiff wrote Moriarty: "Am shipping you for storage from Dix, Nebr., 2 80,000 cap. cars of wheat." The cars were shipped to plaintiff at Omaha, "Notify Moriarty Grain Co.," the bills of lading being indorsed and delivered to Moriarty who, October 28 and 29, received and stored the grain in his own name with Farmers Terminal Elevator Company, he having no storage facilities of his own, and sent the statements of the transaction, with the words "Stored for J. L. Swisher" indorsed thereon in the handwriting of Moriarty, to plaintiff. No warehouse receipt was issued. October 25, Moriarty procured from the elevator company an advance on the wheat of $1,000, and November 23, $500, without the knowledge or consent of plaintiff. So matters rested until March 3, 1922, when Moriarty died. Thereupon plaintiff demanded his wheat and was informed of the advances to Moriarty, for which with freight and storage the elevator company claimed a lien. April 4, 1922, by consent of the parties interested the wheat was sold and the balance of the proceeds, $803.86, paid plaintiff, who sues upon the bond to recover $1,569, and interest, being the amount of advances to Moriarty deducted from the proceeds of the sale. Defendant answered admitting the execution of the bond and denying all other allegations; defendant offered no evidence, and both parties having moved for an instructed verdict, the jury were discharged and the court found for plaintiff, and from the judgment thereon and taxation of attorney's fees defendant appeals.

Appellant urges the following points for reversal:

(1) That Moriarty did not receive the grain as a "commission merchant" for sale on commission, but merely as an agent for storage, in which capacity his fidelity was not

insured by the bond; (2) that plaintiff suffered no damage until he demanded the grain in March, 1922, and, as the period of the bond was 1921, such loss was not covered; (3) that the allowance of attorney's fees was not authorized.

Of these in their order:

Moriarty Grain Company was licensed to carry on the business of a commission merchant who is defined by the statute:

"That any person, firm or corporation pursuing or who shall pursue the business of selling farm * * * produce * * * upon consignment for a commission shall be deemed to be a commission merchant." Laws 1909, ch. 66, sec. 1.

Plaintiff testified that at the time of shipment the market was low, and that he arranged with Moriarty to store the grain until he authorized him to sell it; that he had stored and sold the grain for him before; that plaintiff thought the market would be higher in the spring, when he would sell it through Moriarty.

How shall this transaction be characterized? Was it a special agency to procure storage, or a consignment for sale on commission? From the letter, the situation and previous dealings of the parties and undisputed evidence of plaintiff, the intention is clear that the wheat should be sold when the price was satisfactory to the consignor. The controlling motive for the consignment was the sale of the grain. The custody or care of the goods pending sale was a mere incident to the main purpose. That no time was fixed for the sale is not important—neither the statute nor bond contemplate an immediate sale. Some period of time must elapse between arrival and sale, during which the consignee is in possession. The goods must be unloaded or be subject to demurrage. Without specific instructions it would be the duty of the consignee to store until he received orders to sell. If during the waiting period he converted the goods, the bond would be liable. This, in effect, is what he did *pro tanto*.

We conclude that Moriarty received the goods for sale in his capacity as a commission merchant, that he failed to

perform his agreement with consignor with respect to "the receiving, handling, selling and making payments," thereby committing a breach of the bond.

The second point is not well taken. The breach occurred at the time Moriarty procured the advances, which was within the term of the bond, and was never healed. By Moriarty's wrongful act a lien upon the goods was created, which could only be satisfied by payment. Though the loss was not discovered until later, the default was within the term of the bond.

Lastly, did the court err in assessing an attorney's fee as costs? The bond in question is within the classification of the statute, Comp. St. 1922, sec. 7814: "4. Fidelity insurance—Guaranteeing the fidelity of persons holding places of public or private trust; guaranteeing the performance of contracts other than insurance policies, or guaranteeing and executing all bonds, undertakings and contracts of suretyship." Section 7811, Comp. St. 1922, provides for taxation of attorney's fees "in all cases * * * at law upon any policy of * * * guaranty, fidelity, or other insurance." It is argued that "insurance * * * relates to obligations created by the acts of the parties," while "section 7472, Comp. St. 1922, requiring commission merchants to give bond is an obligation imposed by law." But defendant was not required by law to sign this bond. It was a voluntary act, entered upon for a consideration, and by the acts of the parties. It is further argued that the statute is complete with reference to the liability on the bond. The taxing of an attorney's fee does not increase such liability. If the surety pays its obligations without suit, such fee cannot be claimed. It is taxed as costs.

The judgment of the district court is right and is affirmed. An attorney's fee of $100 will be taxed on the appeal.

AFFIRMED.

Note—See Factors, 25 C. J. secs. 6, 7.

PETERS TRUST COMPANY, APPELLANT, V. DOUGLAS COUNTY, APPELLEE.

FILED MAY 23, 1925. No. 24184.

1. **Taxation: SHARES OF STOCK OF DOMESTIC CORPORATIONS.** "Since under the provisions of the Constitution * * * the same rule must be applied to corporations as to individuals, with respect to taxation by valuation, neither an individual nor a corporation is compelled to list for taxation shares of such domestic corporations owned by either of them, and if the value of such shares has been included in the valuation of the capital stock of a trust company it is entitled to have such value deducted in determining the actual value of such stock for the purpose of taxation." *City Trust Co. v. Douglas County*, 101 Neb. 792.
2. ———: DOUBLE TAXATION. It is the settled policy of our law to guard against double taxation in all cases where the same can be avoided.
3. ———: CORPORATE STOCK. Since the state cannot directly tax property permanently located in another state, it cannot do so indirectly by taxing capital stock of the corporation owning the same without deduction for the enhancement which the value of such property gives to the value of such stock; for this would be not only double taxation, but a taking of private property without due process of law, and as such violative of the Fourteenth Amendment of the federal Constitution.

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

Stout, Rose, Wells & Martin, for appellant.

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

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

SHEPHERD, District Judge.

This case was decided adversely to the Peters Trust Company on demurrer in the district court, and the company is here as the appellant. The facts are as follows:

The trust company made a statement for the 1921 assessment, showing the total of its capital and surplus to be $650,000; and it claimed, so far as is now maintained, two deductions, one for the assessed value of real estate owned by it in the sum of $59,357.52, and another in the sum of $227,915.89 for capital stock of the Keystone investment

Company, a Nebraska corporation, owned by the company and representing a ninety-nine year leasehold interest in the Bee building property (the assessed valuation of such real estate being greater than the deduction claimed). Upon hearing duly had before the board of equalization, the latter allowed only a deduction for the assessed value of the company's real estate in Nebraska, $17,851.59. Thereupon the company appealed to the district court and filed the petition to which demurrer was sustained.

Was the appellant, the Peters Trust Company, entitled to have the assessed valuation of its real property outside of the state deducted as well as the assessed value of its real property within the state? This is the first question. The statute which applies is section 6343, Rev. St. 1913, as amended by chapter 162, Laws 1919. It simply says on this point that, whenever any such company shall have acquired real estate which is assessed separately, the assessed value of such real estate shall be deducted from the valuation of the capital stock of the company. It appears by the petition, the allegations of which are admitted by the demurrer, that the real estate outside of Nebraska was assessed, and that the company is demanding the deduction of the assessment value.

It is the settled policy of our law to guard against double taxation, even though such taxation be not unconstitutional. *Citizens State Bank v. Board of Equalization,* 110 Neb. 704. If the assessed value of the property in question is not deducted, and the capital stock is also assessed at full face value, there will be double assessment and double taxation. Double taxation is condemned by the law of Nebraska in all cases where it can be avoided. *First Trust Co. v. Lancaster County,* 93 Neb. 792; *Nemaha County Bank v. County Board,* 103 Neb. 53. Again, since the state cannot directly tax property permanently located in another state, it cannot do so indirectly by taxing the capital stock of the corporation owning the same without deduction for the enhancement which the value of such property gives to the value of such stock; for this would be not only double taxa-

tion, but a taking of private property without due process of law, and as such violative of the Fourteenth Amendment of the federal Constitution. *Delaware, L. & W. R. Co. v. Pennsylvania,* 198 U. S. 341, 19 Rose's Notes, 467. The real estate deduction prayed for should have been allowed, and the refusal of the district court and of the board of equalization to grant the same was erroneous.

The second question is whether or not the capital stock of the Keystone Investment Company should have been deducted. It appears that the appellant had invested $181,000 in the purchase of this stock in order that it might acquire leasehold of the Bee building, and that it had expended the further sum of $46,915.89 in improving the said real estate, making the total of $227,915.89, for which the right of deduction is claimed by the appellant. It is to be remembered, too, that said real estate, the Bee building, was otherwise assessed, and that the assessed valuation of the same for the year in question exceeded the amount of $227,915.89. In this there is also a feature of double taxation.

We think that the comparatively recent case upon which the appellant depends, *City Trust Company v. Douglas County,* 101 Neb. 792, is decisive of the matter. In that case the question was whether the City Trust Company should be permitted to deduct the value of the capital stock of the City National Bank Building Company, owned by it. The court announced the rule as follows.

"Since under the provision of the Constitution before mentioned the same rule must be applied to corporations as to individuals, with respect to taxation by valuation, neither an individual nor a corporation is compelled to list for taxation shares of such domestic corporations owned by either of them, and if the value of such shares has been included in the valuation of the capital stock of a trust company it is entitled to have such value deducted in determining the actual value of such stock for the purpose of taxation."

The case was decided upon the theory that double taxa-

tion and taxation which is discriminatory and violative of the constitutional rule of uniformity are to be condemned. It is probably true that contrary holdings upon the same facts may be found in other states, but the law expressed in the case cited is the law of Nebraska, and is to be applied in the case at bar.

The judgment of the district court is reversed and the case is remanded, with instructions that a deduction of $227,915.89 be made on account of the stock of the Keystone Investment Company, and an additional reduction of $41,515.93 on account of real estate.

REVERSED, WITH DIRECTIONS.

Note—See Taxation, 37 Cyc. 752, 1028, 1033.

GEORGE H. GOFF ET AL., APPELLANTS, V. ANDREW WEISS ET AL., APPELLEES.

FILED MAY 23, 1925. No. 24308.

1. **Drains:** INJUNCTION. *Held*, in this case, that the appellees obtained from the appellants a parol license to enlarge a soil drainage ditch through their land so that it might carry waste, seepage and flood water from irrigated lands above, upon condition that they should dig it down and clean it out to its original depth so that it would continue to function as a soil drainage ditch also; that having so cleaned it out and enlarged it, and having put it into operation, a flood almost entirely filled it with sand and gravel, and the water mainly broke through the banks of said ditch at the northern boundary of said land and passed off in another more recently constructed drainage ditch; that thereafter, in restoring the ditch in question, appellees were proceeding to reconstruct the same in such wise that the flow thereof would go on a uniform grade from higher lands on the north to the river on the south, thus raising the bottom of the ditch so that it could no longer serve as a soil drain to appellants' land, refusing at the same time to construct toe ditches to provide for the soil drainage originally contemplated. And *held*, further, upon these findings of fact, that the appellants were entitled to an injunction preventing such reconstruction.
2. **Licenses:** RESTRICTED TO GRANT. Where one acquires a license to go upon another's land for two particular purposes, one of

which is beneficial to the owner and is the inducement for the granting of the license, he does not thereby acquire a right to go upon said land for another purpose or for a purpose destructive of the benefit for which the owner bargained.

3. **Injunction:** TAKING LAND OF ANOTHER. A concern which has not condemned, and which attempts to take or to damage another's land without paying the owner due compensation therefor, and without obtaining his consent, may be prevented by injunction from so proceeding; and this is so without regard to whether or not the taking or damaging of such land is for a public purpose.

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

Morrow & Morrow, for appellants.

Ethelbert Ward, L. L. Raymond and *Frank P. Johnson, contra.*

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

SHEPHERD, District Judge.

This action in injunction was brought by the Goffs to restrain the Farmers Irrigation District and the Minatare Drainage District, together with the directors of said concerns, from reconstructing a drainage ditch through certain lands owned by the said Goffs—the S. E. ¼ of section 10, township 21, range 53, Scotts Bluff county, Nebraska. The injunction was denied and the plaintiffs appealed, their several assignments of error amounting to a complaint that the decree of the district court was contrary to the evidence and contrary to law.

The ditch was originally constructed by the Minatare company in 1915 upon verbal license from the Goffs who were desirous of having the lands in question drained. It followed the section line between sections 9 and 10 and furnished a comparatively direct course to the Platte river on the south. But it was not altogether satisfactory, particularly after waste and seepage water from above had been turned into it, and in 1917 conditions had become acute. A large amount of seepage had developed upon immense

irrigated areas to the north and was coming down the Nine-Mile canyon—the great natural drain of the region—to the vicinity of the plaintiffs' half section above described.

At that time, therefore, the defendant companies, including the United States reclamation service, were anxious to get a better outlet to the river and the Goffs were anxious to get better drainage for their land. Accordingly, when the Farmers Irrigation District proposed to enlarge the ditch, digging it down to the original depth so that it would drain said land, and widening it so that it would carry the increasing flow, the Goffs were willing, not only to permit the work, but to give whatever additional ground was necessary for the improvement. And the Minatare company was quick to consent. But when the enlargement was completed and operation was begun, the ditch filled up, the banks were frequently broken and maintenance proved difficult and expensive. For several years the companies had a great deal of trouble of this kind, and in 1923, upon the occurrence of an unusual storm, eroded material and débris came down in such quantities as to almost completely fill the ditch through the Goff lands, while the flood waters broke through the banks above and passed off to the river through an extension of the Minatare drainage ditch which had been constructed to the southeast. In the fall of the year last mentioned the companies started in with a drag line to reconstruct the north and south ditch in question, proceeding southward from above the Goff lands, and had reached a point about 100 feet from said lands when they were stopped by the restraining order of the court.

The court finds, upon examination of the record, that the ditch through the plaintiffs' land was purely a drainage ditch when it was first constructed by said Minatare company; that the defendants gained permission to enlarge it upon agreement to clean it out to its original depth, their object being to secure an outlet for flood and seepage waters which had developed, as above stated, in large quantities upon their lands to the north (some 40,000 acres lying under irrigation canals), and their belief being that by this

means they could at once accomplish their object and maintain the ditch as a soil drain for plaintiffs' land; that incidentally plaintiffs expected to profit in the premises by the partial drainage of other lands of theirs in sections 14 and 23, township 22, range 53, as well as by better soil drainage on said sections 9 and 10, township 21, range 53; that the improvement proved unsatisfactory because of floods and a tendency to fill up, as heretofore indicated; that at the time of the commencement of this suit, and for some time theretofore, the ditch had so filled with earth, sand and gravel, that the flow was largely above the level of the surrounding land; and that at that time the defendants intended, doubtless because they had determined as an engineering proposition that to maintain the ditch both as a flood-water ditch and as a soil-drainage ditch would be either impossible or too expensive, to reconstruct it in such wise as to ultimately cause its contents to flow on a uniform grade from the mouth of the canyon to the river, thus practically destroying it as a soil drainage ditch.

It is clear from the testimony that this contemplated change would not only deprive the Goff land of the soil drainage which it had originally had, but would bring additional seepage water upon it from the reconstructed ditch, for the banks of such reconstructed ditch, mainly of sand and gravel, would permit water flowing in the ditch to seep through upon the land on either side.

The contention of the defendants, much repeated and greatly insisted upon in their brief, is that this drain was a great public enterprise which had cost them upwards of $170,000, and which could not be let or hindered without great public loss. And they insist, in addition to this, that it was for the benefit of the plaintiffs, and was acquiesced in by them, and that they are now estopped to maintain their action.

But, from the findings above, the court is unable to assent to this conclusion. And while the line through plaintiffs' land, lying directly south of the mouth of the Nine-Mile canyon, is perhaps the most feasible route for a flood-water

ditch to the river, it is evident that the court should not deny the plaintiffs their right to refuse to permit a reconstruction which will make the ditch wholly a flood-water ditch instead of partly a soil drainage ditch, and will cast water upon their land instead of taking it away. It is true that the plaintiffs permitted the defendants to enlarge and deepen the ditch in question, but this was without prejudice to their right to have it maintained as a soil drainage ditch as well as a flood-water ditch, and was without prejudice to their right to complain if the character of the same was changed in the manner attempted. Nor does it matter, in considering this question, that possibly or probably the reconstruction contemplated would work to their ultimate benefit rather than to their damage. The rights of the parties are dependent upon the contract made. Plaintiffs did not give the defendants any license to change the ditch so that it should be no longer a soil drainage ditch. The companies acquired no right to a way across the land, except as was agreed.

The principle is well established in law that where one acquires a license to go upon another's land for a particular purpose, or for two particular purposes, one of which is beneficial to the owner and is the inducement for the granting of the right, he does not thereby acquire a right to go upon said land for another purpose or for a purpose destructive of the benefit for which the owner bargained. The expressions of this court in *Gross v. Jones*, 85 Neb. 77, and *Lucas v. Ashland Light, Mill & Power Co.*, 92 Neb. 550, amply support the proposition. Nor do we think that there is anything in the cases relied upon by the appellees to dispute it.

The doctrine that a parol license to enter land and construct irrigation works becomes irrevokable so long as such works are kept up, when such license has been acted upon at great expense and when the works have been used for years without objection, is beyond question in this state. But here, as has been shown, the doctrine does not apply. As stated, appellees acquired no right to use the ditch, ex-

cept in the manner agreed upon. They are attempting to use it otherwise than as contemplated when they were first permitted to go upon the land. They are seeking, in changing the ditch from a drainage and flood-water ditch to one that is a flood-water ditch alone, not only to withdraw a benefit from plaintiffs, but to impose a burden upon them. Having found that their original engineering conclusions were at fault, they now propose to withhold from the plaintiffs the soil drainage which was the inducement to plaintiffs' consent, and to bring water upon the land instead of carrying it away. The question is a question of fact upon this phase of the case, which we determine adversely to the appellees, entertaining no doubt from our examination of the record that it was not their intention to clean out the ditch to its original depth and to so maintain it.

If, with a full knowledge of the plan of the defendants, the plaintiffs had permitted them to go upon their lands in 1923 and to construct and operate according to their plan, they would have been guilty of laches. The evidence, however, proves that as soon as they were informed in regard to the same—only a day or two before the bringing of this suit—they made outspoken objection and acted without delay.

In the federal case of *Bannse v. Northern P. R. Co.*, 205 Fed. 328, in which injunction was denied, the defendants see a controlling likeness to the case at bar. It does not so impress the court. There, the plaintiff, whose rights were invaded as to an unproductive two acres of his farm, stood inactive while the railroad company, in improving its roadbed, spent $33,000 to straighten a stream, and then began an action for a mandatory injunction requiring the company to undo its work at an additional expense of $78,000. The court said in its opinion that, while the plaintiff had told the company to keep off at the outset, he must nevertheless find his remedy in damages, expressly assigning as a reason for its holding that he had taken no legal steps to prevent the work. Here, the plaintiffs promptly brought the action usually employed when the

taking of property without due compensation is attempted. Plaintiffs are not to be charged with laches, as measured by this case or by any of those cited in the brief of their adversaries.

It is urged that in any event the trial court was right in refusing the injunction, and that plaintiffs should be relegated to their action in damages. This seems doubtful. When they learned the facts, an action for damages was scarcely available to them. Defendants had not yet entered. Plaintiffs had not yet been damaged. And if they had waited, would the remedy have been adequate? Certainly, had they mutely permitted the reconstruction to proceed upon the plan stated by defendants' engineer, they would have been charged with acquiescence, and embarrassed in any damage suit prosecuted for their relief.

We have given careful attention to the cases cited by the appellees. Those from Nebraska do not, in our opinion, support their contention, some of them being cases involving disputes as to the ownership and possession of real property which were readily determinable by ejectment and other actions at law, and others being cases respecting title to office and maintenance of disorderly places which should have been dealt with by *quo warranto* and under the criminal law. Appellees cite no authority to convince us that the injury threatened was reparable by resort to a law proceeding.

On the other hand, if we are correct in our findings of fact, this case involves a taking or a damaging of private property without just compensation, and presents a situation peculiarly remediable by injunction. *Omaha & N. W. R. Co. v. Menk,* 4 Neb. 21; *Ray v. Atchison & N. R. Co.,* 4 Neb. 439; *Sittler v. Board of Supervisors,* 91 Neb. 111; *Gross v. Jones,* 85 Neb. 77. Not having acquired the right to use the ditch for flood water purposes to the destruction of its function as a drain for the land, the companies were attempting to take the land for a new purpose, and the principle of these cases directly applies.

As it is now, the flood waters and the seepage from the entire region are going to the river through the Nine-

Mile canyon, and thence through the Minatare Drainage Company's ditch to the southeast. Though this may be less desirable than to convey the said waters by the more direct route through the plaintiff's lands, it is operative, and it is claimed by many to be entirely practicable. We do not doubt, though we do not decide, that it is within the power of the defendants, by appropriate proceedings, to acquire or condemn the right of way for a flood-water ditch through plaintiff's land. But upon the record as it stands, and upon the findings which the court is constrained to make from the evidence, the plaintiffs are entitled to their injunction, and the judgment of the district court must be, and is, reversed. The case is remanded to the district court, with instructions to enter a judgment in accordance with this opinion.

REVERSED, WITH DIRECTIONS.

Note—See Drains, 19 C. J. sec. 153; Licenses, 37 C. J. sec. 184; Eminent Domain, 20 C. J. secs. 532, 533.

ROBERT E. WILLIAMS V. STATE OF NEBRASKA.

FILED MAY 23, 1925. No. 24424.

1. **Criminal Law**: RULINGS: REVIEW. Where misconduct on the part of a juror or attorney is alleged on motion for a new trial, and the question is submitted upon affidavits and decided by the trial court thereon, the ruling of the trial court will not be set aside upon review unless such ruling was clearly wrong.
2. ———: NEW TRIAL: NEWLY DISCOVERED EVIDENCE. A new trial will not ordinarily be granted, overruling the trial court, on the ground of newly discovered cumulative evidence or evidence which is merely impeaching in character.
3. ———: INSTRUCTIONS. If elsewhere in its instructions the court makes it clear that, to convict, the proof on all material points must be enough to convince the jury beyond reasonable doubt, the fact that in one of said instructions it directs that the burden is upon the state to prove all of the elements of the crime, omitting to add "beyond reasonable doubt," is not sufficient to vitiate the verdict.

4. ———: ———: INTENT: MOTIVE. An instruction defining intent in a criminal case as follows, "'Intent' denotes the purpose to use a particular means to effect a certain result, 'motive' being the reason which leads the mind to desire that result," is not erroneous.

5. ———: ———. In the absence of instruction requested to that end, it is not error on the part of the trial court to fail to instruct as to a lesser crime involved in and incident to the greater, as, for instance, larceny in connection with burglary.

6. ———: NEW TRIAL: NEWLY DISCOVERED EVIDENCE: SHOWING. Where an accused asks for a new trial upon ground of newly discovered evidence, he should support his application, not only by his own affidavit to the effect that the existence of such evidence was unknown to him when his trial was in progress, but by similar affidavits on the part of each and all of his attorneys.

7. ———: BILL OF EXCEPTIONS. Affidavits as to newly discovered evidence, or in support of objections to the jurisdiction of the district court, cannot be considered on appeal, unless incorporated in the bill of exceptions.

ERROR to the district court for Nance county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

McKenzie, Lower & Sheehan, for plaintiff in error.

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

Heard before ROSE, DEAN, GOOD and EVANS, JJ., REDICK and SHEPHERD, District Judges.

SHEPHERD, District Judge.

Burglary was charged, and incidental larceny. The defendant Robert E. Williams (plaintiff in error here) was convicted, and brings the case to this court, assigning and arguing five errors which may be briefly designated as follows: Misconduct on the part of two of the jurors; misconduct of the assistant prosecuting attorney; erroneous rulings on newly discovered evidence; the erroneous giving of instructions 3 and 3½; failure to instruct on larceny, the crime of lesser degree involved in the burglary charge.

The affidavits in regard to misconduct on the part of the jurymen were not made a part of the bill of exceptions, but appear in the transcript. The affidavit of one Burgess

states that he heard the juryman Nisbet say at the former trial of the case that the defendant was as guilty as he could be and that he would not fool with him a minute. One Sprague says in an affidavit that prior to the trial in which said Nisbet became a juror the latter stated to him that he believed the defendant was guilty, and that if he had been on the jury he would have voted for a conviction. And one Barnett said in an affidavit that he heard the juryman Pearson state during the course of the trial that the Omaha crowd would not get off as easy this time as they did before. All of these affidavits were flatly denied in affidavits made by the said jurors. It appears that the said Barnett, in his affidavit, stated also that during the trial he heard attorney Beebe, who was assisting the prosecution, say in the presence of the said Pearson that certain receipts or statements used in evidence had been tampered with and changed. Both Beebe and Pearson, in separate affidavits made by them, directly and positively deny this.

The trial court decided adversely to the defendant and refused a new trial on account of such alleged misconduct of the jurors and the attorney.

In two of the Nebraska cases cited and relied upon by the plaintiff in error, the fact of the misconduct upon which the court acted was undenied, and in the third of such cases a portion of the facts constituting such misconduct was not denied. In the latter case, *Edney v. Baum*, 44 Neb. 294, Commissioner Irvine used this language: "Almost every affidavit as to misconduct is met by flat contradiction. As to these matters, therefore, we would not disturb the finding of the district court in overruling the motion for new trial. * * * A few facts are, however, established by uncontradicted evidence, and we think require that the judgment be reversed." It is obvious that in the case at bar, where all the charges are specific and are flatly denied, and where the evidence seems to be quite evenly balanced, the situation is entirely different from that in the cases relied upon by the plaintiff in error. Upon the authority of the *Edney* case, as indicated by the language of Commissioner Irvine, the ruling of the trial court in this is fully sustained.

In the much later case of *Thrasher v. State*, 92 Neb. 110, the court said, respecting a charge of misconduct on the part of a bailiff in charge of a trial jury, that where the issue is submitted upon conflicting affidavits the decision of the district court thereon will not be reversed, unless found to be clearly wrong. Regarding the charging affidavits, it used this language: "But they are contradicted by other affidavits, thus presenting a question of fact, and we cannot say that the decision of the court thereon was wrong." We think, upon due consideration of the affidavits in the case at bar, that the district court was justified in concluding that the charge of misconduct on the part of the jurors and the attorney was wrongfully or mistakenly made. A presumption of regularity attaches to the proceedings and judgments in a criminal case, and where misconduct on the part of a juror or attorney is alleged on motion for a new trial, and the question is submitted upon affidavits and decided by the trial court, the ruling of the trial court will not be set aside by this court, unless it can say upon examination of said affidavits that such ruling was clearly wrong.

The contention of the plaintiff in error that a new trial should have been granted because of newly discovered evidence is without merit. An affidavit was filed by one who did not testify upon the trial, reciting that on the morning of the burglary, which occurred in Fullerton, Nebraska, he met the cars which the evidence indicates were used by the plaintiff in error and his accomplices in leaving town, and that neither of said cars was driven by the plaintiff in error. Inasmuch as the affidavit discloses that, in order to avoid collision with said cars, which were being driven at a high rate of speed, affiant was obliged to turn over the curb, it occurs to the court that his opportunity for accurate identification was exceedingly scant. In addition to this, while it would consume too much space to quote or to state the testimony relative to the matter, the court is convinced by a careful reading of the evidence that the testimony of such affiant would have been largely in the nature of impeaching and cumulative evidence, and that it is exceedingly doubtful

that it would have changed the verdict rendered. Further than this, an omission was made in laying the foundation for urging a new trial upon the ground in question. Only one of the two attorneys for defendant made affidavit that he was without knowledge of the existence of the evidence during the trial of the case. In 16 C. J. 1228, sec. 2744½, it is well said that in showings of this kind each and all of the attorneys representing the accused should make affidavit to lack of knowledge of the existence of such testimony.

A new trial, even in criminal cases, will not be granted on the ground of newly discovered evidence where such evidence would be cumulative merely. *Hamblin v. State,* 81 Neb. 148. The general rule is so stated. *Brooks v. Dutcher,* 22 Neb. 644; *Bell v. City of York,* 31 Neb. 842; *St. Louis v. State,* 8 Neb. 405; *Hanks v. State,* 88 Neb. 464. The supreme court of Illinois say in *People v. Harris,* 263 Ill. 406: "The rule is well settled that a new trial will not be granted on account of newly discovered evidence which in its nature is cumulative or impeaching in its character. Such evidence must be of a character that, if it had been introduced on the trial, it would have been likely to have changed the result." Due examination has been made of the cases cited in the brief of the plaintiff in error, but such cases are not, in our opinion, so directly applicable to the case at bar as to be persuasive.

The trial court had ample ground for its decision upon this point and its ruling will not be disturbed. Moreover, the affidavits as to this newly discovered evidence were not preserved in the bill of exceptions. The supreme court will not consider such affidavits unless so preserved and presented. *Crocker v. Steidl,* 82 Neb. 850.

The court defined "intent" as follows: " 'Intent' denotes the purpose to use a particular means to effect a certain result, 'motive' being the reason which leads the mind to desire that result." While this definition may not be one of those most frequently used in this jurisdiction, we have no doubt that the giving of the same was not erroneous. Indeed, as shown by the state in its brief, the definition has

been generally approved. The supreme court of Wisconsin uses similar language in the case of *Baker v. State,* 120 Wis. 135, saying that intent, from a legal point of view, is really distinct from motive, and that it is defined as the purpose to use a particular means to effect a certain result, while motive is the reason which leads the mind to desire that result. Also, in *People v. Corrigan,* 195 N. Y. 1, the court said: "In law there is a clear distinction between them. Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. See, also, Burrill's Law Dictionary, vol. 1." The definition commends itself to this court. When we consider the use of the word "purpose" in connection with the words "to use a particular means to effect a certain result," we think there is no contradiction between the definition complained of and that in Words and Phrases, "A state of mind which precedes or accompanies an act; volition."

Complaint is made because the court in its instruction 3½ told the jury that the burden was upon the state to prove each and all of the material elements of the offense before it could find the defendant guilty; the point being that it did not say in said instruction that the proof must be beyond reasonable doubt. But in instruction 2 the court put the burden upon the state to prove its charges by evidence beyond reasonable doubt. This was general and applied to all charges. In instruction 3 the material elements of the crimes were stated. The requirement of proof beyond a reasonable doubt was sufficiently comprehensive since it applied to the state's charges, meaning each and every one of the elements set forth in the last-mentioned instruction. And again, in instruction 5, the court said that in order to convict every fact necessary to constitute the crime had to be established by the evidence beyond a reasonable doubt. If elsewhere in its instructions the court makes it clear that, to convict, the state's proof on all material points must be enough to convince beyond reasonable doubt, the fact that in one of said instructions it directs

that the burden is on the state to prove all of the elements of the offense, omitting to add "beyond reasonable doubt," is not sufficient to vitiate the verdict.

A last contention of the plaintiff in error is that the court failed to fully instruct as to the lesser crime involved in and incidental to the crime of burglary. While this might be reversible error according to the holding of many, and even most, of the jurisdictions, it is not so in Nebraska, particularly where such instruction is not requested by the defendant, as in the case at bar. 16 C. J. 1023, sec. 2451; *McConnell v. State*, 77 Neb. 773. In the last case this court said: "On the trial of one charged with a heinous crime, where the charge set forth in the information or indictment fully embraces all of the ingredients of a lesser offense, it is proper for the trial court to define the lesser offense and instruct the jury that, where the evidence requires it, they may convict of such offense, but a failure to so instruct is not reversible error, unless such an instruction is requested by the defendant." Applying this rule to the case at bar, there is no merit in the contention of the plaintiff in error.

The verdict and judgment of the district court appear to be without reversible error and the judgment is

AFFIRMED.

HENRY HILLER, APPELLANT, V. CHARLES UNITT ET AL., APPELLEES.

FILED JUNE 12, 1925. No. 24515.

Taxation: COUNTY BOARD OF EQUALIZATION: JURISDICTION. The jurisdiction of a county board of equalization is limited to a session of 20 days, but it may adjourn from day to day or from time to time, and its jurisdiction will continue until such time as will enable the assessor to forward a copy of the assessment to the state board of equalization on or before July 10, of each year.

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

R. M. Switzler, for appellant.

W. W. Slabaugh, Henry J. Beal, Dana B. Van Dusen and *John F. Moriarty, contra.*

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

PER CURIAM.

Action to enjoin the collection of that portion of a tax represented by an increase of plaintiff's assessment upon the ground that the order for the increase was made after the expiration of 20 days, which is the statutory limit upon the session of the county board of equalization. The district court sustained the demurrer to the petition and dismissed the action, and plaintiff appeals.

The petition alleges that the county board of equalization met as required by law on June 10, 1924, its meeting days being June 10, 11, 12, 13, adjourning to June 16, 17, 18, 19, 20, adjourning to June 23, 24, 25, 26, 27, adjourning to June 30, and July 1, and that the increase of assessment complained of was made July 1. The claim of the plaintiff is that the authority of the board expired by statutory limitation June 30.

The question involves the construction of section 5972, Comp. St. 1922, which is as follows:

"The county board shall hold a session of not less than three nor more than twenty days, for the purpose contemplated in this section, commencing on the first Tuesday after the second Monday of June each year."

Plaintiff contends that the sittings, whether continuous or not, may not extend beyond 20 days from the first Tuesday after the second Monday of June; while defendant insists that the 20 days are sitting days, and that intervening days between sessions are not to be counted in determining the period of the jurisdiction of the board to equalize assessments.

By section 5977, Comp. St. 1922, the county assessor, immediately after the board of equalization have completed their labors, is required to forward an abstract of the

assessment to the state board of equalization on or before the 10th day of July.

The argument of plaintiff is persuasive, but we have had the same question before us in construing similar sections of the Revised Statutes of 1913 (sections 6437, 6442), and we held in *Farmers Cooperative Creamery & Supply Co. v. McDonald*, 97 Neb. 510, rehearing page 512, and in the same case upon a second appeal, 100 Neb. 33, in effect, that, while the jurisdiction of the board is limited to a session of 20 days, it had power to adjourn from day to day or from time to time until July 10, when the assessment is required to be reported to the state board.

It appearing in the present case that the actual sittings of the board prior to July 10 were for 16 days only, and the assessments complained of were made on the last day of the session, we are of opinion that the county board acted within its jurisdiction under the rules announced in the cases above cited, which we have reconsidered and find no good reason to depart from.

The judgment is

AFFIRMED.

DANIEL SANLEY, APPELLANT, V. CHARLES K. DAVIES ET AL., APPELLEES.

FILED JUNE 12, 1925. No. 23153.

1. Partnership: SUIT BETWEEN PARTNERS: PLEADING. In a suit in equity by one partner against the only other partner to recover the net profits on a number of isolated partnership transactions, the petition is generally demurrable if it fails to show a dissolution of the firm or a final settlement of accounts or a purpose to wind up the partnership affairs.
2. ———: FORMATION: EVIDENCE. On a controverted issue as to the existence of an oral profit-sharing agreement, the speech and the conduct of the parties in relation to the subject-matter of the controversy may prove or disprove the intention to form a partnership.
3. ———: ———: ———. Evidence of profit-sharing in real estate transactions does not necessarily prove a partnership.

4. ———: FORMATION: PROOF. In a controversy over the existence of a partnership, more convincing evidence is required to prove the affirmative where alleged partners are the only litigants than is required in an action between partners and a third person.

5. ———: ———: ———. Evidence outlined in the opinion *held* insufficient to prove an oral partnership agreement for the general purpose of buying and reselling real estate, the net profits to be divided equally, plaintiff to furnish the capital and defendant the knowledge, skill and services, including the discovery of purchasable properties with the exclusive right of resale.

APPEAL from the district court for Keith county: J. LEONARD TEWELL, JUDGE. *Reversed in part.*

L. A. DeVoe and *Nye, Worlock & Nye,* for appellant.

Miller & Randall, contra.

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

ROSE, J.

Daniel Sanley, plaintiff, brought this action against Charles K. Davies, defendant, to quiet title to a quarter section of land in Keith county. The wife of defendant was made a party, but she had no pecuniary interest in the controversy and the action as to her was properly dismissed. Plaintiff pleaded that he was the owner of the land described in his petition and that his title was clouded by a recorded affidavit in which defendant wrongfully claimed to be owner of an undivided half interest in the quarter section mentioned. The relief sought was the cancelation of the affidavit and a decree quieting the title in plaintiff.

In an answer to the petition defendant admitted the making and the filing of the affidavit, reasserted his claim to an undivided half interest in the land and prayed for a decree quieting his title thereto. The answer contained also what appears to be a cross-bill, alleging that in 1914 plaintiff and defendant entered into an oral partnership agreement for the general purpose of buying and reselling real

estate, the net profits to be divided equally, plaintiff to furnish the capital and defendant the knowledge, skill and services, including the discovery of purchasable properties with the exclusive right of resale. In substance and effect defendant in his cross-bill alleged that he performed his partnership obligations in selecting for purchase and resale two properties in the city of Kearney, a tract of 80 acres in Custer county and the quarter section of land described in plaintiff's petition; that plaintiff paid the purchase price in each instance, took the title in his own name, clandestinely resold each property for the fraudulent purpose of cheating defendant out of his share of the net profits and refused to account for any part thereof. There was a prayer for confirmation of the partnership, for an accounting as to net profits and for a decree subjecting the real estate purchased or the net proceeds of the resales to the payment of the amount found to be due defendant under the terms of the partnership.

The sufficiency of the cross-bill was challenged by a demurrer, which was overruled. The existence of a partnership and the other facts upon which the cross-bill was based were put in issue by reply and answer.

Upon a trial without a jury the district court properly quieted in plaintiff his title to the land in Keith county, and from that part of the judgment there is no appeal. It was decreed, however, that plaintiff and defendant were partners, and that defendant was entitled to half the net profits his share being $1,438.58, according to the trial court's statement of the cost and resale price of each of the four properties described in the cross-bill. From a judgment in favor of defendant for that sum plaintiff has appealed.

The sufficiency of the cross-bill to state a cause of action against plaintiff for half the net profits of a partnership is presented for review. The demurrer should have been sustained. According to the cross-bill defendant sued his sole partner for a half interest in the net profits of four partnership transactions under an oral partnership agreement for the general purpose of buying and reselling real estate.

There is no allegation that the partnership has been dissolved or that there has been a settlement of partnership affairs or that there has been an accounting between the partners. On the contrary, the cross-bill shows on its face that the four purchases and resales specifically pleaded are not all of the partnership transactions. It is alleged in the cross-bill that since 1914, "up to and including the present time," plaintiff and defendant have been engaged in buying and reselling real estate as partners under their oral partnership agreement. There is no specific prayer for the dissolution of the partnership. Defendant estimates the net profits on the partnership business specifically pleaded at $5,200, but for anything appearing in his cross-bill plaintiff's losses on other partnership transactions may exceed the profits for which defendant sues. The judgment entered in favor of defendant on his cross-bill leaves the partnership in existence. Judge Story said:

"Pending the partnership, courts of equity will not interfere to settle accounts and set right the balance between the partners, but await the regular winding up of the concern." Story, Partnership (6th ed.) sec. 229.

This is the general rule in both law and equity. 20 R. C. L. 934, sec. 152. For the reasons given the cross-bill was demurrable. *Lord v. Peaks*, 41 Neb. 891.

Assuming, but not deciding, that the parties tried the issues on the theory that the cross-bill was in reality an equitable plea for dissolution of the partnership and for a final accounting between the partners, and that an amendment to conform the cross-bill to the proofs is permissible for the purposes of a trial *de novo*, is defendant entitled to a judgment for half the net profits estimated by the trial court at $1,438.58? The answer of course depends on the evidence. The burden was on defendant to prove that he and plaintiff entered into an oral partnership agreement for the general purpose of buying and reselling real estate, the net profits to be divided equally, plaintiff to furnish the capital and defendant the knowledge, skill and services, including the discovery of purchasable properties with the

exclusive right of resale. On an issue of this kind an annotator, after reviewing the cases in point, formulated the following test:

"If the profit-sharing contract is unwritten and oral, the speech and conduct of the parties in relation to its subject-matter prove their intention to be or not be partners." 18 L. R. A. n. s. 1105 (*Cudahy Packing Co. v. Hibou*, 92 Miss. 234).

Profit-sharing in real estate transactions does not necessarily prove a partnership. *Mancuso v. Rosso*, 81 Neb. 786; *Norton v. Brink*, 75 Neb. 575; *Tyson v. Bryan*, 84 Neb. 202. A recognized principle has been stated as follows:

"Where the question of partnership arises in a contest between partners and the interests of no third persons are involved, much stronger proof is required to establish it than when the question arises between the alleged partners and third persons." *Norton v. Brink*, 75 Neb. 566, 570.

Weighed in the standard scales of the law, is there sufficient evidence of the partnership pleaded in the cross-bill? Plaintiff lived at David City and defendant at Kearney in 1914—the alleged date of the oral partnership agreement. Defendant testified that it was not wholly consummated at either place, but that it was discussed at both places at different times. He stated the general terms and the purpose of the partnership as pleaded in the cross-bill and that he and plaintiff orally agreed to it. What plaintiff said in response to any particular proposition to form a partnership does not clearly appear. Defendant did not testify to any provision for the sharing of losses in the event of falling prices. On the other hand, according to the oral agreement, the exclusive right of resale was reserved to himself—a personal advantage inconsistent with the business sagacity displayed by plaintiff in all the transactions for which he furnished the capital or purchase money. The conduct of defendant himself was often at variance with a general partnership agreement for profits. Plaintiff made investigations and assumed individual responsibilities indicating that he did not rely on the knowledge, skill and

services of defendant. Plaintiff sought aid from others, took title in his own name and made resales on his own account. He did not divide profits, though the transactions covered a period of years. Defendant allowed his business relations with plaintiff to continue without a division of profits on the basis of the partnership pleaded. From some of the correspondence between the parties there is a stronger inference of agency than of partnership. The negotiations relating to the purchase of the last of the four properties involved imply an original transaction rather than an incident of a general partnership. Plaintiff denied positively the making or the existence of a partnership agreement for profits. The evidence as a whole, when considered in detail from every standpoint, does not prove that plaintiff and defendant were partners. Without disturbing that part of the decree quieting in plaintiff his title to his land in Keith county, the judgment in favor of defendant for profits is reversed and the cause remanded for further proceedings.

REVERSED IN PART.

Note—See Partnership, 30 Cyc. 369, 405, 413, 474.

LINCOLN GAS & ELECTRIC LIGHT COMPANY ET AL., APPELLEES, V. WINNIE WATKINS, APPELLANT. *

FILED JUNE 12, 1925. No. 24628.

1. **Statutes:** CONSTRUCTION. In the interpretation of a legislative act, it will be presumed that the lawmakers intended that in the enactment of a statute every word used therein shall be given its ordinary and usually accepted meaning.
2. **Master and Servant:** SEASONAL OCCUPATIONS. As applied to occupations, the word "seasonal," as used in section 3049, Comp. St. 1922, refers to occupations which are governed by and are ordinarily performed only in certain seasons of the year.
3. ———: COMPENSATION. The employers' liability law provides that compensation shall be based on the wages received by the

* Note—Argument was had in the above suit April 20, 1925. This is the first suit argued and submitted in the new capitol building.

injured or deceased employee, as the case may be, "at the time of the acccident causing the injury." Comp. St. 1922, sec. 3045.

4. ———: ———. Where the evidence discloses that a claimant, under section 3045, Comp. St. 1922, is wholly dependent for her support upon her son, "at the time of the accident" which caused his death, such claimant is entitled, under section 3045, Comp. St. 1922, to 66⅔ *per centum* of the wages received by the employee at the time of the injury, for a period of 350 weeks, but the compensation shall not be more than $15 a week.

5. ———: ———: COSTS OF ACCIDENT. The employers' liability law accepts as an inevitable condition of industry the happening of accident and charges its costs to the industry.

6. ———: ———: PENALTY. Where reasonable grounds for controversy do not exist in respect of the time when and the manner in which a deceased employee met his death, the defendant's liability under the employers' liability law accrues, in the manner and at the time provided in section 3048, Comp. St. 1922, and if the statutory payments are thereafter withheld by the employer he is subject to the penalty for waiting time which is provided in the above-cited section.

7. ———: ———: ATTORNEY'S FEES. Under the evidence and the law, counsel for claimant are entitled to an additional attorney fee of $100, for services in this court, pursuant to section 3048, Comp. St. 1922.

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

Holmes & Chambers, for appellant.

Reavis & Beghtol and *C. E. Sanden, contra.*

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EVANS, JJ., and SHEPHERD, District Judge.

DEAN, J.

Kenneth Watkins, aged 20, while in the employ of the Lincoln Gas & Electric Light Company, came in contact with an electric current, August 1, 1924, while he was working on an electric light pole, and thereby met an immediate death. The United States Fidelity & Guaranty Company is the insurer of the above named company's risk, and both have been joined as defendants and they will be hereinafter designated as such. Mrs. Winnie Watkins is

Kenneth's mother. She filed a petition with the compensation commissioner wherein she prayed for compensation and, upon a hearing being had, the commissioner found that she came within the partial dependency class, under section 3045, Comp. St. 1922, and fixed her award at $8 a week for 350 weeks and awarded $150 for funeral expenses. Both parties appealed to the district court and the award of the commissioner was there affirmed and, in addition to the commissioner's finding, the district court allowed $100 as an attorney fee, and judgment was accordingly rendered in favor of claimant. Neither party was satisfied with the judgment and both have appealed.

Mrs. Watkins contends that she comes within the class designated in section 3045, Comp. St. 1922, as "wholly dependent," and that she is therefore entitled, under the act, to $15 a week, as compensation, for a period of 350 weeks, and funeral expenses, and an attorney fee and the statutory penalty for waiting time under section 3048, Comp. St. 1922.

Defendants concede that Mrs. Watkins' son was killed by reason of an accident, arising out of and in the scope of his employment, and that his mother is entitled "to an award of some amount, the sole issue being the amount * * * per week" to which she is entitled. The contention is that she is but partially dependent and that, at the most, she is entitled to $2.88 a week, and no more, for the statutory 350-week period. Defendants admit, however, that Mrs. Watkins is entitled to $150 for funeral expenses. But they contend that an attorney fee should not have been allowed and they protest that, under the facts, plaintiff is not entitled to the statutory "waiting time."

The material facts are substantially these: It seems that Mrs. Watkins and her son Kenneth came to Lincoln from Auburn, their former home, in September, 1923, and that her family consisted of Kenneth and herself. Lowell Watkins, her husband, is a carpenter and the last she knew of his whereabouts he was at Dubuque, Iowa. They had not lived together for more than ten years immediately pre-

ceding the trial. There is another son named Gordon, aged 24 and now married, and, from Mrs. Watkins' evidence, it appears that he had not lived with her and Kenneth since they came to Lincoln. Sometime before the trial Mrs. Watkins obtained a divorce. She testified that, during all the years of their separation, she received no support from her husband, and that he, without cause, during upwards of the past ten years of their married life, refused to live with her or to support her; that he never wrote to her; that at times he sent comparatively small sums of money to Kenneth, and that "it was understood that he was to contribute something until the boys were through school and then he was through;" that for about a year he gave Kenneth about $25 a month, but at no time did he contribute anything for her support; that Kenneth was an active young man, "unusually strong and healthy," and so continued "clear up to the day of his death."

She testified that Kenneth was her sole support, and that before he died he furnished her with room and board and such clothing as she "had to have," and occasionally a little currency; that it was always understood by the family that Kenneth would support her; that, when asked what was said by Kenneth on the subject of her support, she answered: "Well, he had always said that he was going to take care of Mamma, that wherever he was she was to be; I can't tell you how many times he said it, and if anything was said about what I was to do that was all that could be said because he always insisted on that;" that the eldest son was not physically strong, and was "never so that he could get any life insurance" and never contributed anything to her support; that she did some plain sewing and ironing and ordinary housework, but this was more than a year before Kenneth's death; that she never attended to the payment of bills, but this was always left to Kenneth; that they lived at Auburn four years before they moved to Lincoln, and that, during this four-year period, she and Kenneth both worked; that for about fifteen months, namely, from the spring of 1922 until the fall of

1923, which was just before they moved to Lincoln, Kenneth, for about three months of this period, was employed by an electrical company building lines out of Nebraska City, and for the remainder of the time he worked for an electrical concern at Auburn, but she did not name the wages which he then earned, but she said that during this time she did little work and that her support "came from Kenneth;" that Kenneth borrowed between $300 and $400 while he was attending school; that at the time of the accident and up to the time of his death, while in defendant's employ, he was earning $36 a week; that since the death of her son she has been going about from place to place, and has lived with relatives and friends in town and in the country, and that for board, lodging and incidental accommodations no charge has been made by any person.

The owner of the house where Kenneth and his mother occupied rooms for about six months before the accident testified that the monthly rental of $25 was always paid by Kenneth's check. This witness and Mrs. Watkins were the sole witnesses to testify in her behalf. Defendants produced no witnesses.

As noted herein, Kenneth Watkins was a student at the state university in 1924, and when the summer vacation period came his employment with the defendant company began, and at the time of his death it is conceded that he had then worked two months at a wage of $36 a week. While defendants contend that Kenneth intended to return to the university in the fall, there is no proof that he intended to do so. There is nothing in the record tending to prove that Kenneth had not found his field of usefulness in electrical pursuits, or that he was dissatisfied with an occupation in which he, a youth of 20, could earn almost $150 a month and be thereby enabled to support his mother in comfort.

Defendants argue that Kenneth's occupation was "seasonal" and that it is therefore governed by section 3049, Comp. St. 1922, which, among other provisions, contains this:

"In occupations involving seasonal employment or employments dependent upon the weather, the employee's weekly wages shall be taken to be one-fiftieth of the total wages which he has earned from all occupations during the year immediately preceding the accident."

Counsel argue:

"He worked as a laborer only during vacations, his principal occupation being attendance at the state university. Likewise his employment did not depend upon the weather, but on the contrary depended only upon the occurrence of the vacation season. However, his employment was 'seasonal.' Seasonal is defined in Winston's Dictionary, 1921 edition, as 'changing with the seasons.' * * * There can be no question that the occupation of the deceased pertained to, changed with and depended on the season of the year. During the fall, winter and spring his occupation was that of a student. During the summer his occupation was laborer."

The argument is ingenious, but it does not appeal to us. This is the Century Dictionary definition of "seasonal:"

"Of or pertaining to the seasons; relating to a season or seasons.

"The deviations which occur from the seasonal averages of climate. (Encyclopœdia Britannica, VI, 6.)

"The rainfall of the British Islands has been examined with reference to its *seasonal* distribution in relation to the physical configuration of the surface."

Following is another recognized definition: "Of or pertaining to a season or the seasons." Webster's Dictionary.

We do not think the legislature intended to place the construction upon the word "seasonal" for which defendants contend. It is elementary that the legislature uses words in their ordinary and usually accepted sense as applied to occupations, the word "seasonal," as used in the statute, seems to refer to occupations which are governed by and can be performed only in certain seasons. For example: The cutting of natural ice upon the frozen surface of a stream would, for obvious reasons, be confined to the win-

ter season and, in this sense, may be called a seasonal occupation.

Mrs. Watkins owns a small six-room house at Auburn which is located on a 75-foot lot and, she testified, is worth perhaps $2,000 and rents for $15 a month. In one year the taxes were over $100 and $80 in another year. From her evidence it appears that, when the repair bills, taxes and insurance were paid, there was nothing left of the rentals, and that she did not "have any (other) property, at the time of Kenneth's death," and she could not live on less than $50 a month. The Carlisle table shows that at her age of 50 years the life expectancy is a little more than 21 years. It is clear that, above expenses, she derives no revenue from the rentals. If the property should be sold for $2,000, and she realized the usual rate of interest, it would yield an income approximating $100 or $120 annually. If, however, she used the principal and also the interest on the unused portion of the principal sum for her support, the fund, at an expenditure of $50 a month, would maintain her for a little over four years.

We think the proved facts bring the case within that part of section 3045, Comp. St. 1922, which provides:

"If death results from injuries and deceased employee leaves one or more dependents wholly dependent upon his earnings for support at the time of the accident causing the injury, the compensation * * * shall be sixty-six and two-thirds *per centum* of the wages received at the time of the injury, but the compensation shall not be more than fifteen dollars per week."

The employers' liability law, as it is called in the Compiled Statutes, 1922, makes repeated provision that compensation shall be based on the wages received by the injured or deceased employee, as the case may be, "at the time of the accident causing the injury." This expression is not without significance, because, in varying forms, the thought is repeatedly emphasized in the statute. In section 3045, above cited, the expression occurs five separate times. That Mrs. Watkins was wholly dependent for her support upon her son Kenneth "at the time of the accident

causing the injury" clearly appears from a fair and unbiased consideration of all the evidence.

An act having to do with this subject is discussed in *Powers v. Hotel Bond Co.*, 89 Conn. 143, wherein this terse observation is made: "The act, by eliminating the proof of negligence, by minimizing the delay in the award and by making it reasonably certain, seeks to avoid the great waste of the tort action and to promote better feeling between workmen and employer, and accepts, as an inevitable condition of industry, the happening of accident, and charges its costs to the industry." See, also, *Parson v. Murphy*, 101 Neb. 542, and cases there cited and discussed.

We conclude that, in view of the record, Mrs. Watkins is entitled to compensation at the rate of $15 a week for 350 weeks from the date of the accident causing the injury. A review of the record discloses that, in respect of the defendants' privileged duty under the law, reasonable grounds for controversy at no time existed. It therefore follows that the defendants are also liable for "waiting time" as provided in section 3048, Comp. St. 1922, which, so far as applicable to the facts, provides:

"Except as hereinafter provided, all amounts of compensation payable under the provisions of this article shall be payable periodically in accordance with the methods of payment of the wages of the employee at the time of the injury or death: Provided, fifty *per centum* shall be added for waiting time for all of delinquent payments after thirty days' notice has been given of disability."

It seems clear that counsel for Mrs. Watkins are entitled to an additional attorney fee of $100 for services in this court pursuant to section 3048, Comp. St. 1922.

The judgment of the district court is reversed, with directions that judgment be entered in conformity with this opinion.

REVERSED AND REMANDED, WITH DIRECTIONS.

The following opinion on motion for rehearing was filed September 21, 1925. *Paragraph of syllabus withdrawn.*

PER CURIAM.

Upon motion for rehearing and reexamination of the record, we conclude that the law announced in the sixth paragraph of the syllabus is not applicable to the proved facts. It therefore follows that the above-mentioned syllabus paragraph, and also the argument in the body of the opinion, on the subject of waiting time, are hereby withdrawn. In all other respects the opinion is adhered to.

PARAGRAPH OF SYLLABUS WITHDRAWN.

ALLIED CONTRACTORS, INC., APPELLANT, V. BOARD OF EQUALIZATION OF DOUGLAS COUNTY, APPELLEE.

FILED JUNE 12, 1925. No. 23184.

1. **Corporations: SHARES OF STOCK.** Shares of stock of a corporation are a distinct entity from the capital stock, or property and assets of the corporation.
2. **Taxation: DOMESTIC CORPORATIONS: SHARES OF STOCK: VALUATION.** In fixing the value of the shares of stock in a domestic corporation under the provisions of section 5884, Comp. St. 1922, no deduction is permitted on account of bonds, warrants or other evidences of indebtedness issued by the state or governmental subdivisions thereof, owned by the corporation.
3. ———: **BONDS AND WARRANTS: CONSTITUTIONAL LAW.** That part of section 5884, Comp. St. 1922, providing that "bonds and warrants or other evidences of indebtedness of this state or governmental subdivisions thereof shall be listed and taxed at one mill on the dollar of the actual valuation thereof," *held* to be unconstitutional.
4. ———: ———. Bonds, warrants, or other evidences of indebtedness of the state or governmental subdivisions thereof are instrumentalities of the government, and are not subject to taxation.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Glenn N. Venrick, for appellant.

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

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EVANS, JJ., and SHEPHERD, District Judge.

DAY, J.

Appellant, a domestic corporation, appeals from a judgment of the district court for Douglas county sustaining the action of the board of equalization of said county in fixing the value of the shares of stock of said corporation for taxation purposes.

The schedule returned by appellant in April, 1922, listed its capital stock, surplus and undivided profits at $200,000. from this amount it deducted the value of certain tangible property, specifically described, listed at $15,485, and certain property outside of the state listed at $108,618. Appellant also deducted certain warrants owned by it, issued by governmental subdivisions of the state, listed at $74,932. After making these deductions, the value of the shares of stock reported for taxation was $965.

The board of equalization, as well as the district court, refused to allow any deduction on account of the warrants above mentioned, and accordingly fixed the value of the shares of stock for taxation at $75,897. The question presented by the record is whether appellant was entitled to deduct from the actual value of its paid-up capital stock, surplus and undivided profits, the actual value of certain warrants issued by governmental subdivisions of the state and owned by the appellant corporation. A solution of the question involves an examination of section 5884, Comp. St. 1922, which is a part of the revenue law of the state pertaining to the taxation of intangible property.

The section in part reads as follows:

"Moneys, gross credits, including corporation shares or stocks * * * securities, debentures, bonds (other than those of the United States or of this state or governmental subdivision of this state), * * * and all other intangible property * * * shall be separately listed and shall be taxed on the basis of twenty-five per cent. of the mill rate levied upon tangible property where said intangible property is assessed, the same to be assessed and collected where the owner resides."

The same section then provides as follows:

"Provided, that the value of the shares or stock of corporations organized under the laws of this state shall be determined for the purpose of this section by deducting from the actual value of the paid-up capital stock, surplus and undivided profits of such corporation available for stock dividends, the actual value of the property of the corporation, both tangible and intangible, listed and taxed in this state. * * * Such corporation shall pay the tax assessed upon its stock or shares and shall have a lien thereon for the same, except that the stock or shares of domestic building and loan associations shall be assessed to and the tax paid by the individual owners thereof."

The section further provides:

"Bonds and warrants or other evidences of indebtedness of this state or governmental subdivisions thereof shall be listed and taxed at one mill on the dollar of the actual valuation thereof."

An examination of the revenue law, of which the section above referred to is a part, manifests an intention on the part of the legislature to classify property subject to taxation into two groups—tangible and intangible. With respect to tangible property the act provides in a general way that it should be listed for taxation at its true value, and assessed upon the full mill-rate levy. With respect to intangible property, it is provided, with certain exceptions, that it is to be listed at its true value, and assessed at 25 per cent. of the mill rate levied upon tangible property.

It will be observed that the section of the statute above mentioned specifically provides the manner for determining the value of shares of stock in domestic corporations for the purpose of taxation. In this respect the act provides that, from the actual value of the paid-up capital stock, surplus and undivided profits, there should be deducted the actual value of the property of the corporation, both tangible and intangible, "listed and taxed" in this state, and the actual value of the property of the corporation outside of the state.

While the corporation as such is required to make a return to the taxing authorities of the values of its shares of stock, theoretically, at least, it does so for its individual shareholders. The corporation is required to pay the tax on the shares of stock, but is given a lien on such shares for the amount of taxes paid.

In this connection it is well to bear in mind that shares of stock in the hands of an individual are a distinct entity from the property of the corporation. A corporation, like an individual, may own tax free securities.

The case before us, however, does not concern the corporation property as such, but relates to the shares of stock presumably held by individuals. The corporation property, which is subject to taxation, is assessed against it. A part of the misunderstanding arises, no doubt, from the fact that the corporation makes the return without being required to give a list of its stock holders, with the number of shares held by each, as is the case in banking corporations. A similar principle was involved in *Peters Trust Co. v. Douglas County*, 106 Neb. 877. In that case the court had under consideration section 6343, Rev. St. 1913, relating to the taxation of shares of stock in a trust company. Under that section the corporation was required to make a return of its shares of stock to the taxing authorities substantially in the same manner as is required of domestic corporations under the section of the statute now being considered. In that case it was held:

"Shares of stock in a trust company are a distinct entity from the capital stock, or property and assets of the corporation."

And, further: "When the tax is laid upon shares of stock of a trust company in the hands of the stockholders, no deduction of securities exempt from taxation, owned by the trust company, is required to be made by the laws of this state or by the laws of the United States."

With respect to the provisions of the section providing that "bonds and warrants or other evidences of indebtedness of this state or governmental subdivisions thereof shall

be listed and taxed at one mill on the dollar of the actual valuation thereof," we are of the view that such provision must be held unconstitutional. This court in *Droll v. Furnas County*, 108 Neb. 85, held:

"Warrants issued by a governmental subdivision of the state for a lawful purpose are instrumentalities of the government." And, further: "Unless plainly provided by a constitutional provision, public property and the instrumentalities of government are not subject to taxation."

It is the policy of the state to avoid, as far as possible, double taxation. The legislature, in recognition of this principle, has provided that the value of the shares of stock in a domestic corporation for taxation purposes shall be determined by deducting from the value of the capital stock, surplus and undivided profits, the value of property owned by the corporation, both tangible and intangible, which is "listed and taxed" in this state against the corporation, as well as the actual value of the property of the corporation outside of the state. Eliminating from the provisions of the statute the unconstitutional part relating to the listing and taxing of bonds and warrants issued by the state or governmental subdivisions thereof, then there is no provision for listing and taxing such property against the corporation, and hence no authority in the law exists for deducting from the value of the shares the warrants in question.

It is argued by appellant that, if the provisions of the statute above quoted respecting the listing of bonds and warrants for taxation is held to be unconstitutional, then the entire section must be held to be unconstitutional, because the provision referred to was an inducement to the passage of the entire section. We are not inclined to agree with this contention. The basic thought of the legislation was to provide a system of taxation which would reach all classes of intangible property which was subject to taxation. Generally speaking, this was to be taxed at 25 per cent. of the mill-rate levy on tangible property. The provision respecting bonds and warrants of the state and governmental subdivisions thereof is a complete thought in

itself, and the tax to be levied upon such property was one mill on the dollar valuation. Considering the entire act as a whole, we are of the view that the sentence in question may be eliminated without affecting the validity of the remaining parts.

Other propositions are argued in support of appellant's contention which we have considered, but we deem them not well taken.

The judgment of the district court is

AFFIRMED.

Note—See Taxation, 37 Cyc. 983, 988, 1031.

CHARLES TAVLINSKY ET AL., APPELLEES, V. RINGLING BROTHERS CIRCUS ET AL., APPELLANTS.

FILED JUNE 12, 1925. No. 23064

1. **Pleading**: ADMISSIONS. Where plaintiffs plead in their petition that defendants enticed, induced and persuaded their minor son to leave their custody and service, and defendants answer that the son sought employment of them and was so employed, and plaintiffs reply, admitting this part of the answer, such admission negatives the allegation of wrongful enticement, inducement and persuasion.
2. **Parent and Child**: CUSTODY OF CHILD: RIGHT OF ACTION. Parents have a right to the care, custody, service and companionship of their minor children, and, when they are wrongfully deprived thereof by another, they have a right of action therefor, even in a case where the child has sought the employment.
3. ———: ———: ———: WAIVER. Where parents receive and appropriate to their own use wages of their minor child earned while wrongfully employed by another, with full knowledge of the material facts, they ratify such employment and waive their right to sue in tort.
4. ———: ———: ACTION: INSTRUCTIONS. On a trial to a jury, each party is entitled to instructions fairly covering the issues raised by the pleadings, and the theory upon which the case is tried, and a refusal thereof by the court, when requested by way of an instruction tendered, is reversible error.

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

John M. Kelley, W. H. Herdman and *A. L. Tidd,* for appellants.

Wilmer B. Comstock, contra.

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

THOMPSON, J.

Plaintiffs Charles Tavlinsky and Julia Tavlinsky, husband and wife, brought this action in the district court for Lancaster county against Ringling Brothers Circus and Barnum and Bailey Circus, seeking to recover $10,000 for the alleged enticement of plaintiffs' minor son, Jacob Tavlinsky, from their home and service. They allege in their petition, in substance, as follows:

That defendants are corporations and associations; that on the first day of September, 1920, Jacob Tavlinsky was an infant 15 years of age, who on this date, and at all times prior thereto, resided with his parents, working for and assisting them, and they supporting and caring for him; that he was a boy of good habits; that on the above date defendants wickedly and unlawfully imprisoned Jacob, and enticed, induced and persuaded him to leave his parents in Lincoln and travel with defendants; that defendants have continually since the above date kept Jacob imprisoned and in their custody, and compelled him to associate with dissolute characters, debauching and ruining him, and have alienated his affections from his parents, and permanently deprived them of his earnings, affections, society and companionship, to plaintiffs' damage in the sum of $10,000.

Defendants for answer, in substance, deny each and every allegation except such as are specifically admitted; allege that the son of plaintiffs "sought employment with the defendants, at Lincoln, Nebraska, and was engaged in working as others, and continued to work for said firm at its winter headquarters;" that he was regularly paid for his services, and was not in any manner prevented from leaving his work; that while at home he was ill treated by his parents; that while he was in defendants' employ they at

no time imprisoned or restrained the son, or compelled him to associate with dissolute characters, or in any manner debauched or ruined him; that he always was, and now is, permitted to leave defendants' employ, and act in that regard as he sees fit; that out of his salary he paid his parents $150; that defendants never had any notice not to pay the son his salary; that the matters alleged in the petition are insufficient to constitute a cause of action.

For reply, plaintiffs, in substance, admit that defendants are associated for the purpose of operating a circus, and that plaintiffs are the parents of Jacob Tavlinsky; and further admit that "the son of plaintiffs sought employment with defendants in Lincoln, Nebraska, and was then and there employed by defendants; that he performed service and duties for said defendants, and continued to work for said firm at its winter quarters." A general denial is then interposed.

Trial was had to a jury. At the close of plaintiffs' evidence defendants moved for a directed verdict in their favor, which was overruled. Verdict was returned for $7,500. Motion for a new trial overruled. Defendants appeal, alleging as grounds for reversal, among others, in substance, that the judgment rendered is not supported by the pleadings or evidence; that the court erred in giving certain instructions on its own motion, and in refusing others offered by defendants; and in overruling defendants' motion for a directed verdict in their favor.

It is important, first, to determine just what issues are raised by the pleadings and covered by the evidence. It will be noticed that as grounds for recovery plaintiffs allege in their petition that Jacob Tavlinsky was wickedly and unlawfully imprisoned by defendants, and by them induced, enticed and persuaded to leave his parents. In their reply, plaintiffs admit the allegation in the answer that Jacob sought employment with defendants, and was by them employed, performing services and duties for them, and working at their winter quarters. Such admission negatives the allegation in the petition that the son was induced and

enticed by defendants to enter their employ. The use of the word "sought" in the answer, and admitted in the reply, amounts to an admission that the son's joining defendants was a voluntary act on his part, and not one superinduced by them. As is well said in *Butterfield v. Ashley,* 2 Gray (Mass.) 254, in a case involving a similar state of facts: "To constitute enticement of a servant from his master's service, within the meaning of the law, inducements must be presented to him, while he is in that service, which cause him to leave it. After he has, of his own accord, left such service, and while he is out of it, he cannot be enticed from it." See, also, *Caughey v. Smith,* 47 N. Y. 244.

The record is without evidence, taken with the admissions in the pleadings, to sustain a finding that defendants imprisoned, secreted, or enticed plaintiffs' son, as these terms are understood in law. It must be remembered, also, that harboring is not alleged. However, as we view the law applicable to the facts pleaded, admitted, and proved, it was not necessary that defendants should have imprisoned, secreted, or enticed the son in order to give rise to a cause of action in tort against defendants. They must have known, and did know, at the time they employed the son that he was a minor. By employing him without the consent of his parents, under the facts disclosed, defendants deprived them of his society, services, and companionship, for which they became liable, unless the parents elected to ratify the employment, or waived the tort.

In *Everett v. Sherfey,* 1 Clarke (Ia.) 356, it is said: "It is not probable that he (defendant) actually secreted the son, or secured or harbored him, as we speak of harboring or secreting those who have violated the law. Neither is it necessary that he should have done so, in order to make him liable. It was the absolute right of the father to have the society, services, and care of his son, unless he had forfeited the same, of which we have no evidence."

Then, as held in *Soper v. Igo, Walker & Co.,* 121 Ky. 550: "It has always been the law that, if anyone wrongfully abducts from the father one of his children, he can maintain

an action against the wrongdoer for damages, based upon the principle that the father has the right to the services of his child, it matters not whether the child renders such services, and, having such a right upon which to base his action, he is not confined in a recovery to the loss of services alone, but may recover for injury to his feelings and the loss of the companionship of his child."

However, it is important to note that the evidence shows that plaintiffs had knowledge of their son's situs with defendants within five days after he left home, and thereafter received a series of letters from him, in each of which he stated where he was. These letters were answered, yet there is no evidence of a request for the son's return, or notice to defendants that plaintiffs objected to the employment. In the first of these letters he informed plaintiffs that he would return to visit them a year later, which he did. The writing of the letters and the return home were voluntary acts on the part of the son. During such stay the record shows that no effort was made by plaintiffs to prevent the son's return to defendants beyond mere verbal requests that he remain at home. There is no evidence of even an attempt to use physical or legal restraint to prevent such return, which would have been perfectly proper under the circumstances. This situation should have been covered by a proper instruction.

It was during his stay, above noted, that this action was brought. As soon as the son learned of it, the evidence shows, in substance, he informed plaintiffs in their home that he believed such action would prevent his continuing in defendants' employ. At this time, witness Paul Cook, a close friend and confidential advisor of plaintiffs, called at their home. Jacob requested Cook, with plaintiffs' knowledge, to accompany him to see defendants, that he might "square himself" and acquaint them with the fact that he had not been responsible for the action against them, and that he might remain with them. This Cook did, without protest from plaintiffs.

Then, at the time of his stay, the son gave plaintiffs $145, which they accepted with knowledge that a part of it, if not all, was from his earnings while with defendants. Although they said they would keep it for him, the mother testifies that later in the same day he demanded this money, which she refused to give him, and that afterwards she and her husband deposited it in the bank in Jacob's name, later appropriating it to their own use, but, as she says, with the intention of paying it back to Jacob. It must be remembered that defendants allege in their answer that "out of his salary he paid to his parents $150, and that this defendant has never received any notice directly or indirectly not to pay their minor son his salary." This is denied in the reply. Thus, the question of a ratification of the son's contract of employment with defendants is raised by the pleadings as well as by the evidence. However, in the instruction given by the court which purported to contain the answer, no reference is made to this allegation or the legal effect of an appropriation of this money to plaintiffs' own use, nor is such issue covered by any instruction given. Instruction No. 2, offered by defendants and refused, contains the entire answer, including, of course, this allegation, and instruction No. 9*a*, offered by them and likewise refused, is as follows:

"You are instructed that, if you find from a preponderance of the evidence that the plaintiffs accepted any portion of the wages earned by Jacob Tavlinsky and paid by the defendants to the said Jacob Tavlinsky, the acceptance of such wages is a waiver of the wrongful employment, if such employment were wrongful, and that the acceptance of any portion of such wages constitutes a ratification of the employment of Jacob Tavlinsky by the defendants, and if you find that plaintiffs did accept such wages, then your verdict should be for the defendants and against the plaintiffs."

From what has been said regarding the receipt of this money, it will be seen that the evidence is conflicting in reference thereto. Therefore, such disputed question of

fact should have been left to the jury under an applicable instruction. As is well said in *Rasmusen v. New York Life Ins. Co.*, 91 Wis. 81: "Doubtless, the act out of which the waiver is deduced must be an intentional act, done with knowledge of the material facts, but it cannot be necessary that there should be an intent to waive. Such a rule would allow a secret intention to defeat the legal effect of unequivocal and deliberate acts." And in *Pfeiffer v. Marshall*, 136 Wis. 51, it is said: "Intent to waive may be shown by conduct." If plaintiffs received the benefit of this transaction, knowing it to be such, they must necessarily have ratified or at least approved of it and they cannot be heard to say that it was wrongful. The rule thus announced is in harmony with our holdings in *United States School-Furniture Co. v. School District*, 56 Neb. 645, and *Barber v. Stromberg-Carlson Telephone Mfg. Co.*, 81 Neb. 517.

If plaintiffs accepted and appropriated this money as their own (which we do not decide), this case is brought clearly within our holding in *Wolf v. Vannoy*, 98 Neb. 637. If by writing the letter in that case it was reduced to an action for the son's wages only, and if, as approved by us therein, "A parent's election to sue for the child's wages is a waiver of the tort and bars his right to recover for enticing the child away," certainly the receipt and appropriation of a part of the wages earned would limit the plaintiffs' recovery to one for wages.

On a trial to a jury, each party is entitled to instructions fairly covering the issues raised by the pleadings, and the theory upon which the case was tried. By denying this to defendants, reversible error was committed. *Hanover Fire Ins. Co., v. Stoddard*, 52 Neb. 745; *Kyd v. Cook*, 56 Neb. 71.

Other assignments of alleged error have been considered; but, in view of the conclusion reached, we deem it unnecessary to discuss them.

The judgment of the district court is

REVERSED.

ALBERT E. STOCKER, TRUSTEE, APPELLEE, V. IOLA H. CHURCH, APPELLANT:
GILBERT E. HANKS ET AL., APPELLEE.

FILED JUNE 12, 1925. No. 24546.

1. **Bankruptcy: MORTGAGES: VALIDITY.** A mortgage executed and delivered for a then present consideration, more than four months before the mortgagor therein files his petition in bankruptcy, and recorded within such four months, is not vulnerable to attack as being void by the trustee in bankruptcy representing creditors not equipped with deed, mortgage, or other instrument duly recorded prior to the recording of such mortgage, under section 5612, Comp. St. 1922. Neither can such trustee avoid it under section 60*a* of the federal bankruptcy act (32 U. S. St. at Large, ch. 487, p. 799) as a preference, it not being "required" to be recorded under our statute that it may be valid.
2. ———: ———: **PRIORITY.** Mortgages executed and delivered for a valuable consideration more than four months before the mortgagor therein files his petition in bankruptcy, and recorded within such four months, take precedence over a judgment lien, with execution returned unsatisfied, created by the federal bankruptcy act in the trustee in bankruptcy, which judgment lien takes effect on the date of the filing of such petition.
3. **Evidence** examined, and *held* insufficient to support the judgment, but to preponderate in favor of appellant.

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

Burkett, Wilson, Brown & Wilson, for appellant.

Pitzer & Tyler, contra.

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

THOMPSON, J.

Albert E. Stocker, legally appointed and acting trustee in bankruptcy of the estate of Gilbert E. Hanks, brought this suit in the district court for Otoe county against Iola H. Church, sister of Hanks, hereinafter called Mrs. Church, Gilbert E. Hanks, the bankrupt, and his wife, Grace W.

Hanks, to cancel and set aside a mortgage executed and delivered to Mrs. Church by the Hanks in the amount of $35,480, covering 560 acres of land in Otoe county. The mortgage is dated June 21, 1921, and was recorded August 3, 1923.

At the hearing in this court the following suits were consolidated with this one: *Nebraska City Nat. Bank v. Hanks,* p. 645, *post,* in which Mrs. Church and her husband, Luther J. Church, as cross-petitioners, seek to foreclose a mortgage for $15,000 given to Mrs. Church by the Hanks, covering lands other than the 560 acres referred to above, dated May 6, 1921, and recorded August 3, 1923; and *United States Trust Co. v. Hanks,* p. 644, *post,* wherein Mrs. Church and her husband, Luther J. Church, again as cross-petitioners, seek to foreclose a mortgage in the amount of $15,000 given to Mrs. Church by the Hanks, covering lands other than the two tracts hereinbefore referred to, dated June 15, 1921, and recorded August 3, 1923, and also to foreclose a deed given by them to her, which was intended to be, and is, a mortgage, and will be so treated, in the amount of $18,966.28, covering the same land as that covered by the last-mentioned mortgage, dated November 1, 1921, and recorded August 3, 1923. Each instrument above mentioned was delivered to Mrs. Church on or about the date of its execution. The issues and evidence in each suit are the same as far as the matters involved herein are concerned, and will be considered and determined in this opinion.

The pleadings filed are somewhat voluminous and will not be set out at length. However, the trustee contends that, at the time these respective mortgages were given, Hanks was insolvent, which was known to Mrs. Church; that such insolvency continued until August 4, 1923, when Hanks was adjudicated a bankrupt; that, notwithstanding her knowledge of the insolvency, she intelligently and collusively withheld her mortgages from record until she learned that Hanks was contemplating bankruptcy, in pursuance of an agreement with Hanks whereby his credit

might be preserved; that these mortgages are instruments required by law to be recorded, and that their recordation within four months prior to the filing of the petition in bankruptcy constitutes a preference under section 60*a* of the federal bankruptcy act, regardless of the date of their execution and delivery.

These contentions of the trustee are denied by Mrs. Church, and she further alleges that these mortgages were given more than four months before the filing of the petition in bankruptcy, and for a then present and valid consideration, and that the same were recorded before the filing of the petition in bankruptcy. In each instance she prays a decree establishing her respective liens, and a foreclosure and sale as by law provided.

Upon the issues thus raised, trial had to the court. Decree entered finding that such mortgages are fraudulent as to creditors of the bankrupt, and are canceled and set aside, and foreclosure thereof denied. From these respective decrees, Mrs. Church appeals.

It will be seen that the trustee challenges these mortgages on the ground that they are void as to the creditors by him represented, under section 60*a* of the bankruptcy act, because recorded within four months before the filing of the petition in bankruptcy. Section 60*a* of such act is as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, * * * made a transfer of any of his property, and the effect * * * will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required." 32 U. S. St. at Large, ch. 487, p. 799.

Thus, we must determine whether the mortgages in question were "required" to be recorded by our state law, so

that the failure to record them more than four months before the filing of the petition in bankruptcy gave rise to a preference in favor of Mrs. Church and against the challenging creditors, under the above section. By the provisions of section 5612, Comp. St. 1922, unrecorded deeds, mortgages and other instruments required to be recorded speak from their date and are not void as to all creditors, but to such creditors only whose deeds, mortgages and other instruments are recorded prior to the ones attacked. The creditors represented by the trustee were each without deed, mortgage or other instrument of record when the instruments in question were recorded, or at any time thereafter, hence such section cannot avail him or such creditors. Therefore, as these mortgages were not required to be recorded under our state law in order to be valid between the parties and as against these creditors, the recording thereof within four months before the petition in bankruptcy was filed did not create a preference under section 60*a*, *supra*. *Cary v. Donohue*, 240 U. S. 430.

The remaining question to be decided is whether or not these challenging creditors were misled to their pecuniary injury by reason of having extended credit to Hanks, while relying upon the then state of the record, and without knowledge of these mortgages to Mrs. Church. From a careful examination of the evidence in the light of the able briefs filed, we are convinced that each of the respective mortgages attacked by the trustee, including that of the deed which, as before mentioned, was at all times intended to be, and is, a mortgage, was given at a time when Hanks is not shown to have been insolvent, for a consideration passing from Mrs. Church to Hanks, consisting of previous debts due the former from the latter, as well as money advanced by Mrs. Church at the time, all of which went to the credit of Hanks, thus augmenting his estate rather than diminishing it. Neither were the mortgages kept from record with an intent on the part of Mrs. Church to mislead or defraud, nor in furtherance of any agreement or understanding so to do, and neither of the respective creditors

disclosed by the record was misled thereby. Furthermore, she has met the burden cast upon her as to transactions between relatives, as well as that of removing the adverse presumptions arising from her failure to record these instruments before she did, by a preponderance of the evidence.

Thus, we are left with two innocent parties, namely, the trustee as a judgment creditor with execution returned unsatisfied, as provided in the bankruptcy act, simply holding a lien on the property in the land in Hanks at the time of the filing of the petition in bankruptcy, and Mrs. Church, with each of her mortgages recorded. In *Minor Lumber Co. v. Thompson*, 91 Neb. 93, a similar situation presented itself, and we held: "A prior unrecorded mortgage on real estate, made in good faith and for a valuable consideration, will take precedence of a title derived by virtue of a sale under attachment or execution, if such mortgage is placed on record before the sheriff's deed based upon such proceedings is recorded." In the same opinion, following *Harral v. Gray*, 10 Neb. 186, and *Mahoney v. Salsbury*, 83 Neb. 488, we held that the same rule applies to a deed. And the recording is the essential feature. *Naudain v. Fullenwider*, 72 Neb. 221.

The equities are entirely with Mrs. Church. The debts due her, as shown by these respective transactions, no one disputes. She, with almost childlike faith and confidence, permitted certain of the creditors to place her money and securities where to them it was deemed to their best interests, and in most instances, if not all, to her own pecuniary disadvantage. A further detail of the evidence, as well as of our reasons for the conclusion reached, would be without purpose.

As we view the records, the finding and judgment of the district court, as between the trustee and the creditors by him represented and Mrs. Church, as to each of these respective mortgages in the respective suits, should have been in favor of Mrs. Church and against the trustee, as prayed by her, and the court committed reversible error in not so finding and entering judgments.

The judgment of the district court in the instant case is reversed and set aside, and the suit remanded, with instructions to proceed in harmony with this opinion.

REVERSED.

Note—See Bankruptcy, 7 C. J. secs. 258, 283, 438.

UNITED STATES TRUST COMPANY, APPELLEE, V. GILBERT E. HANKS ET AL., APPELLEES:
IOLA H. CHURCH, APPELLANT.

FILED JUNE 12, 1925. No. 24415.

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

Burkett, Wilson, Brown & Wilson, for appellant.

Pitzer & Tyler, Paul Jessen, Crofoot, Fraser, Connolly & Stryker, contra.

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

THOMPSON, J.

This case having been submitted in this court together with the case of *Stocker v. Church, ante,* p. 639, and the facts and law applicable thereto in each case being substantially the same, that part of the judgment of the district court in favor of Albert E. Stocker, trustee of the estate of Gilbert E. Hanks, bankrupt, and against Iola H. Church and Luther J. Church, is hereby reversed and set aside, and this case remanded, with instruction to proceed in harmony with the opinion in *Stocker v. Church, supra.*

REVERSED.

NEBRASKA CITY NATIONAL BANK, APPELLEE, V. GILBERT E. HANKS ET AL., APPELLEES:
IOLA H. CHURCH, APPELLANT.

FILED JUNE 12, 1925. No. 24422.

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

Burkett, Wilson, Brown & Wilson, for appellant.

Pitzer & Tyler and *Paul Jessen, contra.*

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

THOMPSON, J.

This case having been submitted in this court together with the case of *Stocker v. Church, ante,* p. 639, and the facts and law applicable thereto in each case being substantially the same, that part of the judgment of the district court in favor of Albert E. Stocker, trustee of the estate of Gilbert E. Hanks, bankrupt, and against Iola H. Church and Luther J. Church, is hereby reversed and set aside, and this case remanded, with instructions to proceed in harmony with the opinion in *Stocker v. Church, supra.*

REVERSED.

HARRY KEISER, APPELLEE, V. LEVI KEISER, APPELLANT.

FILED JUNE 12, 1925. No. 24072.

1. **Insane Persons**: COMPETENCY: PETITION. A petition which sets forth the members of the immediate family of an alleged incompetent, his residence, and alleges that he, "by reason of extreme old age or other cause or causes, is mentally incompetent to have charge and management of his property," is sufficient to confer upon the court jurisdiction to make the necessary inquiry, and is not vulnerable to a general demurrer.
2. ———: ———: QUESTION OF FACT. The incapacity of an individual, which, within the statute, will authorize the appointment of a guardian, is a question of fact in each case for the

trial court, whose finding thereon will not ordinarily be disturbed.

3. ———: ———: SCOPE OF INQUIRY. While the scope of the examination rests in the sound discretion of the court, the examination should be limited to such inquiries as have for their object the finding and determination of the mental condition of the subject of the inquiry.

4. ———: "INCOMPETENT." The descriptive words, "mentally incompetent," "incompetent," and "incapable," as used in sections 1589, 1590, Comp. St. 1922, mean any one who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause or causes, unable or incapable, unassisted, of properly taking care of himself or managing his property, and by reason thereof would be liable to be deceived or imposed upon by artful or designing persons.

5. ———: "MENTAL INCOMPETENCY." Mental incompetency or incapacity is established when there is found to exist an essential privation of reasoning faculties, or when a person is incapable of understanding and acting with discretion in the ordinary affairs of life.

6. ———: APPOINTMENT OF GUARDIAN. Where a person has insufficient mental capacity for the just protection of his property and his mental condition is such that he is guided by the will of others instead of his own in its disposition, a guardian should be appointed.

7. ———: ———: SANITY: EVIDENCE. In a proceeding for the appointment of a guardian for alleged incompetency because incapable of caring for his property, where the person is a party to the proceeding and has not been adjudged insane, his admissions, declarations, and showing of facts inconsistent with mental soundness are admissible as substantive evidence on the issue of sanity.

8. ———: SANITY: COMPETENCY. "Sanity and competency to manage an estate are not synonymous terms. A man may be sane in the sense that it is not necessary to incarcerate him in an asylum and yet be incompetent to manage an estate, even though he be not a spendthrift or a drunkard." *Guardianship of Farr*, 169 Wis. 451.

APPEAL from the district court for Saunders county: FREDERICK E. SHEPHERD, JUDGE. *Modified and remanded.*

Morgan & Strehlow, Slama & Donato and *Thomas, Vail & Stoner*, for appellant.

J. C. Bryant, J. H. Barry and *H. A. Bryant, contra.*

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

EVANS, J.

Harry Keiser, son of Levi Keiser, filed in the county court of Saunders county a petition, alleging that Levi Keiser, his father, was 79 years of age, and the owner of notes and securities in the sum of $40,000; that the parent, Levi Keiser, had fallen into the hands of a designing woman; that by reason of extreme old age and other causes Levi Keiser was mentally incompetent to have charge of his estate or manage his property, and that he was wasting his estate, and if permitted to so continue would be reduced to want and will become a county charge; and the petitioner prayed that a guardian be appointed over his estate. Notice of the time and place of the hearing on the petition was served upon Levi Keiser and hearing had on February 15, 1925. A general demurrer was filed to paragraphs No. 4 and No. 5 of the petition, which was overruled. On February 19, 1925, after a hearing, Levi Keiser was found by the county judge to be mentally incompetent, and Eli Keiser, his brother, was appointed guardian of the person and estate of Levi Keiser. From this order and judgment of the county court, Levi Keiser appealed to the district court, and said cause was tried in the district court, the petition filed therein alleging substantially the same facts as that filed in the court below. The appellant demurred to the fourth, fifth and sixth paragraphs of the petition. The demurrer was overruled and the case was tried to the court without the intervention of a jury. The court found:

"That by reason of extreme age, or other causes, the said Levi Keiser is incompetent and unable to care for his person or to have charge or control of his property and estate, and that it is for the best interests of all concerned that a guardian be appointed for the purpose of caring for the person and property and estate of said Levi Keiser.

"The court further finds that the guardian, heretofore appointed by the county court, was properly appointed, and that the decision of said county court and the appointment of said guardian ought to be approved by this court.

"It is therefore ordered, adjudged and decreed that the decision and appointment of the said county court of Saunders county, Nebraska, be, and the same hereby is, approved, and the said Eli Keiser is appointed guardian of the person and property and estate of the said Levi Keiser.

"It is further ordered and decreed that said guardian be, and he hereby is, ordered and directed not to remove the said Levi Keiser from the county of Saunders, nor from his home therein, nor to restrain him of his personal liberty, until the further order of the court."

From this judgment Levi Keiser has appealed to this court.

The first question presented for consideration is the overruling of appellant's demurrer to the petition, which ruling is assigned as error. The assignment seems to be based upon two propositions: (a) That the petition should be presented by the peace officer of the county; (b) that facts sufficient to give the court jurisdiction are not alleged in the petition. The petition is presented by Harry Keiser, and alleges that he is a son of Levi Keiser, the alleged incompetent, and, within the terms of the statute, a relative; that the family of Levi Keiser consists of the petitioner and a sister. The court is thus advised as to the family and relatives of the alleged incompetent. It is not necessary that all of the relatives join in the petition, as the case, *Prante v. Lompe*, 77 Neb. 377, clearly recognizes the right of the next of kin to resist in such an action; and to hold that all must join in the petition would result in closing the court in many meritorious cases to a proper petition setting forth a well-founded case.

The appellant also claims that, because of the allegation that Levi Keiser is wasting his estate, an officer in charge of the poor should have filed the petition. This contention as made is unsupported by either authorities or reason.

The son filed the petition and in it set forth the persons constituting the family of the alleged incompetent. The provision of the statute as to a spendthrift is that the proper officer "of a county of which such spendthrift is an inhabitant *may* present a complaint." The petition is not vulnerable, therefore, to a demurrer because of the person by whom the petition is presented.

Our statute is almost identical with the Michigan statute, and the construction of the supreme court of that state may be examined as touching the allegations necessary thereunder, and hence under the statute of this state.

In *In re Bassett*, 68 Mich. 348, while other questions are presented and decided, the precise question raised by this demurrer is considered and decided. It is there held that a petition praying for appointment of a guardian for one not of sound mind, alleging that he was mentally incompetent to have the care and management of his property, was sufficient. The allegation of the petition in this case is "that Levi Keiser, by reason of extreme old age or other cause or causes, is mentally incompetent to have charge and management of his property." This allegation is sufficient and is aided by other allegations equivalent thereto. The petition is sufficient and there was no error in overruling the demurrers.

It is urged by the appellant that the fact that Levi Keiser is 79 years old is no evidence that he is mentally incompetent to transact his ordinary business affairs. He also insists that the fact that Levi Keiser loaned money to Mrs. Buell under the circumstances and conditions present in this case is not evidence of incompetency. It may be conceded that, were there no other evidence of incompetency than the age of Mr. Keiser and the loan to Mrs. Buell, it would not support a finding of mental incapacity, but the record is not so lacking or circumscribed.

Old age and failure of memory do not, of themselves, establish incompetency to care for ordinary business affairs. *Speer v. Speer*, 146 Ia. 6. The fact that a man is 79 years old, and, by reason of his feeble condition, has not sufficient strength of mind to manage his business with or-

dinary care and prudence, does not warrant the appointment of a guardian under the provisions of section 1590, Comp St. 1922, which provides for the appointment of a guardian of the property for a person of unsound mind.

No set rule can be enunciated which will be a safe criterion in all cases. It is not sufficient that incompetency alone is established, for it may well be, even where incompetency exists, that the situation and surroundings of the incompetent are such that no necessity exists for the appointment of a guardian, and that no good purpose would be served thereby. The incapacity of a person, which, within the statute, will authorize the appointment of a guardian, is a question of fact in each case for the trial court, whose finding thereon will not ordinarily be disturbed. *Goddard v. Treat,* 83 Conn. 516.

While the scope of the examination rests in the sound discretion of the court, the examination should be limited to inquiries which have for their object the finding and determination of the mental condition of the subject of the inquiry. 37 C. J. 640, sec. 443; *Alvord v. Alvord,* 109 Ia. 113. It has been held that in making a test as to mental incapacity the same test should be applied as in suits to avoid deeds and wills. *Leatherman v. Leatherman,* 82 W. Va. 748. But the present proceeding is under a statute, one of whose purposes is, indeed its chief purpose is, to prevent the necessity of such actions; and, while each individual is entitled to control his own property, the legislative intent was to prevent its dissipation in litigation over contracts secured by improper persons through improper means and to save to the owners of such property that which age and disease have made them unable and incapable to save for and to themselves.

The appellant complains that the court permitted non-expert witnesses to give opinions as to the mental capacity of Levi Keiser without having first laid a proper foundation for the same, and avers that so doing constituted prejudicial error. Where a case is tried to the court without a jury, upon review thereof in this court it will be presumed

that the trial court in arriving at its decision considered only competent and material evidence. And "this court will not reverse the judgment in a case tried to the court without a jury merely because of the admission of improper evidence." *Lunney v. Healey*, 56 Neb. 313.

The descriptive words, "mentally incompetent," "incompetent," and "incapable," as used in sections 1589, 1590, Comp. St. 1922, mean any one who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause or causes, unable or incapable, unassisted, of properly taking care of himself or managing his property, and by reason thereof would be liable to be deceived or imposed upon by artful or designing persons. Mental incompetency or incapacity is established when there is found to exist an essential privation of reasoning faculties, or when a person is incapable of understanding and acting with discretion in the ordinary affairs of life. Where a person has insufficient mental capacity for the just protection of his property and his mental condition is such that he is guided by the will of others instead of his own in its disposition, a guardian should be appointed. *Lang v. Lang*, 157 Ia. 300. In a proceeding for the appointment of a guardian for alleged incompetency because incapable of caring for his property, where the person is a party to the proceeding and had not been adjudged insane, his admissions, declarations, and showing of facts inconsistent with mental soundness are admissible as substantive evidence on the issue of sanity. *Conway v. Murphy*, 135 Ia. 171.

"Sanity and competency to manage an estate are not synonymous terms. A man may be sane in the sense that it is not necessary to incarcerate him in an aslyum and yet be incompetent to manage an estate, even though he be not a spendthrift or a drunkard." *Guardianship of Farr*, 169 Wis. 451. See, also, *Robinson v. Van Camp*, 79 Ind. App. 382.

The record has been carefully examined, and the court is convinced that, in consequence of the character, extent, and kind of property of which the estate consists, the find-

ing of the trial court—"That by reason of extreme age, or other causes, the said Levi Keiser is incompetent and unable to care for his person or to have charge or control of his property and estate, and that it is for the best interests of all concerned that a guardian be appointed for the purpose of caring for the person and property and estate of said Levi Keiser"—is fully sustained by the evidence.

A careful consideration of sections 1576-1621, Comp. St. 1922, leads the court to the conclusion that it was not the legislative intent to at any time deprive an individual of his right to liberty of action, and that under sections 1589, 1590, 1591, Comp. St. 1922, it was the intent, in a proper case, to vest authority in the court to appoint a guardian of either the person or estate, or of both, as the circumstances of the particular case require.

There is, however, an entire lack of evidence that Levi Keiser is in such condition as to be a menace either to himselm or to others, and the provision in the judgment of the trial court—"It is further ordered and decreed that said guardian be, and he hereby is, ordered and directed not to remove the said Levi Keiser from the county of Saunders, nor from his home therein, nor to restrain him of his personal liberty, until the further order of this court"—is right and proper, and should be and is approved, and he should be left in his present family relations uninterfered with in the engagement of his liberty.

This court further finds that Eli Keiser, who is appointed as guardian, has interests which conflict, or are liable to conflict, with those of the estate of Levi Keiser, and he should not have been appointed as guardian of the person and estate of said Levi Keiser, and that a disinterested person and one competent to properly care for Levi Keiser's estate should be appointed in his stead.

Section 9151, Comp. St. 1922, provides:

"When a judgment or final order shall be reversed either in whole or in part, in the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment."

As the decision in this action has been modified in so far as the person of the guardian is concerned, and as both parties in this litigation in proceedings herein have expressed confidence in Hugo A. Wiggenhorn, the said Hugo A. Wiggenhorn is hereby appointed guardian of the person and estate of Levi Keiser under the terms and conditions of this judgment, and the statute with reference thereto, with directions that he appear in the county court of Saunders county and take the oath of office and give the bond required by law, the same to be approved by the county judge of said county.

The decision of the trial court is modified accordingly and the cause is remanded for further proceedings in accordance with this opinion.

MODIFIED AND REMANDED.

Note—See Insane Person, 32 C. J. secs. 172, 197, 254, 264.

LOUISE KERKER, APPELLANT, V. ERNEST KERKER, APPELLEE.

FILED JUNE 12, 1925. No. 23148.

Divorce: EXTREME CRUELTY: SUFFICIENCY OF EVIDENCE. Evidence examined and found insufficient to warrant decree of divorce for extreme cruelty.

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

Boehmer & Boehmer, for appellant.

Charles E. Matson and *Mills, Beebe & Mills, contra.*

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

REDICK, District Judge.

Action for divorce on ground of extreme cruelty. Plaintiff and defendant were married in 1892 and lived together about 30 years. They had three children, the oldest of whom died in 1919, and a son and daughter remain. They lived on a farm of 120 acres until 1919, when they moved

to Lincoln, where they purchased and operated a rooming house, the furniture for which was purchased by plaintiff with her own funds, and later the premises were purchased by defendant for $3,800 subject to a mortgage for $3,200. The farm was rented to the son, and the daughter lived in Lincoln with plaintiff. In August, 1921, defendant conveyed the Lincoln property to plaintiff in payment of moneys she had advanced during the marriage. At about this time defendant moved back to the farm, and the parties have not lived together since. Upon trial, the district court denied plaintiff a divorce and dismissed the action. Plaintiff appeals, and the only question to be considered is whether the court erred in refusing to grant plaintiff a divorce.

It would serve no useful purpose to set forth the evidence. There were no acts of physical violence, and the cruelty complained of consisted almost entirely of outbursts of temper on the part of defendant, directed toward the children and plaintiff impartially. It is not contended that plaintiff's health was affected by these outbursts. In fact, the evidence seems to show that she paid no particular attention to them at the time, and during these quarrels plaintiff talked quite as loud as defendant. The acts complained of relate almost entirely to a period six years or more before the suit was brought and the quarrels almost without exception resulted from controversy over family expenses. The parties are both possessed of high tempers and seemingly make no effort to control them. The result has been a rather stormy married life, but incompatibility of temper is not a ground of divorce in this state. This court has construed "extreme cruelty" to mean: "Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health or endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony." *Ellison v. Ellison*, 65 Neb. 412. We have examined the evidence with care and find it quite

insufficient to support a decree of divorce within the spirit of this definition. The parties are at present living apart. The plaintiff appears to be conducting the rooming house successfully, and her income is considerably more than that of defendant from the farm. They are nearly 60 years of age, and we perceive no legal ground for divorce. The judgment of the district court is

AFFIRMED.

FROST, CURYEA & MURTEY, APPELLEE, V. ERNEST RONNE ET AL., APPELLANTS.

FILED JUNE 12, 1925. No. 23211.

1. **Agency: PROOF.** Evidence of the acts or declarations of a person alleged to be an agent is not admissible for the purpose of establishing the agency.
2. **Mechanics' Liens.** Evidence examined, and *held* insufficient to support the decree establishing a mechanic's lien.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Affirmed in part, and reversed in part.*

James E. Bednar, for appellants.

J. A. Capwell, D. O. Dwyer and *Homer L. Kyle, contra.*

Heard before MORRISSEY, C. J., DEAN, DAY and EVANS, JJ., and REDICK, District Judge.

REDICK, District Judge.

Action to foreclosure a mechanics' lien on a 240-acre farm in Cass county, owned by Fred Ronne until his death April 18, 1921, when it passed to his heirs, who are made defendants. The Lincoln Joint Stock Land Bank and Nebraska State Bank held mortgages on the land, were made defendants, and filed cross-petitions praying establishment of the liens thereof prior to plaintiff's alleged lien. Decree was rendered finding the mortgage of Lincoln Joint Stock Land Bank a first lien; a mechanic's lien in favor of plaintiff for $978.87 second, and Nebraska State Bank mortgage third. The Ronne heirs and Nebraska State Bank appeal

from decree allowing the mechanics' lien, the validity of which is the only question presented.

Plaintiff alleges that it is a partnership engaged in the lumber business at Manley, Nebraska; that Fred Ronne was the owner of the lands upon which the improvements were made, and on March 9, 1920, plaintiff made an oral agreement with Fred Ronne to furnish materials for the construction of a hog house and for other materials for the improvement of said lands; that said materials were furnished between March 9, 1920, and April 18, 1921, in the amount of $903.35, and that a claim of lien therefor was duly filed August 12, 1921. These matters were put in issue by proper pleadings. The error assigned is that the decree is not supported by the evidence, which requires a brief summary thereof. Plaintiff had no dealings directly with Fred Ronne, who lived in Weeping Water. The entire negotiations were with Frank Ronne, a son of Fred, who was in possession of the land as a tenant of his father at a cash rental. The existence of a contract with the owner as a basis for the lien, therefore, depends upon the alleged agency of Frank. The evidence claimed to establish such agency is the fact that Frank was the son of Fred; that he was a tenant of Fred's farm, and that, when the arrangement was made and first materials bought, Frank told plaintiff that "he was going to build a hog house; that his father and him had talked it over," and told plaintiff to charge the materials to him (Frank) and his father would pay him and he would pay plaintiff.

Frank, called as a witness for plaintiff, denied the statements attributed to him. But, assuming plaintiff's evidence to be true in every particular, it is clearly insufficient to establish agency. Frank as a tenant had no authority to incumber the land for improvements. *Waterman v. Stout*, 38 Neb. 396; *Moore v. Vaughn*, 42 Neb. 696. As a son of Fred Ronne he had no implied authority. No circumstances are shown in the evidence authorizing such implication. The son was not living with the father as a member of his family. The father lived in a distant city, though in the

same county, and is not shown to have had any knowledge that the hog house was being built. There is no evidence of holding out one as agent. The supposed principal is not connected with the transaction except by the alleged declarations of the agent. On the contrary, it appears that Frank had dealt with plaintiff on his own account for two or three years; that the materials in question were charged to Frank; that the death of the father occurred about a month after the first bill was bought; that plaintiff took Frank's note for $650 about November, 1921, and subsequently renewed it; that plaintiff never demanded payment from Fred Ronne nor the estate until August, 1921, some 15 months after his death. There is nothing to show what materials went into the hog house and what for other improvements. The proof of agency rests entirely upon the declarations of the alleged agent, when not under oath, which are not competent for that purpose. *Farmers Cooperative Shipping Ass'n v. Adams Grain Co.*, 84 Neb. 752; *Fitzgerald v. Kimball Bros.*, 76 Neb. 236. When called as a witness, he denied making such declarations. The distinction between evidence of the declarations of the supposed agent, not under oath, and his testimony upon the trial, as proof of the fact of agency, is pointed out in *George v. Leypoldt & Pennington*, 108 Neb. 395. Other questions are discussed in the briefs; but, in view of our conclusion above stated, it is not necessary to decide them.

Decree of district court reversed and cause remanded, with instructions to dismiss plaintiff's action at its cost, in all other respects, the decree is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

ROY SCOTT V. STATE OF NEBRASKA.

FILED JUNE 12, 1925. No. 24472.

1. **Criminal Law: TRIAL: PRESENCE OF ACCUSED.** In a felony case, not capital, a defendant out on bail may waive his right to be present at the trial during some of the proceedings.
2. ———: ———: ———: **ADDITIONAL INSTRUCTIONS.** While

the jury were deliberating, the defendant, out on bail, voluntarily absented himself from the courtroom without informing the court where he could be found. *Held*, that he thereby waived his right to be present when the jury were called into court and given further instructions, and the giving thereof under such circumstances was not error.

3. ———: ———: REFUSAL OF INSTRUCTIONS. Refusal of court to give certain instructions, requested by defendant, *held* not prejudicially erroneous.
4. **Evidence** examined, and *held* sufficient to sustain verdict.

ERROR to the district court for Franklin county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

Leon Samuelson and *C. P. Anderbery*, for plaintiff in error.

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

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

REDICK, District Judge.

Plaintiff in error, hereinafter called defendant, was convicted of the crime of an assault to kill, sentenced to the penitentiary for a term of four years, and brings error to this court, assigning a number of errors in the proceedings. The first one involves a matter of procedure arising out of the following facts: After the jury had deliberated for some time, the judge, upon his own motion, called them into open court and read to them a written supplemental instruction concerning their duty as jurors in arriving at a verdict. The substance of this instruction is not criticised, but the objection is that it was given to the jury without notice to, and in the absence of, defendant, who was out on bail. Defendant's counsel were present and objected to the proceeding, but not upon the ground of defendant's absence, which fact was not, at the time, observed by either court or counsel. It may be observed, in passing, that the journal entry upon the records of the court recites the presence of the defendant, and ordinarily this fact would conclude the inquiry. But it appears from the opinion of the trial judge

included in the bill of exceptions, and was admitted upon the hearing, that the defendant was not present; so, in view of the serious nature of the crime charged and the importance of the question, we have concluded to pass the point and consider the assignment of error.

Defendant's contention is based upon section 10129, Comp. St. 1922, reading: "No person indicted for a felony shall be tried unless personally present during the trial."

It is insisted, and no doubt is the law, that under this statute defendant has a right to be present at all times when any proceeding is taken during the trial, from the impaneling of the jury to the rendition of the verdict, inclusive, unless he has waived such right; and, it being a personal right to the defendant, the waiver thereof, if permitted, must be by him personally, and not by his attorneys.

It is pretty generally held that, in capital cases, neither the defendant nor his counsel can waive the right to be present during the trial. *Hill v. State,* 54 Tex. Cr. Rep. 646. And in other felony cases it is uniformly held that, where the defendant is in custody, it is the duty of the court to have him brought into court when any proceeding connected with the trial of the case is taken. *Roberts v. State,* 111 Ind. 340; *State v. Myrick,* 38 Kan. 238; *State v. Beaudin,* 76 Wash. 306; *Kinnemer v. State,* 66 Ark. 206; *Bonner v. State,* 67 Ga. 510—cited by defendant. But there is some difference of opinion among the authorities as to the effect of defendant's absence during some proceeding of the trial when he is out on bail. We think the weight of opinion and the better reasoning is found in those cases which hold that it is the duty of the defendant under bail to attend the sessions of the court, and especially when his case is being tried, and his failure to do so constitutes a voluntary absence on his part and a waiver of his right under the statute quoted. 12 Cyc. 527. In *State v. Way,* 76 Kan. 928, a felony case, the defendant was out on bail and a verdict of guilty was received in his absence and that of his attorney, and it was held, though in pursuance of instructions of his attorneys he held himself in readiness

to be called and was within a half a block of the courthouse, that "the defendant was voluntarily absent from the court without permission, and thereby waived his right to be present when the verdict was received, if that right can ever be waived." The Kansas statute is substantially the same as ours. See, also, *Commonwealth v. McCarthy*, 163 Mass. 458; *Frey v. Calhoun*, 107 Mich. 130. In *Barton v. State*, 67 Ga. 653 (distinguishing cases where defendant is in custody) the court said: "But the case is quite different, when, after being present through the progress of the trial and up to the dismissal of the jury to their room, he voluntarily absents himself from the courtroom where he and his bail obligated themselves he should be." *Sherrod v. State*, 93 Miss. 774, was a capital case, and the judgment was reversed because verdict was received in defendant's absence, but concedes the rule as above stated in felony cases not capital.

In the above cases the irregularity complained of was the reception of the verdict in defendant's absence, but the reasoning applies with equal cogency to the situation in the instant case. It was defendant's duty to attend the court until the trial was concluded by verdict. If he desired to insist upon his right to be present at any orderly proceeding in the case after the jury had retired, he should have notified the court to that effect and where he could be found. His arrangement with his attorneys in that regard, not brought to the attention of the court, was not sufficient. *Barton v. State, supra.* Defendant cites *Davis v. State*, 51 Neb. 301, as to the right of defendant to be present. This is not disputed. What we hold is that, in the present case, he waived that right. If defendant, out on bail, may prevent the completion of the trial by voluntarily absenting himself, and thus tie the hands of justice, he would be permitted to take advantage of his own wrong. The law allows no such thing. We conclude that by his voluntary act he waived the right to be present when the instruction was given.

While, doubtless, the court should, and generally will,

make reasonable effort to secure the presence of defendant at any proceeding during the trial, we are convinced that in this case no prejudice resulted to defendant, and, even though the action of the court were technically erroneous, the judgment should not be reversed on that account. Comp. St. 1922, sec. 10186.

Error is assigned upon the court's refusal to give request No. 2 of defendant to the effect that the fact that defendant had been courting the former wife of the prosecuting witness did not justify the latter in attacking defendant, and No. 3, that the prosecuting witness was of a quarrelsome disposition did not affect the nature of the act of shooting him and should be considered only upon the question of self-defense. While these requests state correct propositions, they are largely argumentative, and we think no prejudicial error is shown by the refusal, in view of the fact that by instruction No. 5, given by the court, the law of self-defense was clearly stated, and the jury told that, if they "find from the evidence that at the time defendant shot Roy Diederich, the circumstances surrounding the defendant were such as in sound reason would, and did, justify and induce in his mind an honest belief that he was in immediate danger of receiving from Roy Diederich great bodily harm," then his act was excusable.

The refusal of the court to receive the clothing of Mabel Diederich in evidence is urged as error. No offer was made as to what was expected to be proved, but from the defendant's brief it seems the clothing would not show any blood spots. The other evidence, however, showed that fact and was undisputed, so defendant had the benefit of that fact.

Complaint is made because of the refusal of the trial judge to order a transcript and bill of exceptions to be paid for by the county in order that defendant might prosecute error to this court, an affidavit of poverty having been filed by defendant in the form required by statute. In view of the fact that defendant has been heard in this court, and of our conclusion that the judgment must be affirmed, we think the defendant has suffered no prejudice by the order of the court, and that it is not necessary to decide the point.

Lastly, it is contended that the verdict is not supported by sufficient evidence. The shooting was admitted, and the evidence of the circumstances is in conflict. The question of self-defense was one for the jury, and, if they believed the testimony of the prosecuting witness, which is corroborated by a number of circumstances, it was their right to do so. A careful examination of the record convinces us that the evidence is sufficient to support the verdict.

JUDGMENT AFFIRMED.

RICHARDSON COUNTY, APPELLANT, V. DRAINAGE DISTRICT NO. 1, RICHARDSON COUNTY, APPELLEE AND CROSS-APPELLANT: HENRY C. ZOELLER ET AL., CROSS-APPELLEES.

FILED JUNE 12, 1925. No. 24305.

1. **Drains:** REPAIR. The right of the supervisors to keep a ditch in repair is not limited to making good its defects in the precise place of its original construction, when the nature of the soil and the general topography do not admit of successful operation there, but it includes the right to make the ditch effective to the use for which the license to construct the same was granted, and hence to straighten its channel or to lengthen and better its outlet.
2. ———: ASSESSMENTS: INJUNCTION. While injunction may be had to prevent the collection of assessments because the proceedings to levy such assessments are void, it is nevertheless well settled in this state that the determination of the board levying drainage assessments cannot be successfully assailed by injunction for less cause, particularly when an adequate remedy exists by *quo warranto* or other action at law.
3. ———: ———: INDIAN LANDS. *Held*, that the statute relating to tribal lands of Indians, though intended to prevent a greater levy than $7 an acre for drainage reclamation purposes so long as the title to said lands remained in the government, was not intended to prevent future taxes and impositions upon said lands after the same had been patented to the Indians without restriction as to sale and incumbrance; and *held* that, while the first or initial assessment upon the Indian lands in this case was settled by a payment of not more than $7 an acre, in

accordance with said statute, the district was not precluded from levying subsequent assessments upon said lands after they had been duly patented, the total of all assessments not exceeding the benefits to the lands.

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

F. N. Prout and *P. B. Weaver,* for appellants.

John Wiltse, contra.

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

SHEPHERD, District Judge.

The thing in controversy is a fourth supplemental assessment for a contemplated improvement to Drainage District No. 1, of Richardson county, Nebraska. The ditch is under the drainage act, sections 1744-1812, Comp. St. 1922. The county was assessed $2,396.61 for its roads lying within the district, and other owners proportionately for their lands situate therein.

At the meeting of the supervisors of the district to hear complaints, the county objected that the proposed improvement was not a repair or improvement at all, but a new ditch, and wholly unauthorized; also, that the proposed assessment was in excess of benefits, and accordingly void. It made other objections which will be considered later. Its objections being overruled by the board, it appealed to the district court, where a demurrer was sustained, and the case dismissed. The board thereupon filed a claim with the county commissioners or supervisors for the first instalment of the assessment; the claim was rejected; the board appealed to the district court; and the county brought this suit for an injunction to prevent the enforcement of the assessment, its contention being that the same was absolutely void. Issue was joined and trial was had. The court's finding was in favor of the district and against the county, except that the district was permanently enjoined from

assessing the land of two or more interveners, on the theory that such lands were Indian lands, and subject only to such assessment as had been theretofore made and collected. Both parties appealed, and the case is here upon the appeal of the county and the cross-appeal of the district.

There seems to be no merit in the contention of the county that the assessment levied was in excess of benefits. The record amply sustains the answer of the district on this point. The benefits to county highways were originally found to be $77,349. The first assessment was $18,600 and three subsequent supplemental assessments totaled $14,772.20. Adding the assessment in question, $2,396.61, the whole amounts to less than 50 per cent. of the benefits. *Drainage District No. 1 v. Richardson County*, 86 Neb. 355, does not pretend to state the total benefit to the public highways within the district, but deals only with the original assessment made. The power to lay the special tax was the matter considered in that case. As pointed out by the appellee in his brief, the original report of the engineer and the finding of the board thereon fixed the benefits to the county roads at $77,349.

It is equally clear, and here the above cited case accords with the record of the proceedings of the board of supervisors, that the notice required by the drainage act was duly given, and that opportunity to make objections was afforded in full compliance with the law. The record also affirmatively shows that the county appeared and objected to the fixing of the total benefits at the sum named, as well as to the fixing of the initial assessment at $18,600. Nor can the county contend with good grace to the contrary, when it is considered that it submitted to, and paid, the first three supplemental assessments amounting to $14,772.20.

We come, therefore, to the improvement for which this fourth supplemental assessment was made, the digging of two miles of straight ditch to connect with the Nemaha river below a series of bends which tended to retard the flow of the stream. It seems that by original construction

the old ditch had followed the lower course of Muddy creek to the Nemaha at a point above these bends, and that its waters, greatly augumented by those of three other ditches belonging to drainage districts more recently organized, had carried silt to the river in such quantity as to almost half fill its channel, thus preventing proper drainage and resulting in the frequent flooding of adjacent lands of the district. This condition affected every owner in the district, much as a loss of function in the human body affects the whole man, and became a matter of moment to all. The first move of the board of supervisors was to invite the other districts mentioned to cooperate in cleaning out the channel of the Nemaha. But it received no response from that quarter. Wherefore it found itself confronted with the alternative of doing such cleaning on its own account at an outlay of upwards of $70,000, or digging a new outlet at a cost of about $35,000. It chose the latter, not only because of its lesser cost, but because it judged that a cleaning out of the old ditch and channel would afford only temporary relief, while the new outlet, with its straight course, promised to scour and to improve in width and depth as time went on, thereby permanently furnishing the drainage desired.

But the question is, was it within the power of the board to so decide? Obviously the board's authority in the premises was only what the statute conferred. The portion of the statute upon which the district depends is found in section 1806, Comp. St. 1922, which provides that, if a ditch of this kind shall become "out of repair, obstructed, inefficient, or defective," the board of supervisors may order an assessment for the purpose of placing the same in proper condition, using the original assessment upon the property of the district as a basis for so doing; and that the assessment made by them shall be limited to the amount necessary to make such repairs, remove the obstruction, or remedy the defect, etc. And the district declares that this is sufficient to give it warrant to dig the new ditch, particularly when it is considered in connection with section 1794, Comp. St. 1922, providing:

"In order to effect the drainage of the district, the board is authorized to clean out and remove all obstructions from the bed of any stream, creek, bayou, lagoon, or other water-course in the district; to straighten or shorten and deepen or widen the course of any stream or to abandon the bed of any stream and construct a new channel therefor, and to fill up any channel, or part of a channel of any stream, creek, bayou, or other water-course in order to turn the direction of the volume of water or to concentrate the water so as to deepen and form a main channel."

It would seem that the statute should be construed liberally for the purpose of giving effect to the intent of the legislature, which undoubtedly was to make the drainage contemplated by the act effective. The supervisors of the district were convinced by the advice of their engineer and by their experience that, if they cleaned out the old ditch and the channel of the Nemaha, the work would not only cost a great deal more than a new outlet, but would have to be done over and over because the condition would recur again and again. They concluded that the new ditch would be a proper remedy for the inefficiency and defectiveness of the old, and no more, in substance, than a repair of the same.

The court is of opinion that this was a reasonable conclusion on the part of the supervisors. We so hold, and that the action of the board was entirely within its power. The right of the supervisors to keep the ditch in repair is not limited to making good its defects in the precise place of its original construction, when the nature of the soil and the general topography do not admit of successful operation there, but it includes the right to make the ditch effective to the use for which the license to construct the same was granted, and hence to straighten its channel or to lengthen and better its outlet.

Possibly the plaintiff may be right in its contention that the seat of the difficulty is at the railroad bridge, though we do not think so from our examination of the record. But suppose that such were the case. Upon appeal and in a direct

proceeding it might become the duty of the court to decide the engineering question and give relief. But in this collateral suit for injunction such a question cannot be decided. The only ground upon which we may rightfully grant the relief demanded is that the proposed improvement is beyond the proper limits of a repair. Unless it be of the latter character, we must consider it as for the board to decide, and decline to interfere with the reasonable discretion of that tribunal. While injunction may be had to prevent the collection of assessments because the proceedings to levy such assessments are void, it is nevertheless well settled in this state that the determination of the board levying drainage assessments cannot be successfully assailed by injunction for less cause, particularly when an adequate remedy exists by *quo warranto* or other action at law. *Omaha & N. P. R. Co. v. Sarpy County,* 82 Neb. 140; *Toner v. McCarter,* 58 Ind. App. 682; *Nebraska Telephone Co. v. Cornell,* 58 Neb. 823.

That the cutting of the new outlet is in the nature of an improvement or repair contemplated by the statute is borne out by decided cases in other jurisdictions, notably *Yeomans v. Riddle,* 84 Ia. 147, in which the court used the following illuminating language: "It is made a ground of complaint * * * that a large part of the work was done when the board of supervisors had not established or located a ditch. The repair of a ditch may involve work to be done elsewhere than in or at it. Embankments or walls may be required, and material therefor may be obtained away from the ditch, or a new channel to straighten the old one may be made, and the like, which are rendered necessary by the action of floods or by other causes. The ditch is not expected to excel all the works of man by being perfect from the beginning." In extension of its remarks upon the point in question it was held: "It being necessary, in order to deepen a ditch, that a new outlet be found, and that this be extended into another county, the supervisors have authority to do so." (80 N. W. 886.)

Other cases furnishing support to this view are *Bomsta*

v. Nelson, 137 Minn. 165; *Simpson v. Board of Supervisors,* 186 Ia. 1034. True, if the new ditch were an independent ditch, it would be beyond the power of the board to construct it, as indicated by *Smith v. Monona-Harrison Drainage District,* 178 Ia. 823. But, as we have seen, this is not the case here.

In the course of constructing the original ditch, litigation arose between the plaintiff and the Chicago, Burlington & Quincy and Missouri Pacific Railroad Companies over the assessments imposed upon said companies; and in the course of such litigation, a portion of which had been brought to this court, or was on the way to this court, a settlement was made by which said companies paid a certain sum and were relieved from any further liability in connection with the project, and were guaranteed against any further assessments to be made against them in that behalf. This is assigned as ground upon which the plaintiff should be relieved from payment of the assessment in question, and should have the injunction prayed for. One answer to this, and a very reasonable one, is that the supervisors acted wisely and well, and in due exercise of their legal authority, in making said settlement. Another is, somewhat to the contrary, that under the law the railroad companies could not be relieved by such an agreement, their liability being imposed by the statute and unavoidable. But however this may be, whether the settlement was legal and binding or not, we perceive no reason why a defense upon the part of the county can be predicated upon it. If the action of the supervisors was without power and if the settlement was illegal and of no force, it may be set aside by the county, or by any person particularly interested, in an appropriate proceeding. If the settlement was legal and binding, the county or such interested person may have remedy by a like proceeding. This suit is for injunction, and injunction is not the proper action by which to obtain such relief. If the county may on such grounds prevent the supervisors from repairing and improving by constructing the proposed ditch at an expense of $35,000, it

may also prevent it from repairing and improving by dredging out the old ditch and the old channel at an expense of $70,000. In other words, it may tie the hands of the supervisors and destroy the whole project. No, the plaintiff can prevail in this case only upon the ground that the work contemplated is not authorized by statute at all, and that the proceeding of the supervisors in that behalf was and is void. And this we determine, as the district court determined, adversely to plaintiff.

The proposed assessment is levied ratably against the lands of the interveners Henry C. Zoeller and Herbert Zoeller, which lands lie within the district and are benefited by the improvement. And the record shows that this fourth supplemental assessment, added to what has heretofore been paid for and on account of such lands, does not exceed the benefits. When the original ditch was constructed these lands were Indian lands and were not patented, and, by a United States statute, only a maximum charge of $7 an acre could then be made against such lands. This sum was less per acre than the original assessment levied, but it was received in full of such assessment.

It is contended by the said interveners, however, that such payment was received in full of all assessments made, or to be made, in connection with such project; that such was the specific agreement between the supervisors of the district and the Indian agent or commissioner who acted in behalf of the Indians, and that such was the force of the federal statute.

Sections 4 and 5 of the federal act in question are as follows:

"Section 4. That the said drainage district be, and it is hereby, authorized to assess the cost of reclaiming the tribal lands of the Sac and Fox Indians, and all lands allotted to the Indians in severalty and held by patents containing restrictions as to sale, taxation, and alienation within said district, and to condemn any of said lands, necessary for the purpose of reclamation, in the same manner as said district may condemn other lands. Provided,

that the payments to be made on the taking of lands under the provisions of this section shall be subject to the approval of the secretary of the interior.

"Section 5. That the secretary of the interior be, and he is hereby, authorized, in his discretion, upon application, to issue a fee simple patent to any Indian for the lands allotted to him within said drainage district, and the issuance of such patent shall operate as a removal of all restrictions as to the sale, incumbrance, or taxation of the lands covered thereby." 34 U. S. St. at Large, ch. 3298, p. 263.

But it is plain from the foregoing quotation that the statute makes a distinction between the lands as held by the government for the Indian and the lands after they are patented. These are the significant words: "And the issuance of such patent shall operate as a removal of all restrictions as to the sale, incumbrance, or taxation of the lands covered thereby." Clearly the intention of congress was to give the Indian this particular protection while his property was held by his guardian, the government, and only during that time. Being patented to him, his land became as government lands patented to the whites, and, after a careful examination of the record, we are all of the opinion that the release given by the supervisors was no more than a settlement of the district's demand upon its initial assessment. It follows, therefore, that the finding of the district court upon this point must be held to be incorrect, and that the lands of the interveners should be adjudged to be chargeable with the fourth supplemental assessment made by the board.

It further appears that the said interveners did not pursue their remedy in the direct proceeding; that is to say, they did not file objections before the board of supervisors and go to the district court by appeal or error. Had there been ground for a successful contention on their part, a remedy at law would have been thus available to them. Nor does it appear that they paid to the county treasurer the amount due upon the first call upon the fourth supple-

mental assessment, as provided by section 1810, Comp. St. 1922. A drainage district may make assessments against lands within the district from time to time so long as such assessments do not exceed total benefits. *Hanscom v. City of Omaha,* 11 Neb. 37. The collection of assessments is not to be enjoined until the party complaining shall first pay to the county treasurer the amount of his assessment. Section 1810, Comp. St. 1922. An injunction will not lie where there is an adequate remedy at law. *Nebraska Telephone Co. v. Cornell,* 58 Neb. 823.

Deciding, as we have, that the trial court was without error in finding and holding against the county, and in refusing it an injunction against the defendant, the decree of said trial court is affirmed in this regard. And, finding as we do, that the trial court was in error in holding that the lands of the interveners were not subject to the fourth supplemental assessment, and that the district should be enjoined from attempting to collect the same, the decree of said court in that regard must be, and is, reversed and the cause is remanded to the district court, with instructions to enter an order setting aside said order of injunction and dismissing the case of said interveners.

AFFIRMED IN PART, AND REVERSED IN PART.

Note—See Drains, 19 C. J. secs. 191, 262.

JAMES T. MARGRAVE ET AL., APPELLEES, V. DRAINAGE DISTRICT NO. 1, RICHARDSON COUNTY ET AL., APPELLANTS.

FILED JUNE 12, 1925. No. 24566.

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

John Wiltse, for appellants.

F. N. Prout, contra.

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

SHEPHERD, District Judge.

This is a case upon an agreed statement of facts involving the precise question raised upon cross-appeal in the case of *Richardson County v. Drainage District No. 1, ante,* p. 662. The case was brought by a large number of owners who joined in an application for injunction on the ground that the district was precluded by the federal statute and by the action of its board of supervisors from levying a fourth supplemental assessment for drainage ditch improvements upon their lands. All of these plaintiffs, with two interveners, are the owners of lands patented subsequently to the levying of the original assessment at the time of the construction of the ditch, and subsequently to the settlement made with respect to such initial assessment by the Indian agent and the supervisors of the drainage district. The amount paid on such initial assessment, added to the fourth supplemental assessment contemplated, does not exceed the total benefits to the land.

The court holds, as in *Richardson County v. Drainage District No. 1, supra,* that the district court was in error in finding for the plaintiffs and appellees and in granting the said appellees an injunction against the collection of the assessment made by the appellants.

The decree of the district court is therefore reversed and the cause is remanded, with instructions to enter an order setting aside the decree and dismissing the case at the costs of the plaintiffs and appellees.

REVERSED AND DISMISSED.

FARMERS STATE BANK OF BLAIR, APPELLEE, V. NOAH J. PETERSON, APPELLEE: OSCAR PETERSON, APPELLANT.

FILED JULY 1, 1925. No. 23168.

1. **Bills and Notes: PLEA OF PAYMENT: LACK OF EVIDENCE: INSTRUCTION.** The first defense pleaded, viz., payment of the note in suit, lacked sufficient evidence to sustain it and the court properly withdrew it from the consideration of the jury.

2. Appeal: DIRECTION OF VERDICT. "When the evidence upon a question of fact material to the issue is conflicting, and such that reasonable minds might reach different conclusions, the question is one for the jury, and it is error for the court to direct a verdict." *Von Knuth v. Ryan*, 107 Neb. 351.

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

J. A. Douglas, for appellant.

Gaines, Van Orsdel & Gaines and *M. L. Donovan, contra.*

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

MORRISSEY, C. J.

This action was commenced in the district court for Douglas county to recover the balance alleged to be due plaintiff upon a promissory note in the amount of $7,000, given by defendants to plaintiff.

The petition alleged that plaintiff is a banking corporation; that the note in suit was made and delivered August 4, 1920; that the sum of $3,282.24 had been paid thereon, and concluded with a prayer for the balance alleged to be due. Defendant Oscar Peterson filed an answer, in which he admitted the corporate character of plaintiff, and, that he and his codefendant, Noah Peterson, on the date alleged, signed a promissory note for $7,000 payable to plaintiff and delivered the note to plaintiff; denied all other allegations of the petition; and alleged that, on or before the date of the note in suit, defendant Noah Peterson was indebted to plaintiff in the sum of $7,000, which indebtedness was evidenced by the promissory note of Noah Peterson for that amount secured by a mortgage on certain personal property; that, in consideration of plaintiff's agreement to release the chattels, defendant Oscar Peterson, together with his codefendant, Noah Peterson, executed the note in suit, which fell due November 29, 1920; that in November, 1920, defendant gave his son, Noah Peterson, two checks with which to pay the note; that Noah Peterson deposited

one of the checks to his own account in the First National Bank of Stuart, Nebraska, and then delivered to the Packers National Bank of South Omaha, to whom the note had been sent for collection, his personal check on the Stuart bank for the amount deposited therein, and the other check of Oscar Peterson for the balance; that the Packers National Bank, acting under the direction of plaintiff bank, delivered up the note in suit, together with the original note and chattel mortgage executed by Noah Peterson; that the check drawn by Noah Peterson on the First National Bank of Stuart was subsequently protested for nonpayment, which fact was not brought to the attention of defendant Oscar Peterson until September, 1921, at which time Noah Peterson was insolvent; that by reason of the laches of plaintiff it should not be permitted to maintain this action.

As a further defense, defendant pleaded an accord and satisfaction based upon an alleged agreement whereby Noah Peterson gave a new note to plaintiff for the amount of the protested check, and later returned to plaintiff his original note for $7,000, together with the chattel mortgage securing the same. It is alleged that this agreement was fully executed and defendant was thereby released and discharged from any liability upon the note in suit.

By way of reply, plaintiff denied defendant's defense which is based upon payment and cancelation of the note, and alleged that the original note was delivered to defendant through mistake and on account of the fraud of Noah Peterson, who in the reply is designated "agent and co-defendant" of Oscar Peterson. All allegations of defendant's defense based upon an agreement alleged to have been made between plaintiff and Noah Peterson subsequent to the surrender of the note are denied. Defendant Noah Peterson defaulted.

The cause was tried to a jury, and at the conclusion of the testimony plaintiff moved for a directed verdict, or that the court discharge the jury and enter judgment for plaintiff. This motion was sustained, and the court entered judgment for plaintiff in the amount of $4,249.76, with interest and costs.

The one assignment of error made by appellant, Oscar Peterson, which seems most important is that "the court erred in not submitting the case to the jury."

Defendant pleaded two defenses: First, that the note in suit had been canceled and surrendered by the holder. In support of this defense, appellant introduced the note in suit, signed by himself and his codefendant, which note was marked "Paid." Noah Peterson testified that, when he went to the Packers National Bank to pay the note, an officer of the bank refused to accept the checks he offered as payment until they had been approved by plaintiff; that thereupon this officer of the Packers National Bank called one Gibson, then an officer of plaintiff bank, by long distance telephone, and was directed by him to accept the checks, to cancel the note, and to deliver it, together with the original note signed by Noah Peterson and the chattel mortgage, to Noah Peterson. This conversation is admitted by Gibson, but it is claimed that he was induced to give such direction by the fraud and misrepresentation of Noah Peterson, who was acting for himself and as agent for his codefendant, Oscar Peterson. The defense of payment is without sufficient competent evidence to sustain it and the court correctly withdrew it from the jury.

Has defendant Oscar Peterson been released by an accord and satisfaction between his comaker and the holder of the note? This defense is based upon the alleged agreement made between Noah Peterson and Gibson, then president of plaintiff bank, that the former should give plaintiff his personal note for the amount of the protested check, heretofore mentioned, and return his original note and the chattel mortgage given to secure its payment. The testimony of both parties shows that a new note was given and the original note and chattel mortgage were returned to plaintiff, and the amount which had been paid upon the note here in suit was indorsed upon the indebtedness. As to the terms and conditions of this arrangement, there is such dispute in the evidence that reasonable minds may draw different conclusions. "When the evidence upon a

question of fact material to the issue is conflicting, and such that reasonable minds might reach different conclusions, the question is one for the jury, and it is error for the court to direct a verdict." *Von Knuth v. Ryan*, 107 Neb. 351.

The judgment is reversed and the cause remanded.

REVERSED.

ALBERT EGGERS V. STATE OF NEBRASKA.

FILED JULY 1, 1925. NO. 23517.

Robbery: INSUFFICIENT EVIDENCE. The evidence has been examined, and *held* insufficient to sustain the verdict.

ERROR to the district court for Douglas county: CHARLES A. GOSS, JUDGE. *Reversed.*

W. J. McNichols and *Gerald F. Harrington*, for plaintiff in error.

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

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

MORRISSEY, C. J.

Defendant was tried in the district court for Douglas county upon an information charging him with having robbed one John Sawicki of $15. The jury returned a verdict of guilty, but included in the verdict a recommendation to the court that defendant be paroled. From a judgment and sentence upon the verdict, defendant prosecutes error to this court.

The only assignment which we deem it necessary to consider is the one which challenges the sufficiency of the evidence to sustain the verdict. The complaining witness was deprived of his money by some person in the manner which he detailed to the jury. He undertook to identify defendant as the guilty person, and on such attempted identification the verdict of guilty was returned.

Before his arrest on this charge defendant had not been charged with a violation of any law. The jury were mis-

taken in thinking that, on their recommendation, the court could grant defendant a parole. Had they known that the court could not do so, it is probable that they would not have found a verdict of guilty. The record presented to us strongly indicates that the complaining witness was mistaken in his identification of defendant as the party who robbed him. In a supplemental motion for new trial, he attempted to correct his testimony. The record presented is so lacking in competent proof to sustain the verdict that the judgment cannot be permitted to stand.

The judgment is, therefore, reversed and the cause remanded.

REVERSED.

ELIZA ASHCRAFT, APPELLEE, V. LILLIE DELLA HUFF ET AL., APPELLANTS.

FILED JULY 1, 1925. NO. 24444.

Evidence examined, and *held* sufficient to sustain the judgment.

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

E. C. Hodder, for appellants.

Baker & Ready, contra.

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

MORRISSEY, C. J.

This is a suit in equity to cancel a written contract entered into between the parties to this litigation, April 14, 1920, under which plaintiff delivered to defendants $2,-141.60, substantially all the property which she possessed, and defendants agreed to thereafter provide plaintiff with a home and pay her funeral expenses after her death. The contract contains other provisions which appear to be inconsistent with the main provision, but they are not material to the disposition of this case. At the time of entering into

the contract, plaintiff was 70 years of age. Defendant Lillie Della Huff was her niece and defendant Edward O. Huff was the husband of Lillie Della Huff. Plaintiff was then living at the Old People's Home and paying $1 a day for her maintenance. Although advanced in years, she was employed the greater part of the time in different homes in the city of Omaha as a nurse, or governess, for the children in the homes where she was employed. Immediately upon making the contract in suit, plaintiff established her residence in the home of defendants and continued to live therein as a member of the family until November 30, 1923, but throughout this period she continued to follow her former occupation. Although this employment was irregular, she was so occupied approximately three-fourths of the time. During the two years immediately following the making of the contract, the parties lived amicably together, but thereafter, until the bringing of this suit, there was much discord and unpleasantness.

Plaintiff alleges that defendants breached the contract. Defendants deny the charge. The trial court found generally in favor of plaintiff; found that the reasonable value of the services rendered by defendants to plaintiff during the life of the contract was $600, and, after calculating interest, etc., entered a decree in favor of plaintiff for $1,691.40 and costs. From the judgment thus entered defendants appeal.

Questions of fact only are presented by the appeal. We have made an extended examination of the evidence, but to set it out in detail would serve no useful purpose. From plaintiff's point of view, she was grossly mistreated, while defendants look upon themselves as the injured parties. A dispassionate examination of the evidence, *pro* and *con*, leads to the conclusion that for the most part the irritations and difficulties that arose may be charged to the frailties of human nature. It is doubtful if the parties to the contract ever construed it in the same sense, or appreciated the obligations assumed. During the latter part of plaintiff's residence with defendants, her health was not good.

While defendants may have acted in good faith, yet, from a consideration of all the evidence, the trial court was warranted in finding, as it did, that, "the conduct of said defendants and that of other members of their family has been such as to cause discomfort to plaintiff, and that such conduct was, under all the circumstances of the case, unjustified and unwarranted; that a continuation of the contractual relationship between plaintiff and defendants would be impracticable, and that the same should be dissolved."

In support of this finding, we may say that the testimony of a reputable, disinterested witness is to the effect that, while plaintiff was still in the home of defendants, one of the defendants expressed regret that plaintiff had ever been permitted to become a member of the home and expressed a disinclination to have her continue therein. From a consideration of all the evidence, we have reached the conclusion that the court's findings, and each of them, are proper, and the judgment entered is

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. FARMERS STATE BANK OF CULBERTSON.

UNION AUTOMOBILE INSURANCE COMPANY, CLAIMANT, APPELLEE, V. VAN E. PETERSON, RECEIVER, APPELLANT.

FILED JULY 1, 1925. NO. 24560.

1. **Banks and Banking**: DEPOSIT. The evidence contained in the bill of exceptions *held* insufficient to show such collateral agreement between the depositor and the bank as to bring the deposit in suit within the inhibitions of section 39, ch. 191, Laws 1923.
2. ———: ———: INTEREST. By section 24, ch. 191, Laws 1923, claims against an insolvent state bank based upon certificates of deposit are, as to interest, taken out of the general rule, and, in determining the amount to be paid upon any such claim, interest should be reckoned at the rate fixed in the certificate from the date of the certificate to date of payment, if paid before its maturity, but, if not paid until after maturity, interest should be reckoned from the date of the certificate until its maturity only, and any judgment recovered will bear interest at 7 per cent. from date of hearing in the district court until paid.

APPEAL from the district court for Hitchcock county: CHARLES E. ELDRED, JUDGE. *Affirmed in part, and reversed in part.*

C. M. Skiles and *Butler & James*, for appellant.

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

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

MORRISSEY, C. J.

This appeal grows out of receivership proceedings brought to wind up the affairs of the Farmers State Bank of Culbertson, Nebraska. The Union Automobile Insurance Company filed its claim based upon a certificate of deposit in the amount of $1,500, drawing 5 per cent. interest, and payable one year after its date, which was issued originally to the Bankers National Life Insurance Company, of Denver, Colorado, and assigned by that company to claimant. The receiver refused payment on the ground that it was not a deposit within the meaning of section 39, ch. 191, Laws 1923, and alleged that it had been issued upon a collateral agreement by which the bank's cashier agreed to solicit insurance business for the payee, provided that company would make a deposit in the bank. The trial court found generally for claimant, and directed the receiver to pay the face value of the certificate, plus interest, reckoned at the rate of 5 per cent. per annum for the whole period from the date of the certificate until the final payment of the claim, from the depositors' guaranty fund.

The receiver contends that the court erred in holding that the claim should be paid out of the guaranty fund, and that it was error for the court to allow claimant interest on the certificate of deposit after the date of the appointment of the receiver. The claimant has taken a cross-appeal, contending that the court should have allowed interest to the date of maturity at 5 per cent., and from the date of maturity to the date of the judgment on the amount of the certificate plus accrued interest at the rate of 7 per cent. per annum until paid.

The evidence shows that on June 7, 1923, a vice-president of the Bankers National Life Insurance Company called at the bank, and while there, with the assistance of the bank's cashier, wrote several policies of insurance and arranged to appoint the cashier of the bank the local agent of the company; that on the same date a draft for the amount of the certificate was drawn upon the company and sent with the certificate of deposit here in suit to the company for acceptance, and that the draft was paid. The receipt by the insolvent bank of the amount represented by the certificate is not questioned. But, because the policies were written and the local agency established, the receiver argues that the deposit was not protected by the state guaranty fund. And he cites section 39, ch. 191, Laws 1923, which reads in part as follows:

"No state bank shall receive any deposit upon any collateral agreement or condition other than an agreement for length of time to maturity and rate of interest, and no money deposited in any such bank, upon any such collateral agreement or condition, shall be guaranteed by the depositors' guaranty fund."

A careful reading of the evidence adduced discloses no collateral agreement such as would bring this deposit within the statute cited. The court, therefore, correctly held that the deposit was a proper claim upon the state guaranty fund.

Both parties object to the method adopted by the trial court in computing interest. The receiver contends that no interest should be allowed for the time subsequent to his appointment, and he cites authority in support of the general rule that, after the property of an insolvent passes into the hands of a receiver, interest is not allowed on claims against the funds. These authorities are instructive, but they are not controlling in the instant case. By statute it is provided that "holders of certificates of deposit shall not be entitled to payment until their maturity, according to their terms." Laws 1923, ch. 191, sec. 24. This statute, it will be noted, prevents the holder of a certificate of deposit

from demanding the payment of his claim before maturity, and takes it out of the general rule. Inasmuch as the holder of a certificate of deposit is, by statute, put in a special class, it cannot be said that the appointment of a receiver affects his rights until the maturity of his certificate, when he may rightfully demand payment. It follows that claimant is entitled to interest at the rate fixed in the certificate up to the date of its maturity. From the date of the maturity of the instrument until action is taken by the court upon the claim, no interest should be allowed, as the delay in payment may be said to be the delay of the law. But upon hearing by the court, if the claim be found to be valid, interest from that date should be paid at the rate of 7 per cent. per annum until the judgment is paid. Comp. St. 1922, sec. 2835. *State v. Nebraska State Bank*, 111 Neb. 360.

The judgment is affirmed in part and reversed in part, and remanded, with directions to enter judgment in accordance with this opinion; all costs to be taxed to appellant.

AFFIRMED IN PART, AND REVERSED IN PART.

BENJAMIN ROBIDOUX ET AL., APPELLEES, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED JULY 1, 1925. NO. 23180.

1. Commerce: STATE COURTS: LOSS OF INTERSTATE BAGGAGE. In controversies between passengers and common carriers over the loss of interstate baggage, state courts are bound by the acts of congress, the terms of transportation fixed by the published tariffs on file with the interstate commerce commission, the regulations of that body, and the rules and decisions applied in federal tribunals.
2. Carriers: INTERSTATE PASSENGERS: BAGGAGE: NOTICE. Interstate passengers are charged with notice of the rates and liabilities of common carriers of checked baggage as disclosed by published tariffs on file with the interstate commerce commission pursuant to the acts of congress.
3. ———: ———: ———: ALTERNATIVE RATES. Under published tariffs on file with the interstate commerce commission,

interstate passengers have the alternative of two rates for the transportation of 150 pounds of checked baggage; one based on a value of $100 as a carrying liability, without any compensation beyond the price of the passenger's ticket, and the other an additional charge of 10 cents for each increase of $100 in value, or fraction thereof.

4. ———: ———: ———: ———: ESTOPPEL. An interstate passenger who consents to the lower of two alternative rates for the transportation of checked baggage, the rates being based on different values, is, in the event of a loss, estopped from recovering more than the valuation resulting in the lower rate.
5. ———: INTERSTATE BAGGAGE: ISSUANCE OF CHECK. The issuance and acceptance of a passenger's check for interstate baggage are sufficient compliance with that part of the Carmack amendment requiring the carrier to issue a receipt or a bill of lading.
6. ———: LOSS OF BAGGAGE: RECOVERY. Where there is a partial loss of interstate baggage checked on the lower of two alternative rates based on values, the agreed valuation does not fix an arbitrary limit of recovery but a ratio, the proportion being the amount which the real value of the lost articles bears to the actual value of the entire baggage checked.
7. ———: ———: ———. Interstate regulation of rates for the transportation of shipments based on agreed or fixed values under bills of lading and of amounts recoverable from carriers for losses may apply under similar circumstances to checked baggage belonging to interstate passengers.

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

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

Switzler, Ringer, Switzler & Shackelford, contra.

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

ROSE, J.

This is an action to recover $111.30 for baggage lost or stolen August 15, 1921, by employees of defendant from a trunk while in transit by rail from Omaha, Nebraska, to Winnetka, Illinois. The trunk had been checked on two full-fare passenger tickets purchased and used by plain-

tiffs. In addition to a general denial, defendant, an interstate carrier of passengers and baggage, pleaded in substance that its liability for the loss, if any, was, in connection with conduct of plaintiffs amounting to an estoppel, limited to $33.24 by valid tariffs filed with the interstate commerce commission pursuant to federal law—the interstate commerce act and the Carmack amendment to the Hepburn act. 34 U. S. St. at Large, ch. 3591, secs. 1, 2, pp. 584, 586. Upon a trial to the district court without a jury, there was a finding in favor of plaintiffs October 20, 1922, for $111.30 and interest computed at $9.16. From a judgment on this finding for $120.46, the sum of principal and interest, defendant has appealed.

Is the judgment excessive? The action grew out of interstate transactions over which the congress of the United States and the interstate commerce commission have exercised control to the exclusion of the states of the Union. In controversies between passengers and common carriers over the loss of interstate baggage, state courts are bound by the acts of congress, the terms of transportation fixed by the published tariffs on file with the interstate commerce commission, the regulations of that body, and the rules and decisions applied in federal tribunals. *Boston & M. R. Co. v. Hooker,* 233 U. S. 97; *Adams Express Co. v. Croninger,* 226 U. S. 491.

The controlling facts are not in dispute. The two plaintiffs purchased from defendant August 15, 1921, and used two full-fare passenger tickets entitling them to transportation from Omaha, Nebraska, to Winnetka, Illinois. Pursuant to federal law under tariffs filed with the interstate commerce commission and regulations of that body, payment for the passenger tickets included, without additional charge, the transportation of baggage not exceeding in value $100 for each passenger, or $200 for both. According to the tariffs this was deemed to be the limit of the carrier's liability for the loss of, or damage to, the checked baggage, in absence of a declaration by the passengers of a greater value. In the latter contingency there

was an additional charge of 10 cents for each increase of $100, or fraction thereof. While purchasing their tickets and checking their trunk, plaintiffs did not declare the contents to be of a greater value than $100 for each passenger, nor did they pay or tender additional compensation proportioned to an increased risk based on the real value of the baggage checked. The trunk contained property belonging to each of the plaintiffs, the actual value of the whole being $675. The total value of the missing articles was $111.30.

Plaintiffs take the position that defendant, on grounds of public policy, could not in advance by means of contracts or tariffs limit its liability for its own negligence or other wrongdoing to an arbitrary maximum based on a valuation below the real value of the property checked. It is argued that in any event the carrier assumed a liability of $200 for the safe transportation of the trunk, and that consequently plaintiffs are entitled to recover their partial loss of $111.30. On these subjects the views of the courts in different jurisdictions are not harmonious. Some of the reasons for a full recovery, notwithstanding restrictive regulations or agreement, may be summarized as follows: The passenger or shipper did not enter into a binding contract limiting the liability of the carrier or receive a bill of lading containing valid restrictions as to rates based on agreed values. They did not have actual notice of the tariffs filed with the interstate commerce commission. The Carmack amendment required the carrier to issue a receipt or bill of lading for baggage—an unperformed duty. The passenger was obliged to accept the check for the trunk on the terms imposed by the carrier or leave it behind. To sanction a limitation of liability under the circumstances is to permit a carrier to stipulate that it may be fraudulently negligent or safely dishonest, a violation of public policy and an imposition on travelers and shippers. These in substance are some of the reasons given by courts to justify the conclusion that the limitation of liability by tariff regulations or agreements is illegal.

Other courts have taken a different view, reasoning as follows: The carrier is entitled to protection from the fraud and imposition of shippers and passengers who undervalue property for the purpose of procuring the lower of two alternative charges for transportation. In making defenses in actions for losses the carrier is at a disadvantage, the passenger or shipper having a superior knowledge of articles and values. A lower rate based on undervaluation but protecting the shipper or passenger on the basis of full value is unfair and discriminatory. There is a difference between a limitation of liability resulting from a carrier's negligence and an agreed valuation in the event of a loss. Where passengers or shippers consent to charges based on undervaluations they are estopped from recovering actual values. These and other reasons for upholding terms of liability apportioned to agreed or fixed values conforming to federal law are found in judicial opinions.

In interstate transactions relating to charges and values for the purposes of transportation by common carriers, a state court is not now at liberty to take an independent course or to depart from the rulings of the federal courts on those subjects.

While controversies were multiplying with the diversity of judicial decisions, the interstate commerce commission, by means of regulations and published tariffs, under authority from congress, made provision for charges and liabilities apportioned to the risks assumed in bills of lading and in checks for baggage. According to the rulings of federal tribunals, shippers and passengers, alike, are charged with notice of these regulations and tariffs. Plaintiffs had the alternative of two rates for transportation of baggage. Payment for their tickets included compensation for the transportation of 150 pounds of baggage valued at $100—one rate. By declaring a greater value they had the privilege of imposing upon the carrier a greater liability by the payment of additional charges—another rate. A careful annotator reached the following conclusion after reviewing the cases:

"Under the Carmack amendment to the interstate commerce act, a regulation contained in the published tariffs of a carrier on file with the interstate commerce commission, limiting its liability for baggage to a certain amount unless a greater value is declared by the owner and excess charges paid thereon, is binding upon the passenger in case of loss through the carrier's negligence of baggage being transported in interstate commerce, regardless of the passenger's lack of knowledge of or assent to such regulations, or of the carrier's failure to inquire as to the value of the baggage. *Boston & M. R. Co. v. Hooker,* 233 U. S. 97, L. R. A. 1915B, 450; *Wright v. Southern P. Co.,* 181 Mo. App. 137; *Ford v. Chicago, R. I. & P. R. Co.,* 123 Minn. 87; *Louisville & N. R. Co. v. Miller,* 156 Ky. 677, 50 L. R. A. n. s. 819; *Harris v. Southern R. Co.,* 100 S. Car. 469; *Missouri, K. & T. R. Co. v. Hailey,* 156 S. W. (Tex. Civ. App.) 1119; *Barstow v. New York, N. H. & H. R. Co.,* 158 App. Div. 665, 143 N. Y. Supp. 983." L. R. A. 1916A, 1275 (*Zettler v. Tonopah & G. R. Co.,* 35 Nev. 381).

The following is a ruling of the supreme court of the United States:

"The shipper who values his goods for the purpose of obtaining the lower of two duly published rates, based on valuation, is estopped from recovering a greater amount than his own valuation." *Missouri, K. & T. R. Co. v. Harriman,* 227 U. S. 657.

It has been held that the issuance and acceptance of a check for baggage are a sufficient compliance with that part of the Carmack amendment requiring the carrier to issue a receipt or bill of lading. *Boston & M. R. Co. v. Hooker,* 233 U. S. 97, 121.

Under the decisions of the supreme court of the United States, there seems to be no escape from the conclusion that plaintiffs are bound by the published tariffs on file with the interstate commerce commission. What, then, is the measure of recovery in the present case? As already stated, the actual value of the baggage checked was $675. For a total loss the liability of defendant was $200. The partial

loss or the value of the missing articles was $111.30. For a partial loss under a bill of lading for an interstate shipment of goods, "the valuation clause fixes not an arbitrary limit of recovery but a ratio," says the supreme court of the United States in *Western Transit Co. v. Leslie & Co.*, 242 U. S. 448. In the present instance the ratio is the proportion which $111.30 bears to $675. On that basis plaintiffs were entitled to $32.98. Estoppel prevents a greater recovery. This method of determining the carrier's liability applies under similar circumstances to a partial loss of baggage checked on a passenger's ticket. *Boston & M. R. Co. v. Hooker*, 233 U. S. 97.

The recovery, therefore, is excessive, and for the purpose of correcting the error the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Carriers, 10 C. J. secs. 1580, 1582; 12 C. J. secs. 1568, 1582.

CHARLES H. SCHARF, APPELLANT, V. FRONTIER COUNTY, APPELLEE.

FILED JULY 1, 1925. No. 23229.

1. **Negligence: PLEADING: PROOF.** Plaintiff, in an action based on specific acts of negligence resulting in personal injuries, is not entitled as a matter of right to prove entirely different acts of negligence during the trial without amending his petition or giving defendant an opportunity to plead or prepare a new defense.
2. **———: ———: AMENDMENT AFTER VERDICT.** In an action for specific acts of negligence resulting in personal injuries, it is within the discretion of the district court, after directing a verdict for defendant, to overrule a motion by plaintiff for leave to amend his petition to conform to proof of negligence not pleaded in the original petition, and error in that respect is not shown in absence of an abuse of discretion.

APPEAL from the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Bruckman & Paulson, for appellant.

F. J. Schroeder, L. H. Cheney, E. J. Lambe and *Butler & James, contra.*

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EVANS, JJ., and SHEPHERD, District Judge.

ROSE, J.

This is an action by Charles H. Scharf, plaintiff, to recover from the county of Frontier, defendant, $17,500 in damages for negligence resulting in personal injuries. The claim arose under the following circumstances: Plaintiff, in a motor truck with a load of wheat, started southward, September 7, 1921, on a public highway leading to his destination at Curtis. Ahead of him in the same highway, going in the same direction, Bruce Baker in another motor truck, also loaded with wheat, got stalled at the north end of the county bridge over Fox creek and blocked the road. The rear wheels of Baker's truck stood on a fill or approach where the ground joins the superstructure. The front wheels rested on the wooden floor of the bridge. One rear wheel had sunk into the ground, and in this situation Baker could neither go forward nor backward. Plaintiff came to his aid, and the two, assisted by others who came later, raised the sunken wheel to the level of the ground by the use of jacks standing on planks. Baker with his motor attempted to back the rear wheels onto solid ground, but the body of the truck slipped off the jacks and planks under them and fell on plaintiff, who, at the time, had hold of the truck assisting in the effort to move it backward. The negligence charged in the petition may be summarized as follows: The bridge was "not of sufficient size, strength and dimension." There was a negligent failure to properly construct and maintain wings to protect the approaches. The grading of the approaches was never completed or properly done and was not sufficient in quantity, but permitted water to flow over the fill and wash holes at the ends of the bridge, leaving it in a dangerous condition for travel. Defendant, in its answer, among other defenses, denied the negligence charged by plaintiff. The reply to the answer

was a general denial. Upon a trial of the issues the district court directed a judgment in favor of defendant and dismissed the action. Plaintiff has appealed.

Did the trial court err in refusing to submit the case to the jury? An examination of the record shows conclusively by the testimony adduced on behalf of plaintiff himself that the proximate cause of his injuries was not the negligence pleaded in the petition. Under the pleadings there was no competent evidence of any negligence attributable to defendant as the proximate cause of the injuries to plaintiff. From the standpoint of the pleadings and the proofs, therefore, there was no question of fact for the jury to determine and consequently there was no error in the dismissal of the action.

It is insisted, nevertheless, that the trial court erred in refusing to permit plaintiff to amend his petition to conform to the proofs. This motion was based on testimony to the effect that there was an open space between planks of the retaining wall of the fill or approach, and that loose earth filtered through, leaving a hole covered by a crust at the surface of the approach where it joined the floor of the bridge. All testimony relating to this defect was incompetent under the issues raised by the pleadings. The bridge had been in use for 15 years at least. Defendant had not been legally called upon to answer to plaintiff for a defect in the retaining wall. There was no plea warning defendant to prepare for a defense in contemplation of such an issue. Plaintiff did not ask to amend his petition until after the trial judge had announced his decision from the bench. Under the circumstances, the trial judge in directing the proceedings according to well-established rules of law did not abuse his discretion in refusing to allow an amendment introducing a new charge of negligence after the closing of the testimony. The law does not permit a plaintiff to base his action on specific acts of negligence and prove an entirely different ground of negligence or cause of action at the trial.

Error does not affirmatively appear in the record. The judgment is therefore

AFFIRMED.

MINDEN STATE BANK, APPELLANT, V. W. B. SAWIN, APPELLEE.

FILED JULY 1, 1925. No. 23210.

Bills and Notes: TRIAL: DIRECTION OF VERDICT. "In a suit on an unpaid, past-due negotiable promissory note, it is error for the trial court to refuse a request for a peremptory instruction in favor of plaintiff, where the uncontradicted evidence of witnesses whose credibility is not questioned shows that plaintiff is a *bona fide* holder of the note, and that he purchased it for value before maturity without knowledge of any infirmity therein and of facts indicating bad faith in taking it." *Piper v. Neylon*, 88 Neb. 253.

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

C. P. Anderbery, for appellant.

Bruckman & Paulson, contra.

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

DEAN, J.

The Minden State Bank, plaintiff, sued in the district court for Kearney county to recover a judgment against W. B. Sawin, defendant, on two certain negotiable promissory notes, which were executed by defendant, in the sum of $1,000 and $2,000, respectively. The notes are both dated August 27, 1921, and by their terms draw interest at the rate of 7 per cent. per annum and became due six months after date. The notes are payable to the order of G. G. Withers and were by him indorsed and sold to the plaintiff bank before maturity. The following indorsement appears on both notes: "Demand, notice and protest waived. Payment guaranteed, G. G. Withers." Defendant recovered a verdict, and judgment thereon, and plaintiff appealed.

Defendant is a substantial and well-to-do farmer who has resided in Kearney county more than 30 years. He admits the execution and delivery of the notes to Withers, but he pleads that they were given for worthless lands in Colorado and that they are therefore without consideration. Following is a brief recital of the circumstances out of which this action arose:

Early in August, 1921, Mr. Sawin, and a Kearney county friend, named Franklin, accompanied by Mr. Withers, went to Alamosa, Colorado, with the object in view of buying or trading for land in Alamosa county. Upon arrival they were introduced to C. Carpenter by Mr. Withers, as a friend of his, and the party all drove together into the open country on a trip of inspection. Subsequently the quarter section of land was bought by defendant for which the notes in suit were executed. Sawin testified that Withers showed land to him, not far from the land in question, that yielded, per acre, about four tons of alfalfa and from two to seven hundred bushels of potatoes, and that wheat, oats and barley ground was pointed out that produced "tremendous yields," and that Withers and Carpenter said: "This land we are selling you is just as good as any of this other." And it so appeared to defendant at the time. But the soil ultimately turned out to be an alkali and gumbo formation and was worthless.

Before leaving Colorado defendant entered into an "exchange contract" with Withers and Carpenter for the purchase of the land. This contract was executed by "The Interstate Land and Mortgage Co., by C. Carpenter," on the part of the vendor, and Mr. Sawin signed as purchaser. The vendor, by the terms of the contract, agreed to sell the land to defendant, which was therein "valued at $9,600" and apparently, as an additional inducement, "fifty shares of the capital stock of the San Luis Canal Company" was included. The contract recites that the land was "free and clear of all incumbrances * * * except one certain (7 per cent. five year) trust deed in the sum of $11,000, dated August 12, 1921." Some of the consideration that passed

from Sawin to the vendor, as shown by the contract, consisted of "forty-eight shares of stock in the Basket Stores Company of Omaha, Nebraska," the trade price, as shown by the contract, being fixed at $4,500. Sawin also agreed to give the notes in suit and his check for $1,000. Elsewhere in the record it appears that Mr. Sawin was also the owner of some blocks of "Withers Painless Dental Company" stock, and it appears that he agreed to assign some of this dental stock to Withers in part payment for the land. But whether he did so does not clearly appear. He admitted, however, that the stocks of the "Basket Stores Company" and of the "Withers Painless Dental Company" were all practically valueless at the time, and that he was quite pleased to turn it all in to the vendors in the trade.

The plaintiff bank contends that it is a purchaser for value and before maturity and without knowledge of any infirmity in the notes. Arthur Jensen is its vice-president. He testified that he, as such officer, bought the notes for the bank from Withers, August 27, 1921, and that, when Withers asked him, he told him the rate of discount would be "6½ per cent. off the face;" that Withers was satisfied with this discount, and he thereupon bought the notes because he "knew Mr. Sawin was good for such an amount." He further testified that the discount in the transaction was the usual and customary bank discount at that time. It also appears that Withers had no connection with the bank and was practically a stranger, and that he gave Jensen no information in respect of the consideration for which the notes in suit were executed. The president of the bank testified that he did not know the consideration for which the notes were given, and he corroborated the evidence of Arthur Jensen in respect of the rate of discount which was charged and said that it was the usual and customary discount that prevailed in the purchase of notes at that time. To substantially the same effect was the evidence of the plaintiff bank's cashier and the assistant cashier.

Defendant complains because the bank made only one inquiry in respect of the note before purchasing, and that was to inquire if the signature of defendant Sawin was genuine, and that, upon being informed that such was the fact, the bank closed the transaction with Withers. But, in view of the facts herein, it is not without significance that defendant testified that he did not discover that the Colorado land in question was worthless until about two months after the notes were sold by Withers to the bank.

It appears from defendant's evidence that some time in October, 1921, he retraced his steps to Colorado, and that, upon inquiry and further examination, he then first discovered that he had been deceived and swindled by Withers and his friend Carpenter. But his evidence shows that when he first saw and obtained the land he thought he had made a profitable trade and that he continued to so believe until he made his return trip to Colorado. From the date of the making of the notes, namely, August 27, 1921, until he made this return trip, he frankly testified that he never once suspected that the land was valueless and that he had been defrauded. It also appears from his own evidence that he told all inquirers that he believed he had made a good trade and that the farm was a good deal for him. When asked if he would have so informed the bank if, before his return trip to Colorado, any of its officers had asked him about the land for which he gave the notes in suit, he frankly answered that he would. This was his language when he testified on this point:

"Q. If anybody inquired from you, you told them about the good soil out there in that San Luis valley? A. Yes, sir. Q. And that you had gotten a good deal? A. I don't know that I had told them I had gotten a good deal. It was in my mind that I had. Q. If they had asked you, you would have told them? A. Sure. Q. Then, if anybody had inquired from you, Mr. Sawin, up until October, you would have told them that, so far as you knew, you had a good deal? A. Yes sir. * * * Q. Then, Mr. Sawin, no matter if the bank had seen or heard or known of this transaction, you

would have told them that you were not defrauded, up until October, when you saw this land? A. So far as I knew at that time. Q. Well, you would have told them that, wouldn't you? A. Sure."

The negotiable instruments act provides:

"To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Comp. St. 1922, sec. 4667.

We think that plaintiff, in view of the uncontradicted evidence, is not a purchaser in bad faith within the meaning of section 4667, above cited. In a comparatively recent case we said:

"In a suit on an unpaid, past-due negotiable promissory note, it is error for the trial court to refuse a request for a peremptory instruction in favor of plaintiff, where the uncontradicted evidence of witnesses whose credibility is not questioned shows that plaintiff is a *bona fide* holder of the note, and that he purchased it for value before maturity without knowledge of any infirmity therein and of facts indicating bad faith in taking it." *Piper v. Neylon*, 88 Neb. 253.

When the taking of evidence was concluded, plaintiff moved for a directed verdict. The motion was overruled. We conclude that the court erred in its ruling. The judgment is therefore reversed and the cause remanded.

REVERSED.

UNITED STATES RUBBER COMPANY, APPELLANT, V. EUGENE H. GRIGSBY ET AL., APPELLEES.

FILED JULY 1, 1925. No. 23214.

Pleading: PROOF. The allegations and the proof must agree. A plaintiff may not plead a cause of action on a *quantum meruit* and, over objection, prove a cause of action based on an express contract.

APPEAL from the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Latham & Schroeder, for appellant.

Cordeal & Colfer, contra.

Heard before MORRISSEY, C. J., DEAN, DAY and EVANS, JJ., and REDICK, District Judge.

DEAN, J.

Plaintiff brought this action, in the district court for Frontier county, to recover $372.35 from the defendant partnership for "the reasonable prices and value" of three "Sawyer endless belts" which, it is alleged, plaintiff sold and delivered to the partnership. Plaintiff was nonsuited and has appealed.

The defendant partnership is engaged in the retail hardware business at Maywood and from time to time purchased goods from plaintiff. Some time in 1918, or 1919, one of plaintiff's salesmen called at defendant's place of business and solicited and, according to the salesman's evidence, obtained an order for the goods in question. It is alleged that the order was taken in October, and that it was agreed by the parties that the goods were to be shipped and delivered June 1 following. An unsigned memorandum, showing the shipment, is in the record. Whether the order was obtained in 1918 or 1919 is in dispute, but, in view of other facts in the record and in view of our disposition of the action, we do not find it necessary to decide this disputed point.

The receipt of the goods is not denied, but it is defendant's contention that no order was given to plaintiff's salesman, and that the belting was shipped without an express order or, at least, under a misunderstanding on plaintiff's part. Anyhow, there is evidence tending to prove that the defendant partnership notified plaintiff in apt time, and promptly informed it that the goods were not ordered and were held subject to be returned to plaintiff on request at any time. And defendant so holds the goods now.

In its petition plaintiff alleges that the prices charged "are the reasonable prices and value thereof, and said goods are of the aggregate value of $372.35, no part of which has been paid," and for which it prays for judgment, with interest, and so on. And in its brief plaintiff argues that "the petition is not based on an express contract, but on *quantum meruit,*" and that the action is brought "for the reasonable value of the goods, and not on any contract within the statute of frauds." Plaintiff's argument, as disclosed by its brief is, in short, that his "petition is based on the theory of reasonable value, and not on any particular contract."

In respect of the nature of the action, the parties appear to be in entire accord; defendant's argument, in substance, being that the court directed a verdict for the defendant partnership "for the reason the plaintiff sought to recover on a *quantum meruit.*" Defendant, then, in support, of the judgment of dismissal, contends that "the only evidence offered tended to sustain an express contract." And, without needless discussion of the evidence, it may be added that the record sustains defendant's contention. Plaintiff's evidence all goes to establish that an express contract had been entered into between the parties, and that it placed its reliance upon such express or special contract for recovery. No evidence in respect of the reasonable value of the goods was submitted by plaintiff. On the contrary, plaintiff's evidence tends to establish a cause of action which is not pleaded in the petition.

It is elementary that the allegations and the proof must agree. A plaintiff may not plead a cause of action on a *quantum meruit,* and, over objection, prove a cause of action based on an express contract. The court did not err in directing a verdict for the defendant partnership.

The judgment is right, and is

AFFIRMED.

FREDERICK A. EDWARDS V. STATE OF NEBRASKA.

FILED JULY 1, 1925. No. 24306.

1. **Homicide**: EVIDENCE: DYING DECLARATIONS. In a prosecution for homicide, resulting from an operation to procure an abortion, it is not error to receive in evidence the dying declaration of the patient which contains statements tending to prove that a conspiracy existed between her and others named in the declaration to perform the unlawful act, the statements in the declaration being competent and relevant to the facts connected with the commission of the offense.
2. **Criminal Law**: TRIAL: PROPER MATTER TO SUBMIT TO JURY. "The modern practice, both in civil and criminal cases, is to send to the jury room all instruments, articles and documents, except depositions, which have been received in evidence, and which will, in the opinion of the trial judge, aid the jury in their deliberations." *Russell v. State*, 66 Neb. 497.
3. ———: ———: ———. "In the absence of statutory direction, it is, in a great measure, left to the sound discretion of the court as to what papers, books, or other matters of evidence, or instructions, the jury will be permitted to carry with them to their room upon retiring to consider of their verdict." *Langworthy v. Connelly*, 14 Neb. 340.
4. ———: ———: ACTS AND DECLARATIONS. "When a conspiracy is once shown to exist by the requisite *quantum* of proof, the acts and declarations of each of the conspirators, in furtherance of the common design, are the acts and declarations of all." *Lamb v. State*, 69 Neb. 212.
5. **Homicide**: EVIDENCE: DYING DECLARATIONS. "In a prosecution for homicide in procuring an abortion under section 6 of the Criminal Code (now section 9547, Comp. St. 1922) dying declarations of the deceased may be admitted in evidence, under the same conditions and limitations as in prosecutions for murder or manslaughter." *Edwards v. State*, 79 Neb. 251.
6. ———: ———: ———: WEIGHT AND CREDIBILITY FOR JURY. Where dying declarations have been admitted in evidence, their weight and credibility are for the determination of the jury.
7. ———: ———: ———: ADMISSIBILITY. The principle on which dying declarations are admitted is "that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth." *Rex v. Woodcock* (1789) 1 Leach (Eng.) 500.

8. ———: ———: ———: ———. In homicide cases, the rule has long prevailed that the strict rules which are ordinarily applicable to the admission in evidence of the spoken word do not always apply with the same strictness to dying declarations.

9. ———: ———: ———: ———. The admission of a dying declaration is, primarily, a question to be determined by the nature of each case.

10. ———: ———: ———: FORM. The law looks to the substance rather than to the form, and it does not require that dying declarations must be made in any prescribed form or manner.

ERROR to the district court for Douglas county: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Jamieson, O'Sullivan & Southard, for plaintiff in error.

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

Heard before ROSE, DEAN, DAY, GOOD and THOMPSON, JJ., and SHEPHERD, District Judge.

DEAN, J.

Defendant, an Omaha practicing physician, was informed against in the district court for Douglas county, under count one of the information, for having unlawfully caused the death of Lillian Holman, January 14, 1924, she being, then, an unmarried woman just past her eighteenth year. The specific charges are that the abortion was procured by the unlawful use, by defendant, of certain instruments, and other means, used upon and administered to Miss Holman. Under count two defendant was charged with having unlawfully used, in and upon the body and womb of Lillian Holman, certain instruments and other means, wherewith certain bruises and wounds were inflicted upon the vitalized embryo, or fetus, of the pregnant woman, which caused its death.

The jury found defendant guilty, under both counts of the information, whereupon he was sentenced by the court to serve a term of five years, under each count, in the state penitentiary, the sentence under both counts to run con-

currently. A motion for a new trial was denied and defendant prosecutes error.

The state, over defendant's objections, introduced in evidence the dying declaration of Miss Holman. The declaration, which is "exhibit 5," follows:

"Omaha, Nebraska.

"Lillian Holman, 18 years old Dec. 11, 1923. Edward Hazen is responsible for my condition, he said he was a ball-player, not now working, he must be about 22 years old, went out to Dorsey's chicken hut on West Center St. about 2½ months ago; three couples went—Joe Flynn, Douglas Docks, Miss Meagher, Miss Rhoades, Hazen and myself; four of us girls had an apartment at Gray Gables, 20th & Davenport; all three couples were in a coupé, had something to drink—the boys furnished it—relations took place at Gray Gables—had had no relations with any one else other than Hazen—first discovered that I was pregnant at next period—tried quinine and camphor internally to procure an abortion—Hazen gave me $80 to have an operation performed. I called up Hazen at his home, he hung up receiver. Hazen then called me up and asked me to come up to his father's office; he then turned and said to some one am I talking all right? I didn't go to his father's office but met him near Burlington Station. Hazen suggested that I go to Dr. Mathews—I wouldn't; then he suggested Dr. Edwards with office at Securities Bldg. On the 13th of Dec. 1923 about 3:30 p. m. first went to Dr. Edwards with Daisy Beem, my sister, made appointment for next day—gave him $50.00 that day—on next day at 3:30 went again to Dr. Edwards he then used an instrument and placed a rubber tube—I gave him the name Gertrude Holman, 1939 So. 9th; Daisy gave the name Mrs. Daisy Doran, 1117 So. 10th; on the 14th after he put in the tube I and Daisy had to go home for money for taxi; Daisy and I took Yellow cab from home to 412 So. 48th St. where Dr. Edwards had told me to go; it was about 4:30 p. m. when we got there. Nothing more was done with me that night. He was fixing up another girl. Dr. Edwards came to the

house on the 14th but did nothing for me. Came again about midnight on the 15th and used instruments on me and put in three tubes. On the following night Dec. 16th he came again about midnight and used instruments and took out all tubes—Mrs. Childs had the house—gave no anæsthetic but Mrs. Childs held me while he operated—saw her diploma as a trained nurse on the wall—she is a widow and has three children. I left the next morning in a taxi—I called Daisy and she sent a taxi for me and met me at corner of 10th and Pierce Sts. The folks thought I had gone to Tekamah to visit. Another girl came just before I left—Came home on morning of Dec. 17, 1923. Mother was home in bed when I got home—she went to hospital three or four days later—had no doctor until on day before I entered Nicholas Senn Hospital when Daisy called Dr. Foltz—he wasn't told of my trouble until the next day about 12 o'clock—Dr. Foltz had me brought to Nicholas Senn Hospital as soon as he learned the trouble—that was Friday, Dec. 28th, 1923, at about 3:30 p. m.

"Lillian Holman.

"The above statement bearing my signature was read to me, and I, knowing that I am dying, do solemnly swear that it is the truth.

"(Signed) Lillian Holman.

"Witness: A. B. Griffith, Louise Brackhahn.

"Subscribed and sworn to before me this 5th day of January, 1924.

"(Seal) H. S. Brackhahn, Notary Public."

Defendant denies that he is guilty of the offense with which he is charged. He admits, however, that the declarant and her sister called at his office December 13, 1923, and that he then made a physical examination, and that, by appointment, they came the next day, when he made another examination, and that he received $50 from her; that there was no evidence of pregnancy; that at his direction she went to Mrs. Childs' home at 412 South Forty-eighth street and was there treated by him for gonorrhea

and infection, or a kindred ailment, several times; that she left there December 16, which was the last time he saw her, and was subsequently taken to the Nicholas Senn Hospital by direction of Dr. C. B. Foltz.

Defendant excepts to the dying declaration. His exceptions cover more than 40 pages of an 800-page record. Practically the same identical objection is separately applied to almost every sentence, every expression, and every statement which Lillian Holman voiced with her dying breath. The substance of the objection, which was overruled, is that the statements are severally "incompetent, irrelevant, and immaterial, hearsay testimony, and the mere conclusion of the witness, and for the further reason that no sufficient foundation has been laid and the same is not part of the *res gestæ* of the case, and not being matter which declarant would be permitted to testify to if in court." But see *Edwards v. State*, 79 Neb. 251.

We do not agree with counsel. It seems to us that the declaration is competent and was properly submitted to the jury. Material facts, which are a part of the *res gestæ*, are stated, and other facts, in specific terms and with unerring accuracy, are stated which tend to prove that Hazen and defendant and Lillian and her sister, Daisy Beem, and Mrs. Childs, to whose place Lillian was sent by defendant, were all unlawfully engaged in a conspiracy to procure an abortion. The competency of the declaration, in this respect, arises in part, from the fact that it tends to identify the conspiring participants. There is no need to repeat the ghastly details of the felonious operation which the evidence tends to prove was performed by the defendant doctor. The statements in the declaration and the references to Mrs. Childs and her house and "another girl" whom defendant "was fixing up" and still "another girl" who came just before declarant left, when considered with the other evidence, were competent to go to the jury in proof of the questionable type of house to which defendant sent the declarant and his unlawful purpose in doing so. Whether

a dying declaration fairly reflects the facts is a question for the jury. Prejudicial error is not shown therein.

If the dying girl spoke the truth, will it be seriously argued that she and Hazen and defendant and Daisy Beem and Mrs. Childs did not conspire together to commit the felonious act? Or will it be contended that Lillian's material statements, if true, do not point out facts which form a part of the *res gestæ?* And these were all questions for the jury, and the trial court properly so held. The following cases support the rule: *Lamb v. State,* 69 Neb. 212; *Clark v. State,* 102 Neb. 728; *Mathews v. State,* 111 Neb. 593; *State v. Crofford,* 133 Ia. 478; *Solander v. People,* 2 Colo. 48; *Johnson v. People,* 33 Colo. 224; *People v. Atwood,* 188 Mich. 36; *State v. Power,* 24 Wash. 34; *State v. Dickinson,* 41 Wis. 299; *State v. Howard,* 32 Vt. 380. See, also, *Fields v. State,* 107 Neb. 91, and the above cases there cited, with excerpts therefrom, at page 98 and following. The *Fields* case has to do with a homicide which grew out of a like unlawful operation as that involved here. It is there disclosed that a letter was written by the young woman to her lover several days before the operation was performed. As a result of the operation she died shortly afterward. It was held that the letter was properly submitted to the jury on the ground that the statements therein were relevant and, being so, were clearly a part of the *res gestæ.*

A familiar rule, as affecting the apprehension of conspirators, is pointed out in *Lamb v. State,* 69 Neb. 212, wherein it is held that, if it is shown by sufficient competent evidence that two or more persons have joined, or participated, in the commission of a felony, the acts and declarations of each of the conspirators, in the common design, are the acts and declarations of all. *Welter v. State,* 112 Neb. 22; *Neal v. State,* 104 Neb. 56; *Katleman v. State,* 104 Neb. 62.

In homicide cases it seems that the rule has long prevailed that the strict rules which are ordinarily applicable to the admission in evidence of the spoken word do not always apply with the same strictness to dying declarations. 1 R. C. L. 542, sec. 86. It seems, too, that this type of evi-

dence, which would be admissible in one case, would not necessarily, nor under dissimilar circumstances, be admissible in another, and is, primarily, a question to be determined by the nature of each case. *State v. Howard,* 32 Vt. 380.

In *Rex. v. Woodcock* (1789) 1 Leach (Eng.) 500 (cited in *King v. Perry,* 6 B. R. C. 235), it is said that a dying declaration "made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

Rex v. Louie, 2 B. R. C. 912, is a case where an Indian woman died as the result of an unlawful assault. Not long before she died a constable asked questions of her through an interpreter, who was sworn, and "a doctor wrote down what the interpreter said the woman's answers were." The doctor and the justice of the peace then signed the statement. To some of the questions the woman indicated her answer by nodding her head. It was held that the statement was admissible as a dying declaration.

"The law looks to the substance rather than to the form, and it does not require that dying declarations must be made in any prescribed form or manner. * * * If the rule were otherwise dying declarations would be denied admission in many cases, not because the declarant was not under the sense of impending dissolution and without hope of recovery, but because of the violation of some technical rule." 1 R. C. L. 542, sec. 86. In *Worthington v. State,* 92 Md. 222, 244, it is said that a dying declaration may be made in response to leading questions, or even to urgent solicitation. 1 Greenleaf, Evidence (16th ed.) 245; 2 Bishop, New Criminal Procedure (2d ed.) sec. 1207, *et seq.; Howard v. State, ante,* p. 67.

Four doctors testified on the part of the state. Some of these attended Lillian Holman after the operation and all were present at the autopsy. The evidence of two or more of the doctors was such that the jury would be justified in finding that Lillian Holman had been operated on for an abortion. Almida Rice is a girl of 16 employed as a maid by Mrs. Childs from November 2 until about December 16, 1923. She testified that defendant was at Mrs. Childs' place almost every day, and that he had female patients there during all the time of her employment, and one of these was Lillian Holman. From her evidence, if they believed her statements, and without going into details, we think the jury would be justified in finding that Mrs. Childs' house was maintained almost solely for the purpose of performing such unlawful operations as are involved in the present case. She testified that defendant had many female patients there.

Defendant contends that Juror Heine, a Northwestern railroad conductor, was disqualified, from the fact that a witness testified that he had expressed an opinion in the presence of a certain witness, in effect that, if he were to serve on the Edwards' jury, he would "stick until hell froze over." Heine denied this and said that, on the occasion referred to, his language was a mere passing remark made when he first read about the occurrence, and that he then said, in substance, "Yes, there is another poor victim, and if the man is guilty he should pay the penalty." This, he said, was long before he was notified to report for jury work. This evidence was brought out at an examination held on the motion for a new trial. We do not think the court erred in refusing to grant a new trial on this assignment.

Complaint is made because the state obtained, and exhibited to the jury, certain instruments found in defendant's possession at the Childs home. The contention is that his constitutional rights were thereby invaded. But when possession was obtained by Paul Haze, a detective connected with the police department, Haze testified that defendant

said at the time, "That would be all right." Reversible error does not appear in this assignment. We conclude that the evidence throughout amply supports the verdict. *Langworthy v. Connelly,* 14 Neb. 340; *Russell v. State,* 66 Neb. 497.

Notwithstanding defendant's complaint in respect of certain of the instructions, we find upon examination that the exceptions do not present questions of reversible error. And this is true of other assignments of alleged error to which our attention has been directed but have not discussed for the reason above stated.

The judgment of the district court is right, and is in all things

AFFIRMED.

Note—See Homicide, 30 C. J. secs. 494, 500, 502, 507, 510, 521.

C. M. EMPSON, RECEIVER, APPELLEE, V. V. E. RICHTER: ESSIE E. DAVIS, APPELLANT.

FILED JULY 1, 1925. No. 23147.

1. **Bills and Notes: ACCOMMODATION MAKER.** An accommodation maker of a promissory note is not liable to the party accommodated.
2. **———: ———: QUESTION FOR JURY.** Evidence examined and set out in the opinion, *held* sufficient, in the absence of any contradiction, to support the defendant's theory that her signature to the notes was for the accommodation of the bank, and that the court erred in directing a verdict for the plaintiff.

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

Hoagland & Carr, Carlson & Erickson and *W. R. Ramsey,* for appellant.

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

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

DAY, J.

Action by C. M. Empson, receiver of the Exchange Bank of Ogallala, against V. E. Richter and Essie E. Davis to recover a balance alleged to be due upon two promissory notes executed by the defendants in which the bank was named as payee. At the close of the evidence, on motion of the plaintiff, the court directed the jury to return a verdict in favor of the plaintiff and against both defendants for $7,385, being the amount claimed to be due by plaintiff after deducting a credit of $4,000, arising from the sale of certain cattle. From a judgment upon the verdict, the defendant Davis has appealed.

The petition contained the usual allegations in an action to recover upon a promissory note. The notes were payable to the Exchange Bank, dated April 7, 1921, due in six months, and called for the payment of $5,000 and $5,478.17, respectively, with interest at 10 per cent. from date. Defendant Richter filed no answer. Essie E. Davis filed an answer in which she admitted that the plaintiff is the receiver of the Exchange Bank, and as such is the holder of the notes sued on. By way of defense she alleged that the two notes were signed by her at the request of the Exchange Bank, solely as an accommodation to the said bank, and under a promise made to her at the time by the bank that she would not be called upon to pay the notes or any part thereof. The answer further detailed the circumstances of her signing the notes, and alleged that she received no consideration for or on account of the execution of the same.

The reply denied that the notes were signed as an accomodation to the bank, and denied that there was no consideration for the signing of the notes by the defendant Davis. The reply further alleged that on or about October 22, 1920, the defendant, V. E. Richter, was indebted to the Exchange Bank in the sum of approximately $26,000, which amount was secured by a chattel mortgage upon a herd of cattle then owned by defendant Richter; that the indebtedness was long past due and the chattel security wholly inadequate

therefor; that the Exchange Bank notified Richter that it could no longer carry him for the indebtedness, and that it would proceed to sell the chattel security unless additional security was procured by Richter, and then agreed that the time of payment would be extended six months if he would procure defendant Davis to execute notes for a part of the indebtedness then owing by Richter to the bank; that, pursuant to this agreement, defendant Davis, who was a sister-in-law of Richter, agreed with the bank to sign two notes of $5,000 each with defendant Richter, in consideration that the Exchange Bank would extend the time of payment of the indebtedness owing by Richter; that the indebtedness was extended for six months; that at the time the Exchange Bank entered into a writing that, in consideration of defendant Davis signing the notes, the bank agreed to apply upon the notes the proceeds of the sale of the cattle held under the chattel mortgage.

From the pleadings it seems clear that the main issue in the case was whether defendant Davis was an accommodation maker for the accommodation of the bank as claimed by her. If she was, then the plaintiff could not recover against her.

Upon the trial the plaintiff offered testimony tending to establish the execution and identity of the notes, the amount realized from the sale of the chattel security, the amount due upon the notes, and then rested.

The defendant Davis then offered testimony tending to support her theory of the case as pleaded in her answer, the witnesses for the defense being the two defendants. At the close of the testimony for the defense the trial court ruled that defendant Davis signed the notes in suit in consideration of an extension of the time of payment of the debt due by Richter to the bank, and for his accommodation, and not for the accommodation or benefit of the bank, and accordingly directed a verdict for the plaintiff.

It is now urged by the defendant that the court erred in so directing a verdict, and in failing to submit to the jury defendant's theory of the case.

The testimony on behalf of the defendant tended to show that the notes in suit were renewals, with interest added, of two notes of $5,000 each, dated October 22, 1920, in which the bank was named as payee, due in six months, and signed by both of the defendants. The testimony further tended to show that on October 22, 1920, the Exchange Bank was holding Richter's past-due notes for about $26,000; that it held as security for this indebtedness a chattel mortgage on a mixed herd of about 200 head of cattle, many of which were one and two years old; that the cattle were not ready for the market; that the security was wholly inadequate to secure the payment of the debt; that the bank held as security all of Richter's property; that the bank appreciated that a loss was inevitable; that the bank was not able to carry this large loan; and that in order to render its loss as light as possible it was the desire of the bank that the cattle be kept a year longer in order that the younger cattle might become more valuable, and that a better market might be secured. At that time Richter realized that the chattel security could not be made to pay out, and he was then willing to quit and turn over the property to the bank.

Under this state of facts the bank solicited Mrs. Davis to sign notes aggregating $10,000 as an accommodation to the bank to enable it to float the paper for a year, till the stock grew more valuable. After this talk, Mrs. Davis signed two notes of $5,000 each with Richter, without consideration, due in six months, for the accommodation of the bank, with the distinct understanding that she was not to be called upon to pay one cent, that her signature was for the purpose of enabling the bank to float the paper, and that at the end of six months the notes were to be renewed for six months longer. At the same time Richter agreed that he would put in his time and care for the cattle. At that time the bank signed a writing to the effect that the first money realized on the sale of the cattle was to be credited on the notes. When the notes became due they

were renewed for a period of six months on the same conditions as the original notes.

The bank took possession of the cattle under an agreement with Richter on June 11, 1921, and they were sold at a private sale for $4,000.

While there is some reference in the cross-examination of Richter which seems to indicate that there was an extension of the time of payment of his indebtedness, we are of the view that a fair construction of the entire evidence tends to show that the extension, if any, was for the benefit of the bank, rather than Richter. Mrs. Davis' testimony is very positive that it was distinctly understood between her and the bank that she was signing the notes as an accommodation to the bank, and that she was not to be called on to pay any part of the notes. The testimony of Mrs. Davis was not denied by any one.

It is fundamental that an accommodation maker or indorser is not liable to the party accommodated. The mere fact that Richter may have received some benefit out of the transaction does not necessarily determine that he was the accommodated party. Under the evidence we think the trial court, if it had been requested to do so, would have been justified in directing a verdict for the defendant Davis. In any event the court should have submitted the question at issue to the jury, and it erred in not doing so.

We are not unmindful of our holding in *Farmers Nat. Bank v. Ohman*, 112 Neb. 491. In that case, however, it appeared that Mrs. Ohman was an accommodation maker for her son, and not the bank, and that there was a consideration for her signing the note.

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

REVERSED.

OMAHA NATIONAL BANK, APPELLANT, V. BRADY STATE BANK ET AL., APPELLEES.

FILED JULY 1, 1925. No. 23202.

1. **Banks and Banking: COLLECTION: AGENT OF SENDER.** Where a bank receives an instrument for collection and remittance, it becomes the agent of the sender for such purpose.
2. ———: ———: **CHECK AS PAYMENT.** The acceptance by a collecting bank of a check drawn on another bank, in the absence of a specific agreement that such check is to be accepted in payment of an instrument placed in the hands of such bank for collection, is presumed in law to be on condition that the check is good. If the check is dishonored, no payment is effected.
3. ———: ———: ———. Where a collecting bank receives a check drawn on another bank tendered in payment of an instrument placed in its hands for collection and remittance, and where the collecting bank, in the belief that the check will be paid when presented, stamps the instrument paid, but does not surrender it to the debtor, and thereupon mails its own check to the sender of the instrument, and where the check given by the debtor to the collecting bank is promptly presented and is dishonored, the collecting bank may stop payment on its check without incurring liability thereon, and return the instrument placed in its hands for collection.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Ralph G. Coad and *Stout, Rose, Wells & Martin,* for appellant.

John P. Breen and *Morsman, Maxwell & Haggart, contra.*

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

DAY, J.

Action in the district court for Douglas county by the Omaha National Bank, plaintiff, against the Brady State Bank of Brady, Lincoln county, Nebraska, and the United States National Bank of Omaha, defendants, to recover upon a check issued by the Brady State Bank in favor of the Omaha National Bank, drawn on the United States

National Bank. The case was submitted upon a stipulation of facts, and resulted in a judgment in favor of the defendants. Plaintiff appeals.

On January 5, 1920, the Chevrolet Motor Company, doing business at Omaha, drew a sight draft on C. M. Trotter, its debtor at Brady, Nebraska, for $1,898, payable to the Omaha National Bank, and delivered the same to the latter bank for collection. The latter bank sent the draft to the Brady bank for collection and remittance. On January 20, 1920, Trotter gave his check to the Brady bank for $1,898, drawn on the First National Bank of North Platte, to take up the sight draft. The Brady bank, believing the check to be good, stamped the sight draft "paid," but did not deliver it to Trotter. On January 20, 1920, before the Brady bank had received returns on Trotter's check, it drew its check in favor of the Omaha National Bank for $1,898, drawn on the United States National Bank, and mailed the same to the Omaha National Bank. After sending its check to the Omaha National Bank, the Brady bank received notice from the First National Bank of North Platte that the Trotter check was not paid for want of funds, and thereupon the Brady bank notified the United States National Bank to stop payment of its check drawn in favor of the Omaha National Bank. The Brady State Bank thereupon returned the sight draft to the Omaha National Bank with full explanations of the transaction. Meanwhile the Omaha National Bank presented the Brady State Bank check to the United States National Bank for payment, which was refused on the ground that payment thereon had been stopped by the Brady bank. On receiving the check from the Brady bank, the Omaha National Bank credited the Chevrolet Motor Company with the amount of the collection, but charged the same back immediately upon discovering that the payment of the Brady bank check had been stopped. Thereupon this action was commenced.

By an arrangement between the Omaha National Bank and the Chevrolet Motor Company, the action was continued in the name of the Omaha National Bank.

We pass the question of jurisdiction over the person raised by the Brady bank, as no doubt all of the parties would prefer a decision based on the merits of the case. We are of the view, however, that no cause of action was stated against the United States National Bank.

Upon the oral argument counsel for appellant stated that no claim was made based upon the possible negligence of the collecting bank, but that the only question in the case was whether the Brady bank had any authority to accept anything but money in payment of the sight draft. It was argued that, by accepting Trotter's check in lieu of money, it thereby became liable to the same extent as though money had been paid by Trotter.

The stipulation of facts recites, among other things, that the officers of the Brady bank, if called as witnesses upon the trial of the case, would testify, if permitted to do so, that the Brady bank did not take or intend to take the Trotter check in absolute and unconditional payment of the sight draft, but took such check for collection in the expectation and belief that the check was good and would be paid upon its presentation to the First National Bank of North Platte. It was also stipulated: "In the usual course of its custom and bank collection business, the said Brady State Bank received from the said Trotter said check on January 20, 1920, and sent the same to the First National Bank of North Platte for collection."

Under the facts stated it is clear that the Brady bank was the agent of the Omaha National Bank for the purpose of collecting the sight draft.

It is a general rule, equally applicable to a bank acting as collecting agent, that, unless otherwise instructed, an agent for collection has no authority to receive in payment anything but cash, and when he does accept anything other than cash in payment he will be liable to his principal for any loss the latter may suffer. This rule is applicable to banks acting as collecting agents. 3 R. C. L. 616, sec. 245.

But this rule does not prevent the agent from conditionally accepting a check in discharge of the instrument he

holds for collection. In *Bellevue Bank v. Security Nat. Bank*, 168 Ia. 707, it was held: "The naked act of accepting a check in payment of a note is presumed in law to be on condition that the check is good. If the check is dishonored, no payment is effected."

In discussing the principle involved in the case before us, it was said in *Griffin v. Erskine*, 131 Ia. 444, 451:

"Checks, drafts, and other bills of exchange are the means of transferring the money in adjusting nearly all commercial transactions, and in authorizing an agent, whether a bank or individual, to make collections, it may be assumed in the absence of instructions to the contrary that the authority is to be executed in the manner usual and customary in the commercial world. While the agent may not accept anything but the actual cash in satisfaction of the claim, he may receive a check or draft, negotiable and payable on demand, which he has good reason to believe will be honored upon presentation, as a ready and more convenient means of obtaining the money in conditional satisfaction of the debt. Such a payment offers no greater temptations to the agent than payment in cash to which ordinarily it is equivalent. If honored by the drawee, payment relates back to the time of delivery. If not honored, the creditor has parted with nothing by reason of conduct of his agent; for, though the agent may receive such paper as conditional payment, he is not permitted, on its strength, to deliver conveyances, leases, or other valuables at the risk of his principal."

In *Steinhart v. National Bank*, 94 Cal. 362, it was held: "When a creditor takes a note or check for an antecedent debt, it does not operate to extinguish the debt, unless it is received by express agreement as payment."

The same principle is announced in *National Life Ins. Co. v. Goble*, 51 Neb. 5.

For cases bearing on the question being considered, see *Inter-State Nat. Bank v. Ringo*, 72 Kan. 116; *Savings Bank v. National Bank*, 98 Tenn. 337; *Farmers Bank & Trust*

Co. v. Newland, 97 Ky. 464; *United States Nat. Bank v. Shupak,* 54 Mont. 542.

We will not prolong this opinion by distinguishing the cases cited by appellant from the case at bar. Most of them present a situation where the check offered was accepted by the collecting bank in payment of the instrument, and the instrument held for collection surrendered to the debtor.

In the case before us the Brady bank's acceptance of the check operated only as a conditional payment. Upon the dishonor of the check, the condition failed. The Brady bank did not surrender the sight draft to Trotter, but after the dishonor of the check returned it to the plaintiff. The mere fact that the Brady bank, under the belief that the check was good, stamped the sight draft "paid" is not at all controlling.

The Chevrolet Motor Company and the plaintiff bank are in no worse plight by reason of the Brady bank having stopped payment of its check. Trotter is still liable to the motor company for his debt.

Upon a consideration of the record, we are satisfied that the judgment of the district court is sustained by the evidence and the law applicable to the facts. The judgment is

AFFIRMED.

BARBARA E. WATKINS, APPELLANT, V. THOMAS J. ADAMSON ET AL., APPELLEES.

FILED JULY 1, 1925. No. 23197.

Limitation of Actions: MARRIED WOMEN. Since the enactment by the legislature of the married woman's act, permitting married women to sue in the same manner as if they were unmarried, the former disability of coverture, so far as it relates to the right to bring an action, has been removed, and the statute of limitations now runs against married women during coverture, notwithstanding an earlier statute which, in terms, allowed married women the full period of limitations after the removal of the disability of coverture.

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

Lambert & Hawxby and *Hall, Cline & Williams*, for appellant.

Paul Jessen, William G. Rutledge, R. F. Neal and *E. F. Armstrong, contra.*

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

GOOD, J.

On December 15, 1912, Gertrude Adamson loaned to her husband, Thomas J. Adamson, $2,200, and received therefor a promissory note, due one year after date and signed by her husband and his father. When this note became due Adamson and his father executed a renewal note for the same amount and due one year later. In February, 1916, Gertrude Adamson died intestate, without issue, leaving as her next of kin and heirs at law her mother, Barbara E. Watkins, and her husband. In November, 1920, E. M. Boyd was appointed administrator of the estate of Mrs. Adamson, deceased. Mrs. Watkins then requested the administrator to bring an action on the promissory note, to which reference has been made. He refused, on the ground that the note was barred by the statute of limitations. Thereafter this action was brought in equity by Barbara E. Watkins against Thomas J. Adamson and Boyd, the administrator, to require an accounting from Thomas J. Adamson to those lawfully entitled to the proceeds of the note. Adamson admitted the execution of the note and pleaded the statute of limitations as a defense. Another defense was pleaded which need not be considered. The administrator also answered and admitted his refusal to bring action on the note, on the ground that the uncertain nature of the claim justified such refusal. The trial court held that the action was barred by the statute of limitations, and entered judgment of dismissal. Plaintiff appeals.

This action was not begun until after the lapse of more than five years from maturity of the note in controversy. Section 8510, Comp. St. 1922, requires that an action on a

written contract shall be commenced within five years after the cause of action accrues. Plaintiff, however, contends that coverture prevents the running of the statute and that the statute did not begin to run during the lifetime of Mrs. Gertrude Adamson. This contention is based upon section 8519, Comp. St. 1922, as it existed prior to 1913. Prior to that date the statute provided, in effect, that if a person entitled to bring any action, except for penalty or forfeiture, be, at the time the cause of action accrues, a married woman, she shall be entitled to bring such action at any time within the time limited by the statute after such disability shall be removed.

However, after the enactment of that statute, the legislature enacted a law known as the married woman's act (Laws 1871, p. 68, sec. 3) which permitted married women to sue and be sued in the same manner as if they were unmarried. After the enactment of this statute, coverture no longer constituted a disability, so far as relates to the right to bring an action.

In *Murphy v. Evans City Steam Laundry Co.*, 52 Neb. 593, it was held that, after the enactment of the married woman's act, the statute of limitations would run against a married woman during coverture, notwithstanding the statute, which allows married women the full period of limitations after the removal of the disability of coverture. Other cases holding a similar view are *Pope v. Hooper*, 6 Neb. 178; *Omaha Horse Railway Co. v. Doolittle*, 7 Neb. 481; *Morse & Co. v. Engle*, 28 Neb. 534; *Smithson v. Smithson*, 37 Neb. 535; *Linton v. Heye*, 69 Neb. 450.

By the holdings of this court it is quite clear that coverture no longer constitutes a disability, preventing the bringing of an action, and does not interfere with the running of the statute of limitations against a married woman. Under the authorities cited, this action was barred by the statute of limitations and the district court properly dismissed the action. The judgment is

AFFIRMED.

RIVERTON STATE BANK, APPELLANT, V. EDSON L. WALKER ET AL., APPELLEES.

FILED JULY 1, 1925. No. 24005.

1. **Appeal: INCOMPETENT EVIDENCE.** The reception, over objection, of incompetent evidence that is calculated to prejudice the rights of the objecting party constitutes reversible error.
2. **Bills and Notes: BONA FIDE PURCHASER.** "To defeat a recovery on a promissory note in the hands of an indorsee, who takes it before maturity for a valuable consideration, in the ordinary course of business, without notice, it is not sufficient to show that it was taken under circumstances which might excite suspicion in the mind of a prudent man, but it must be shown that the indorsee took the paper under circumstances showing bad faith or want of honesty on his part." *Norwood v. Bank of Commerce*, 77 Neb. 205.

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

Byrum & Thompson and *Bernard McNeny*, for appellant.

M. L. Donovan and *George J. Marshall, contra.*

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

GOOD, J.

This is the second appearance of this case in this court. The former opinion is reported in 107 Neb. 672, reference to which is made for a more complete statement of the issues.

This is an action on a promissory note by the payee against the makers. The note in controversy is a renewal of a previous note, given by the same makers to the Missouri Valley Cattle Loan Company, and purchased before its maturity for value by plaintiff. The defenses pleaded are that the previous note was without consideration and was procured by fraud, and that plaintiff was not an innocent holder; also that plaintiff and its officers had conspired with the Missouri Valley Cattle Loan Company and its officers and agents to perpetrate a fraud upon the defend-

ants in inducing them to purchase stock in said cattle loan company. Defendants had the verdict and judgment thereon, and plaintiff has appealed.

It is conceded, or appears without dispute, that there was fraud in the inception of the note given to the cattle loan company; that defendants received practically no consideration for the note; and that plaintiff purchased the note before maturity, in the ordinary course of business, for value. There is no competent evidence that plaintiff, or any of its officers, entered into any conspiracy with the cattle loan company, or its officers or agents, to defraud the defendants. The only question for determination is whether plaintiff purchased the note in good faith and without notice of infirmity therein.

Among the errors assigned by plaintiff are the admission of evidence, over objection, and the giving of certain instructions.

Defendant Vansyckle, over objection, was permitted to testify to a conversation, had with one Cohn, without the presence of any officer or agent of the plaintiff bank. Cohn was an agent of the Missouri Valley Cattle Loan Company for the sale of its stock, and, in attempting to sell stock to Vansyckle, made certain statements concerning the relations between the cattle loan company and the plaintiff bank, and of the latter's knowledge of the affairs of the loan company. The evidence was purely hearsay and was therefore incompetent. It was of a nature calculated to prejudice the rights of plaintiff in the action then on trial. The reception of incompetent evidence, over objection, that is calculated to prejudice the rights of the objecting party constitutes reversible error.

One of the instructions of which plaintiff complains told the jury that—"If the proposed purchaser, before the purchase of the note, learns some facts which although in themselves would not make him believe the note was obtained by fraud but that would put a reasonably prudent man upon inquiry to determine whether or not it was obtained by fraud, it then becomes the duty of the proposed purchaser

to make such an investigation, and if he does not make such an investigation and it later develops that if he had made such an investigation he would have learned of the fraud, then in such a state of circumstances he would not be, in the eyes of the law, an innocent purchaser, and the note would be subject to the same defenses in his hands, that it would be in the hands of the original payee; and this would be true even though he paid the full face value for the note." A somewhat similar instruction was condemned by this court in *Benton v. Sikyta*, 84 Neb. 808.

The correct rule, applicable to the case, is set forth in *Norwood v. Bank of Commerce*, 77 Neb. 205, in the following language: "To defeat a recovery on a promissory note in the hands of an indorsee, who takes it before maturity for a valuable consideration, in the ordinary course of business, without notice, it is not sufficient to show that it was taken under circumstances which might excite suspicion in the mind of a prudent man, but it must be shown that the indorsee took the paper under circumstances showing bad faith or want of honesty on his part."

In *Howells State Bank v. Hekrdle, ante*, p. 561, it is held: "It is not sufficient to show that the indorsee took the note under circumstances which ought to excite suspicion in the mind of a prudent man, but it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part."

The instruction given did not correctly state the law applicable to the case, and constituted prejudicial error.

We refrain from discussing other assignments of error, as they are not necessary to a determination of this case and are not likely to occur in a subsequent trial. We feel impelled, however, to make this observation: Without apparent reason, counsel for the defendants, by a continued and persistent course of leading and suggestive questions, and by a series of questions suggesting or imputing to witnesses for the plaintiff improper conduct and motives, may have improperly influenced the jury in their deliberations.

Such a course of conduct should be avoided on a future trial.

For the reasons given, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

HENRY J. ABRAHAMS, APPELLANT, V. STUDEBAKER CORPORATION OF AMERICA, APPELLEE.

FILED JULY 1, 1925. No. 23182.

1. **Judgment: RES JUDICATA.** In order that *res judicata* as a plea in bar to a subsequent action may avail, the latter must be upon the same claim or demand. If upon a different claim or demand, *res judicata* may avail as an estoppel only as to issues therein shown to have been actually determined.
2. **Election of Remedies.** Plea of election of remedies found to be without basis.
3. **Limitation of Actions.** Plea of statute of limitations examined, and *held* without merit.

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

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

Howard Saxton and *Baldrige, Dorsey, Randall & Baldrige, contra.*

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

THOMPSON, J.

On February 11, 1916, plaintiff, appellant, brought an action in the district court for Douglas county against defendant, appellee, to recover $1,672.25 alleged to be due him as damages arising out of the sale of an automobile by it to him. On June 16, 1916, while such suit was pending, the parties entered into an agreement whereby, in consideration of plaintiff returning such automobile and dismissing the action with prejudice, defendant would credit

him with $835 upon the price of a new car, to wit, $1,135, the remaining $300 to be paid by plaintiff at time of delivery of the new car. This agreement describes the car as "One Studebaker Touring Car Model Six Cyl. * * * to be delivered on or about May 1st, 1917, or prior thereto at your (defendant's) option."

The old automobile was then delivered to defendant, by it sold, the proceeds thereof converted to its own use and the action dismissed with prejudice. Defendant received and retains the $835 advance payment. It will be seen that the contract is silent as to the model of the automobile to be delivered, and without provision as to place or specific date of delivery.

On March 5, 1919, plaintiff brought an action in the same court, which will hereafter be referred to as the first action, alleging the execution of the contract above mentioned, and "that said contract does not specify in detail the exact type and style of car that plaintiff herein was to receive, but plaintiff alleges that this contract means that he was to receive one Studebaker Touring car, current model, at the time delivery thereof was to have been made." He further alleges, in substance, that about May 1, 1917, he demanded of defendant that such agreement be carried out; that he was then, and is now, ready and willing to carry out his part of it by paying the $300; that defendant refused, and still refuses, to fulfil its part of the contract; that he has been damaged in the amount of $835, for which he prayed judgment.

Defendant for answer, in substance, interposes a general denial, and alleges that it has performed all conditions precedent on its part, and has tendered to plaintiff "the Studebaker touring car" referred to in the contract; that plaintiff neglected to call for it, and refused to pay the $300; that it has been at all times able, ready and willing to comply with its part of the contract. It further alleges that it has been damaged in the sum of $500 because of plaintiff's failure to comply with his part of the contract, but it does not pray for judgment of any kind.

Plaintiff filed a reply in the nature of a general denial, and alleged that he offered to pay the $300 to defendant, which it refused. Case tried to a jury, verdict as follows: "We the jury, duly impaneled and sworn in the above-entitled cause, do find for the defendant." Motion for a new trial overruled, and judgment that defendant go hence without day, and for costs, from which no appeal was taken.

On April 29, 1921, plaintiff brought this present action in the municipal court for Omaha. From the judgment rendered therein, appeal had to the district court for Douglas county, and case tried upon new pleadings, the substance of plaintiff's petition, after setting out the history of the transaction and previous legal proceedings hereinbefore referred to, being as follows: That the $835 was to be credited to him as the "equivalent to a cash payment," and in paragraph 5 alleges that on or about the 2d day of April, 1919, because of an alleged breach on the part of plaintiff of the contract of June 16, defendant herein rescinded such contract and refused and still refuses to carry out the provisions therein contained on its part, although plaintiff was ready and willing at that date to perform all the provisions of such contract on his part to be performed. In paragraph 6: "Plaintiff further alleges that the defendant herein upon the rescission of said contract on its part has failed and refused to return to the plaintiff the consideration paid to the defendant by the plaintiff, or any part thereof." He then alleges, in substance, that defendant has sold the automobile returned to it under the agreement, and appropriated the proceeds to its own use, and that the agreement was a settlement for all damages in such action then pending, and the 1913 model car turned over; that he has demanded payment to him of the advance payment of $835, which defendant has refused to pay, and prays judgment for that amount, interest and costs.

Defendant for answer, after admitting its corporate existence, and the execution of the contract as alleged by plaintiff, and after pleading the history of the transaction and legal proceedings, alleges that the matters adjudicated

in the first action "are the same matters attempted to be litigated in this action, that said findings of the jury are binding in all respects upon the plaintiff, and that by said former adjudication, plaintiff is hereby estopped from again claiming the right to recover on the cause of action herein attempted to be set forth." It then further alleges that—"If the plaintiff ever had any cause of action against the defendant upon or pertaining to the matters and things attempted to be alleged or set out in his petition, the same accrued more than four years ago, * * * and the statute of limitations has run against any alleged cause of action of the plaintiff against the defendant of the nature attempted to be pleaded or set out in his petition herein, and same is now barred and outlawed by the statute of limitations." It then enters a general denial, and prays that it may go hence and recover its costs.

Plaintiff's reply denies that the issues and cause are the same in this action as those litigated in the first action, and denies that this action is barred by the statute of limitations, and further denies each and every allegation in defendant's answer.

Defendant moved the court for judgment on the pleadings. Before ruling on such motion, the parties filed a stipulation that the copies of pleadings, orders, journal entries, verdict, and judgment in the first action are to be considered as before the court, that the same are true copies of such records and files, and that the instructions in such first action may be considered by the court on the hearing of the motion made by defendant for judgment on the pleadings, subject to the defendant's objection as to their materiality. The court sustained defendant's motion, and entered judgment dismissing the case with prejudice, and allowing defendant to go hence and recover costs. Motion for new trial overruled. From this judgment, plaintiff appeals.

It will be seen from the record that two questions are presented, namely: Did the court err in entering judgment on the plea of a previous adjudication as an estoppel? Did

the court err in sustaining defendant's plea of the statute of limitations?

The alleged defenses pleaded in the first action after the general denial were but amplifications of what might have been proved under such general denial, to wit, ability, readiness, and willingness on defendant's part to comply at all times, and plaintiff's neglect or refusal to do so. No affirmative relief was prayed, as before stated, nor was rescission or abandonment put in issue. The contract was silent as to the kind of car plaintiff was to receive, and without specific averment of place of delivery, or the specific date thereof. From an instruction given by the court, evidence must have been received that the car was to be a current 1917 model, and that the contract implied a delivery at the place where made, to wit, Omaha. Thus, the verdict for defendant was a finding that it has at all times stood ready and willing to comply with its part of the contract and had not breached the same as alleged by plaintiff or otherwise, and thus left the parties each desirous of completing the contract, and each with the knowledge that the automobile to be delivered was to be of the current 1917 model, to be delivered as implied from the contract at defendant's place of business in Omaha. There was nothing more necessary to be determined, and, as we conclude, that was all that was determined.

In the instant action plaintiff alleges that defendant rescinded the contract in question on or about April 2, 1919 (which date is subsequent to the commencement of the first trial, and possibly after the verdict therein), and refuses to return the $835 advanced by the plaintiff. The record does not show that defendant tendered the $835 back to plaintiff on the above date, nor that plaintiff then elected to treat the contract as rescinded, nor upon what subsequent date, if any, up to the bringing of this action, he so elected. It is clear that he did so elect when he brought this action. By moving for judgment on the pleadings, defendant admits the facts well pleaded by plaintiff, which included the allegation of rescission.

As we have seen, the first action was based solely upon an alleged breach of contract, and no issue of rescission was raised by the pleadings, nor was it in any manner determined by the verdict or judgment therein. Nor did defendant present an issue of abandonment of the contract, or rely upon such issue. As is well said in *Trauerman v. Nebraska Land & Feeding Co.*, 77 Neb. 403: "To subject the purchaser to this penalty or forfeiture it should clearly appear that he has wholly abandoned the contract and wilfully refused to proceed thereunder." As neither rescission nor abandonment are alleged, they are not issues that were, or could have been, litigated in the first action, and neither properly belonged to the subject of litigation therein. It would require different evidence to determine the issue of rescission from that required to determine the issues raised at the first trial.

In order that *res judicata* may avail as a plea in bar in a subsequent action, such subsequent action must be upon the same claim or demand. *Triska v. Miller*, 86 Neb. 503; *Slater v. Skirving*, 51 Neb. 108. However, it must be remembered that a somewhat different rule is applicable where a plea of estoppel is interposed than that where a plea in bar is presented. As said by Justice Field in *Cromwell v. Sac County*, 94 U. S. 351, and approved by us in *Hanson v. Hanson*, 64 Neb. 506: "There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

The previous judgment is neither a bar nor an estoppel

to the right of the plaintiff to prosecute this action, and the trial court committed reversible error in not so finding, and in sustaining defendant's motion for judgment on the pleadings.

The law of election does not apply, as plaintiff was at the first trial without basis for an election. *State v. Bank of Commerce*, 61 Neb. 22.

Taking up the plea of the statute of limitations, the record shows, as before stated, that the cause of action in the instant case, based upon a rescission of the contract, arose on or about April 2, 1919. The instant action was brought April 29, 1921, as shown by the return of the summons. Thus, such plea is without merit.

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

REVERSED.

JOHN P. CARSON, APPELLEE, V. A. P. HUNT ET AL., APPELLANTS.

FILED JULY 1, 1925. No. 23228.

1. **Pleading: GENERAL DENIAL: ADMISSIONS.** When, as in this case, a general denial is interposed to a pleading, coupled with and followed by admissions, the denial yields to the admissions to the extent thereof.
2. **Trial: INSTRUCTIONS.** On a trial to a jury, each party is entitled to instructions covering the issues raised by the pleadings, which are supported by evidence, and the respective theories upon which the case is tried. It is reversible error not to give such instructions.
3. **Alleged Errors** based upon the refusal of the trial court to admit certain evidence, and the sufficiency of the evidence as a whole, considered and discussed in the opinion.

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

W. C. Parriott, for appellants.

Harry R. Ankeny and *A. Moore Berry, contra.*

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

THOMPSON, J.

Plaintiff, appellee, seeks to recover of defendants, appellants, whom he designates as members of a partnership, on an alleged oral contract for employment for the term of six months, at the salary of $65 a week, and $5 a day in addition when required to be away from Lincoln. He alleges, in substance, that the employment commenced November 1, 1920, and continued until January 17, 1921, when he was informed that his services were no longer needed; that on March 21, 1921, he obtained employment with another party at $43.50 a week; that defendants paid him $250 in salary, $105 as expenses, and the other employment enabled him to earn $217.50, making a total of $572.50, leaving a balance past due and owing of $1,239.56, for which he prays judgment.

The following is the substance of the answer interposed: A denial of each and every allegation in the petition; alleges that the parties to the action undertook to organize a company to be known as the Consolidated Silica Company, of which plaintiff subscribed for stock, its purpose being to handle the products of the Douglas Nu-Wa Company, which was owned by defendants Hunt and Douglas; that as a part of such plan plaintiff was employed for three months at $65 a week, $15 of which was to apply on the payment of such stock subscription; that they have paid plaintiff $50 a week for three months; that of these three months plaintiff consumed much time in his own private business in experimenting on a secret sweeping compound; that plaintiff was incompetent to do the work for which he was hired, and that the organization of the company was not fully perfected because of such incompetency; that the adventure resulted in a total loss to defendants, while plaintiff received a salary for the time he was employed, in excess of his earning.

For reply, plaintiff denies generally each allegation of

the answer, except that he admits that he was to become a stockholder, and that defendants Hunt and Douglas were the owners of the Douglas Nu-Wa Company, and alleges that no objections were interposed to his conduct or services rendered. Trial had to a jury, verdict and judgment as prayed by plaintiff for $1,239.56. Motion for a new trial overruled, and defendants appeal, relying for reversal upon the following grounds: The court erred in giving instructions numbered 1 and 4; in refusing to admit in evidence exhibit 8; the verdict is unsupported by the evidence, and is excessive.

The answer taken as an entirety admits the contract of employment, and also admits that the salary was to be at the rate of $65 a week, but alleges that the contract was for three months, and that $15 of the $65 was to be satisfied by plaintiff's acceptance of $15 worth of stock in the proposed corporation, for which he had subscribed, plaintiff and defendants together undertaking its organization. These admissions follow the general denial, and no objection was interposed to this manner of pleading. Thus, each thereof eliminates such denial to that extent, and to the same extent supplants it. As is stated in the body of the opinion in *Bierbower v. Polk*, 17 Neb. 268, 278: "We will not try to harmonize the general denial with the other allegations of the answer, but will only say that it must be quite difficult to deny a proposition and admit its truth in the same verified pleading. The denial must yield to the admission." This rule applies especially to this case, as the answer is not challenged for inconsistency.

Then, plaintiff could not be heard to complain if a failure to organize the proposed corporation resulted in his not receiving the $15 worth of stock, as the record shows that he was to be one of its organizers along with defendants. He could not at will unload the burden of organization and recover the $15 as cash owing him from defendants, if the jury should have found that he was to receive stock only, for the latter amount. There should have been an instruction on this issue. In not giving such an instruction, the

court kept from the jury important features of the defense.

The employment being admitted, as well as the salary of $65 a week, the issues to be determined were: Was the employment for six months or for three months only? Was the $65 to be paid in cash or was $50 thereof to be paid in cash and $15 in stock when the parties organized the new company? These issues were fairly covered by the evidence introduced by each party, in harmony with the respective theories, but instruction No. 1, after setting out the petition *in extenso*, told the jury that defendants presented a general denial thereto, thus omitting all other defenses pleaded. The parties were entitled to have the issues presented by the pleadings and covered by the evidence, and the respective theories upon which the case was tried, covered by proper instructions. *Hanover Fire Ins. Co. v. Stoddard*, 52 Neb. 475; *Kyd v. Cook*, 56 Neb. 71; *Tavlinsky v. Ringling Bros. Circus, ante*, p. 632. This, we have seen, was not done.

Instruction No. 4, giving plaintiff's theory of the case, and not defendants', abruptly and without explanation, impliedly took from the jury all issues except that of a contract for six months, and by implication told them that all other issues were withdrawn.

Instruction No. 2, complained of in the motion for a new trial, and in the oral argument in this court, was challenged, in that it omitted to tell the jury that, if they found that plaintiff was employed for six months and was by defendants discharged before the expiration thereof, it was plaintiff's duty to reduce damages by seeking other employment with reasonable diligence, and, if he did not do so, he would not be entitled to recover for the time intervening between the time of his discharge and his attempt to obtain other employment. To this challenge it is sufficient to say that defendants did not meet the burden cast upon them to allege and prove that plaintiff had not diligently sought other employment. *Wirth v. Calhoun*, 64 Neb. 316; *Kring v. School District*, 105 Neb. 864. Therefore, they cannot be heard to complain of the instruction.

The alleged error based upon the court's refusal to admit exhibit 8 in evidence is without basis, as no proper foundation had been laid. The objection to the sufficiency of the evidence has merit. However, the verdict is not without evidence to support it.

The limitive instructions were so prejudicial to defendants as to deny them a fair trial, and the judgment of the district court should be, and is reversed and the cause remanded.

REVERSED.

NEBRASKA WHEAT GROWERS ASSOCIATION, APPELLEE, V. C. C. NORQUEST ET AL., APPELLANTS.

FILED JULY 1, 1925. No. 24564.

1. **Monopolies: COOPERATIVE WHEAT GROWERS ASSOCIATION.** A nonprofit, cooperative association, which has for its purpose the orderly marketing of the wheat of its members, and which does not control prices, restrain trade, or prevent competition, as in this case, does not constitute an unlawful combination.
2. **Injunction: REMEDY AT LAW.** The scope and purpose of plaintiff association considered, and *held*, that the liquidated damages provided for by the contract do not afford an adequate remedy at law.
3. **Commerce: FOREIGN CORPORATIONS: FILING OF CERTIFICATE.** A foreign corporation engaged in interstate commerce is not required, under section 634, Comp. St. 1922, to file a certificate before doing interstate business within the state.

APPEAL from the district court for York county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

J. H. Grosvenor, for appellants.

Corcoran & Sprague and *Bernard McNeny, contra.*

Butler & James and *J. F. Ratcliff, amici curiæ.*

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

THOMPSON, J.

The Nebraska Wheat Growers Association, appellee, brought this suit in the district court for York county against defendants, appellants, members of the association, to restrain them from selling 854 bushels of wheat grown by them in 1924 to others than plaintiff, alleging, in substance, that it is a Kansas corporation, organized for the purpose of handling wheat of its contractees, and doing business in Nebraska; that defendants raised 854 bushels of wheat in 1924, which they refuse to sell to plaintiff under the contract between the parties, dated March 26, 1921, extending for five years, which is of the standard form used by such associations, and which is made a part of the petition; that defendants have sold 50 bushels of such wheat to others; that plaintiff is a nonprofit corporation, without capital stock, formed for the purpose of handling wheat cooperatively and collectively, without any pecuniary profit to plaintiff, with about 2,800 members, each of whom entered into such contract; that plaintiff has hired employees and expended large sums of money in expectation of receiving defendants' wheat; that a failure of the members to sell wheat as agreed will defeat the purpose for which plaintiff was organized, as well as the purpose of the contract, and damage plaintiff and each member thereof. It then prays that defendants be enjoined from withholding or disposing of their wheat in any other manner than that provided for in the contract, and $12.50 damages for the 50 bushels sold in violation of it.

Defendants for answer, in substance, deny any knowledge as to plaintiff's legal status in Kansas, and allege that plaintiff, if incorporated at all, is a foreign corporation, seeking to carry on business in Nebraska without first having obtained the statutory certificate; that the contract is in violation of law, is unconscionable, inequitable, and oppressive, and defendants renounce it and demand rescission thereof; that plaintiff has an adequate remedy at law. A denial is then interposed to all allegations not admitted. Plaintiff filed a reply in the nature of a general denial.

The case was submitted to the court upon an agreed statement of facts, the substance of which is as follows: Plaintiff is, and was, a corporation organized under the laws of Kansas at the time of the contract; the statutory certificate was not filed in Nebraska until three years later; the parties entered into the contract referred to in the pleadings; defendants raised 854 bushels of wheat in 1924, and refuse to sell and deliver such wheat, less the amount they may retain under the contract, to plaintiff, although requested to do so; that defendants have sold 50 bushels of such wheat to others than plaintiff, and intend to, and will, sell the remainder to others unless prevented; that 2,700 have become members of plaintiff and entered into agreements identical with the one herein; that plaintiff has hired employees and spent large sums of money in expectation of selling defendants' wheat according to the contract; that 25 cents a bushel is a reasonable amount for plaintiff's damage for the wheat sold; that defendants marketed their wheat with plaintiff under the contract for the years 1922 and 1923, and received whatever benefits arose therefrom; that exhibit 2 is a correct copy of plaintiff's by-laws, and exhibit 3 is a copy of its articles of incorporation filed with the secretary of state.

The court found for plaintiff as prayed. Motion for a new trial was overruled. Defendants appeal.

The challenge to the judgment brings us to a consideration (1) of the effect of plaintiff's failure to file articles of incorporation in Nebraska until after this contract was entered into. (2) Does the contract provide plaintiff with an adequate remedy at law by way of liquidated damages? (3) Does such contract contravene sections 3420 and 3421, Comp. St. 1922, or the provisions of the common law applicable?

To quote from the articles of incorporation or by-laws of plaintiff, or the contract, would extend this opinion to an unreasonable length. It is sufficient to say that the parties admit that these are the same as were considered in the cases hereinafter cited construing them, each being in the

standard form used by such associations in the different states.

In harmony with their importance to the case, we shall consider the above questions in their inverse order. We are not unmindful of the evil sought to be avoided at common law by congress in enacting anti-trust laws, and by our legislature in enacting the above statutes, to wit, combinations in restraint of trade in the hands of individuals. However, as we view the contract in question, its purpose is not to retard, but to stimulate, trade, by intelligent and efficient management by the few in close touch with the demand for wheat, considered in connection with the mode and distance of its transportation, and its impelling enticement to buyers by reason of the quantity controlled by those in charge. It is organized for mutual help, is without capital stock, is not conducted for profit, but is a simple, businesslike scheme of those engaged in wheat growing to advantageously handle and market their product, and this without encroachment upon the rights of others. That it is without the evil aimed at by antitrust laws is proved by its being open to all, its profits, if any, divided without preference, and there being nothing within its scope or procedure which tends to control prices, restrain trade, or prevent competition. Thus, we conclude that this contract does not contravene either of the above-mentioned statutes or the common law. In this conclusion we are sustained by the following cases deciding similar questions both as to law and fact: *Kansas Wheat Growers Ass'n v. Schulte,* 113 Kan. 672; *Dark Tobacco Growers Cooperative Ass'n v. Mason,* 150 Tenn. 228; *Hollingsworth v. Texas Hay Ass'n,* 246 S. W. (Tex. Civ. App.) 1068; *Tobacco Growers Cooperative Ass'n v. Jones,* 185 N. Car. 265; *Oregon Growers Cooperative Ass'n v. Lentz,* 107 Or. 561. For the rule at common law see opinion in *Standard Oil Co. v. United States,* 221 U. S. 1.

As to the second question, we are of the opinion that, when the scope and purpose of the plaintiff association is considered, the liquidated damages provided for by the con-

tract do not afford plaintiff an adequate remedy at law. As is well said in *Kansas Wheat Growers Ass'n v. Schulte, supra:*

"This association was organized for the sole purpose of marketing the wheat raised by its members, and performing such functions as are incidental thereto. From the very nature of things it must have the wheat or it cannot exist. It has no power to buy wheat, hence it cannot go into the open market and purchase wheat to fill its contracts of sale and sustain its existence or recoup its loss, if the members fail to deliver. Even the payment of damages of 25 cents a bushel, stipulated to be paid by a member for each bushel he produces and sells elsewhere, would not sustain the association and enable it to do the business for which it is incorporated. Hence, as a practical matter, it is of little consequence that the member is solvent and able to respond in damages. If the association received damages from all, or a substantial portion, of its members, it would cease as a going concern, or be so seriously handicapped as to destroy its usefulness. Wheat is the only commodity the association can use as a going concern. All it can do with money is to pay its expenses and disburse the balance among its members. It necessarily follows that there is no adequate remedy at law. The only adequate remedy is injunction, preventing the member from selling to others, and thus forcing the delivery of the wheat to the association."

This succinctly states the facts under consideration, as well as the law applicable.

As to the remaining proposition: We must determine whether plaintiff comes within the prohibition of section 634, Comp. St. 1922, requiring a foreign corporation to file its certificate with the secretary of state before it is authorized to engage in any kind of business in the state. Corporations organized for the purpose and doing business as shown by this record are engaged in interstate commerce, and, as such, are not required to file the certificate called for by section 634, *supra,* before doing business in this state. *Traphagen v. Lindsay,* 95 Neb. 823. We conclude

that this is the proper interpretation of the clause in such section, which reads: "Except such corporations engaged in interstate commerce as common carriers;" the words "common carriers" as used being in a general sense, and not intended to limit such words to those engaged in actual transportation, but to include, as well, those engaged in a business partaking thereof, as plaintiff herein. To hold otherwise would be to run counter to the provisions of the Constitution of the United States, which lodges in congress the sole power to regulate interstate commerce.

In the articles of incorporation, the directors are impressed with the duty of doing everything necessary to enhance the purpose of the corporation anywhere throughout the world, and, in the contract, plaintiff is authorized to sell the wheat to any agency in other states, or to millers or exporters. These provisions, taken with the entire record, bring this question clearly within the very recent decision of the United States supreme court in *Shafer v. Farmers Grain Co.*, —— U. S. ——, 45 Sup. Ct. Rep. 481, wherein it is said: "Buying for shipment, and shipping, to markets in other states, when conducted as before shown, constitutes interstate commerce; the buying being as much a part of it as the shipping."

For the foregoing reasons, it is considered that the judgment of the district court is in all things right, and should be, and hereby is,

AFFIRMED.

Note—See Monopolies, 27 Cyc. 902.

AUGUST G. SCHROEDER, APPELLANT, V. HOLT COUNTY ET AL., APPELLEES.

FILED JULY 1, 1925. No. 24633.

Master and Servant: COMPENSATION: LOSS OF USE OF LEG. An employee who receives an injury not affecting any other part of his person, but totally and permanently destroying the use of one leg, is only entitled to recover as if the leg had been removed by reason of such injury, under subdivision 3, sec. 3044, Comp. St. 1922, and not under subdivision 1 thereof.

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

M. F. Harrington, Gerald F. Harrington and *Clifford B. Scott,* for appellant.

Kennedy, Holland, DeLacy & McLaughlin, contra.

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

THOMPSON, J.

This case comes here on appeal by plaintiff from a finding and judgment in the district court for Holt county in a compensation case, and is submitted solely on the finding and judgment, which, as shown by the record, is as follows:

"The court finds that by reason of such injuries the plaintiff has entirely lost the use of his left leg and is entitled to compensation the same as if the leg were amputated, to which finding both parties except, the exception by plaintiff being as to the measure of recovery, and by the defendants as to the fact found. The court finds that the plaintiff can flex the knee to some extent but has no actual use of it. The court finds that by reason of such injury the plaintiff will never be able to perform any work or labor, to which finding the defendants except. On the foregoing facts the court finds as a matter of law that the plaintiff is entitled to recover for 215 weeks from the date of his injury at the rate of $10 a week. To this finding of law both plaintiff and defendants except. The court further finds that, while plaintiff will never be able to perform any work or labor by reason of the aforesaid injuries, still as a matter of law this condition does not establish permanent disability within the meaning of the employers' liability act, to which finding of law plaintiff excepts. The court further finds that plaintiff is unable to walk or move about without the aid of crutches and that this condition is permanent. The court further finds that the plaintiff is entitled to recover the sum of $68.65, expenses necessarily incurred in making trips to Omaha, Nebraska, to be examined by defendants' sur-

geons. The court finds the total amount paid by defendant, Travelers Insurance Company, to the plaintiff is $660 and there is still due to the plaintiff from the defendant, to be paid as herein directed, the sum of $1,490, to which finding both plaintiff and defendants except. The court finds that there is due at this time compensation at the rate of $10 a week to plaintiff from defendants in the sum of $270, being compensation for 27 weeks, to which defendants except. The court further finds that plaintiff is entitled to compensation for another 122 weeks from this date at the rate of $10 a week, to which finding defendants except."

Appellant insists for reversal of the lower court: "That, in view of the fact that the court has found that by reason of these injuries he will never again be able to perform any work or labor, the measure of recovery is not at all what it would have been had he merely lost his leg. We claim that other provisions of the compensation act apply. Our contention is that in view of the fact that certain injuries have rendered him unable to ever again perform any work or labor he is entitled to compensation at the rate of $10 a week for 300 weeks instead of 215 weeks. It is our further contention that after the expiration of 300 weeks he will be entitled to compensation for the rest of his life at the rate of $6.75 a week. His wages were $15 a week. If we are right he would be entitled to 45 per cent. of this amount for the remainder of his life after the 300 weeks, and that would be $6.75 a week. * * * The crucial question is whether the compensation is to end after 215 weeks the same as if his leg had been cut off."

Appellant cites to sustain this position, *Nebraska National Guard v. Morgan*, 112 Neb. 432. The cases are readily distinguishable. In this case the injury is limited to the left leg, it in no manner affecting other parts of the person. In the *Morgan* case, we said:

"While the only direct result was a fracture of the surgical neck of the femur, the evidence establishes the facts that the injury left broken ends of bone in the hip of the claimant resulting in a malplacement of the hip bone against

the pelvic bone, causing irritation of the nerves coming into the hip and affecting the whole physical and nervous system in such manner as to totally disable the claimant from doing any work. The district court found that the plaintiff was suffering from total disability, and such finding is amply sustained by the evidence."

The only similarity between the *Morgan* case and this one is that by reason of the injury each lost the use of the leg injured, and, if that were all, to that extent each was entitled to compensation the same as if the leg had been, by reason thereof, amputated. But there the similarity ceases, as well as the law applicable. The law as announced and applied in *Hull v. United States Fidelity & Guaranty Co.*, 102 Neb. 246, governs the facts disclosed by the record herein, and not *Nebraska National Guard v. Morgan, supra.*

It must be remembered that the law opens a way for the injured man to help himself, and contemplates his doing so. While in some cases, possibly in this, complete justice is not provided for, as a rule the law has met the approval of employer and employee. In any event, it is not for us to disregard its plain intent and meaning.

The judgment of the district court is right, and is in all things

AFFIRMED.

J. F. BLOOM & COMPANY, APPELLANT, V. MYRTLE LEWIS, APPELLEE.

FILED JULY 1, 1925. No. 23183.

Evidence examined, and *held* insufficient to sustain the verdict.

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

W. W. Wilson and *Johnson, Moorhead & Rine*, for appellant.

D. W. Livingston, contra.

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

REDICK, District Judge.

The petition declares upon a written contract dated November 16, 1920, for the sale by plaintiff to defendant of a monument to be placed over the grave of her husband. The material was to be Balfour pink granite of a design and lettering specified in the contract, and included an engraved marker and initialed corner stones. The price was $650 set in place. The answer admitted the making of the contract, and in addition to a quite dramatic description of the forlorn and helpless situation of the widow, and the wicked intentions of plaintiff's salesman, presumably inserted as matter of inducement, alleged that her signature to said contract had been obtained by false representations: (a) "That the plaintiff company would furnish such monument to her at two-thirds, or less than two-thirds, of the price charged by the local dealer or by any other persons engaged in selling and erecting monuments;" and (b) "that the said plaintiff company was then about to make a large shipment of monuments to Nebraska City, and the one that he proposed to sell defendant would be included." And it is then alleged that immediately upon discovery that said representations were false she caused the administrator of said estate to rescind said contract. The reply was a general denial. Trial to a jury, verdict for the defendant, motion for new trial overruled, judgment on the verdict, from which plaintiff appeals.

Errors relied upon for reversal are: (1) That the verdict is not sustained by sufficient evidence; (2) error in giving and refusing certain instructions; (3) the reception of incompetent evidence over plaintiff's objections; and (4) error in permitting leading questions to be put to defendant as to false representations.

The first assignment requires a somewhat detailed examination of the evidence. The defendant was the only witness called to prove the alleged representations, although two other persons, her mother-in-law and sister-in-law,

were present at the time, and were within the jurisdiction of the process of the court at the time of the trial.

After stating that one Perry, sales agent of plaintiff, about a month after her husband's death, came to her house, she testified as follows:

"Q. Did he tell you what he came to your place for? Just answer by yes or no. A. Yes, sir. Q. What was it he said his business there was? Just tell the jury in words or substance what he stated at that time. A. He was wanting to sell me a monument and he showed photos of a monument. We looked at the photos and I decided on the one that I wanted. Q. What did he say to you, if anything, about what this monument was worth? Mr. Wilson: Objected to as leading and suggestive. The Court: Overruled. A. That it was worth its price. Q. Do you remember what that price was? A. $650. Q. Now, what, if anything, did he say about whether or not it could be purchased, whether he was offering it to you, for less than you could get it here? Mr. Wilson: Objected to as incompetent, irrelevant, immaterial, leading, and suggestive. The Court: Sustained. Q. What, if anything, did he say about the price as compared with others? Mr. Wilson: Objected to as incompetent, irrelevant, immaterial, leading, and suggestive. The Court: Overruled. A. One-third less. Q. Did he explain to you how he could make that kind of a price to you? Mr. Wilson: Objected to as incompetent, irrelevant, immaterial, leading, and suggestive. The Court: Overruled. A. That he was having a large shipment and for that reason he could sell it cheaper. Q. Had you had any experience in buying monuments at that time? A. No, sir. Q. Did you have any knowledge of the value of monuments at that time? A. No, sir. Q. Did you rely on what he said as to the value of this monument? A. Yes, sir. Q. Did you depend upon or believe what he said as to its value? A. Yes, sir."

The defendant then, in answer to leading questions, stated that about two or three weeks later she received information (not stated) leading her to believe that the representation as to the value of the monument was untrue,

and that she instructed the administrator of the estate to rescind the contract. The above constitutes the entire testimony as to the alleged fraud.

The salesman, Perry, denied that he represented the monument would be furnished at two-thirds or less of the price of a local dealer, but admitted that he told her of a few people he had sold monuments to, and that they would be shipped down in the spring and hers would come with the rest of them.

November 19, 1920, defendant, in response to a letter from plaintiff, confirmed the contract, subject to some alterations as to the form of the letters. About December 15, 1920, plaintiff received the following letter:

"J. F. Bloom & Company, Omaha, Nebr.

"Gentlemen: Mrs. Myrtle Lewis showed me what purports to be a contract for a monument to be furnished by your firm for the estate of the late Lewis Lewis, I say to you that I was appointed admstrtr. of this estate, and any contract would have to have my name signed to it to bind the estate, which I refuse to do, I therefore notify you not to proceed with this work, *you must not trespass on the Lewis lot in Wyuka Cem,* the fact is the estate is not in condition to contract for a monument, you will have to cancel this contract, this is final and I don't want you or your agent bother either Mrs. Lewis or myself about this matter any further. Yours truly,

"(Signed) Wm. Wardon, Administrator."

This is the letter which defendant says she instructed the administrator to write. It will be noted that not the slightest suggestion of fraud or misrepresentation is contained in the letter. The emphasis is put upon the assumption that the contract would have to be made with the administrator, and that the estate was not in condition to contract. This letter was written out in pencil by Wardon, and typewritten, at his request, by W. A. Forbes, a monument dealer of Nebraska City, in his office. Forbes subsequently sold defendant a monument for $500. It may be remarked in passing that the contract in suit does not purport to bind the estate, but is a personal one with the de-

fendant. After receiving above letter plaintiff sent Perry to Nebraska City to see defendant, and he testifies: "I went there, went to her home here where she was staying and asked her about it, and she told me that she, that Mr. Wardon didn't want her to take the monument. She said she didn't know why, and I told her that we could not rescind the contract and that we would have to go ahead with it, and she told me to go ahead with it." This is not denied by the defendant. However, in March or April, 1921, the monument being ready for delivery, Perry called upon defendant for her authority to the cemetery association to place the monument upon her lot, but she refused to take it, saying, according to the witness: "That she had made arrangements with Mr. Forbes, and that he said, if she had any damages to pay on this one, he would pay them." At neither of these conversations was there the slightest intimation from defendant that she claimed to have been defrauded. Defendant denied that she made any statement to Perry as to Forbes, but admitted that she stated over the telephone to Mr. Wilson, plaintiff's attorney, that Forbes was backing her, and later, upon the suggestion of her counsel that she did not understand the question, denied that she had so stated.

No question is made but that plaintiff prepared the monument in accordance with the contract and had it in Omaha ready for delivery.

We think the trial judge should not have permitted the leading questions as to the representations, at least until after the witness had stated all the conversation she could remember, when it is allowable to call attention to some particular matter. But passing this, and not ignoring the well-established rule of this court that disputed questions of fact are for the jury, it requires more than a scintilla of evidence to support a verdict, and we are in serious doubt whether even that amount of evidence is here present. Considered in connection with the matters now to be discussed, we think the evidence is absolutely insufficient to support the verdict.

The false representations relied upon are that the monument was of the value stated in the contract, and that it was a third or more less than the same monument could be furnished by local dealers. As to the first point, defendant introduced but one witness, Forbes, who subsequently, with full knowledge of plaintiff's contract, sold defendant a monument to take the place of the one plaintiff was to furnish and who defendant once admitted was backing her in this law-suit. He testified that the monument in question (stone marker and corners) was worth not to exceed $425 to $450, the same price as any standard granite. His testimony was objected to as incompetent, and no proper foundation laid. The objection should have been sustained. While the trial judge has considerable latitude of discretion in determining the competency of expert witnesses to give their opinions, it appeared from the witness' testimony that he had never handled any granite of the kind specified in the contract, and that all he knew of the cost of the stone was from conversation with unnamed and unidentified salesmen some three years previously in which they stated that the granite in question, which comes from North Carolina, would cost at the quarries some 10 or 15 per cent. more than Vermont or Massachusetts granite. He testified that stone like that furnished by plaintiff, of Barre granite from Vermont, would cost $100, and this was what he sold defendant. It appears, however, without dispute, that the stone furnished by plaintiff cost at the quarry $280. The witness' estimate was based upon $100 as the cost of the stone, and allowing for the correction in accordance with the facts would bring his estimate substantially up to the price charged by plaintiff. The evidence establishes that the pink granite is a special kind, much harder than the gray, and much more difficult to polish, testimony for plaintiff being that the cost of preparing the stone was 50 per cent. greater than ordinary granite. It is shown by the evidence that the cost to plaintiff of the stone in question set in place would be about $401, therefore yielding him a profit under his contract of about 38 per cent.; while, ac-

cording to Forbes, the stone he sold cost him $100, and, the evidence showing the expense of lettering and setting to be $100, it appears that the cost to him of the monument in place sold defendant was about $200, yielding a profit of 60 per cent. It would seem, therefore, that he could well afford to "back" the defendant in this litigation. Plaintiff produced five witnesses, three of them disinterested, who testified that the fair value of plaintiff's monument was the price fixed by the contract. There was no competent evidence that the monument was not worth the price, and there was no evidence, competent or otherwise, that the price was more than two-thirds what a similar monument could be furnished for by a local dealer, nor that plaintiff had not sold other monuments which would be shipped at the same time.

Inasmuch as the evidence is insufficient to support the verdict as to the existence of the alleged representations or as to their falsity, if made, judgment must be reversed.

REVERSED AND REMANDED.

JAMES D. LAWSON, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED JULY 1, 1925. No. 24234.

1. **Appeal:** LAW OF CASE. "When the evidence is substantially the same as on a former appeal, the weight and effect to be given such evidence must be considered as foreclosed by the former decision on that point." *Hruby v. Sovereign Camp, W. O. W.*, 83 Neb. 800.
2. **Evidence:** JUDICIAL NOTICE. The court will take judicial notice of matters of common knowledge, and evidence of witnesses will not be received to establish such matters.
3. **Railroads:** NEGLIGENCE. A breach of the rules adopted by a railroad company for the government of its employees is not evidence of negligence in an action by a third person, a member of the public, for injury to cattle on the right of way; the liability in such cases is determined by the statute or common law.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed and dismissed.*

C. A. Magaw, Thomas W. Bockes and *Thomas F. Hamer*, for appellant.

Nye, Worlock & Nye and *Prince & Prince, contra.*

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

REDICK, District Judge.

This is the second appearance of this case in this court. For a full statement of the facts reference is made to the former decision, 109 Neb. 785, affirming a judgment for plaintiff, and 109 Neb. 793, a decision upon rehearing withdrawing the former opinion and reversing the case upon the ground that the verdict was without support in the evidence. Upon a second trial without a jury there was again a finding and judgment for plaintiff, and defendant appeals.

For our present purpose it is sufficient to state that the action is brought by plaintiff to recover damages for the loss of 45 head of cattle killed by one of defendant's trains while upon the right of way of defendant. A freight train of defendant while awaiting orders was standing near a station on a switch track about 58 feet south of the two main tracks and about 300 feet east of a highway crossing. The electric head light was lighted and cast a strong light upon the crossing. The plaintiff with full knowledge of the situation, about 7 p. m., when it was quite dark, with the assistance of three helpers, drove his herd of 103 cattle along the road south of the engine, past the same, and turned them north upon the crossing over the switch track and two main tracks. The cattle were going nicely passing over the switch track and south main track and 26 of them followed the leading herder across the north track, but the remainder hesitated and bunched up when upon the two main tracks, and drifted to the west along the tracks and resisted all efforts to return them to the crossing. While this was going on a fast train of defendant approached from the east at 60 miles an hour and ran into the cattle killing 45. The only ground of negligence relied upon for

recovery is permitting the head light of the freight engine to shine upon the crossing, resulting in the formation on the north side of the tracks of dark spots or shadows which caused the cattle to refuse to pass over them and off the right of way, and to crowd westward along the tracks.

Upon this state of facts we held on the rehearing that no actionable negligence was shown "where there is nothing to indicate that the engineer and fireman in charge of the freight train could reasonably or probably have anticipated what happened," the court, Rose, J., saying (page 795):

"If, as an experienced cattleman, knowing, as he did, that the light from defendant's engine was shining on the crossing, he did not anticipate what happened, is it fair to assume without proof that the engineer and fireman, in reason and probability knew the propensities of the animals and that the light and shadows would frighten them and make them unmanageable? It seems more reasonable to assume the contrary in the absence of proof, since engineers and firemen in the performance of their duties at night necessarily cross highways at different elevations above the natural surface of the ground, throw light on public crossings at varying angles, cast shadows along railroad tracks, observe the custom to light highway crossings in cities, villages and country places and witness the endless caravan of moving automobiles as they throw light and cast shadows at highway crossings everywhere." And the opinion closed with the remark: "The better view of the record is that the verdict is without support in the evidence."

The evidence upon the second trial, with the exception of two points to be mentioned later, was substantially the same as upon the first trial, and, therefore, under the settled rulings of this court the question of the sufficiency of the evidence is foreclosed by the decision on rehearing which was the final disposition of the case in this court. *Mead v. Tzschuck*, 57 Neb. 615; *Hruby v. Sovereign Camp, W. O. W.*, 83 Neb. 800. Plaintiff seeks to distinguish these cases because judgments upon the second trials were for defendants. We think there is no such distinction. The

rule was applied in *Merkouras v. Chicago, B. & Q. R. Co.*, 104 Neb. 491, where plaintiff recovered on both trials. Nevertheless, we have made a careful and critical study of the evidence contained in the record and find no reason to change our decision as announced upon the rehearing, subject to the consideration of two new matters brought into the evidence upon the second trial and now called to our attention as obviating the effect which would ordinarily follow our former decision upon a second appeal.

The first of these matters has to do with certain evidence offered by plaintiff and received by the court, but which we think is based upon a misapprehension of our opinion. Plaintiff asserts in his brief: "On rehearing this court sustained its former opinion, but withdrew it in order to send the case back to the district court for proof that the men in charge of the freight engine could reasonably have anticipated the consequence of permitting the light from the freight engine to shine undimmed. This court seemed to think that such anticipation could not be common knowledge, hence had to be proved, and because it was not proved at the first trial it should be proved at the second one. This was done at the second trial in accordance with the directions of this court." The statement that "this court sustained its former opinion, but withdrew it," aside from its lack of accuracy, assumes the possession by this court of powers which have been granted to none. If it were practicable for this court to sustain an opinion and withdraw it at the same time we might attain that felicitous, but generally supposed impossible, consummation of having decided the case with perfect satisfaction to both sides. We deem it unnecessary to disclaim any such attempt, especially in view of the wording of our order, "Former opinion vacated, and judgment of district court reversed," which we still think effectually stripped our first opinion of any effect upon the subsequent proceedings. Notwithstanding plaintiff's construction that the opinion required proof of knowledge on the part of the engineer and fireman of the freight engine of the propensities of the animals to become

frightened at lights and shadows, no such evidence was offered; but the plaintiff called a contractor, a janitor, a printer, a lumber dealer, and a barber, and was permitted to show by each of them that in their judgment a glaring headlight of an engine situated 300 feet from a highway crossing would have a tendency to frighten cattle and force them to travel with the rays of light. These witnesses were not offered as experts, counsel for plaintiff frankly conceding that his purpose was to show common knowledge of the facts stated in the evidence, and by that means charge the defendant's employees with such knowledge, and consequently with the duty of anticipating the effect of the light and shadows upon plaintiff's cattle. The experience and research of the writer may be at fault, but he is obliged to confess never having so far met with an attempt to prove common knowledge by the production of witnesses. Matters of common knowledge require no proof, the court taking judicial notice thereof.

If, however, we assume the possession of such knowledge by the engineer and fireman, it would still be necessary to locate these servants at such time and place as would call it into use in the performance of some duty they owed plaintiff, arising out of a knowledge, or duty to know, of the position of plaintiff's cattle. To meet this situation the evidence now to be considered was produced by plaintiff. The other new feature upon the second trial was the introduction of certain rules of defendant company requiring the fireman to "remain on duty with the engine," and providing that "engines must not be left without a man in charge except at designated places." It is not claimed that plaintiff had any prior knowledge of these rules, or that he relied upon them in any way, but it is contended that a breach of the rules of itself is evidence of negligence. A former engineer and now trainmaster of defendant testified to the practical construction which, in the operations of the rialroad, had been given these rules, and that it had never been held a violation that the servants were not at all times in the cab of the engine (see *Merkouras v. Chicago, B. &*

Q. R. Co., 101 Neb. 717); that their duties frequently called them both to be down on the ground oiling, taking care of the ash pan, and a number of other things. This would seem to be also the reasonable construction. Notwithstanding the temporary absence of the servants while performing other duties, they would still be "in charge of" and "with the engine" for all practicable purposes. True, if children climbed upon the engine during such temporary absence and were injured, it might furnish an inference of negligence, not, however, because of the rule, but because of a failure to exercise ordinary care under the circumstances.

So far as the public is concerned, the measure of care to be exercised in the operation of a railroad is determined by law, not by the rules of the company. *Merchants Transfer & Storage Co. v. Chicago, R. I. & P. R. Co.*, 170 Ia. 378; *Hoffman v. Cedar Rapids & M. C. R. Co.*, 157 Ia. 655; *McKernan v. Detroit City Street R. Co.*, 138 Mich. 519; *Fonda v. St. Paul City R. Co.*, 71 Minn. 438; where the reasons for the exclusion in certain cases of rules of defendant company for the guidance of its employees as evidence of negligence are well stated, and the cases discussed and distinguished.

Plaintiff cites from *Merkouras v. Chicago, B. & Q. R. Co.*, 101 Neb. 717, a remark from the dissenting opinion by Morrissey, C. J., but the action in that case was by an employee of the defendant, and the cases are a unit that in that situation the rules of the company, when applicable, are admissible. Also *Smithson v. Chicago G. W. R. Co.*, 71 Minn. 216: That was an action by an employee fireman against his immediate employer, Chicago Great Western Railway Company, and receivers of Wisconsin Central Railroad Company, upon whose tracks he was operating under a joint arrangement between the two companies. The rules received in evidence, a breach of which was claimed to have caused the accident, were those adopted by the Wisconsin Central Railroad Company for the government of all trainmen while using or occupying those tracks. It is evident that plaintiff as a trainman was entitled to the

protection of these rules to the same extent as if they had been promulgated by his employer. Also, *Blumenthal v. Union Electric Co.*, 129 Ia. 322, an action by a passenger against the carrier, where the admission of the rules was merely held not prejudicial to defendant, as they did not require a higher degree of care than was imposed by law. Cases between employer and employee, and passenger and carrier, involve considerations of duty not present as regards the general public. The cases cited are not in point.

There is no direct evidence that defendant's servants were "not on duty with the engine," or were not "in charge" thereof, within the meaning of the rules in question. It seems to be assumed they were not from the fact that they were not called as witnesses. If they were not, we have seen their absence was no breach of duty toward plaintiff; if they were, to sustain plaintiff's position, we would be required to hold that at least one of them should have been in the cab of the standing engine watching the crossing with meticulous attention lest some animal should frighten at a shadow and refuse to step off the track and be run down by another train. This we are not prepared to do. To convict the servant of negligence under such circumstances would require him at a distance of 300 feet to observe the bunching of the cattle upon the track, divine the cause, and turn out the light; and after all this had been done the jury would have to assume that the cattle could have been driven off the track in time to avoid the collision.

We are unable to find in the record any evidence of actionable negligence. The judgment of the district court is reversed and the case dismissed.

REVERSED AND DISMISSED.

LUDMILA STRILKA, APPELLEE, V. LOUIS MARGOLIN ET AL., APPELLANTS.

FILED JULY 1, 1925. No. 23172.

1. **Appeal: EVIDENCE: REVIEW.** While an aggrieved party cannot

upon review complain of erroneous evidence received over his objections, unless he moves to strike it out, this applies only where there is nothing in the form of the question or in the form of the objection to indicate the vice to be guarded against, and when, also, the reviewing court cannot say that the evidence was prejudicial.

2. ———: INSUFFICIENT EVIDENCE. Where the evidence is obviously insufficient to sustain the verdict, because the same is received upon a hypothetical question which does not reflect the allegations of the petition, the verdict cannot stand and the judgment of the trial court must be reversed.

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

Weaver & Giller, for appellants.

Baker & Ready and *J. E. Von Dorn, contra.*

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

SHEPHERD, District Judge.

On the 12th of November, 1920, Margolin Brothers, the defendants, owned a picture house which had been fitted up and leased for a long term in advance at $100 a month. The lessees had put in chairs, piano, picture machine and what not, and were conducting a show there daily. The plaintiff, who was in the market for a picture show, had approached defendants, having learned from the lessees that they were the owners of the building, and after several days of negotiation offered them $8,000 for the whole plant, building, equipment, show and good-will. And on that day, the said 12th of November, 1920, defendants agreed in writing to sell to plaintiff at said price, provided they could buy out the lessees at $1,250. This they were able to do, and did, and subsequently in accordance with said written agreement they conveyed the property to plaintiff, taking $5,000 in cash and a mortgage on the property for $3,000 to secure the remainder.

Afterward, having been unsuccessful in running the picture show, the plaintiff sued the defendants for $20,000

damages, alleging that they had induced her to make the purchase through false and fraudulent representations to the effect that the show had been taking in from $150 to $200 daily upon an expense of from $25 to $30 a day, when in fact its gross income had been scarcely more than $10 a day, while its daily expense was in the neighborhood of $60 a day.

Answer was filed by the defendants, generally and specifically denying this, and thereafter upon issue duly joined trial was had, resulting in a verdict of $16,150 in favor of the plaintiff. The court ordered a remittitur of all in excess of $10,000, which remittitur was promptly made; and thereupon motion for a new trial was overruled and judgment was entered against the defendants for $10,000 and costs.

From this judgment defendants have appealed, assigning some 30 errors on the part of the trial court. All of these have been considered with care, not omitting a close reading of the voluminous briefs and record.

The judgment of the district court must be reversed and a new trial ordered because of error in the reception of the plaintiff's expert testimony as to the value of the picture show, supposing the representations of the defendants were as set forth in the petition.

In attempting to establish the value of the property, as it would have been had the show been as profitable as it was represented to be, the plaintiff called expert picture-show men and asked them what the value of the show would have been, assuming that all during the summer and up to the time of the sale it took in from $150 to $200 a day and operated at an expense of $6 or $7 a day. The answers ran from $20,000 to $50,000. In each case there was due objection, and in the case of Van Husen, who answered that the show would have been worth $50,000, the objection to the question was that it was incompetent, immaterial, irrelevant, and meeting no issue in the case and sustaining no element of damages in the case. This objection was good because, notwithstanding the fact that there was evidence on the

part of plaintiff's witnesses that representation had been made that the show was operated on an expense of $6 or $7 a day, the plaintiff's petition alleged that the representation was that the expense was $25 to $30 a day, and the petition was not amended to conform to the facts or to the evidence.

The court is not unmindful that it has hitherto held in the case of *Carlile v. Bentley*, 81 Neb. 715, and others, that, where the question does not disclose to the court the particular vice objected to, the objector must move to strike the answer, in order to avail himself of the error upon review. But in the foregoing objection it is obvious that the court was sufficiently apprised of the vice aimed at, for it must be presumed that the court, as well as the attorney for the plaintiff, knew the substantive allegations of the petition upon which the suit was founded. Under such circumstances it cannot be said that the doctrine of the case cited applies. The objection was necessarily good because a hypothetical question of this kind must reflect the allegation of the petition upon which recovery is sought.

But even if this were not so, the fact remains that the verdict, based upon this testimony, is not sustained by sufficient evidence. The evidence is to an entirely different state of facts than that upon which the plaintiff was proceeding. The question and answer were grossly prejudicial to the defendants. The answer does not prove, or tend to prove, the allegation of the petition and the verdict stands without support in the evidence.

The same vice inheres in similar questions propounded to the other expert witnesses, Pramer and Kirk. Where the evidence is obviously insufficient to sustain the verdict, because the same is received upon a hypothetical question which does not reflect the allegation of the petition, the verdict cannot stand and the judgment of the trial court must be reversed.

The court is also of the opinion that upon a retrial of the case the court should receive in evidence the checks, receipts and contracts offered for the purpose of showing

that the picture show, as distinguished from the building, was originally owned by the lessees, Dorsey and Walker, and for the purpose of supporting the testimony of the defendants Margolin that he was not at plaintiff's house at all times during business hours of the 9th, 10th and 11th of November, 1920, as was testified by the plaintiff and her relations. We think that this is corroborative evidence of the testimony of the defendant, and that, while the refusal of the judge to receive the same was not such prejudicial error as would of itself work a reversal of the case, the defendants were entitled to have the same received in corroboration of their testimony.

For the reasons above stated, the judgment of the district court is reversed and the cause remanded.

REVERSED.

GEORGE HAMLEY MARTIN V. STATE OF NEBRASKA.

FILED JULY 1, 1925. No. 24479.

1. **Criminal Law: VERDICT: CONFLICT OF EVIDENCE.** Unless the evidence is wholly insufficient to sustain the verdict, unless it be such that the jury should not be permitted to speculate upon its effect, the finding of the jury upon conflicting evidence will not be disturbed by this court, except for error of law occurring upon trial.
2. ———: **REFUSAL OF INSTRUCTION.** It is not error to refuse an instruction where the proposition of law therein contained is substantially covered in an instruction given by the court on its own motion.

ERROR to the district court for Sheridan county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Roscoe L. Wilhite and *Allen G. Fisher,* for plaintiff in error.

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

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

SHEPHERD, District Judge.

This is a case in which the defendant, George Hamley Martin, brings proceedings in error to reverse a judgment of conviction for cattle stealing in Sheridan county.

On the 1st of February, 1923, he butchered a red brockle-faced heifer bearing the brand C-A on her left side, and took the meat to Bingham. So far the identity of the animal was well established. Its hide was found and fitted the skull and bones, bullet mark and all, with such nicety as to remove any question, when supplemented by the testimony of Lineback who assisted in the skinning.

But from here on the evidence is sharply conflicting. Monahan, a ranchman close by, testified that he owned the brand C-A and that the heifer was his, a long haired, breachy, fence-crawling four-year old which he could positively identify by its brand, its conformation and its characteristics. Martin, on the contrary, stoutly swore that the heifer was his; that it had been dropped by his shield-brand cow in April, 1920, and had been in his uninterrupted possession since the fall of that year when it was returned to him from another range. Certain of the Adams ranch riders corroborated him to this extent: They testified that when they moved their cows and calves in the spring they unwittingly took along his shield-brand cow, followed by a red brockle-faced heifer calf, and that they advised him of the fact upon their return, and duly drove the animals back in the fall.

There were circumstances to aid both the defense and the prosecution. Martin openly disposed of the major portion of the meat in the little town of Bingham, where he was living with his wife and family, making no secret of the fact that he was going to butcher, proffering inspection of the hide as he delivered a quarter of the beef to the store-keeper, and then hanging the hide over a two-by-four in plain sight in his barn. But shortly following, though after a complaint had been filed against him, he vanished and was for about nine months in Missouri, Wyoming, Kansas, and other places, looking for a location, as he testified.

There was much testimony as to the age of the slaughtered animal. Monahan stated that it was coming four, having been born in the spring of 1919. The hide, the skull and the legs were before the jury. Dr. Snyder, a veterinarian, testified rather positively from his examination of the teeth that the heifer was past two and a half, and coming three years old. Perhaps he faltered slightly on the point that it might be a little over or a little under three, it being difficult to tell with absoluteness. But mainly he was positive enough that the teeth showed a cow animal not more than three years old. Monahan qualified and said that the mouth of the heifer showed that she was coming four. It seems that in the cattle country owners and ranchmen generally are able to tell the age of a cow by the mouth. The court is furnished with the jaw in question, and also with plates and an excerpt from Huidekoper on the age of domestic animals.

The record has received careful examination. It is entirely possible that the defendant had a red heifer coming three and that this was the beef that he butchered. Contrariwise, it is entirely possible, and probable too, that the red heifer that he butchered was a brockle-face coming four, and that it belonged to Monahan. It is possible that, while the heifer was Monahan's, Martin made a mistake and thought it was his. Again he might have lifted the cow in Grant county and mixed it with his bunch when he took the same to the Lineback place to winter; and he might have found the breachy red brockle-face ranging in Sheridan county, and slipped her into his herd on the way to Lineback's, or thereafter.

From what has been said it is clear that the case was for the jury upon ample evidence to sustain a conviction, though it must be admitted that it is a case in which reasonable minds, even if trained in the law and in the determination of questions of fact, might differ upon the question of reasonable doubt involved.

But may we on that account set aside the verdict of the jury which the law invests with the function of finding the

facts? By no means, unless we find that there was prejudicial error in the information, in the reception of the evidence, in the conduct of the trial, or in the instructions of the trial court. Unless the evidence is wholly insufficient to sustain the verdict, unless it be such that the jury should not be permitted to speculate upon its effect, the finding of the jury upon conflicting evidence will not be disturbed by this court, except for error of law occurring upon trial. The instruction upon reasonable doubt was quite beyond reproach.

We turn, then, to the record and to the errors assigned and presented in defendant's brief. It is first said that there was no competent proof that Monahan's brand was recorded. Monahan testified that it was. A drawing of the brand was offered and received in evidence without objection. And while he did not produce a certified copy of the record, as he expected to do, no motion was made to strike his evidence on that account. The proof was sufficient under a proper construction of the statute and the objection is not well taken. *Rema v. State,* 52 Neb. 375.

Undisputed proof, according to the language of the assignment, indicates that the heifer was born in 1920 rather than 1919. But to this we cannot agree. The fact is very much in dispute, as evidenced by the testimony of the prosecuting witness Monahan, who swore as to the age from the appearance of the teeth, and qualified in so doing. We quote the following from the experience of the prosecutor, and from his brief, not as an impeachment of science, but as containing the grain of caution which seekers after truth are constrained to use in dealing with the testimony of the expert: "I have had altogether about 17 years experience as a prosecutor, and I well remember when I was district attorney of the first district we had a case of poisoning. In the trial of the case of State v. Morris, where the charge was poisoning, we called for the state a number of doctors who testified positively that the symptoms were those of strychnine poisoning, and the defense called just as many doctors who gave just the opposite opinion, so that ex-

perience would lead me to believe that a man's experience of a great number of years would be just as reliable as the testimony of a horse doctor." The conclusion of the attorney goes much too far, but the common knowledge of stockmen makes them fully aware that a comparatively slight circumstance, such as trauma, disease or character of feed, may make a change in the mouth of a cow or horse sufficient to mislead even a capable examiner. Exceptions are undoubtedly many. It is most difficult to be sure when it comes to months, even in normal cases. In the judgment of the court the exhibit does not show the incisive arch as it was when the heifer was alive.

From what has been said in the foregoing pages it is obvious that the trial was not without evidence tending to show a felonious intent. The testimony of Monahan and the circumstances of the matter are such as to raise a question for the jury, and the court was not in error in giving its instruction No. 3, defining the crime.

It is assigned in the fourth objection of the defendant that the court erred in giving its instruction No. 7 upon circumstantial evidence. In the opinion of the court the case bristled with circumstantial evidence, as may be gathered from the foregoing. The instruction was not only good as a statement of the law, but it was eminently proper that it should be given.

Objection is made in assignment of error No. 5 that the court erred in its definition of criminal intent. We find no error in the instruction on this phase of the case. It contains all of the essential elements of a correct instruction, not forgetting the substance of what was tendered by defendant and refused by the court. If it had included the concluding phrase of the instruction tendered, it would have been open to objection on the part of the state, as making the matter of reasonable doubt so prominent by repetition that it would tend to mislead the jury. It is not error to refuse an instruction where the proposition of law therein contained is substantially covered in an instruction given by the court on its own motion.

Instruction No. 10 deals with the matter of flight. The trial court was particularly careful to guard the defendant from any improper testimony on the part of sheriff Bruce, striking out the only objectionable statement therein and directing the jury not to consider it. Under the evidence that the defendant left as he did, and that his wife in his absence rented a place in the vicinity of Litchfield, a hundred miles distant, and moved the household and the stock, and that the sheriff was unable to find the defendant, though searching for him, instruction No. 10, being a correct exposition of the law upon the subject, was properly given.

Complaint was made upon argument that the trial judge reexamined the witness Monahan upon a certain point and would not permit cross-examination by counsel for the defendant. The most casual scrutiny of the record in this connection satisfies the court that the testimony thus elicited was not less favorable to the defendant than to the state, also that the point had been well covered by the cross-examination of the defendant theretofore, and finally that defendant made no objection in the record, and neither asked for leave to cross-examine nor moved that the testimony be stricken out.

Much was said upon oral argument to the effect that the trial court expressed itself as of certain opinion, which, being entertained by it, should have led it to direct a verdict for the defendant or to grant him a new trial. In the absence of a record upon the point, this court cannot well consider it.

The record, we think, is free from prejudicial error. The defendant had a fair trial. In the opinion of a majority of the court the finding of the jury was a correct one. The judgment of the court is therefore

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BEN SOMBERG, APPELLANT.

FILED JULY 1, 1925. No. 24543.

Constitutional Law: CITY ORDINANCES: POLICE POWER. "Ordinances are made by virtue of the incidental powers of municipal corporations, under the authority conferred by legislative enactment, in the exercise of their legitimate police authority for the preservation of the peace, good order, safety and health, of the inhabitants of the corporation;" and "an ordinance prohibiting persons from engaging in certain kinds of business on the first day of the week, commonly called Sunday, is not void by reason of such discrimination, the prohibited business not being of public necessity." *Liberman v. State*, 26 Neb. 464.

APPEAL from the district court for Douglas county: L. B. DAY, JUDGE. *Affirmed.*

Edward R. Burke and *Monsky, Katleman & Grodinsky*, for appellant.

Abel V. Shotwell, Dana B. Van Dusen and *A. F. Brungardt, contra.*

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

SHEPHERD, District Judge.

The defendant was convicted and sentenced upon a complaint charging him with unlawfully opening his store in Omaha on Saturday and Sunday and selling and offering for sale groceries, meats and the articles ordinarily sold in grocery stores and meat markets, in violation of the Sunday closing ordinance of that city. He brings the case to this court, alleging in seven specific assignments what may be summarized as follows: The court erred in finding the defendant guilty of violation of ordinance No. 9805 of the city of Omaha; the court erred in not holding said ordinance unconstitutional and void; the court erred in excluding the evidence offered that fruit stands and cigar and tobacco stores are open seven days a week in Omaha, although they sell articles handled by practically all grocery stores.

The evidence was enough to sustain the court in finding that the defendant was opening his store, offering for sale, and selling on both Saturday and Sunday; also that he had there for sale and was offering for sale, not only meats, but articles which are ordinarily sold in grocery stores.

His two main contentions are that the ordinance is dependent upon section 9795, Comp. St. 1922, and that because it does not contain the exceptions of said statute it is absolutely void; and that by express terms and necessary operation it unlawfully delegates legislative power.

If it were true that said section 9795 confers the only authority that the city had to pass the ordinance in question, the argument of the defendant would be most persuasive. The pertinent part of the section referred to is as follows:

"If any person of the age of fourteen years or upward shall be found on the first day of the week, commonly called Sunday, at common labor (work of necessity and charity only excepted), he or she shall be fined in a sum not exceeding five dollars nor less than one dollar: Provided, * * * nothing herein contained in relation to common labor on said day of the week, commonly called Sunday, shall be construed to extend to those who conscientiously do observe the seventh day of the week as the Sabbath."

The pertinent part of the ordinance in question is under title, "An ordinance providing for the closing of all stores selling groceries and all meat markets on the first day of the week, commonly called Sunday, and providing a penalty for the violation of any of the provisions hereof," and reads in these words:

"It shall be unlawful for any person or persons within the corporate limits of the city of Omaha, on the first day of the week, commonly called Sunday, to open to the public, or to sell, or offer to sell, give away, or dispose of in any way, from any store or building where groceries are sold, any groceries or articles ordinarly sold from a grocery store, or to open any meat market, sell, offer to sell, or give away from such meat market, any meats or other

products ordinarily sold or handled in meat markets, and all such stores and meat markets shall be closed on said day: Provided, however, that nothing herein contained shall extend to those who conscientiously observe the seventh day of the week as the Sabbath, and in pursuance of such observation shall close and keep closed their store or meat market on the seventh day of the week, commonly known as Saturday."

The ordinance does not contain the exception of the statute, "work of necessity and charity only excepted." The statute came from Ohio, where it received judicial construction prior to the time that it was adopted in Nebraska; that construction being that an omission of the exception vitiates the ordinance because otherwise such ordinance would make the citizens guilty of a crime or misdemeanor not contemplated by statute, merely because he had labored, without regard to whether what he had done was a work of charity or necessity. In other words, the ordinance without the exception makes a crime out of whole cloth, and without warrant or authority of law. *City of Canton v. Nist,* 9 Ohio St. 439, in which the court declared a similar ordinance void, is perhaps the leading case upon the point.

True, if by adjudicated cases in Nebraska a construction, prior to that of Ohio, has been adopted in this state, we would not be bound by the doctrine of the *Nist* case. But we are not aware of any such decisions dealing with this particular statute. It has long been held in this state, where the legislature adopts the statute of another state which has theretofore been construed by courts of that state, it adopts the settled construction along with the statute. *Forrester & Co. v. Kearney Nat. Bank,* 49 Neb. 655; *Coffield v. State,* 44 Neb. 417.

Defendant takes the ground that his store-keeping, his opening and offering or his selling and disposing is common labor. With this we cannot agree. While some of the states have held that opening a store and conducting it is common labor, the decisions of our state tend to the contrary. In fact, from *In re Caldwell,* 82 Neb. 544, *State*

v. Murray, 104 Neb. 51, and the action taken by the legislature in section 9797, Comp. St. 1922, to make barbering common labor, we are convinced that Nebraska, in common with many of the jurisdictions, stands solidly upon the proposition that common labor is what is meant by the term according to its usual and popular acceptation, *i. e.*, labor which is not skilled by a period of apprenticeship, as the labor of a mechanic, or labor that is not skilled by reason of connection with trade or commerce, as the labor of a store-keeper.

We are, however, in full accord with the remainder of the argument upon this particular point. Granting that the ordinance is dependent for authority upon said section 9795, defendant would hardly be legally guilty in opening and selling, because so doing is innocent enough in itself, and the statute in question vests the city with no power to make him guilty on that ground.

But the state contends that the ordinance under consideration is valid, and should be sustained, under the police power section of the Omaha charter, agreeing with the defendant that the legislature has enacted no statute making it an offense to open and to sell on Sunday. This is the legislative enactment upon which the state asserts that the ordinance is based:

"To make and enforce all police regulations for the good government, general welfare, health, safety and security of the city and the citizens thereof, in addition to the police powers expressly granted herein, and in the exercise of the police power, may pass all needful and proper ordinances; and shall have power to impose fines, forfeitures, penalties, and imprisonment at hard labor for the violation of any ordinance, and to provide for the recovery, collection and enforcement thereof; and in default of payment to provide for the confinement in the city or county prison, workhouse or other place of confinement with or without hard labor as may be provided by ordinance." Comp. St. 1922, sec. 3489, subd. XXV.

The language is very broad. It gives power to the city

to make police regulations for the good government, welfare, health and safety of the citizens, and to pass all proper ordinances to that end. Is not this an entirely lawful delegation of the state's power to the municipality, sufficient in terms and in intent to empower the council to say that the opening of such stores as groceries or meat markets on Sunday is contrary to the general health and welfare? We think it is.

"Ordinances are made by virtue of the incidental powers of municipal corporations, under the authority conferred by legislative enactment, in the exercise of their legitimate police authority for the preservation of the peace, good order, safety and health, of the inhabitants of the corporation.

"An ordinance prohibiting persons from engaging in certain kinds of business on the first day of the week, commonly called Sunday, is not void by reason of such discrimination, the prohibited business not being of public necessity." *Liberman v. State*, 26 Neb. 464.

His second contention has been heretofore considered by the court in the cases cited. It was considered in *Liberman v. State, supra,* and with the holding in that case the court is well content. The complaint is that under the ordinance as it stands other store-keepers may make and change the law which applies to the defendant. By the simple expedient of adding articles to their stock they may make the business heretofore properly done by the defendant on Sunday illegal and criminal, whereby it is insisted that the city practically delegates its power to determine what should or should not be sold on Sunday to dealers and leave the defendant subject to their whims and caprice. In the ultimate the objection is an objection as to classification and failure on the part of the city to fix in its ordinance what are the particular articles ordinarily sold in a grocery store, etc. But, as stated, the subject is practically covered in *Liberman v. State, supra,* and in *In re Caldwell*, 82 Neb. 544, Root, Commissioner, refers to the classification with approval.

The answer is that, after all, the classification, or "what is ordinarily sold in a grocery store," is so nearly certain that no difficulty should result in the operation of the law. If the grocery stores in Omaha should put in whetstones and hatchets, the fact that they did so would not make these articles such articles as are ordinarily sold in grocery stores.

The third assignment on the part of the defendant is without merit. What if the court had permitted him to prove by testimony that the fruit stands and cigar stores of the city, though open every day of the week, are in the habit of selling merchandise handled by practically all grocery stores? They ought not to be permitted to do so, and will not be permitted to do so upon complaint and apprehension. Because the drug store is permitted to be open for the purpose of selling medicines, it does not thereby acquire the right to sell soaps, perfumes and baseball bats. This subject, also, has been considered in the cases cited.

We find no reversible error in the proceedings of the district court, and its judgment is

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1925

THOMAS E. POULSOM v. STATE OF NEBRASKA.

FILED SEPTEMBER 29, 1925. No. 24497.

Information: SUFFICIENCY: VENUE. An information in a case of felony which lacks any allegation that the crime charged was committed within the jurisdiction of the court is vulnerable to a general demurrer.

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

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

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

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

PER CURIAM.

Defendant prosecutes error from a conviction had in the district court for Otoe county on an information charging a violation of section 9616, Comp. St. 1922, as amended by chapter 91, Laws 1923, in that defendant received and had in his possession an automobile, knowing the same to have been stolen.

The information contains no allegation which, either directly or indirectly, alleges that defendant received or had the car in his possession in Otoe county.

At the opening of the trial defendant filed a general demurrer to the information, which was overruled by the

court. The correctness of this ruling is presented for review.

To sustain the ruling of the trial court the attorney general cites *Bartley v. State*, 53 Neb. 310, *Dunn v. State*, 58 Neb. 807, and *Fussell v. State*, 102 Neb. 117. In the first case cited, *Bartley v. State, supra*, the rule is announced: "An information, in the caption and venue of which a given county and state are named, which charges that the defendant 'in the county aforesaid, then and there being in said county,' did commit a given crime, sufficiently alleges that the offense was committed in the county stated in the caption and venue." The succeeding cases have merely followed that rule. In the instant case the title and caption are not made a part of the information by reference, or otherwise, and the cases cited by the state are not in point. The rule is well settled that, to confer jurisdiction upon the court for the trial of an offender, the indictment or information must allege specifically that the the crime was committed within the jurisdiction of the court. *McCoy v. State*, 22 Neb. 418.

It was error for the court to overrule the demurrer, and the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

WALTER RAY SIMMONS, APPELLANT, V. WILLIAM T. FENTON, WARDEN, APPELLEE.

FILED SEPTEMBER 29, 1925. No. 24995.

1. **Criminal Law**: REPRIEVES. Section 13, art. IV of the Constitution, prohibits the governor from granting a single reprieve for a longer period than thirty days, or for a period extending beyond the time of the next meeting of the board of pardons. It does not prohibit the granting of successive reprieves which, in the aggregate, may exceed thirty days.
2. ———: DATE OF EXECUTION. Where a defendant in a criminal action has been legally sentenced to death and has not been executed at the time fixed in the death warrant, he is not entitled to be discharged from custody on habeas corpus, but a new date for the execution may be fixed by the proper court.

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

E. P. Holmes and *Josiah Coombs*, for appellant.

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

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

PER CURIAM.

Action in habeas corpus by Walter Ray Simmons against the warden of the state penitentiary, to determine whether petitioner is unlawfully restrained of his liberty by defendant. From a judgment of dismissal petitioner has appealed.

From the petition and return thereto, it appears that petitioner was convicted in the district court for Boyd county of the crime of murder in the first degree. The jury, by their verdict, fixed the penalty of death. The sentence and judgment of the district court followed the verdict. On error to this court, that judgment was affirmed, and the 23d day of May, 1924, was fixed as the date for petitioner's execution. *Simmons v. State*, 111 Neb. 644. Thereafter, petitioner filed in the United States supreme court an application for a writ of *certiorari*. This application remained pending and undetermined in that court until a short time before the commencement of this action, when the application was denied.

While petitioner's application for a writ of *certiorari* was pending in the United States supreme court, petitioner made application to the governor for reprieves from time to time. A number of reprieves were granted, the last one of which, by its terms, expires on the 11th day of August, 1925. It is alleged that a number of these reprieves were signed by the governor while out of the state, and that others were signed in blank and were later filled in by his stenographer or secretary; that all of such reprieves are void, and that after the expiration of the last valid reprieve which was issued no date was then legally fixed for petitioner's execution; that it was not within the power of the governor to fix another date for his execution, and that

petitioner is unlawfully restrained of his liberty. The return denies that any of the reprieves were signed by the governor while out of the state, or that any of them were signed by him in blank and later filled in and issued by any other person.

The defendant has filed a motion to dismiss the appeal on the following, among other grounds, viz.: The petition does not state facts sufficient to constitute a cause of action, and does not set forth sufficient facts as grounds for habeas corpus.

Counsel for petitioner contend that, under section 13, art. IV of the Constitution, the governor is without authority to grant any reprieves that, in the aggregate, exceed a period of thirty days, or extend beyond the time of the next meeting of the board of pardons. That section of the Constitution, *inter alia,* provides: "Provided, however, the governor shall have power to grant respites or reprieves in all cases of conviction for offenses against the laws of the state, except treason and cases of impeachment, but such respites or reprieves shall not extend beyond the next meeting of the board of pardons, and in no case for a greater period than thirty days."

Stress is laid upon the word "case" in the last clause quoted. It is urged that the word means the case or action in which the defendant is convicted of an offense. The contention seeks to put too narrow and restricted a construction upon the language used. The word "case" is evidently used in the sense of "instance," and it was intended to limit the powers of the governor, as to the time of any one reprieve, to a period which should not exceed thirty days, nor extend beyond the time of the next meeting of the board of pardons. It certainly was not intended to prevent the granting of more than one reprieve. It is not reasonable to presume that the constitutional provision, above quoted, would limit the power of the governor so that successive reprieves could not be granted where the exigencies of the case called for more than one reprieve. Petitioner's application to the United States supreme court

for a writ of *certiorari* was pending and undisposed of. The theory that successive reprieves could not be granted until such application had been passed on is untenable. It is also significant that the petitioner, himself, was asking the governor for such reprieves. Can it be possible that he was not acting in good faith in asking the governor to grant such a respite, in the exercise of power given by the Constitution, and that he was asking the governor to do an unlawful thing that he might, himself, later profit by it? We prefer to think that he was asking the governor to do a lawful act, and think that the action of the governor was entirely within the powers conferred upon him.

If, as alleged by petitioner, some of the reprieves had been signed by the governor while he was out of the state, or if some of them had been signed in blank and later filled in by some other person, and such reprieves were void, and the date, legally fixed for petitioner's execution, had passed, still he would not be entitled to be discharged from custody. In such case, the proper court could fix, by a new order, the date for the execution to take place. If the officer charged with the duty of carrying out the death sentence should, by reason of sudden death or illness, be prevented from performing that duty, it would not follow that the defendant would be entitled to a discharge, but his execution might be deferred until a new date had been fixed by the proper court for his execution. See 16 C. J. 1331, secs. 3130-3133, and 29 C. J. 57, sec. 48, and cases therein cited in support of the text. In the instant case, however, it was conceded on argument that the evidence fails to show that any reprieve was signed by the governor while out of the state, or that any of them were signed in blank and later filled in by some other person.

The petition in this case fails to state facts sufficient to show that petitioner is illegally restrained of his liberty, or that he is entitled to be discharged from custody, and the motion to dismiss the appeal is sustained and the appeal

DISMISSED.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, APPELLEE, V. KILGORE STATE BANK: FRED A. CUMBOW, RECEIVER, APPELLEE: YOUR BANK OF ELI, CLAIMANT, APPELLANT.

FILED SEPTEMBER 29, 1925. No. 23403.

1. **Banks and Banking**: GUARANTY FUND: LIABILITY. The depositors' guaranty fund is not liable for the payment of a bank deposit which has been placed in a state bank which subsequently fails, unless both the depositor and the bank come within the provisions of the bank depositors' guaranty law in respect of such deposit. Comp. St. 1922, sec. 7982 *et seq.*; *Iams v. Farmers State Bank*, 101 Neb. 778.
2. ———: ———: ———. Money, or its equivalent, must be deposited in a bank to bring the transaction within the meaning and the protection of the bank depositors' guaranty law.
3. ———: ———: DEPOSITS. "In order to create a deposit which will be protected by the guaranty law, as the term 'deposit' is understood in section 8033, Comp. St. 1922, it is necessary that money or its equivalent shall in intention and effect be placed in or at the command of the bank under circumstances which do not transgress specific limitations of the bank guaranty law." *State v. Farmers State Bank*, 111 Neb. 117.
4. ———: ———: ———: INNOCENT PURCHASER. Where a bank certificate of deposit has been issued by a state bank which subsequently fails, and, by reason of the facts under which it was issued, such certificate does not come within the protection of the bank depositors' guaranty law, a subsequent holder, no matter what may be the fact, cannot invoke the plea that he is an innocent purchaser, and thereby come within the protection of the law in question.
5. ———: ———: ———: ———. One cannot become an innocent holder, or purchaser, of a bank certificate of deposit, which has been unlawfully issued, let its form or its recitals be what they may, in the sense that such purchaser, or holder, can come within the protection of the bank depositors' guaranty law.
6. **Appeal**: AFFIRMANCE. Under the evidence, the judgment is without reversible error, and it is affirmed.

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

W. B. Haley, E. D. Crites and *F. A. Crites*, for appellant.

O. S. Spillman, Attorney General, C. M. Skiles, James C. Quigley and *J. J. Harrington, contra.*

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

DEAN, J.

February 21, 1921, the Kilgore State Bank, hereinafter called the Kilgore bank, issued a 5 per cent. time certificate of deposit, in the principal sum of $2,200, which, by its terms, was "payable to the order of themselves in current funds October 24, 1922." On the same date the Your Bank of Eli, hereinafter called the claimant, or claimant bank, maintains that the Bank of Cody, hereinafter called the Cody bank, which is not a party to this suit, had $2,200 on deposit in the Kilgore bank, and that for this sum, so on deposit, the Kilgore bank issued, and delivered to the Cody bank, the above-mentioned certificate in the usual form. The contention is that the Cody bank, in the ordinary course of business, before maturity and for value, sold, assigned, and delivered the certificate to the claimant bank, properly indorsed, and that claimant is now the owner and holder thereof.

June 21, 1922, the claimant, alleging ownership of the certificate, and previous insolvency of the Kilgore bank, filed its verified claim, or petition, as it is designated in the record, in the district court for Cherry county, for an allowance of its claim in full, and prayed that Fred A. Cumbow, the receiver of the Kilgore bank, thereunto appointed by lawful authority, be ordered to pay the claimant bank $2,200, with interest, out of the depositors' guaranty fund, in satisfaction of its claim.

The attorney general, in behalf of the state, and of the receiver, admits the issuance of the certificate of deposit by the Kilgore bank, but alleges that the Cody bank did not have $2,200 in lawful money of the United States, or its equivalent, or any other sum of money, on deposit in the Kilgore bank, when the certificate was issued. It is also alleged that it was issued, without authority, by the

president of the Kilgore bank. The argument is that the $2,200 certificate was issued in exchange for a $2,600 note and mortgage, obtained by assignment from a stranger to this suit. It may be added that the difference of $400 between the apparent face value of the $2,600 note and mortgage and the $2,200 certificate of deposit, for which it was exchanged, was explained by the president of the Cody bank. But in view of our decision on the merits this circumstance will not be further noticed.

The security, above referred to, is a recorded third mortgage lien on 800 acres of land in Cherry county. The state contends that the note and mortgage so exchanged by the claimant bank for the certificate are now, and at all times material to this inquiry were, valueless and had no market value whatever, for the reason that the land, upon which the third mortgage is a purported lien, had been previously mortgaged by the owners, the Christensen brothers, for its full value.

The court sustained the contention of the state and, from the evidence of Cherry county residents fixing the value of the Christensen land at from $7.50 to $15.00 an acre, found and decreed that the note and mortgage were "worthless at the time they were exchanged for said certificate of deposit," and that nothing was due the claimant Eli bank, on the Kilgore bank certificate, which it obtained from the Cody bank, "either against the assets of the said defendant Kilgore State Bank or against the state bank guaranty fund." A motion for a new trial was overruled, and the Eli bank, as claimant, appealed.

The receiver testified that, upon examination of the Kilgore bank records and bank books, he found that the Cody bank was never "given any credit in this transaction for any money deposited," but that the Kilgore bank books show "the coming in of the note that has been offered here in evidence for $2,600 and the issuance of the certificate of deposit for $2,200 for it." It appears that the receiver tendered the $2,600 note and mortgage to the Cody bank and, the tender being refused, it was renewed in open court,

on condition that the certificate of deposit be returned, but the tender was again refused.

Mr. Skeen is president of the Cody bank. In respect of the $2,600 note, he testified that it was a secured note. "Q. And what sort of security? A. It was a second mortgage I think, on real estate. * * * Q. What was the amount of the prior mortgage? A. There was a $6,400 mortgage, or maybe that was $6,000, and a commission mortgage of $400 to Hess & Company of Council Bluffs, ahead of our mortgage." He further testified in respect of the price which was paid for the land in 1919 by the Christensens: "Q. Do you know what the entire consideration was—the purchase price? A. Yes. Q. How much was that? A. They paid $12,000 for it. Q. Which, as you stated, was $3,000 in cash, a $6,000 mortgage assumed, and a $400 mortgage assumed, and a purchase mortgage of $2,600 which you got and sold to the Kilgore State Bank? A. Yes, sir." It also appears from Skeen's evidence that the Christensen note and mortgage was the sole consideration which was paid for the certificate of deposit in suit. The year 1919 was a "boom year" in land prices in Cherry county, as one witness testified, and it may be noted that the prevailing conditions were the same elsewhere. And the mortgage in suit was a third lien.

Counsel for claimant have made an able argument in support of their contention, but we are not convinced that the claimant Eli bank, under the evidence, is entitled to have its claim paid from the depositors' guaranty fund in satisfaction of its certificate. In *State v. Farmers State Bank*, 111 Neb. 117, attention is directed to a like situation in the following language: "The circumstances under which the guaranty fund may be liable are entirely apart from the law pertaining to negotiable paper." And this is fundamental. In the same case it is observed that there is a distinction "between the liability of the maker of a negotiable instrument, which rests upon the law pertaining to negotiable paper, and the liability of the guaranty fund, which is purely statutory." We adhere to the views expressed in the *Farmers State Bank* case.

The policy of the law in this jurisdiction is that the bank depositors' guaranty fund is not liable for a bank deposit which has been placed in a state bank, which subsequently fails, unless both the depositor and the bank come within the provisions of the law in question in respect of such deposit. Comp St. 1922, sec. 7982 *et seq.*; *Iams v. Farmers State Bank*, 101 Neb. 778. And this court is thoroughly committed to the proposition that money, or its equivalent, must be deposited in a bank to bring the transaction within the meaning and the protection of the bank depositors' guaranty law. The note and mortgage in question lack much of being "money, or its equivalent," and therefore do not come within the meaning of the act. In *State v. Farmers State Bank*, 112 Neb. 380, it is pointed out: "The law will look through all semblances and forms to ascertain the actual facts as to whether there has been a *bona fide* deposit, and, if not, the guaranty fund does not protect the transaction, no matter how it may be evidenced." To substantially the same effect is *State v. Gross State Bank, ante*, p. 119, and cases there cited.

It may be noted that a like rule prevails in other jurisdictions. In a recent Kansas case, in an opinion by Burch, J., a bank deposit was defined in this language: "Speaking generally, to create a deposit, within the meaning of the statute, money or the equivalent of money must in intention and effect be placed in or at the command of the bank, under circumstances which do not transgress specific limitations of the bank guaranty law." *Fourth Nat. Bank v. Bank Commissioner*, 110 Kan. 380. See *American State Bank v. Bank Commissioner*, 110 Kan. 520.

We adopted and approved the language of the Kansas court in the following cases: *State v. Banking House of A. Castetter*, 110 Neb. 564; *State v. Farmers State Bank*, 111 Neb. 117; *State v. Home State Bank, ante*, p. 93; *State v. Gross State Bank, ante*, p. 119.

In a recent case this was said: "The fund protects deposits only. And if no deposit is made, or no deposit within the protection of the guaranty law, the transfer of a cer-

tificate cannot impose a liability on the fund." And in the same case the court observed: "Where a certificate of deposit is given under such circumstances that it is not protected by the guaranty fund, although that fact is not indicated by anything on its face, its indorsement to an innocent holder cannot confer that quality upon it." *American State Bank v. Bank Commissioner,* 110 Kan. 520.

The controlling feature in the case before us is the established fact that neither money, nor its equivalent, in the sum of $2,200, nor in any other sum, was placed on deposit in, or at the command of, the Kilgore bank by the Cody bank, as a fund, or as a thing of value, upon which the $2,200 certificate of deposit in suit could be lawfully issued. The evidence in respect of the prior incumbrances on the Christensen land, as given by Mr. Skeen, the president of the Cody bank, speaks for itself, and no language of this court, on this feature of the case, can be added which would lead to a more complete understanding of the unauthorized transaction in question here.

It clearly appears that the certificate of deposit in suit does not come within the protection of the bank depositors' guaranty law. Nor would it come within its protection even in the hands of an innocent purchaser for value, as argued by the claimant bank. One cannot become an innocent holder, or purchaser, of a bank certificate of deposit, which has been unlawfully issued, let its form or its recitals be what they may, in the sense that such purchaser, or holder, can come within the protection of the bank depositors' guaranty law. It follows that, in this case, it is not necessary to pass upon the question of whether the claimant bank is an innocent purchaser.

It has not yet come to pass that a promissory note, its only security being a valueless third mortgage lien on land, may ripen into a valid obligation against the bank guaranty fund on the ground that such note and mortgage have come into the hands of an innocent purchaser, or holder, for value. It is perfectly obvious that, to hold to the contrary, might be the means of opening a door to an unlawful as-

sault upon the integrity of a wisely beneficent act which was designed by the legislature to protect the money of good faith depositors in state banks.

The evidence amply sustains the judgment of the trial court in holding that the Christensen note and mortgage were "worthless at the time they were exchanged for said certificate of deposit."

We conclude that the court did not err in its findings and judgment that the Your Bank of Eli was not entitled to be made a preferred creditor, either as against the assets of the defendant Kilgore State Bank or as against the depositors' guaranty fund.

The judgment of the trial court is right, and is in all things

AFFIRMED.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, APPELLEE, V. KILGORE STATE BANK: FRED A. CUMBOW, RECEIVER, APPELLEE: NENZEL STATE BANK ET AL., CLAIMANTS, APPELLANTS.

FILED SEPTEMBER 29, 1925. No. 23404.

Banks and Banking: GUARANTY FUND: LIABILITY. Evidence examined, and discussed herein, and *held* that the judgment of the district court is for affirmance under the rule announced in *State v. Kilgore State Bank, ante*, p. 772.

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

W. B. Haley, E. D. Crites and *F. A. Crites*, for appellants.

O. S. Spillman, Attorney General, C. M. Skiles, James C. Quigley and *J. J. Harrington, contra.*

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

DEAN, J.

This action involves two separate cases which were consolidated and tried together in the district court and were

heard and submitted together here. The issues are substantially the same as those discussed in the preceding case entitled, *State v. Kilgore State Bank, ante,* p. 772, wherein Fred A. Cumbow was appointed receiver for the insolvent Kilgore bank.

The facts involved here, as affecting both intervening claimants herein, are substantially these: April 16, 1921, the Kilgore bank issued three 5 per cent. certificates of deposit to E. C. Cole, who is connected in some capacity with the Nenzel State Bank and the Ranchers State Bank at Cody. Two of the certificates are for $1,000 each and one is for $1,032.61. The three certificates were issued in exchange for a promissory note, in the principal sum of $2,857.95, bearing interest at the rate of 10 per cent. per annum, which, with the unpaid interest, amounted to $3,032.61, and this sum equaled the total sum of the three deposits. The note was secured by a third mortgage lien on certain lands in Cherry county, owned by John B. Sellar, and he, with his wife, Katherine, were the makers of the note and mortgage.

The $1,032.61 certificate was, by the indorsement of E. C. Cole, made payable to the Nenzel State Bank. It alleges ownership and is one of the intervening claimants. The two $1,000 certificates were likewise, by Cole's indorsement, each made payable to S. D. Willard, and he, alleging ownership, is also an intervening claimant.

Both the Nenzel bank and Willard submitted proofs tending to maintain their respective claims that the certificates came into their hands, respectively, before maturity and in the usual course and for value and without notice of any infirmity, and both now seek in this suit, by the usual proceedings, to recover the amounts, respectively, of the principal of their respective notes, with interest and costs, from the bank depositors' guaranty fund.

The receiver here, as in the former case, contends that the note and mortgage, which were exchanged for the three certificates of deposit, are now and always were valueless, for the reason that the land upon which the third mortgage

in suit is a purported lien had been theretofore mortgaged for its full value by Sellar. The court sustained the contention of the receiver and found, in substance and in effect, that the issuance of the certificates of deposit, and the acceptance by the bank of the Sellar note and third mortgage lien, in exchange therefor, did not constitute a deposit of money, or its equivalent, in the Kilgore bank, within the meaning of the bank depositors' guaranty law, and that both note and mortgage were worthless when the exchange was made. The court further found, and decreed, that neither S. D. Willard nor the Nenzel bank, by virtue of the certificates of deposit in suit, had a claim against the assets of the Kilgore bank, nor did either suitor have any claim against the bank depositors' guaranty fund by reason thereof. Both Willard and the Nenzel bank have appealed.

The tract of land involved in this suit consists of from 944 to 960 acres of land in Cherry county. Mr. Cole testified that two mortgages were prior to the Willard and Nenzel bank mortgages, and were therefore superior to the lien of the Kilgore bank mortgage in suit, namely, a first mortgage of $7,100 drawing 4 per cent. interest and a second mortgage of $4,000 drawing 5 per cent. interest, "and then this mortgage that I sold to the Kilgore State Bank of $2,857.95." The district court found, and decreed, that the Willard and Nenzel bank notes, and the mortgage securing the notes, all of which are involved in the present case, did not, as noted above, represent "a deposit of money or its equivalent in said bank," and "were worthless and represented nothing of value and constituted a fraud upon the guaranty fund of this state and a fraud against the assets of the Kilgore State Bank," and specifically found that neither Willard nor the Nenzel bank were entitled to recover anything from either of the last above mentioned funds. The evidence supports the judgment of the district court.

Substantially the same issues are involved here which were considered by us, and disposed of adversely to the contention of both claimants herein, in *State v. Kilgore*

State Bank, ante, p. 772, as above noted. It follows that the present case, as to the respective claims of both Willard and the Nenzel State Bank, are controlled by our decision in the former case.

The judgment of the trial court is therefore

AFFIRMED.

STATE, EX REL. ORA S. SPILLMAN, ATTORNEY GENERAL, APPELLEE, V. BRICTSON MANUFACTURING COMPANY, APPELLANT. *

FILED SEPTEMBER 29, 1925. No. 24140.

1. **Corporations**: OUSTER. 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.
2. ———: ———. Evidence examined, and *held* sufficient to sustain the judgment in so far as it ousted the respondent from the state.
3. ———: QUO WARRANTO: EXTENT OF REMEDY. In an action in *quo warranto* by the state against a foreign corporation authorized to do business therein, to oust such corporation and to wind up its affairs in this state, the court has no power to wind up the affairs of the corporation nor to decree a distribution of its assets in the state among its stockholders, when the testimony fails to disclose that there are creditors of the corporation. In such an action a stockholder as such is not to be considered a creditor of the corporation.
4. ———: DISTRIBUTION OF ASSETS. Evidence examined, and *held* insufficient to sustain the judgment decreeing a distribution of the assets of the corporation among its creditors and stockholders.
5. ———: ———. Sections 9295, 9298, Comp. St. 1922, are applicable only to cases where a distribution of the assets of a corporation has been properly decreed.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed in part, and reversed in part.*

M. E. Culhane and *Weaver & Giller*, for appellant.

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* Modified. See opinion, 114 Neb. p. ——.

Ora S. Spillman, Attorney General, and *T. J. McGuire, contra.*

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

DAY, J.

This is an action in *quo warranto* brought by the attorney general to oust the Brictson Manufacturing Company, a South Dakota corporation, from doing business in this state. The relator also prayed that the affairs of the corporation in this state be wound up and its assets distributed among its creditors and stockholders. The trial court found generally in favor of the relator, decreed that the respondent be ousted from the state, and that its affairs therein be wound up. Three trustees were appointed to take charge of the property and assets of the corporation within the state, and directed to pay its liabilities and to divide the surplus among the stockholders and creditors. The order further directed that the trustees publish in one or more daily newspapers in South Dakota, Iowa, and Nebraska, a notice directing all persons having claims against the corporation, either as creditors, stockholders, or otherwise, to file their claims with the court for allowance or rejection on or before April 15, 1924. From this decree respondent has appealed.

The petition was based upon the theory that the corporation was organized for the purpose of defrauding those who might become stockholders; that the license to sell its stock in this state was procured by false and fraudulent statements made to the state railway commission concerning its assets and the extent of the business; that it had violated the laws of this state by fraudulently paying dividends to its stockholders which it had not earned; that it was conducting a small and unprofitable business for the purpose of keeping the charter alive, but in reality had ceased to perform the functions for which it was organized; that the capital stock and assets had been depleted by the fraudulent payment of purported dividends, and were being

further depleted by the payment of exorbitant salaries and expenses in conducting the business.

The answer of the respondent, among other things, denied all allegations of fraud, denied that it had paid dividends out of its capital stock, and pleaded that the matters now sought to be litigated, in so far as they pertain to the winding up of the affairs of the corporation, had been adjudicated in the case of *Brictson Mfg. Co. v. Close*, 280 Fed. 297.

The record shows that for some years prior to November, 1916, O. A. Brictson, under the trade name of the Brictson Manufacturing Company, had been engaged in manufacturing and selling at Brookings, South Dakota, automobile tires which he designated the Brictson tire. The distinguishing feature of the tire was a device for which he received United States letters patent, and, generally speaking, consisted of a chrome leather sheath or covering placed around the tire, through which metal rivets, arranged in irregular rows, were placed so that the exposed ends of the rivets would form the tread of the tire. The purpose of this device was to prevent puncture, skidding, and wear of the tire. From a small beginning the business had grown to considerable proportions, the annual sales ranging from $80,000 to $100,000. In conducting the business, Brictson would purchase ordinary automobile tires and attach thereto his device which he manufactured.

On November 4, 1916, Brictson and others who joined him organized a corporation under the laws of South Dakota, which they named the Brictson Manufacturing Company. The articles of incorporation, as amended, fixed the capital stock at $5,000,000, divided into 50,000 shares of $100 each, of which 40,000 shares were common stock and 10,000 shares preferred stock. The articles designated Brookings, South Dakota, as the principle place of transacting its business, but also provided that other business offices might be located in other cities, among them, Omaha, Nebraska. Thirty-nine shares of preferred stock were issued, and officers and directors of the corporation elected.

On January 17, 1917, the board of directors authorized the making of a contract between the corporation and O. A. Brictson, whereby the corporation issued to Brictson 40,000 shares of the common stock and 1,000 shares of preferred stock, and also paid to Brictson $2,200 in cash. Brictson immediately donated back to the corporation 8,000 shares of the common stock and 250 shares of the preferred stock. In consideration of the above, Brictson transferred to the corporation the exclusive privilege of using his patent, the good-will of his business, and trade-name, together with his office and factory equipment, stock on hand and accounts receivable. The contract also provided that Brictson was to be employed as manager of the corporation at a salary of not less than $7,500 for the first year, and not less than $10,000 a year thereafter.

About January 20, 1917, the corporation applied to the Nebraska state railway commission, the department of the state then having the administration of the "Blue Sky" laws, for authority to sell its stock to the public in the state of Nebraska. A similar application was also made to the proper authorities in South Dakota and Iowa. On December 11, 1917, the corporation filed a proper application with the secretary of state for permission to transact business in this state as a foreign corporation, which was granted. In its application to the Nebraska state railway commission, the corporation stated, among other things, that it was organized under the laws of the state of South Dakota, with a capital stock of $5,000,000, divided into 40,000 shares of common stock and 10,000 shares of preferred stock; that $4,000,000 of common stock had been issued to Brictson for the trade-name and good-will of his business; that $100,000 of preferred stock had been issued to Brictson for his plant, equipment, and use of patents, and that 39 shares of preferred stock had been issued for cash. In the detailed statement of the assets and liabilities of the corporation a number of discrepancies appear.

The application recited that the corporation was manufacturing the Brictson detachable tire tread and the Brictson

10,000-mile pneumatic tire, but proposed to extend these operations more extensively and add the manufacturing of all kinds of high grade rubber tires, inner tubes, and all other rubber products. It further recited that "the funds from the sale of the company's preferred stock is to be used in the construction of a large modern factory, purchase of machinery, equipment, working capital, the manufacturing and marketing of the company's products," and that the company proposed to offer its preferred stock for sale through stock salesmen operating on a commission basis.

The application further recited that "the company wishes to call special attention to the fact that only a commission of 20 per cent. in cash and 5 per cent. in common stock donated by O. A. Brictson is being paid for the sale of the company's preferred stock," and recited further that the preferred stock was to be sold at par for cash or bankable notes; that a bonus of three shares of common stock would be given to each purchaser of one share of preferred stock up to the first $100,000 of preferred stock sold, two shares up to the second $100,000 sold, and one share for the remainder up to 5,000 shares sold. Upon this presentation the company asked for authority to sell $500,000 of its preferred stock.

The railway commission through one of its examiners made an examination of the books and plant of the corporation, and upon his favorable report issued a license to the corporation to sell its shares of stock for the year 1917, which license was renewed for the years 1918 and 1919. About the same time the company also secured a permit to sell its stock in South Dakota and Iowa.

Thereupon the company through its fiscal agent opened an office at Omaha, Nebraska, and entered upon an intensive campaign of stock selling. Literature of the most fascinating and alluring character was sent out. Among other things a picture of a large factory, four stories high, with smoke rolling from the chimney, and other evidences of operation were distributed with the statement: "The above

gives the elevation plans of the Brictson Manufacturing Company's new automobile tire factory and reclaiming plant to be located on the company's property consisting of six and one-half acres located at Twenty-fourth and Poppleton avenue. Contract for the unit of the factory will be awarded at once and at an early date additional buildings will be added to enable the company to increase its output to meet the growing demands for the Brictson tires." The circular also stated that 7 per cent. cumulative dividends would be paid on the preferred stock. The advertising matter was accompanied by letters of approval signed by prominent men in the state. Another circular stated that the company was making 37½ per cent., and that it had business ahead for 14 years. It will serve no useful purpose to follow further the character of the advertising set out. Suffice it to say that it was well calculated to excite the cupidity of even conservative men.

A considerable portion of the record is devoted to a controversy between the company and the fiscal agent as to which one should be charged with the responsibility of sending out the literature, each charging the other with the responsibility. That question has no place here. In any event, the company by accepting the results of the advertising campaign would be bound by the methods employed in securing such results.

Exclusive of the $100,000 of stock issued to Brictson, the corporation through its fiscal agency sold to the public during the years 1917, 1918, and 1919, about $326,000 worth of preferred stock, of which $36,000 was sold in Iowa. An audit of the business affairs of the corporation made from the date of its organization to September 6, 1921, a few days after the appointment of the receiver, disclosed that the business of the corporation had been conducted at a loss of $32,809.73, the greater part of which was lost in 1921, but notwithstanding this fact the corporation declared and paid two annual dividends on its preferred stock, aggregating about $63,700. During this period Brictson drew a salary of approximately $43,000. It is quite ap-

parent that the dividends were paid from the proceeds of the sales of the preferred stock. At no time were the earnings sufficient to pay the dividends. Up to the date of the appointment of the receiver the corporation was a going concern operating at Brookings, South Dakota, and employing from four to six men besides the office force. At that time it owed no general creditor except for current expenses which amounted to about $1,000, and this amount was subsequently paid. It had cash on hand amply sufficient to pay its obligations. In addition to its cash and commercial paper it had liberty bonds of the face value of $60,650. Outside of its obligation to its stockholders the corporation was perfectly solvent.

The record further shows that in August, 1921, eight stockholders of the corporation, holding fifty shares of the stock, joined in an action against the corporation in the district court of the United States for the district of Nebraska, praying that a receiver be appointed to take charge of the affairs of the corporation, and that its affairs be wound up. The United States district court appointed a receiver who took possession of the property of the corporation, including money in banks at Brookings, South Dakota, and stock and materials on hand, and, after disposing of the property, brought the proceeds into this state. Outside of the state of Nebraska there was property of about $36,000 which came into possession of the receiver. He also took possession of liberty bonds, thrift savings stamps, commercial paper, cash in banks, and real estate in Nebraska aggregating a large sum. An appeal was taken from the order appointing the receiver to the circuit court of appeals of the ninth circuit, the opinion being reported in *Brictson Mfg. Co. v. Close,* 280 Fed. 297. In that case it was held that there was no basis in the pleadings or facts upon which a receiver could rest, and an order was made directing the receiver to return the property in his hands to those from whom he had received it. Before the receiver had made his report and obtained his discharge, the present action was commenced.

The main question presented by the record is whether the judgment is supported by the law and the evidence.

We first consider the judgment in its aspect ousting the respondent from doing business in the state. 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. Our statute authorizes foreign corporations to do business in the state upon compliance with its terms, which provide, among other things, for the payment of a filing fee of $50. While the right of a foreign corporation to do business in the state is a mere privilege, such privilege should not arbitrarily be canceled. The right of ouster is somewhat in the nature of a legal discretion, and should not be exercised without cause. However, when a foreign corporation is usurping its corporate powers, or violating the law, or doing acts in contravention of the established policy of the state, it may in proceedings brought for that purpose be ousted from the state.

The payment of dividends by the corporation from the proceeds of the sales of its stock and not from earnings was a violation of the statute and the policy of this state. In the absence of proof to the contrary, we may presume that the payment of dividends out of the corporate stock was also a violation of the laws of South Dakota. In the interest of present and prospective shareholders we think it was well within the province of the state to oust the respondent. In this connection the argument is made that the contract between the corporation and Brictson, hereinbefore alluded to, was a fraud upon the stockholders. This contract, however, was entered into before the application was made to sell stock in this state. The contract was a matter of public record, and stockholders who became such

after the execution of the contract had ample means of knowing of its existence. The stockholders who subscribed the first $3,900 of stock were parties to the making of the contract, and do not complain of it. Besides this, Brictson is not a party to this suit, and his rights under the contract cannot be determined here. From a consideration of the entire evidence bearing upon this phase of the case, we think the evidence justifies the judgment of ouster.

We come now to consider the phase of the judgment ordering the affairs of the corporation to be wound up and its assets distributed among its creditors and stockholders. A number of interesting propositions are discussed in the briefs bearing upon the question of the jurisdiction of the court to wind up the affairs of a foreign corporation. The general rule is that the courts of one state cannot dissolve a corporation created by another state, but may appoint a receiver of the corporation in a proper action, and administer the assets within its jurisdiction. Such cases usually arise when creditors of the corporation seek to enforce their demands. In the case before us, however, there is a complete failure to show that any creditor has reduced his claim to judgment. In fact, outside of some insignificant amounts, the general creditors of the corporation have been paid. There is evidence that 43 out of more than 1,000 stockholders have brought suit against the corporation to annul their subscriptions and recover the amount paid by them, upon the ground that they were induced to subscribe for stock through fraudulent representations. So far as the record shows, none of the stockholders have recovered judgment against the corporation. Five stockholders, holding 22 shares of stock, were witnesses in the present case and testified to facts tending to show that they were induced to become stockholders through fraudulent statements made by the agents of the corporation as to its affairs and business.

The rule is well settled that a court of equity has no jurisdiction to wind up the affairs of a foreign corporation and to decree a distribution of its assets among the individ-

ual stockholders at the suit of one or more of the stockholders as such. 3 Cook, Corporations (8th ed.), sec. 629; *Brictson Mfg. Co. v. Close,* 280 Fed. 297.

The relator cites sections 9295, 9298, Comp. St. 1922, which provide in substance that, if a corporation is ousted and dissolved by proceedings in *quo warranto,* the court shall appoint three disinterested persons as trustees to collect the assets and pay the debts of the corporation and divide the surplus among those thereto entitled. It is clear that these provisions apply only to those cases wherein the court has properly decreed a dissolution of the corporation.

The most that can be claimed is that a number of stockholders are dissatisfied with the management of the affairs of the corporation, and are claiming that they were defrauded in having been induced to purchase stock. It must be borne in mind, however, that a stockholder as such is not a general creditor.

The record is very voluminous. Many questions are discussed at length in the briefs, which in our view of the evidence need not be considered.

The judgment is affirmed in so far as it ousts the respondent from doing business in this state; and is reversed in so far as it undertakes to wind up the affairs of the corporation and distribute its assets among creditors and stockholders, and in appointing trustees to carry out that part of the judgment; each party to pay his own costs.

AFFIRMED IN PART, AND REVERSED IN PART.

Note—See Corporations, 14 A, C. J., secs. 1391, 4000, 4107.

CHARLES L. EGBERT V. STATE OF NEBRASKA.

FILED SEPTEMBER 29, 1925. No. 24437.

1. **Criminal Law: PROOF: CONFESSIONS.** One cannot be convicted of a felony upon his own unsupported extra-judicial confession that a crime has been committed.
2. **———: ———: ———.** But, while a voluntary admission tending to prove a crime is insufficient standing alone to prove

the *corpus delicti*, it is competent evidence, and may with slight corroborating circumstances be sufficient to warrant a conviction. *Sullivan v. State*, 58 Neb. 796.

3. ———: ———: ———. Circumstances capable of an innocent construction may be interpreted in the light of the defendant's admissions, and the fact under investigation be thus given a criminal aspect. *Sullivan v. State*, 58 Neb. 796.

4. ———: EVIDENCE: ARTICLES OF CLOTHING. In a prosecution for murder, articles of clothing worn by the victim of the homicide are, when sufficient foundation has been laid, properly received in evidence where they tend to illustrate or make clear any controverted issue in the case.

5. Assault: MANSLAUGHTER. The intentional pointing of a loaded pistol at a person is ordinarily an unlawful assault, and when under these circumstances the pistol is unintentionally discharged and a person killed, such acts constitute manslaughter.

6. Instructions given and refused examined, and *held* that the court committed no error with respect to them.

7. Evidence examined, and *held* sufficient to support the verdict and judgment.

ERROR to the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

Stiner & Boslaugh, Charles E. Bruckman and *Edmund P. Nuss*, for plaintiff in error.

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

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

DAY, J.

This is the second appearance of this case in this court. Upon the first trial Charles L. Egbert, the defendant, was convicted of murder in the second degree and sentenced to serve a term of fifteen years in the penitentiary. That judgment was reversed by this court because of an erroneous instruction and the case was remanded for further proceedings. *Egbert v. State*, 112 Neb. 129. Upon the second trial the defendant was found guilty of manslaughter and sentenced to the penitentiary for a period of ten years.

He has brought the record of his conviction to this court for review.

It is first urged by defendant that the verdict and judgment are not supported by the evidence. The record shows that for some time prior to February 21, 1923, the date of the homicide, the defendant had been a practicing physician and surgeon in the city of Hastings where he resided. His family consisted of himself, his wife, his daughter, Mae Gordon, and her husband, Charles R. Gordon, the victim of the homicide, and Mary Mitchell, a sister of defendant's wife. The home of the defendant had been the home of the others. There is evidence which seems to indicate that the relationship of the parties was pleasant. On February 12, 1923, Mary Mitchell was taken to a hospital and operated upon by the defendant for appendicitis. Defendant was absent from his home on professional business during the day of February 13, 1923, and upon his return in the evening found that his daughter and her husband had left the house. Defendant testified that when he returned: "Mrs. Egbert was worrying and almost in a physical collapse, and said that the children had left." He located his daughter and her husband next day at a hotel in Hastings, and visited them almost daily. On February 17 the defendant's wife was taken to the hospital and, from that time to the date of the homicide, the defendant lived alone in the house.

It further appears that, on the evening of February 20, the defendant called upon his wife and sister-in-law at the hospital and also upon his daughter and her husband at the hotel. Later he attended a professional call and returned to his home at about midnight. In making professional calls at night it was the defendant's custom to carry a revolver. Upon his return home he laid the revolver upon a table in the dining-room and retired to a bedroom immediately adjoining. While defendant was alone in the house at about 10 o'clock in the forenoon of February 21, 1923, his daughter and her husband entered the front door by

means of a pass-key. The daughter was called as a witness for the state. She testified, in substance, that upon entering the house her husband suggested that she call "Dad;" that she thereupon called her father, at the same time removing her hat and cloak; that as she stepped into the dining-room the defendant came out of the kitchen wearing a bath-robe; that as he approached her he said, "Hello, honey, is that you?" and that she replied, "Yes;" that as he came toward her and passed the dining-room table he picked up the revolver with his left hand; that he put his right arm around her shoulder, still holding the revolver in his left hand; that at this time Roy was just inside the front door; that her father asked her, "Are you alone?" and that she replied,"No, Roy is with me;" that defendant then asked her what she wanted, and she answered that she had come for some clothes; that thereupon defendant said, " 'It's all right for you, but don't let Roy come in and get the clothes,' or something like that;" that nothing further was said; that, while they were standing in this position, her husband rushed in and grabbed hold of defendant's hands; they struggled, and "both tried to get the gun away from each other;" that Roy had hold of her father's hand which held the gun; that no words were spoken; that the gun went off twice, and Roy fell. She was asked the direct question, "Do you know who shot your husband?" and she answered, "Nobody shot him. I think it was an accident."

It further appears that after the shooting the defendant rushed out of the house onto the front porch. He was in a high state of excitement. One witness testified that he was screaming: "Mr. Yocum! Mr. Yocum! God help me, I didn't mean to do it, Mr. Yocum." Other witnesses testified that he kept repeating: "My God, I didn't mean to do it."

Dr. Beghtol, another witness for the state, testified in substance that he received a telephone call from the defendant; that the defendant said: "Doctor, come up to Dr. Egbert's residence as quick as you can. Something

terrible has happened here. Bring Stiner and the police and the sheriff;" that as he approached the house he saw the defendant on the porch; that he did not seem to have himself under control; that he was speaking in loud lamentations; that, among other things, he said, "God knows I didn't intend to do it;" that the witness took hold of the defendant and assisted him into the house; that as they were going toward the bed-room defendant sank to the floor; that the witness asked defendant, "What's happened?" and that defendant replied: "'They came in the house and I told Mae that she could come in but he couldn't, and he came toward me and I fired,' or 'I shot,' I don't know which he said;" that defendant then asked the witness, "Is he dead?" and looked over toward the body; that the witness then examined the body and found it to be the body of Roy Gordon, the defendant's son-in-law, and that he was dead.

Another witness testified that the defendant kept repeating, "My God, I didn't mean to do it," and then, without seeming to address any one in particular, said, "He struck my wife last week, and no man can strike my wife," and that thereupon Mae Gordon said: "It's a lie. Roy never touched mother. I struck her myself." The defendant and his daughter deny that they made these statements.

Another witness testified that the evening before the tragedy he had a conversation with the defendant; that the defendant seemed to implicate Gordon with having some little trouble with Mrs. Egbert; that the defendant stated that his wife and Mary Mitchell were in the hospital, and that his only child was held a prisoner at the Clarke hotel.

The autopsy revealed that the bullet entered the body just below the left nipple, passing through the heart, and lodged a little to the right of the spine and below the point of entrance; and that the gun-shot wound was the cause of Gordon's death.

The gun in question is what is known to the trade as a 45 Colt automatic loading pistol. At the time the defendant picked the pistol up from the table it was loaded,

the trigger was cocked, and the safety catch was on. The testimony discloses that this is a proper and safe way to leave this kind of a pistol when it is loaded and not in use. In this condition the process of discharging the pistol is, first, the releasing of the safety catch, which is on the left-hand side of the barrel near the handle, and which is usually released by a slight downward pressure with the right thumb when the pistol is held in the right hand; second, a pressure with the hand against the grip safety, which is located in the back of the handle; and, third, while the grip safety is pressed in, the pulling of the trigger. When the pistol is being fired in this manner it will continue to shoot unless the pressure is released from either or both the trigger or the grip safety.

It is urged by defendant's counsel that the declarations made by the defendant were not competent evidence as tending to prove the *corpus delicti*, and that, without the declarations, evidence is wholly wanting that a crime had been committed. The rule is well established that one cannot be convicted of a felony upon his own unsupported extrajudicial confession or admission that he has committed a crime. But, while a voluntary confession is insufficient when standing alone to prove that a crime has been committed, it is competent evidence, and may with slight corroborating circumstances be sufficient to warrant a conviction. *Sullivan v. State*, 58 Neb. 796.

In the case just cited it was also held: "Circumstances capable of an innocent construction may be interpreted in the light of the defendant's confession, and the fact under investigation be thus given a criminal aspect."

The defendant denied having made some of the declarations attributed to him by the witnesses for the state. As to other statements, he testified that he had no recollection of having made them, and still others he sought to explain. Considering the entire evidence, together with the circumstances and the inferences which may be properly drawn therefrom, we think the question whether a crime had been

committed was for the jury to determine. The credibility of the witnesses, the weight to be given to their testimony, and the proper inferences to be drawn from the evidence were questions within the province of the jury. In our opinion the evidence was sufficient to justify the court in submitting the case to the jury. From this it follows that the court did not err in refusing to direct a verdict of not guilty.

It is next urged that the court erred in permitting certain clothing worn by deceased at the time of the homicide and identified as exhibits H, I, J, and K, being, respectively, a shirt, overcoat, coat, and vest, to be received in evidence and exhibited to the jury. It is contended by defendant's counsel that these exhibits did not tend to prove or disprove any controverted issue in the case, and served only to excite the minds and inflame the passions of the jury against the defendant.

There are many instances in which it is proper that articles of clothing worn by the victim of a homicide should be received in evidence when sufficiently identified. We conceive the rule to be that, when evidence of this character tends to throw light upon or illustrate any controverted issue, then it is admissible. When, however, such evidence has no tendency to establish the guilt or innocence of the accused, and is effective only to inflame the passions of the jury, it should not be received. This we understand to be the rule announced in *McKay v. State*, 90 Neb. 63; *Flege v. State*, 93 Neb. 610; *Blazka v. State*, 105 Neb. 13.

In the case before us it was the theory of the defense that the deceased came to his death by the accidental discharge of a pistol held in the left hand of the defendant while defendant and deceased were engaged in a struggle for the possession of the pistol, and that the struggle was precipitated by the action of the deceased in attempting to wrest the pistol from the defendant. The testimony indicated that there were no powder marks or burns visible upon the clothing worn by the deceased at the time it was

removed from the body of the deceased a few hours after the homicide. Testimony was introduced on behalf of the state showing the result of experiments in firing the pistol loaded with the same class of ammunition as that with which it was loaded at the time of the homicide. When the pistol was fired with the muzzle against a vest which was used, a hole was torn in the cloth about four inches in diameter, and where the bullet entered was a ring of scorched cloth. At a distance of three inches there was a ring of scorched cloth about the size of a five cent piece, and also showed a ring of unexploded powder around the scorched part. At six inches the scorch was not so perceptible, but the powder marks were very distinct. At a foot powder marks were very much in evidence. At three feet there were still grains of powder on the cloth and imbedded somewhat in the cloth. The evidence on behalf of the defendant upon this question tended to somewhat contradict the state's evidence on this subject.

In view of the entire record, we think the exhibits tended to throw some light upon the controverted questions presented to the jury, and that they were properly received in evidence. In this connection it is urged by defendant that no proper foundation was laid for the introduction of exhibits H, I, J, and K, because it was not shown that the exhibits were in the same condition that they were in immediately after the homicide. It was shown that the exhibits were clothing worn by the deceased at the time. An inspection shows a clean cut round hole through the clothing the size of the bullet. A strict compliance with the rule would have required a showing that the clothing when offered in evidence was in the same condition as at the time of the homicide. That there was no proper foundation laid was hardly sufficient to challenge the attention of the court to the point now urged. In any event, the admission of the exhibits in evidence, if error, was without prejudice to the defendant.

The correctness of instruction No. 5 is assailed by the defendant. This instruction reads as follows:

"In reference to the offense of manslaughter, to support which the killing must have been done either upon a sudden quarrel or unintentionally while the slayer was in the commission of some unlawful act, you will determine from the evidence whether these things or either of them existed and have been established by the evidence; and you are further instructed that under the laws of this state one who threatens another in a menacing manner commits an unlawful act, and if you are convinced by the evidence beyond a reasonable doubt that the defendant at the time and place stated in the information was threatening the deceased, Charles R. Gordon, or the wife of said Gordon, in a menacing manner, and while in the commission of some unlawful act and by reason thereof the revolver was discharged, accidentally or otherwise, whereby said Gordon was shot and killed, then the defendant would be guilty of manslaughter.

"It is not unlawful for one to own and have in his possession in his home firearms and ammunition for use in a lawful way."

In defining the offense of manslaughter the instruction is in the language of the statute. The criticism is made that there is no evidence of threats or of any unlawful act on the part of the defendant, and that therefore the instruction complained of is not responsive to the evidence. We are unable to agree with this contention. We think the evidence was such that the jury might well infer that the defendant intentionally pointed a loaded pistol at the deceased. If this were done it would be an unlawful assault, and if under these circumstances the pistol was unintentionally discharged and a person killed, it would constitute manslaughter. *Ford v. State,* 71 Neb. 246; *Schultz v. State,* 89 Neb. 34; *Thiede v. State,* 106 Neb. 48. From the testimony of Dr. Beghtol and other witnesses, the position of the wound, and the circumstances in evidence, we think the jury might well find that the defendant was guilty of manslaughter. In our opinion the instruction is responsive to that issue.

It is also urged that the court erred in giving instruction No. 6. By this instruction the court defined the word "accident," and in the course of the instruction this language was used:

"As before stated to you, the burden is not upon the defendant to prove by the greater weight of the evidence that the shooting was an accident, but to warrant a verdict of guilty the state must satisfy you beyond a reasonable doubt that the revolver at the time and place in question was not accidentally discharged, or, if accidentally discharged, that the defendant was then in the commission of an unlawful act directly connected therewith, as explained in these instructions.

"If the shot which caused the death of Charles R. Gordon was wholly accidental so far as the defendant was concerned, and without intention on his part to kill or injure or menace any person, and not while the defendant was in the commission of an unlawful act, then your verdict should be not guilty."

The criticism is made that by the use of the term "wholly accidental" a burden was placed upon the defendant which is not recognized in criminal practice. Taking the charge as a whole, we do not think that the instruction is vulnerable to the attack made upon it. Throughout the instructions it is made clear that the burden was upon the state to prove the guilt of the defendant beyond a reasonable doubt, and that the burden never shifted, but was at all times on the state. There was no error in the giving of this instruction.

It is urged that the court erred in failing to give instruction No. 3 requested by the defendant. This instruction in effect told the jury that, if the evidence failed to disclose a motive on the part of the defendant to commit the offense charged, "this is a circumstance in favor of his innocence." Defendant relies upon *Clough v. State*, 7 Neb. 322, and *Smith v. State*, 61 Neb. 296, to support his contention that the proffered instruction was erroneously refused.

In the *Clough* case an instruction somewhat more favorable to the accused was held properly refused, and in the discussion which followed there is a dictum to the effect that an instruction substantially in the language of the one proffered would have been proper. We are of the view, however, that the instruction tendered is not a correct statement of the law. It is not the province of the court to instruct the jury what weight or bearing should be given to a particular circumstance. As applied to the present situation, the instruction should go no further than to inform the jury that such a circumstance should be considered by them in connection with all the other facts and circumstances in determining the guilt or innocence of the defendant.

In the *Smith* case, *supra,* an instruction very similar to the one requested was given. In that case the defendant contended that the instruction was erroneous. It was held that, the instruction being favorable to the accused, he could not predicate error thereon.

Criticism is made in the brief to other alleged errors; among them, the failure of the court to give an instruction to the effect that no consideration should be given to questions which were not answered and to answers which were subsequently stricken from the record; also, to misconduct on the part of the county attorney in persisting in asking questions along a certain line after the court had clearly ruled that such testimony was inadmissible. We deem it unnecessary to go into a detailed discussion of these criticisms. In a long trial it is almost inevitable that things occur which a reviewing court might desire had not happened. This is true in this case, but on the whole we regard them as not of sufficient importance to amount to prejudicial error. We have considered all the assignments of error and in our opinion they are not sufficient to show prejudicial error. In the instructions given the court clearly and carefully guarded the rights of the defendant. His theory of the case was submitted to the jury.

Upon an examination of the entire record and the fair inferences based thereon, we are clearly of the opinion that the evidence is sufficient to support the verdict and judgment. No prejudicial error appearing in the record, the judgment of the district court is

AFFIRMED.

Note—See Criminal Law, 16 C. J., secs. 1226, 1514.

FARMERS COOPERATIVE MERCANTILE COMPANY, APPELLANT AND CROSS-APPELLEE, V. ARTHUR H. SHULTZ, ET AL., APPELLEES AND CROSS-APPELLANTS.

FILED SEPTEMBER 29, 1925. No. 23052.

1. **Corporations**: PURCHASE OF STOCK. A by-law of a corporation which provides: "The board of directors shall have full power to buy and sell shares at par value. A shareholder wishing to withdraw his stock for any reason shall present the same to the directors and they shall have full power to dispose of and consent to transfer of same"—does not authorize the manager of such corporation, without the approval of its board of directors, to purchase and retire any of its capital stock; nor does the fact that the corporation, through its board of directors, has usually approved such purchase and retirement of capital stock, when requested by shareholders, authorize the manager, without the approval of the board of directors, to purchase for the corporation any of its outstanding capital stock.
2. **Payment**: BURDEN OF PROOF. The plea of payment is an affirmative defense, and the burden of proving it rests on him who pleads it as a defense.
3. **Corporations**: MONEY DUE FROM MANAGER: PAYMENT: BURDEN OF PROOF. Where the manager of a corporation undertakes to pay his obligation to the corporation out of the undivided profits account of the corporation, claiming that he had placed funds of his own in that account, the burden is upon him to establish that he had intermingled his own funds with the funds of the corporation, and to point out in detail the amounts and items, which he claims were his own, that went into the corporation's treasury. Under such circumstances, where the defendant testifies in a general way that he had paid in large sums to the treasury of the corporation, without specifying items, dates, and amounts, such testimony is not sufficient to comply with the rule and is a mere conclusion.

4. **Limitation of Actions:** DECEIT. Where the manager of a corporation, having control of its books of account, withdraws funds from the corporation and charges the same to himself on its books, and informs the officers or board of directors that such funds have been restored to the corporation, and points to entries upon the books evidencing the supposed payment, and thereby leads the directors of the corporation to believe that the debt had been liquidated, and, after the lapse of more than four years, the corporation discovers that the entry was not a true statement, and that payment had not been made, and brings an action against the manager to recover the amount, the defendant will not be permitted to avail himself of the statute of limitations as a defense.
5. **Appeal:** FINDINGS BY COURT: CONFLICT OF EVIDENCE. In a law action, where a question of fact has been submitted to the trial court, without the intervention of a jury, the court's finding is entitled to the same force and effect as the verdict of a jury, and, if based on conflicting evidence, will not be disturbed unless clearly wrong.

APPEAL from the district court for Dodge county: A. M. POST, JUDGE. *Affirmed in part, and reversed in part.*

Courtright, Sidner, Lee & Gunderson, for appellant.

Cain & Johnson and *Abbott, Rohn & Dunlap, contra.*

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

GOOD, J.

Plaintiff, Farmers Cooperative Mercantile Company of Scribner, Nebraska, is a cooperative corporation, organized under the laws of Nebraska and engaged in handling grain, lumber and other commodities. During the time of all the transactions involved in this controversy, Arthur H. Shultz was a stockholder and a member of the board of directors, and also president and manager of the corporation. Defendant Mary A. Shultz was the wife of Arthur H. Shultz, and she and the other defendants were shareholders in the corporation.

Plaintiff in its second amended petition declared on ten separate causes of action. The second cause of action

was against all of the defendants and was equitable in its nature. The third cause of action was against Arthur H. and Mary A. Shultz, and the other eight causes of action were against Arthur H. Shultz alone. All of the causes, save the second, were for money judgments and were legal, rather than equitable, in their nature. By stipulation, the parties waived a jury and submitted the case on the ten causes of action to the court. Misjoinder of parties or causes of action is not raised. There was a finding and decree for plaintiff and against all of the defendants on the second cause of action, and a finding for defendants and judgment of dismissal on all of the other causes. Plaintiff has appealed from the finding and judgment on the nine causes of action in which it suffered defeat, and the defendants have filed a cross-appeal as to the second cause of action. Since most of the discussion in this opinion will relate to defendant Arthur H. Shultz, he will be referred to as defendant, while other defendants will be designated by name. Before taking up the discussion of the separate causes of action, a preliminary general statement seems advisable.

Plaintiff corporation was organized in June, 1913, with an authorized capital of $25,000, divided into shares, each of the par value of $5. The by-laws provided that each shareholder should be entitled to but one vote, regardless of the number of shares owned by him, and that no shareholder could own more than 40 shares of the capital stock. About the first of the year 1915 plaintiff desired to purchase a mill and elevator property owned by a competitor, and, with this in view, it amended its articles of incorporation and by-laws so as to provide for an authorized capital of $125,000, and permit a shareholder to own 1,000 shares of the capital stock. At this time some difficulty was experienced in securing sufficient subscriptions to capital stock to raise the funds necessary to purchase the mill and elevator property. Thereupon, the defendant agreed to subscribe for and become the owner of 1,000 shares of capital stock,

provided he was made the manager of the corporation. Accordingly, he was selected as manager, and a written contract was entered into that he should be manager for a period of five years. He then subscribed for additional shares of stock so that his holdings were $5,000 in his own name. An additional $5,000 of the par value of the stock was issued to his wife, defendant Mary A. Shultz. It subsequently appears, however, that Mrs. Shultz never subscribed or paid for this stock, but that defendant paid therefor and really held the additional $5,000 in the name of his wife. Defendant also induced his mother-in-law, defendant Anna Mohr, to subscribe for 440 shares of capital stock, and his friend, Herman Witthinrich, at various times to subscribe for or purchase shares of stock until his holdings amounted to 1,000 shares, of the par value of $5,000. Defendant became manager of the corporation. At no time did plaintiff authorize or permit any dealings in grain futures, in the nature of gambling; nor did it permit or authorize any of its officers to engage in such dealings on its behalf.

Section 7 of plaintiff's by-laws provided: "The board of directors shall have full power to buy and sell shares at par value. A shareholder wishing to withdraw his stock for any reason shall present the same to the directors and they shall have full power to dispose of and consent to transfer of same."

For a number of years it was the custom of the plaintiff, when a shareholder desired to surrender his stock, to purchase the same and retire it or sell it to some other individual. However, in all of these transactions whereby stock was retired, it was either authorized in advance or subsequently ratified by the board of directors, except in the instances that are in controversy in this action.

Defendant continued to be manager until the 1st of March, 1921. Some time prior to this defendant became dissatisfied with the by-law which permitted but one vote to a shareholder, regardless of the number of shares of

stock held, and sought to have it changed. Neither the shareholders nor the directors would consent to this change. Thereupon, defendant tendered his resignation on the 1st of February, 1921, as manager and president of the corporation, which was accepted a few weeks later.

For its first cause of action plaintiff alleges that prior to the 5th of February, 1921, defendant purchased from various shareholders an aggregate of 344 shares of plaintiff's capital stock, of the par value of $1,720; that the certificates of stock were delivered to him, but were not formally transferred on plaintiff's corporate books; that, contrary to his duties and obligations as manager of the plaintiff, defendant, on the 5th of February, 1921, pretended to retire said 344 shares of capital stock, and took and received therefor, and thereby converted to his own use, money, bills receivable and other property of plaintiff, of the value of $1,720. Defendant admits the purchase of said 344 shares of stock and that the certificates representing these shares were delivered to him, and avers that, under the articles of incorporation and by-laws and the general usage and custom of the plaintiff, it was authorized to purchase and retire its capital stock, and that, in pursuance of such authority, custom and usage, he, as manager, had delivered the certificates representing said shares of stock to the plaintiff and that they were thereby retired; and defendant denies any liability on account of the money and property which he had received in payment for said shares of stock.

The evidence shows that defendant received from the funds and property of plaintiff $1,720, being the par value of the stock, and that he had placed the certificates representing these shares of stock in plaintiff's vault. Defendant argues that, under section 7 of the by-laws above quoted, and under the usage and custom prevailing, he, as manager, was authorized to retire and had retired the stock, and that the transaction whereby he received $1,720 of plaintiff's funds in payment therefor was legitimate and proper.

The evidence shows that on numerous occasions, prior to this time, shares of stock held by various parties were retired and canceled, but that in every instance this was done with the approval of the board of directors. It was either specifically authorized or subsequently ratified by the board. It is also disclosed that some time prior to this a shareholder had made application to the board to have his stock retired, and that the board of directors, at the suggestion of the defendant, declined to retire the stock and voted not to thereafter retire stock, it being the belief of the board at that time that the corporation was in need of all of the capital represented by its outstanding stock, and that it would be detrimental to its interests to decrease its capital stock. At the time defendant undertook to retire his stock, he had tendered his resignation, but the same had not yet been accepted. He did not present the matter to the board of directors and ask them to approve the retirement of his stock; nor did the directors at any time ratify the action of defendant, as manager, in attempting to retire it, but, on the contrary, disavowed his action.

We think section 7 of the by-laws does not require that stock shall be purchased or retired at the request of a shareholder, but goes no further than to authorize such action when approved by the board of directors. Nor does the evidence disclose that there was any custom or usage to retire stock, except by the approval of the board of directors. Whether the board of directors should retire a shareholder's stock upon his application was a matter for its discretion. Nowhere was the manager authorized to retire stock except by and with the approval of the board of directors, and during the six years in which defendant was manager, in every instance, up to this time, when he had sought to retire stock, he had applied for and secured the approval of the board in such transactions.

Under the facts disclosed, this 344 shares of stock was never legally retired, and defendant never acquired the right to the $1,720 which he took from plaintiff's funds in

payment therefor. The finding of the district court for defendant on the first cause of action is not sustained by the evidence.

For its third cause of action plaintiff alleges that on the 19th of December, 1916, the defendant and Mary A. Shultz, without authority from plaintiff and without its knowledge, withdrew $8,000 of its funds, charging the same on plaintiff's books to capital stock, as follows: "Deb. Capital Stock Mrs. S. $5,000, A. H. S. $3,000—$8,000," thereby pretending to reduce the outstanding capital stock of the plaintiff to the extent of $5,000 of the stock of Mary A. Shultz and $3,000 of the stock of defendant, and pretending thereby to surrender and cancel certificates for the corresponding amounts of plaintiff's capital stock; that the certificates were not actually surrendered or canceled; that a few months thereafter defendant reported to plaintiff that the withdrawal of said funds was a temporary proposition only, and stated and agreed that he would shortly reinstate such certificates and refund the $8,000 so withdrawn; that thereafter defendant reported to plaintiff the reinstatement of the said stock and the repayment of the $8,000, and thereby lulled the plaintiff into the belief that said funds had been restored to plaintiff; and that it had no notice to the contrary until the year 1921; that when defendant was interrogated as to the restoration of the said $8,000 defendant then stated that said funds were restored on March 28, 1918, and pointed out an entry on the books which he claimed represented the transaction; that on the 28th of March defendant made entries upon plaintiff's books showing credit to capital stock of $8,830, and this was the entry which defendant stated represented the restoration of the $8,000 theretofore withdrawn. Plaintiff avers that this was an untrue statement; that upon the same day defendant charged plaintiff's undivided profits account with $8,830 as an offset to the credit of the same amount to capital stock; that neither defendant nor Mary A. Shultz had anything in plaintiff's undivided

profits account which could offset or account for the said entries; and it is charged that it was a mere switching of the book entries, without any money transaction, and for the purpose of deceiving plaintiff, and that, in fact, neither defendant nor Mary A. Shultz ever restored said $8,000 to plaintiff. Plaintiff demands judgment for that amount.

Defendant admits that on the 19th of December, 1916, he delivered to plaintiff $8,000 of its capital stock, then owned by him, part of which was in the name of his wife, Mary A. Shultz; that he thereafter reissued said stock and repossessed himself thereof, and alleges that when he delivered the $8,000 par value of stock to plaintiff he intended to apply the same upon a then existing indebtedness of himself to plaintiff, but shortly thereafter, by speculation in grain, outside of and beyond the scope of his authority as manager of plaintiff, and upon his individual account, he secured profits of his own to the extent of said $8,000, and paid the same to plaintiff; and thereupon withdrew and again became the absolute owner of said $8,000 of stock. It is thus admitted that defendant surrendered stock to the company and obtained $8,000, and that he thereafter reissued the stock to himself and claimed to have thereafter paid the $8,000 to plaintiff. Defendant also pleads the statute of limitations as a defense.

Under the pleadings the burden is on the defendant to prove that he has repaid to plaintiff the $8,000 of stock when it was reissued to himself. The payment for the stock reissued was made from plaintiff's profit and loss account. Unless defendant had funds belonging to him in that account, it plainly appears that he has never repaid the $8,000. Defendant, however, testified in a general way that he did a "scalping" business on the grain market, from which he received large profits, and that the same were turned over to plaintiff and went into its cash account, and that therefrom he had to his credit in plaintiff's cash account more than $8,000 when the entries were made. He did not testify to any particular transaction; nor did he

point to any items which can be identified as representing such transactions. No items on the books are shown or pointed out that disclose that any money from this source went into plaintiff's treasury. It is also significant that prior to this time defendant had stated that the funds for this $8,000 arose out of other transactions. Under the circumstances, we think his statement is a mere conclusion, and not a statement of ultimate fact. It must be recalled that defendant was plaintiff's manager and stood in a fiduciary relation to plaintiff. If he had intermingled his own funds with the funds of the plaintiff, it was incumbent upon him to point out that he had funds in the plaintiff's cash account, to identify the transaction, and to point out the items which would represent his contributions to plaintiff's cash account.

From a careful examination of the evidence, it appears that defendant has not proved, by evidence that is clear and convincing, that he had funds of his own in plaintiff's cash account, or that he was entitled to withdraw therefrom $8,000. He has not met the burden that the law imposes upon him.

It appears that the action was not begun until more than four years after the withdrawal of the funds in question, but defendant was plaintiff's manager, in possession and control of the books of account, and caused an entry to be made thereon indicating that the $8,000 had been repaid, and reported to plaintiff's board of directors that it had, in fact, been repaid, and pointed to the entry upon the books which he now seeks to justify. By his conduct he intentionally led the plaintiff and its board of directors to believe that he had restored the $8,000 to plaintiff's treasury. To permit the defendant to defeat recovery on the ground of the statute of limitations would permit him to take advantage of his own wrong. Under such circumstances the law will deny him the right to avail himself of the statute of limitations as a defense.

The finding and judgment of the district court for de-

fendant on this cause of action is not sustained by the evidence.

For its fourth cause of action plaintiff charges that defendant wrongfully credited to himself on plaintiff's books $2,700, being a part of a remittance from the Flanley Grain Company, of Omaha, which plaintiff claims was owing to it.

For its fifth cause of action plaintiff alleges that in August and September, 1916, defendant remitted $3,000 of plaintiff's funds to the Flanley Grain Company for margins on grain-hedging contracts for plaintiff, and that a profit of $5,232.94 accrued from these hedging contracts and was remitted to plaintiff by the grain company; and that defendant improperly charged the $3,000 remitted to the Flanley Grain Company to himself on the plaintiff's books and appropriated the profits of the transaction to his own use.

For its sixth cause of action plaintiff avers that in September, 1916, defendant appropriated to his own use profits in the sum of $3,925, accruing to it on grain-hedging transactions, carried on for it by the Flanley Grain Company, and also appropriated the further sum of $1,000, which was theretofore standing to its credit on the books of the Flanley Grain Company and remitted by it to plaintiff.

For defenses to the fourth, fifth and sixth causes of action, defendant avers that the funds which plaintiff claims in these causes of action were all gains or profits arising from option transactions, carried on by defendant for his own account; that plaintiff had no part or interest in these gambling transactions and was entitled to no part of the winnings. The findings on these three causes of action were for the defendant.

Under the law, the finding of the district court in a law action has the same force and effect as the verdict of a jury, and, if based on conflicting evidence, it will not be disturbed unless clearly wrong. We have carefully read and examined the voluminous record, consisting of 800 pages, together with a large number of exhibits, and we find that, at best, there is conflict in the evidence, but there is ample

in the record to sustain the finding for defendant as to each of these causes of action.

For its seventh cause of action plaintiff alleges that in July and August, 1916, $1,600 of its funds was remitted to E. W. Wagner & Company, of Omaha, for margins on hedging contracts on the board of trade, carried on for plaintiff; that these hedging contracts resulted in a net profit of $1,135.28, which was remitted to plaintiff, and that defendant wrongfully appropriated this profit to his own use. For a defense defendant alleges that the transactions referred to in this cause of action were option deals on the board of trade, carried on for and on behalf of defendant, and that plaintiff had no interest therein and was entitled to no part of the winnings from the gambling transactions. There was a finding for defendant on this cause of action.

The most that may be said for plaintiff's contention is that there is some conflict in the evidence, but there is ample evidence to sustain the finding of the trial court.

For its eighth cause of action plaintiff alleges that in the spring of 1917 it had an account with the Nebraska-Iowa Grain Company for cash grain shipped, and also an account for hedging contracts on the board of trade; that on the 30th of April, 1917, the Nebraska-Iowa Grain Company remitted to plaintiff a check for $7,500, representing a balance of $3,697.72, due for cash grain, and $3,802.28, profits on the hedging contracts; that defendant received and appropriated said check to his own use and made no entry thereof on plaintiff's books. Defendant admits that on the 30th of April, 1917, he received from the Nebraska-Iowa Grain Company two checks, aggregating $7,500, but avers that at that time he had to his credit with the Nebraska-Iowa Grain Company profits on gambling transactions, carried on for his own account on the board of trade, in an amount largely in excess of $7,500, and that the check so received was on account of his profits arising from his gambling transactions and belonged exclusively to him, and that plaintiff had no property or interest therein. The

trial court found for defendant on the eighth cause of action.

The evidence as to this cause of action is in sharp and irreconcilable conflict, but we are unable to say, from an examination of the record, that the trial court's finding for defendant is not sustained.

For its ninth cause of action plaintiff alleges that defendant drew two checks, for $1,000 each, on its bank account and used the proceeds for gambling transactions for his own account, and improperly charged said checks on plaintiff's books to "grain hedge," and thereby appropriated $2,000 of plaintiff's funds.

For its tenth cause of action plaintiff alleges that defendant, on January 29, 1917, drew a check for $3,000 on plaintiff's bank account and used the proceeds for his own benefit and did not charge himself with the amount on plaintiff's books, and thereby wrongfully appropriated $3,000 of plaintiff's funds.

For a defense to the ninth cause of action defendant admits that he drew these checks and purchased drafts for his own use, and avers that they were charged to him on plaintiff's books and that he has accounted therefor. As to the tenth cause of action, defendant admits that he drew the check, as alleged, and avers that he was properly charged therewith on plaintiff's books, and that he has fully repaid the same to plaintiff. The trial court found for the defendant on the ninth and tenth causes of action.

The evidence as to the ninth and tenth causes of action is also conflicting. On behalf of defendant, it tends to show that he has been charged with these amounts and that he still has a small credit to his account, and, under the rule above quoted, the finding of the district court will not be disturbed.

For its second cause of action plaintiff alleges that on and prior to the 16th of February, 1921, defendant was the owner of, and there had been issued to him, 1,000 shares of plaintiff's capital stock; that defendant Witthinrich on

said date was the owner of 1,000 shares of capital stock which, at divers times theretofore, had been issued to him, or purchased by him from other shareholders; that defendant Anna Mohr was on said date the owner of, and there had been issued to her, 440 shares of plaintiff's capital stock; that defendant Mary A. Shultz, on and prior to said date, was the owner of, and there had been issued to her, 1,000 shares of plaintiff's capital stock; that on the 16th of February, 1921, defendant, as manager of plaintiff, made entries upon its books, charging stock with $17,200, and crediting bills receivable with $23,129.39, and that about the same time defendant paid into plaintiff in money $4,000, and defendant Witthinrich paid into plaintiff in money $2,000, and on the same day all of the certificates representing the above mentioned capital stock were, by the parties to whom they had been issued, surrendered and left in plaintiff's vault, and all indorsed by the respective parties to whom they had been issued as being sold and assigned to plaintiff; that upon the capital stock record, opposite the entry as to each of said certificates of shares, except as to the certificate held by defendant Anna Mohr, defendant made the following record: "Traded for bills receivable." Plaintiff alleges that these transactions were without authority from plaintiff, contrary to law, and that by means thereof defendants, by conspiring among themselves, undertook to retire the capital stock theretofore owned by them, and to surrender their certificates representing the same, and to take, and did take, bills receivable and property of plaintiff in the sum of $23,129.39. Plaintiff tenders to the defendants the said certificates of shares of stock, and tenders back to defendant A. H. Shultz $4,000 in money and to defendant Witthinrich $2,000, and asks to have the entire transaction rescinded and for the return of its bills receivable, which are particularly described.

As a defense to this cause of action, the defendants aver that defendant Shultz became manager of the plaintiff company and subscribed for 1,000 shares of its capital stock

upon the condition that he should become and continue to be manager of the plaintiff, and that if he ceased to be plaintiff's manager said 1,000 shares of capital stock should be redeemed at par value, and that, but for such agreement and understanding, he would not have subscribed for and become the owner of said 1,000 shares of capital stock. Defendants further aver that the shares of stock owned by defendants Anna Mohr and Herman Witthinrich were issued to them upon the express promise made by the defendant that if he ceased to be manager their stock should be retired and they would be repaid the par value thereof, and that, in pursuance of the provisions of section 7 of the by-laws, heretofore quoted, and the construction given them by the plaintiff company, and under the custom and usage, and in pursuance of the agreement between the defendant and the plaintiff, and between him, on behalf of plaintiff, and defendants Mohr and Witthinrich, they were entitled to have their stock retired when he ceased to be manager of the plaintiff, and that he ceased to be such manager on or about the 1st of March, 1921. Defendants acknowledge the payment of the $4,000 and the $2,000 by the defendants Shultz and Witthinrich, respectively, and the receipt of the bills receivable, as set out in plaintiff's second cause of action.

On the second cause of action the trial court found generally for the plaintiff and against the defendants and each of them, and that the attempted transfer of the 3,440 shares of stock of the par value of $17,200, accompanied by the payment of $6,000 in cash from the defendants to the plaintiff, and the transfer of $23,189.37 of bills receivable from plaintiff to defendant were unauthorized and invalid, and that plaintiff is entitled to a rescission of the transaction and to be repossessed of the bills receivable, which are particularly described, and that the defendants were each entitled to the delivery back to them of the certificates representing the shares of stock theretofore held by them. From the finding and decree, defendants have filed a cross-appeal.

The evidence shows that when defendant became manager there was a contract in writing between him and the plaintiff, whereby he became manager for the term of five years. This was entered into about the 1st of January, 1915, and he continued as manager for more than six years. The written contract contains no provision for or reference to any agreement to retire stock of the defendant upon his ceasing to be manager. From the whole evidence and circumstances proved, different conclusions may have been reached as to whether there was any agreement between the defendant and plaintiff, and the evidence, as to an agreement between the plaintiff and defendants Mohr and Witthinrich, that their stock was subscribed for at various times upon any express condition, is far from convincing. There is nothing in the evidence from which it could be properly inferred that defendant Shultz was authorized to make any such agreement as is claimed existed between defendants Mohr and Witthinrich and the plaintiff company. Moreover, when the evidence is examined, the testimony does not indicate that the agreement, if any, was that of the company. If an agreement was made that their stock was to be retired, it was upon the personal agreement of defendant Shultz and would bind no one but himself. As pointed out in the discussion of the first cause of action, the by-law and the interpretation given it by the company, and the custom and usage, would not and did not authorize the retirement of this stock without the approval of the board of directors. It never was approved by the board or submitted to it for its approval. We are constrained to hold that the finding and decree of the trial court as to the second cause of action are sustained.

It follows, therefore, that the judgment as to the second, fourth, fifth, sixth, seventh, eighth, ninth and tenth causes of action is affirmed, and as to the first and third causes of action is reversed and remanded for further proceedings.

AFFIRMED IN PART, AND REVERSED IN PART.

INVESTORS SYNDICATE, APPELLANT, V. CHARLES W. BRYAN, GOVERNOR, ET AL., APPELLEES.

FILED SEPTEMBER 29, 1925. No. 24532.

1. **Banks and Banking: FOREIGN INVESTMENT COMPANIES: STATUTORY PROVISIONS.** Sections 8055, 8056, and 8062, Comp. St. 1922, construed, and *held* to fix a general standard to which all foreign instalment investment companies must conform, to entitle them to a license to transact business in Nebraska, and it is further *held*, that such statute vests in the department of trade and commerce quasi-judicial power, in the proper exercise of which power the department of trade and commerce shall determine whether a foreign instalment investment company, applying for a certificate of approval, conforms to the standards prescribed by the statute.
2. ———: ———: ———. Sections 8055, 8056, and 8062, Comp. St. 1922, do not vest unrestrained, arbitrary power in the department of trade and commerce to grant to or withhold from a foreign instalment investment company a certificate of approval to transact business in Nebraska.
3. ———: ———: ———: CONSTITUTIONALITY. Sections 8055, 8056, and 8062, Comp. St. 1922, do not authorize or sanction the taking of property without due process of law; nor do said sections deny to any person or corporation the equal protection of the law.

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

Peterson & Devoe, for appellant.

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

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

GOOD, J.

Action by Investors Syndicate, a foreign corporation, to enjoin the governor and deputy secretary of trade and commerce of the state of Nebraska from interfering with the conduct of plaintiff's business in this state. From a decree of the district court denying it the relief sought, plaintiff has appealed.

There is no substantial conflict in the evidence. Plaintiff is a corporation, organized under the laws of Minnesota, for the transaction of an instalment investment business. For a number of years it had been duly licensed to transact business in Nebraska; had built up quite an extensive business in this state, and had in its employ a large force of agents and field workers.

In January, 1924, plaintiff, in due form of law, made application to the department of trade and commerce for a renewal of its permit to transact its business in Nebraska. Citizens of the state filed a remonstrance against the issuance of a permit to the plaintiff, for the reason, as alleged, that its plan of business is unfair, unjust, inequitable and oppressive to the class of investors, and for other reasons which need not be considered. The deputy secretary of the department of trade and commerce, at plaintiff's request, fixed a time and place for a hearing upon its application and remonstrance thereto. In February, 1924, the hearing was held and evidence taken on behalf of the remonstrants and on behalf of plaintiff, and, after an examination of the evidence and of plaintiff's contracts and applications, the department of trade and commerce found that the proposed plan of business and the proposed contracts were unfair, unjust, inequitable and oppressive to the class of contributors, and entered an order, denying plaintiff a permit to transact business in Nebraska after March 1, 1924.

From this order plaintiff did not prosecute error, as it was privileged to do, pursuant to the provisions of section 9127, Comp. St. 1922. Instead, it began this action, on the theory that sections 8055, 8056, and 8062, Comp. St. 1922, are unconstitutional, as being in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, and of section 3, art. I of the Constitution of the state of Nebraska; that the action of the department of trade and commerce was arbitrary, without authority of law, and that plaintiff had no adequate remedy except in an injunction proceeding.

Section 8055, Comp. St. 1922, provides: "It shall be the duty of the department of trade and commerce to examine carefully the statements and documents so filed (referring to the statements and documents required to be filed by section 8054), and if it finds that such instalment investment company is solvent, that its articles of incorporation or association, its constitution and by-laws, its proposed plan of business and proposed contract contain and provide for a fair, just and equitable plan for the transaction of business, it shall issue to such instalment investment company a certificate of approval; but if it finds that such articles of incorporation or association, charter, constitution, by-laws, plan of business or proposed contract contains any provision that is unfair, unjust, inequitable or oppressive to any class of contributors, it shall withhold its approval. All certificates of approval issued to foreign instalment investment companies shall be limited to those counties for which said company has filed with the department of trade and commerce appointments of attorneys, as required by the next preceding section, and that all certificates issued to such foreign instalment investment companies shall expire on the 31st day of January of the following year."

Section 8056, Comp. St. 1922, among other things, contains a provision making it unlawful for a foreign instalment investment company to transact business in Nebraska without first procuring a certificate of approval or license from the department of trade and commerce; and section 8062 provides for the infliction of penalties on such investment companies that transact business in the state of Nebraska, unless at the time they are holders of valid, unrevoked and unexpired certificates of approval from the department of trade and commerce.

Plaintiff earnestly contends that the above sections of the statute are void because they vest in an administrative board absolute, unregulated, and undefined discretion to grant or withhold its certificate of approval under general

statutory language, which fixes no standards or tests to which an applicant may knowingly conform, and from which it can be determined whether corporations, transacting precisely the same kind and character of business, have been or may be dealt with equally; that the statute attempts to vest in an administrative board absolute and arbitrary power to say which, if any, of two or more companies, proposing to transact the same kind of business in the same manner and under like conditions, may be permitted so to do in the state of Nebraska.

If the statutes, when properly construed, grant or attempt to grant to an administrative board such unrestricted and arbitrary discretion as plaintiff contends they do, then we will be compelled to hold that they are void because violative of both state and federal constitutional provisions. They would deny the equal protection of the law and violate the due process provisions of the Fourteenth Amendment to the federal Constitution. They would then fall within the class of statutes and ordinances that are condemned in *Yick Wo v. Hopkins,* 118 U. S. 356; *Tai Kee v. Minister of Interior,* 12 Hawaiian Rep. 164; *State v. Superior Court,* 113 Wash. 296; *City of Richmond v. Dudley,* 129 Ind. 112; *City of Seattle v. Gibson,* 96 Wash. 425; *Bear v. City of Cedar Rapids,* 147 Ia. 341; *Hewitt v. State Board of Medical Examiners,* 148 Cal. 590, 3 L. R. A. n. s. 896.

We think the statutes under consideration, when properly construed, are not subject to the criticism made. In our opinion, they do not vest the department of trade and commerce with an arbitrary and unrestricted discretion to grant or withhold a certificate of approval. Fairly construed, the statute vests the department of trade and commerce with a quasi-judicial power; fixes standards for its guidance, and vests it with the judicial function of determining whether a company, seeking a certificate of approval, has met the requirements of the statute. The tests of the right to such certificate, under the statute, are that the company must be solvent; its articles of incorporation or

association, its constitution and by-laws, its proposed plan of business and proposed contracts must contain and provide a fair, just and equitable plan for the transaction of business. And, upon the other hand, if the department, after investigation, finds that the articles of incorporation or association, charter, constitution, by-laws, plan of business or proposed contract of any investment company contain any provision that is unfair, unjust, inequitable or oppressive to any class of contributors, it shall withhold its approval.

In *Mutual Film Corporation v. Industrial Commission*, 236 U. S. 230, the court had under consideration a very similar question. An Ohio statute provided that it should be unlawful for moving picture films to be publicly exhibited and displayed in that state until they had been submitted to, passed on and approved by a board of censors, and only such films should be approved as, in the judgment of the board, were moral, educational, or of amusing and harmless character. It was insisted in that case that the statute fixed no standard as to what was moral, educational, amusing and harmless, and that the statute permitted the board to exercise an arbitrary judgment and to act according to whim and caprice; that the statute attempted to delegate legislative authority to an administrative board and to substitute government by men for government by law. The court, however, held to a contrary view and upheld the statute. In *Mutual Film Corporation v. Hodges*, 236 U. S. 248, the court had under consideration a similar statute, enacted by the legislature of the state of Kansas. In that case it was likewise held that the statute did not delegate legislative power to an administrative official, and that it was not violative of the provisions of the Constitution.

In the instant case, power was given by statute to the department of trade and commerce to determine whether a foreign instalment investment company, desiring to do business in this state, has met the requirements of the legis-

lative standard, and, in conferring this quasi-judicial function upon the department of trade and commerce, the legislature did not delegate legislative power to such department; nor does the statute authorize the taking of property without due process of law, nor deny equal protection of the law. Other authorities, holding to the same general tenor, are *State v. Howard,* 69 Neb. 278; *Althaus v. State,* 99 Neb. 465; *Schaake v. Dolley,* 85 Kan. 598; *State v. Atlantic C. L. R. Co.,* 56 Fla. 617, 32 L. R. A. n. s. 639; *Moers v. City of Reading,* 21 Pa. St. 188, *State v. Thompson,* 160 Mo. 333, 54 L. R. A. 950; 12 C. J. 844, sec. 329.

Although it is alleged that, in refusing plaintiff's application, the department of trade and commerce acted in an arbitrary and unwarranted manner, we fail to find anything in the record to sustain the charge. It does not appear that any foreign investment company, with a like plan of doing business, has been given a license to operate in this state. We have carefully examined the proposed contracts of plaintiff and fully concur in the views and findings of the department of trade and commerce that the proposed contracts are unfair, unjust and inequitable to the class of contributors.

In reaching its conclusions, the court has been greatly aided by exceptionally able briefs on behalf of both parties, and by a written opinion of the learned trial judge, with which we fully agree. We find no error in the record. Judgment

AFFIRMED.

OTTO V. SCHEER, APPELLEE, V. BERTLE NELSON ET AL., APPELLEES: LEVI GUTRU, APPELLANT.

FILED SEPTEMBER 29, 1925. No. 23216.

1. **Vendor and Purchaser: LAND CONTRACT: FORECLOSURE: LIABILITY OF ASSIGNEE.** An assignee of a land contract who has paid nothing upon the purchase price is properly decreed to pay the whole thereof to the vendor who has succeeded to the interest of the vendee in the original contract, upon foreclosure thereof.

2. ———: ———: CONTRACT OF ASSIGNEE WITH THIRD PERSON. A vendor in a land contract taking a quitclaim deed of the land from an assignee of his vendee does not thereby assume the obligations of a contract of exchange of such land between such assignee and a third person for other lands.
3. ———: INTEREST. Legal interest is properly allowed upon default in a cash payment, notwithstanding deferred payments are to draw a smaller rate by the terms of the contract.
4. ———: EXPENSE OF LOAN: LIABILITY OF VENDEE. A vendor of real estate holding under a contract of purchase may not charge his defaulting vendee with the expense of procuring a loan to secure a conveyance, as damages for such default, notwithstanding his expectation that vendee's payment would be forthcoming to pay his debt, as the vendor's obligation in connection with which expense was incurred arose out of a collateral contract.
5. Damages: FAILURE TO PAY MONEY. The measure of damage for failure to pay money is ordinarily interest on the amount due at the legal contract rate.

APPEAL from the district court for Platte county: A. M. POST, JUDGE. *Affirmed.*

H. Halderson and *Albert & Wagner*, for appellant.

O. A. Abbott and *James Nichols, contra.*

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

REDICK, District Judge.

The only parties interested in this appeal are Otto V. Scheer, plaintiff, and Levi Gutru, defendant. The case was originally instituted by plaintiff as an action of ejectment, but after it had proceeded some time was changed into an action to quiet title and for general equitable relief. The facts are not in dispute and are substantially as follows:

Plaintiff held a contract of purchase for the south one-half of section 3, township 20, range 4, in Platte county, Nebraska. August 30, 1917, he contracted to sell the southeast quarter to Timmons for $27,600; $2,162.40 cash, $13,437.60 March 1, 1918, and a first mortgage for $12,000

due in 4½ years at the prevailing rate of interest, the transaction to be closed March 1, 1918.

October 1, 1917, Timmons contracted to sell said land to Anderson for $27,900; cash $1,000, $14,900 March 1, 1918, Anderson to assume a mortgage of $12,000.

February 1, 1918, Anderson contracted with defendant Levi Gutru to exchange said land at $30,500, subject to a $12,000 mortgage, for 400 acres in Merrick county at $60,000, subject to a mortgage of $12,500, Anderson to give a second mortgage for the remainder, $29,000, to be closed March 1, 1918.

None of the transactions were closed on the date specified, and shortly after March 1 Scheer procured a loan of $12,000 upon the southeast quarter in order to complete his purchase of the half-section and receive title. The mortgage was for 5 years at 5½ per cent., but Scheer was compelled to pay a commission or bonus of ½ of 1 per cent., $300, which was commuted to $240 by cash payment.

March 23, 1918, Gutru tendered Scheer $13,437.60, offering to assume the mortgage of $12,000, and demanding a conveyance from Scheer in accordance with the terms of the Timmons contract of which Gutru claimed to be the assignee through Anderson. This was the remainder of the contract price in the Timmons contract of $27,600. The tender was refused, Scheer demanding an additional $300 for his expense and trouble growing out of the failure to complete the contract on March 1. Prior to the tender Gutru had an understanding with Anderson that, if Gutru received a conveyance of the land from Scheer, Anderson would be relieved from carrying out the exchange for the Merrick county land. Some time later Scheer made settlements with Timmons and Anderson, the terms of which are not definitely shown, whereby they quitclaimed to Scheer all interest in the southeast quarter. It appears, however, that Scheer was to protect Timmons to the extent of the payments made by him upon the contract. The tender was not kept good by the deposit of the money so

that Scheer might take it, and in March, 1919, this action was commenced. The only answer to the second amended petition was filed by Gutru (Timmons and Anderson having no further interest in the land), which, after setting out in detail the various contracts above referred to, averred the making of the tender and refusal thereof, and by way of cross-petition prayed for a specific performance by Timmons and Anderson of said contracts, and for general relief. No replies or answers were filed to this pleading.

The district court entered a decree foreclosing the Timmons contract and requiring Gutru to pay into court the following amount: $23,597.21, with 7 per cent. interest. The decree further provided for a sale of the property in case said sums were not paid and a conveyance from Scheer to Gutru upon payment or to the purchaser upon sale. The court further found that Timmons had an equitable lien upon the premises for $1,462.40, being $2,162.40 plus $300 excess of his contract price over what he was to pay Scheer, and less $1,000 received by Timmons from Anderson, and transferred said lien to the fund to be paid into court or resulting from a sale of the land under the decree, reserving any dispute as to distribution of the proceeds for further hearing, and dismissed the case without prejudice as to the controversy between Anderson and Gutru over the exchange contract between them.

Gutru appeals from the decree and presents three contentions:

1. That he should not have been required to pay interest after having made the tender referred to. A sufficient answer to this contention is that, in order to have the effect stated, the tender should have been kept good by a deposit of the money in court where it would be available for the use of the plaintiff. *Portsmouth Savings Bank v. Yeiser*, 81 Neb. 343. But, aside from this, the defendant took possession of the land March 1, 1918, and has retained it ever since, receiving rentals far in excess of the interest. We know of no principle in equity that will permit a pur-

chaser to retain posesssion of the land and at the same time refuse to pay interest on the purchase price. He further contends that he should not have been charged interest at a greater rate than that prevailing on farm loans, which the decree found to be 6 per cent., but there is no merit in this, the principal amount, being a part of the cash payment due March 1, 1918, drew legal interest.

2. That he should not have been required to pay $1,462.40 more than was due upon the Scheer-Timmons contract. This leaves out of view the fact that Scheer had become the assignee of the Timmons-Anderson contract and was accountable to Timmons for the latter's lien upon the fund. Gutru had paid nothing to Timmons or Anderson, and if he received a deed direct from Scheer he should properly pay the entire purchase price, Scheer having succeeded to their interests.

3. He contends that the court erred in requiring him to perform the contract by a cash payment, upon the theory that by the quitclaim deed from Anderson to Scheer the latter became bound to carry out the contract of exchange between Anderson and Gutru for the Merrick county land. The contention is absolutely without merit. The only transaction between Anderson and Scheer was a conveyance by the former of all his interest in the quarter section of land in controversy. It did not cover the Merrick county land. There is no evidence that Scheer assumed and agreed to carry out the Anderson-Gutru contract; in fact, there was no assignment of that contract, and Anderson refused to carry it out, claiming it had been procured by false and fraudulent representations. Furthermore, specific performance by Scheer of the Anderson-Gutru contract is not asked by the cross-petition. The district court was right in refusing to decide the dispute between Anderson and Gutru as to the Merrick county land. It had no jurisdiction to charge said land with a lien. This disposes of all of the contentions of the defendant.

The plaintiff filed a cross-appeal, presenting but one ques-

tion, viz., that the court should have allowed the plaintiff an additional sum of $240, with interest, being the amount of commission or bonus, or as a part of the interest paid to procure the loan of $12,000 made necessary by the failure of defendant to pay the balance of the purchase price on March 1, 1918. The theory of plaintiff seems to be that, inasmuch as Timmons would have been required to give a mortgage at 6 per cent., the ruling rate as found by the court, and the mortgage substituted for the Timmons mortgage drawing only 5½ per cent., defendant should be charged with the difference; or that if Timmons had paid promptly plaintiff would not have been required to procure the loan. We think, however, that Scheer having had the use of the money in lieu of the cash payment, any expense occasioned by procuring the loan was compensated by the allowance of 7 per cent. interest upon the cash payment from October 1, 1918. The damages for failure to pay money on a certain date are ordinarily measured by legal interest on the sum due. *Lowe v. Turpie,* 147 Ind. 652. See, also, *City of Chicago v. Duffy,* 117 Ill. App. 261, 288, in which the opinion quotes from 1 Sutherland, Damages (1st ed.) 128:

"The practical difficulty to a creditor of borrowing the money, where the debtor is withholding the sum wanted which he owes, and that of a vendee to make a new purchase after he has paid the defaulting vendor for the goods wanted is the same. No party's condition, in respect to the measure of damages, should be worse for having failed in his engagement to a person whose affairs are embarrassed, than if it had been made with one in prosperous or affluent circumstances."

Furthermore, it was the duty of Scheer to have title on that date to be transferred to Timmons, and if it were necessary for him to borrow the money in order to secure the title he should bear the expense incident thereto, as Timmons was not a party to the contract of purchase between Scheer and his vendor, and neither he nor his

assignee, Gutru, should be charged with the expense incident to the performance of that contract by Scheer. The obligation of Scheer arose out of a collateral contract. It had to be met regardless of Timmons' contract, and therefore the expense incurred was not attributable to Timmons' default.

The decree of the district court is right, and is

AFFIRMED.

Note—See Vendor and Purchaser, 39 Cyc. 1570, 1671, 1974.

ERNEST QUESNER, APPELLANT, V. ROSIE NOVOTNY ET AL., APPELLEES.

FILED OCTOBER 26, 1925. No. 23196.

Mortgages: FORECLOSURE: BURDEN OF PROOF. "In an action to foreclose a real estate mortgage, when the allegations of the petition are denied, the burden is on plaintiff to make *prima facie* proof that no action at law has been instituted for the recovery of the debt." *Beebe v. Bahr*, 84 Neb. 191.

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

George W. Wertz, for appellant.

A. R. Oleson and *J. C. Elliott, contra.*

Heard before MORRISSEY, C. J., DEAN, DAY and EVANS, JJ., and REDICK, District Judge.

PER CURIAM.

Plaintiff, Ernest Quesner, and appellant herein, brought this action in the district court for Cuming county, Nebraska, to foreclose a real estate mortgage on a 120-acre farm given to secure the payment of a note for $10,000. The petition was in the usual form.

The answer admitted execution of the note and mortgage and then denied all the remaining allegations of the plaintiff's petition. It also contained two affirmative defenses, one of which was that the note and mortgage in suit were

given to, and for the benefit of, the Howells State Bank; that at the time of the execution of the note and mortgage and the acknowledgment thereof by the mortgagors the premises constituted the homestead of the mortgagors; that the notary who took the acknowledgment of the mortgagors was a stockholder of said Howells State Bank and was thus disqualified to take the same, and the pretended acknowledgment by him taken was null and void because of his interest therein.

To this answer appellant filed a reply traversing the several allegations therein contained. The answer, it may be stated in passing, put in issue the allegation of the petition that "no proceedings have been had for the collection of said debt or any part thereof."

The evidence was received and heard by the district court on September 22, 1922, and the cause was then taken under advisement. This order of that date further provided: "Defendant to file her brief within 20 days after receiving transcript of evidence, and plaintiff to file his brief within 10 days after filing of defendant's brief."

On December 1, 1922, after briefs of the parties had been filed, the district court entered a decree finding "generally in favor of the defendants, * * * and that the said plaintiff has failed to establish a cause of action against the said named defendants."

It is admitted that the plaintiff wholly failed to introduce any evidence in the court below sustaining the allegation as to proceedings had at law for the recovery of the debt secured by the mortgage foreclosed. It has been repeatedly held by this court that this allegation, although a negative one, must be proved to entitle plaintiff to a decree of foreclosure. In this case it is to be noted that the finding of the district court was in part "that the said plaintiff has failed to establish a cause of action." It therefore follows that the district court is right, unless for reasons hereinafter set forth appellant is entitled to relief. *Beebe v. Bahr*, 84 Neb. 191. See, also, *Great Western Commission Co. v. Schmeeckle*, 99 Neb. 672.

However, it is urged by appellant that the failure to introduce evidence on the point in question "was a pure inadvertent omission on the part of the plaintiff, which could have been rectified at any time, had the defendant objected to the record on this point, or in any manner called the discrepancy to the attention of the plaintiff or the court;" and he further contends that the defendant, by assuming the burden of proof and by being required to file her brief first, at all times tacitly treated plaintiff's case as complete on the point in question, and is now estopped from urging the same as a basis for sustaining the judgment below.

Unfortunately the record is silent on all of these contentions save one. It does appear that by the order of the court on September 22, 1922, the defendant below and appellee here is required to first file her brief. But it does not appear that this order was made at the instance of, or even with the consent of, the appellee. Indeed, under the provisions of section 8822, Comp. St. 1922, this order of September 22, 1922, must be read as though duly excepted to by the appellee herein. It follows that the record contains nothing that would sustain appellant's contention that appellee by her conduct in any manner misled appellant in the court below, or presented the case to the district court on the theory that the proof on the question here presented was sufficient to sustain plaintiff's petition. Therefore, even conceding the order of the district court of September 22, 1922, requiring the appellee to first file her brief, to be erroneous, yet under the decisions of this court it must be considered to be error without prejudice, for the order itself determined nothing more than the right to open and close an argument to a district court sitting as a court of equity and sitting without the assistance of a jury. "In trials by the court without the assistance of a jury, it is not reversible error to deny the party holding the affirmative leave to open and close the argument, where it is apparent from the record that he has not been prejudiced thereby." *Citizens State Bank v. Baird,* 42 Neb. 219.

It follows that the judgment of the district court is right, and it is therefore

AFFIRMED.

The following opinion on motion for rehearing was filed January 23, 1926:

PER CURIAM.

The cause, which is one in equity, is before us on a motion for rehearing. Upon further consideration the former judgment of affirmance is adhered to, but the cause is reinstated in the district court for the purpose of permitting plaintiff to adduce proof of the allegations of his petition, if so advised; plaintiff to pay costs in both courts.

EUNICE FADANELLI, APPELLEE, V. NATIONAL SECURITY FIRE INSURANCE COMPANY, APPELLANT.

FILED OCTOBER 26, 1925. No. 23198.

1. **Insurance**: VALUED POLICY: TOTAL LOSS: MEASURE OF RECOVERY. "Under the valued policy law (Comp. St. 1889, ch. 43, sec. 43), the statute fixes the worth of the property insured conclusively at the valuation written in the contract of insurance, and in case of total loss, that sum is the measure of recovery." *Lancashire Ins. Co. v. Bush*, 60 Neb. 116.
2. ———: ———: ———: ———. "If, under a valued policy, the property insured is totally destroyed as the result of two or more fires, the measure of recovery for the final loss is the amount written in the contract less amounts paid in settlement of previous losses." *Lancashire Ins. Co. v. Bush*, 60 Neb. 116.
3. **Constitutional Law**: DELEGATION OF LEGISLATIVE POWER. "Authority to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations, is not an exclusively legislative power. Such authority is administrative in its nature, and its use by administrative officers is essential to the complete exercise of the powers of all the departments." *State v. Howard*, 96 Neb. 278.

APPEAL from the district court for Douglas county: L. B. DAY, JUDGE. *Affirmed.*

Montgomery, Hall & Young, for appellant.

J. E. Von Dorn and *Baker & Ready, contra.*

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

PER CURIAM.

The appellant, an insurance company, hereinafter called the company, issued its policy upon the property of the appellee, hereinafter called the plaintiff, for the sum of $2,500. As a part of the policy is the following provision: "It shall be optional, however, with this company * * * to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do." This the company did.

The plaintiff relies upon the provision in the statute known as the valued policy provision, being section 7809, Comp. St. 1922. The company urges section 7836, Comp. St. 1922, in avoidance of this provision. Section 7836 is as follows:

"No fire insurance company shall issue any fire insurance policy covering any property or interest therein in this state other than on a form prescribed by the department of trade and commerce as nearly as practicable in the form known as the New York standard as now * * * constituted."

The precise question presented is: Do the provisions of the statute, section 7836, Comp. St. 1922, void or nullify the provision of section 7809, Comp. St. 1922?

Chapter 488, Laws of New York, 1886, sec. 1, provides:

"The superintendent of the insurance department shall prepare and file in the office of the secretary of state on or before the fifteenth day of November, eighteen hundred and eighty-six, a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements or conditions as may be indorsed thereon or added thereto and form a part of such contract or policy, unless the New York board of fire underwriters shall prepare, approve and

adopt a printed form in blank, of a contract or policy of fire insurance, together with such provisions, agreements and conditions as may be indorsed thereon or added thereto and form a part of such contract or policy, and file the same in the office of the secretary of state, on or before the fifteenth day of October, eighteen hundred and eighty-six, and such form when filed shall be known and designated as the 'Standard Fire Insurance Policy of the State of New York.'"

Section 121 of the insurance law of New York, being chapter 28, vol. 5, McKinney's Consolidated Laws of New York, is as follows:

"The printed blank form of a contract or policy of fire insurance, with such provisions, agreements or conditions as may be indorsed thereon or added thereto and form a part of such contract or policy, heretofore filed in the office of the secretary of state by the superintendent of insurance or by the New York board of fire underwriters pursuant to the provisions of chapter four hundred and eighty-eight of the laws of eighteen hundred and eighty-six shall be transferred by the secretary of state to the office of the superintendent of insurance and, together with such provisions, agreements or conditions as may be filed by the New York board of fire underwriters in the office of the superintendent of insurance and approved by him, which provisions, agreements or conditions shall be void if they are inconsistent with the standard fire insurance policy heretofore filed in the office of the secretary of state, shall be known and designated as the 'Standard Fire Insurance Policy of the State of New York.' No fire insurance corporation, its officers or agents, shall make, issue, or deliver for use, any fire insurance policy or the renewal of any such policy on property in this state, other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions with such printed blank form of contract or policy; and no other or different provision, agreement, condition or clause shall be in any manner made a part of such contract or policy or indorsed thereon or delivered therewith."

"Kentucky Statutes, sec. 700, provides that in case of total loss by fire the insurer shall be liable for the full estimated value of the property as fixed in the policy. A policy provided that the company should not be liable beyond the actual cash value of the property at the time of the loss. *Held,* that such provision was of no validity, as the statute fixes the loss at the face of the policy where it is total.

"Section 700 provides that in case of a loss by fire the estimated value of the property may be diminished to the extent of any depreciation in value of the property occurring between the dates of the policy and the loss. *Held,* that, a provision of a policy providing that the amount of loss shall be the cash value at time of loss, the proper deduction for depreciation, 'however caused,' is invalid.

"Section 700, provides that in case of a loss by fire the insurer shall be liable for the value of the property as fixed by the policy. *Held,* that, in so far as total loss is concerned, a provision of the policy providing that the loss 'shall in no event exceed what it would cost the insured to replace the building' is invalid.

"A policy provided that in case of difference between insured and insurer as to the amount of the loss the sum should be fixed by appraisers. *Held,* that, if the policy meant that the question whether there has been a total loss was to be submitted to arbitrators, the provision was void, as submitting a question of law as to what was a total loss within section 700, Kentucky Statutes." *Hartford Fire Ins. Co. v. Bourbon County Court,* 72 S. W. 739 (115 Ky. 109).

"Where the provisions of that act are in conflict with the provisions of the policy the act controls the policy." *White v. Connecticut Mut. Life Ins. Co.,* 29 Fed. Cas. No. 17545, p. 1011.

"A *casus omissus* in a statute cannot be supplied by a court of law, for that would be to make laws." *In re Contest Proceedings,* 31 Neb. 262.

In the construction of a statute effect must, if possible, be given to every clause, and one clause must not be placed

in antagonism to another. *McIntosh v. Johnson,* 51 Neb. 33.

"Where one construction leaves a portion of a statute meaningless and nugatory, and another construction gives to the entire statute an intelligible and consistent meaning, the latter will ordinarily be adopted." *Western Travelers Accident Ass'n v. Taylor,* 62 Neb. 783.

"An amended statute is to be construed, in its application to subsequent transactions, precisely as though it had been originally enacted in its amended form." *Cass County v. Sarpy County,* 63 Neb. 813.

The certificate to the New York standard form of contract is in the following language:

"State of New York, Office of the Secretary of State, ss.:

"I have compared the preceding with the 'Standard Fire Insurance Policy of the State of New York,' prepared, approved and adopted by the New York board of fire underwriters with certificate and affidavit of the president and secretary of said board thereto annexed, filed in this office pursuant to chapter 488, Laws of 1886, on the fourteenth day of October, 1886, and do hereby certify the same to be a correct transcript therefrom and of the whole of said 'Standard Fire Insurance Policy of the State of New York,' and said certificate and affidavit so filed as aforesaid.

"Witness my hand and the seal of office of the secretary of state, at the city of Albany, this fourteenth day of October, one thousand eight hundred and eighty-six.

"Secretary of State."

It is therefore apparent from the laws quoted and the certificate that the terms of the policy, indeed the very provision under which the appellant defends, is the work of the board of underwriters of New York, and under the decision of this court in *State v. Howard,* 96 Neb. 278, that part of the insurance code which would leave the form of the policy or insurance code to the legislature of the state of New York or to the insurance commissioner of that state is void and unconstitutional, and that portion which in effect adopts or approves the form presented by the board

of underwriters is valid. As is pointed out by the appellant, in its brief, the valued policy provision of our insurance law has been a part of our law since 1889, while the provision adopting the New York standard form of policy was enacted in 1913. Under the constitutional provision the amended law was copied *in toto* into the insurance code. This included the valued policy provision of 1889.

In *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, the valued policy provision was under consideration, and this court, speaking through Judge Sullivan, said:

"Under the valued policy law (Comp. St. 1889, ch. 43, sec. 43), the statute fixes the worth of the property insured conclusively at the valuation written in the contract of insurance, and in case of total loss, that sum is the measure of recovery."

"If, under a valued policy, the property insured is totally destroyed as the result of two or more fires, the measure of recovery for the final loss is the amount written in the contract less amounts paid in settlement of previous losses."

In the opinion of this case the court say: "The law in question was designed to repress an evil practice, to advance public interest and promote justice. It was an exercise of legislative power justified by consideration of public policy." Apparently the evil practices are still present and the same considerations were present in 1913 as were present in 1889. No reason appears for not enforcing the valued policy provision.

In considering the valued policy law of the state of Missouri, the United States supreme court, speaking through Justice McKenna, said:

"We see no risk to insurance companies in this statute. How can it come? Not from fraud and not from change, because, as we have seen, the presumptions of the statute do not obtain against fraud or change in the valuation of the property. Risk then can only come from the failure to observe care—that care which it might be supposed, without any prompting from the law, underwriters would ob-

serve, and which if observed would make their policies true contracts of assurance, not seemingly so, but really so, not only when premiums are paying, but when loss is to be paid. The state surely has the power to determine that this result is desirable, and to accomplish it even by a limitation of the right of contract claimed by plaintiff in error." *Orient Ins. Co. v. Daggs*, 172 U. S. 557.

The position of the appellant forces us to a construction of the following situation: The provision of the valued policy law makes it a part of the insurance contract, and in terms as follows: "Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire, tornado or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assignee, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages. Comp. St. 1922, sec. 7809. In the same contract is a provision as follows: "It shall be optional, however, with this company * * * to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do."

In considering these provisions, it should be born in mind that this court has held: "Insurance upon a building is insurance upon a building as such and not upon the materials of which it is composed." *Insurance Co. of North America v. Bachler*, 44 Neb. 549. See *German Ins. Co. v. Eddy*, 36 Neb. 461.

Where real property is wholly destroyed by fire, any provision of the policy of insurance covering such property which in any manner limits the amount of the loss at less than the sum written in the policy is in conflict with the statutory rule, invalid, and will not be enforced.

In *State v. Howard, supra*, this court said. "We are of the opinion that it was the intention of the legislature that

the New York form should be adopted as the basis of the insurance contract, and that the words 'as nearly as practicable' should be construed to mean as nearly as practicable considering the other provisions contained in the insurance code which in anywise are inconsistent with or modify the provisions of the New York standard form of contract." Can it be said, without doing violence to the ordinary and accepted meaning of terms, that a payment of the amount fixed in the policy by the assured and for which he has received and accepted the premium, in place of meaning dollars, means plank, building materials, labor, materials, etc.? If a payment were tendered to the insurer in like commodities, would they accept it in place of the dollars they fixed as the premium due upon the policy in suit, and, failing so to do, upon what course of reasoning may the company consistently ask to satisfy its liability in other and less valuable commodities than that which it required and received? The answer is obvious.

The valued policy act was designed to repress an evil practice, and thereby advance public interest and promote public justice by securing for the assured a policy payment, in the event of total loss, of the full amount of indemnity for which he contracted, and for which he paid. In the present instance we have a recurrence of the evil practices above referred to, to wit: The endeavor to secure a settlement by the insurer for less than his contract in terms imposes upon him. This conclusion certainly cannot be gainsaid. It must be admitted that the purpose of the rebuilding clause in the policy in question, and its only purpose, was and is that it might enable the defendant company, in case of a total loss, to discharge its liability on the policy by an expenditure of a less sum of money than would be required to pay the amount of insurance named in the policy. In no other way could the company derive any benefit from that clause. If the expense of rebuilding would exceed or even equal the amount of the insurance mentioned, there could be neither advantage nor object on the part of the company to undergo that trouble, and when the expense is

less the performance of that condition by rebuilding the destroyed property would be but a mode of satisfying the obligations of the company by payment to persons other than the assured of a sum less than became payable on the policy according to the provisions of the statute. Thus, the evident purpose by this method is to accomplish by indirection the effect of a transaction expressly prohibited by the ordinary construction of the terms of the section of the statute involved. Particularly is this true in the light of the Nebraska decisions heretofore cited, which were made prior to the adoption of the act of 1913, and which decisions construed the identical language which now appears in the present insurance code. A fair consideration of the doctrines and principles, announced in these decisions referred to, leads to no other conclusion than that agreements for rebuilding and replacement, such as are contained in the policy in suit, and on which the company relies, are repugnant to the provisions of section 43, ch. 43, Comp. St. 1889. Now, the language construed in these decisions appears as reenacted without modification or the slightest change in the act of 1913. The ordinary canon of construction applicable to this situation is that the reenactment of a statute which had been theretofore construed continues the situation as it was, and by implication makes the judicial construction, theretofore had, an essential part of the statute thus reenacted. Therefore, the legislature in adopting or reenacting this provision and making it a part of the insurance code of 1913, by fair construction, adopted and continued in force and effect the judicial construction theretofore placed upon it. *State v. Cornell*, 54 Neb. 647.

Keeping in mind the reasons that caused the adoption of this statute, the evils sought to be repressed thereby, giving the provisions of section 7809, Comp. St. 1922, full force and effect, and as bearing the judicial construction that was given it by this court prior to 1913, and giving section 7836, Comp. St. 1922, a construction identical with that applied by this court in *State v. Howard, supra*, it follows that the provisions of section 7809 are wholly unmodified by section

7836, Comp. St. 1922, and that the "insurance board" are without authority to retain any clause or provision of the "New York Standard Policy" which would in the slightest degree modify or impair the rights guaranteed or secured by section 7809; that this is fully expressed in the words "a form prescribed by the insurance board *as nearly as practicable* in the form known as the New York standard as now * * * constituted." Therefore, the provisions of the form must yield to the terms of the statute, and, where inconsistent, the terms of the statute must prevail. It follows that the provision of the policy in suit providing for replacement or rebuilding at option of insurer are, as applied to cases of total loss, repugnant to section 7809, Comp. St. 1922, and invalidated thereby, and would thus afford no basis or foundation for the defense sought to be made by the company in this action. The judgment of the district court is

AFFIRMED.

Note—See Fire Insurance, 26 C. J. secs. 453, 601.

GEORGE ESELIN V. STATE OF NEBRASKA.

FILED OCTOBER 26, 1925. No. 23854.

False Pretenses: PROOF: INTENT. When, on the trial of one charged with obtaining property by false pretenses, the evidence fails to show that, in performing the acts charged, defendant entertained the criminal intent to defraud the complaining witness of his property, a conviction cannot be sustained.

ERROR to the district court for Douglas county: CHARLES A. GOSS, JUDGE. *Reversed and dismissed.*

Barney W. Gill, for plaintiff in error.

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

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

MORRISSEY, C. J.

In the district court for Douglas county defendant was convicted of a violation of section 9892, Comp. St. 1922, and from this conviction he prosecutes error to this court.

In April, 1922, defendant and one John M. Kemp entered into an agreement in writing wherein it was provided that Kemp should convey certain real properties in Omaha, subject to incumbrances, to defendant, and defendant should convey certain lands, subject to incumbrances, in Thomas county, to Kemp. The title to the property which Kemp agreed to convey was held in the name of his wife, Mary T. Kemp, and the property which defendant agreed to convey was said to stand in the name of one Don E. DeBow, a friend or silent partner of defendant. Following the execution of this agreement, Kemp stood willing to convey to defendant all the properties covered by the written agreement, but one parcel thereof was so heavily incumbered that defendant did not desire to receive the conveyance and whatever interest either party had in the property was subsequently extinguished by foreclosure proceedings. So far as that property is concerned it need not be further considered. Kemp and his wife executed and delivered a deed, according to the written agreement, to the other property, which is denominated "The House of Hope." This property was also heavily incumbered. It is claimed by defendant that the incumbrances equalled the value of the property. A consideration of all the evidence, direct and circumstantial, convinces us that this claim is approximately correct.

On receipt of the deed from Kemp, defendant delivered to him a quitclaim deed, running from DeBow, and covering the land in Thomas county. Each deed exchanged was delivered without the name of the grantee being inserted in the instrument. This appears to have been the custom followed by both Kemp and Eselin, who may be denominated traders. After having accepted the quitclaim deed to the Thomas county land, Kemp claims to have returned to the office of defendant and complained because the deed de-

livered was a quitclaim deed, whereas he desired a warranty deed. Kemp testified that he demanded the return of the deed which he had delivered covering the Omaha property, and that defendant then informed him that the deed to the Omaha property had already been delivered to one Acker. While complaint is made of the form of the conveyance of the Thomas county land, the prosecution rests upon a different basis. Although defendant Eselin was the true owner of the land in Thomas county, the title had been taken in the name of DeBow. This fact had been made known to Kemp and no complaint is made thereof, but the following circumstances constitute the basis of the complaint.

Prior to the time when Kemp and Eselin began their negotiations, Eselin had been involved in litigation and a judgment had been entered against him in the district court for Douglas county. Eselin prosecuted an appeal from that judgment to the supreme court of Nebraska, and in connection with that appeal, executed a supersedeas bond. In order to induce the Massachusetts Bonding & Insurance Company to become a surety upon this supersedeas bond, defendant had, in July, 1921, caused DeBow to execute a deed, absolute in form, which purported to convey title to the land in Thomas county to the Massachusetts Bonding & Insurance Company. This deed had been placed on record in Thomas county before the contract for exchange of properties was made between Kemp and defendant. The deed of conveyance to the Massachusetts Bonding & Insurance Company constitutes the basis for this prosecution. Kemp testified that he did not know of the deed of conveyance to the Massachusetts Bonding & Insurance Company at the time he accepted the quitclaim deed, while defendant testified that he made known to Kemp the existence of the deed, although he was himself in ignorance of the fact that the deed had been recorded. The verdict may be said to have settled this controverted question of fact according to the contention of Kemp. However, this being a criminal prosecution, before the judgment can be upheld, a felonious in-

tent on the part of Eselin must be established. This has made it necessary to examine the entire record and to consider the actual situation of the parties. Kemp and Eselin engaged in trading, not only with one another, but with others, properties, or so-called equities in properties. From the testimony of the only disinterested competent witness on the subject, it appears that the property known as "The House of Hope," the deed to which was given to Eselin, had little, if any, value above the incumbrances resting upon it at the time the deed was delivered. Soon thereafter Kemp again became the owner of the property by exchanging his promissory note in the sum of $125, which upon the trial of this case he admitted he had never paid, and claimed it was understood that he should not be called upon to pay, and an interest or equity in a contract covering a small parcel of land in the suburbs of Omaha, his interest in this land not being shown to be of any value. When these facts are considered in connection with the testimony of the disinterested witness who stated that "The House of Hope" property was worth an amount which was approximately the amount of the incumbrances against it, we may, we think, assume that Kemp had little or no equity in the premises. These facts may not be a direct refutation of his testimony as to the value of the property, but they are circumstances which may be taken to explain the general conduct of the parties. Kemp would be more likely to exchange a deed to his property for the Thomas county land, with a contingent liability upon it, than he would be if he owned a substantial equity in the premises. Furthermore, it appears that no liability to the Massachusetts Bonding & Insurance Company ever arose. The judgment which had been superseded had been set aside on appeal, and, although at the time of the trial the title still stood in the name of the insurance company, its agent testified in effect that the company was merely awaiting the formal disposition of the litigation, when it would willingly surrender any claim that it had under the deed. Of course, this circumstance did not make good the title which DeBow was supposed to hold

at the time Eselin was negotiating with Kemp, but it is a circumstance worthy of consideration when we come to pass upon the conduct of the parties and determine the presence or absence of a guilty intent. There is no evidence that either party suffered any substantial loss by the trade or because of the confused condition of the title to the Thomas county land. Stupidity rather than cupidity is reflected from the record. There is not sufficient evidence of a felonious intent on the part of defendant to sustain the verdict.

The judgment of the district court is, therefore, reversed and set aside, and the information dismissed.

REVERSED AND DISMISSED.

STATE, EX REL. O. S. SPILLMAN, V. ATLAS BANK OF NELIGH: PIONEER INSURANCE COMPANY, CLAIMANT, APPELLANT: EMIL FOLDA, RECEIVER, APPELLEE.

FILED OCTOBER 26, 1925. No. 24603.

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

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

Field, Ricketts & Ricketts and *Williams & Kryger,* for appellant.

C. M. Skiles, Lyle E. Jackson, Fred S. Berry and *Charles H. Kelsey, contra.*

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

MORRISSEY, C. J.

The question before us for determination is whether or not a certificate of deposit issued by the Atlas Bank of Neligh, now insolvent, and held by the Pioneer Insurance Company should be made a charge against the depositors' guaranty fund.

In May, 1921, the bank, being in urgent need of $7,000, the president of the bank enlisted the services of one McAllister and agreed with him that, if he should procure $7,000 on certificates of deposit to be issued by the bank, the bank would pay him, McAllister, $1,000. McAllister informed the president of the insurance company of the offer made by the bank and an arrangement was made between them under which the offer of the bank was accepted. The bank then issued seven certificates of deposit, each of the sum of $1,000, bearing interest at the rate of 5 per cent. per annum, payable to the insurance company, maturing one year after date, and one certificate of deposit for $1,000 under the same terms and conditions as the foregoing, but payable to McAllister. These certificates were delivered to the insurance company, or its president, and the insurance company issued its draft for $7,000 payable to the bank, while the president of the insurance company paid McAllister $500 for McAllister's interest in the certificate of deposit which had been made payable to him, it apparently having been agreed that the $1,000 commission should be divided between them. McAllister indorsed and delivered the certificate of deposit to the president of the insurance company, who in turn delivered it to the insurance company, receiving therefor $1,000. When the certificates of deposit matured, the bank, still being hard pressed for money, arranged with the insurance company for an extension of time of payment and new certificates were issued. Ultimately all of the certificates were paid in full except the one in suit, which is a renewal of one of the certificates originally issued in the name of the insurance company, the certificate which had originally been issued in the name of McAllister having been paid. The bank became insolvent and a receiver was appointed to wind up its affairs. This claim was filed by the insurance company with the receiver, who refused payment and filed objections to its allowance by the court.

By these objections the following questions were put in issue, namely: Does the certificate represent a good faith

deposit in the insolvent bank made without the payment of a bonus for the deposit, or the payment of interest, or an agreement to pay interest, in excess of the maximum rate of 5 per cent. per annum? After a full hearing, the trial court found that the certificate of deposit "is the renewal of a former certificate which was part of a transaction in which certificates of deposit aggregating in amount $8,000 were issued; that said certificates were issued in pursuance of an agreement whereby claimant was to pay $7,000 in cash and receive in certificates $8,000; and the court further finds that said claim should be disallowed as one payable from the depositors' guaranty fund, but that said claim should be allowed as a general claim only."

Claimant excepts to the finding and judgment of the court, and argues that claimant paid full value for the seven certificates originally made payable to it, and that that transaction was separate and distinct from the transaction negotiated by its president and McAllister whereby for $500 claimant's president secured a certificate in the sum of $1,000. It is urged that, as the certificate originally issued to McAllister had been paid, that transaction should be dismissed from our consideration. In this connection it may be noted that, when the eight certificates of deposit were issued and the draft for $7,000 issued by the insurance company was received by the bank, the bank books were not made to show the payment of any commission to any person, and, of course, they did not then balance; however, there was then placed in the bank a note bearing the signature of one Pitzer for the sum of $1,000, without any credit being extended to Pitzer, and thus the books of the bank were made again to balance. At the time of the hearing on this claim, the Pitzer note had not been paid, although it was long past due, and this record does not show whether Pitzer is solvent or insolvent, but in any event, in the absence of a consideration for the note, we cannot well assume that its collection can be enforced. Furthermore, the testimony conclusively shows that the certificate made payable to McAllister was issued as a bonus, or commission,

to procure the $7,000 deposit, and was not made in consideration of the Pitzer note.

It being apparent that the certificate which was made payable to McAllister did not represent a genuine deposit, we must now determine whether or not its issuance was so interlocked with the issuance of the certificates made payable directly to the insurance company as to make the issuance of the eight certificates a single transaction. We think the testimony of the president of the insurance company, given on cross-examination, answers the question in the affirmative. He testified as follows: "Q. You did get $500 from some one for your services in connection with that $7,000 or $8,000 transaction? A. I would answer that question by saying that I bought $8,000 of C/D's when money was awfully tight for $7,500."

It is stipulated that all certificates drew the maximum rate of interest allowed under the law, and, when to that rate is added the $1,000 which was issued by way of bonus or premium, there is no escaping the conclusion that the effect of the transaction was to enable the holders of the certificates to draw a greater rate of interest than 5 per cent. or to permit them to withdraw money from the bank in an amount largely in excess of the amount deposited. It is clear that the claim in suit does not fall within the protection of the guaranty fund. *State v. Farmers State Bank*, 111 Neb. 117; *State v. Farmers State Bank*, 112 Neb. 380; *State v. Brown County Bank*, 112 Neb. 367; *State v. Banking House of A. Castetter*, 110 Neb. 564; *Iams v. Farmers State Bank*, 101 Neb. 778.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. BROWNELL BUILDING COMPANY, APPELLANT, V. ROBERT L. COCHRAN ET AL., APPELLEES.

FILED OCTOBER 26, 1925. No. 24685.

1. States: CONTRACTS. Executive state officers have no general authority to enter into executory contracts thereby binding the

state, and the state is not bound by contracts made by them in excess of their authority.

2. **Estoppel.** Upon the record presented, the plea of estoppel is not available to relator.

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

T. F. A. Williams and *Homer L. Kyle,* for appellant.

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

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

MORRISSEY, C. J.

This is a proceeding in mandamus brought by the Brownell Building Company against the following officers of the state, viz.: Secretary of department of public works, secretary of department of finance, secretary of state, governor, auditor of public accounts, and treasurer, praying a peremptory writ against each respondent, the purpose of which is to require each respondent to perform the acts required under the laws of the state to be done by each so that a voucher in the sum of $350 should be issued and paid by the state to the relator in payment of the rental alleged to be due relator from the state under a purported lease executed August 27, 1920, by the department of public works and relator's assignor, covering the fourth floor of an office building situated in the city of Lincoln, and known as the Brownell building.

After alleging the official position of each respondent, relator alleged that the legislature of 1919 provided for the erection, on the site of the then capitol, of a new capitol; and that the same legislature authorized the secretary of the department of public works to establish and maintain, at places other than the seat of government, branch offices for the conduct of any one or more functions of the office (Comp. St. 1922, sec. 7253); and alleged that the then secretary of the department of public works, with the knowl-

edge and approval of the governor, on August 27, 1920, entered into a lease and contract in writing with the then owner of the Brownell building by which the state agreed to lease, and did lease, from the owner of the building, a part of that building for the term beginning November 1, 1920, and expiring November 1, 1925, with the option to the lessee to extend the term either one or two years thereafter. There is the proper allegation of present ownership of the building and cause of action in relator and an allegation that the terms of the lease have been fully performed by relator. Furthermore, that, in compliance with the lease, relator expended approximately the sum of $3,000 in remodeling the building to meet the requirements of the lease; that the state, through its department of public works, entered into the possession of the premises November 1, 1920, and occupied the same until on or about January 1, 1925, paying the rent agreed upon each month, when, without consent of the relator, it vacated the premises, and that at the time of the suing out of this writ the rental for the month of January, 1925, was due and owing, but payment had been refused.

The execution of the lease, a copy of which is set out and attached to relator's petition, is not denied, and, indeed, we find little, if any, dispute as to the facts. The questions that confront us are questions of law. The attorney general suggests that relator has mistaken his remedy; that he has a plain and adequate remedy at law, and mandamus will not lie. Because of the unusual situation presented, it seems advisable to forego a discussion of this question. All parties are desirous of having a decision on the merits, as there is in dispute, not only the claim for the rental for the month of January, but a claim for rental for the unexpired term of the lease, to wit, ten months. Because of the conclusions we have reached, we shall not determine the question of procedure which has been raised, but will consider the more important question, which is: Does the lease pleaded constitute a legal and binding obligation against the state? For the same reason that we refrain from a

discussion of the matters of procedure, we refrain from a discussion of the objections raised to the form of the lease, which in the opening paragraph appears to have been made by the owner of the building and "State Department of Public Works, by George E. Johnson, Secretary," but is signed merely by the lessor of the building and by "George E. Johnson," as lessee, and, although extending for a period of more than one year, bears no acknowledgement.

The trial court found in favor of respondents, and relator has appealed.

A number of errors are assigned, but it is not necessary to take them up seriatim. The burden is upon relator to show itself entitled to the relief prayed. In order to sustain this burden, it must show a valid and binding obligation upon the part of the state. In other words, it must sustain proposition three of its own brief, namely, "Secretary Johnson was lawfully authorized to make the lease, and it is binding upon the state." In support of this statement, appellant cites sections 7244, 7252, 7253, and 7266, Comp. St. 1922, and a number of decisions. The first section merely creates the office which Johnson filled and confers upon the incumbent authority to discharge the duties which may be vested in him by law; the second section cited authorizes the secretary to prescribe rules and regulations for the government of his department, etc. Section 7253 reads as follows: "Each department shall maintain a central office in the capitol at Lincoln, Nebraska, in rooms provided therefor. The secretary of each department may, in his discretion and with the approval of the governor, establish and maintain, at places other than the seat of government, branch offices for the conduct of any one or more functions of his department."

The building for the rental of which this action is brought was not used as a branch office, and, during the term of its occupancy, it was the main office of the department of public works, which, in disregard of the first sentence of the section, was removed from the capitol building and maintained in the building of relator. The last section cited,

7266, merely gave each department control of the business falling to it under the statute. It is clear that these sections of the statute conferred no authority upon Johnson or any other state officer to execute the lease, and the judicial citations do not apply to the facts of this case.

In the brief of respondents it is said that the secretary of the department had no authority to execute a lease beyond his term of office. We feel impelled to say that in the absence of an emergency, and no emergency is shown in this record, he had no authority to execute the lease for any period of time. In connection with the subject of an emergency, it may be said that the only claim of emergency is that, at the time of the execution of the lease, the department of public works was occupying the rooms in the capitol building which, whenever the legislature was in session, were used by the legislature; that the legislature would convene early in January following the making of the lease; that by an act of the legislature of 1919 provision had been made whereby, in the course of time, the then capitol building would be removed and a new building erected upon the same site. But the old building had not been removed. Proof that the legislature was about to convene and occupy the rooms then occupied by the department of public works is sufficient proof that the old building still stood. The statute (Comp. St. 1922, sec. 7253) required the secretary of the department of public works to maintain his office in the state capitol, and the mere fact that the capitol was crowded and commodious office rooms were not available, and that in the judgment of the secretary, or even in the judgment of the governor, his superior officer, it was desirable to procure more spacious rooms outside the capitol building, is not sufficient to vest these officers with power to enter into the contract in suit and thereby create a legal liability against the state. Such officers have no general authority to contract in behalf of the state and the state will not be bound by their contracts in excess of the authority conferred by law. 36 Cyc. 872, 873.

The doctrine of estoppel is invoked, but under the facts

disclosed it is not available to relator. Were the state seeking to recover back the money paid as rental, perhaps it might be said that, having enjoyed the benefits, it would be estopped from recovering back the rental paid, but such situation is not presented, and the state cannot by estoppel become bound by the unauthorized contract of its officer. 36 Cyc. 873.

The judgment of the district court is

AFFIRMED.

Note—See States, 36 Cyc. 873.

STEVE BIDDICK V. STATE OF NEBRASKA.

FILED OCTOBER 26, 1925. No. 24711.

1. **Criminal Law**: EVIDENCE. It is elementary that persons accused of crime are to be tried upon competent evidence alone and none other.
2. ———: APPEAL: REFUSAL OF CONTINUANCE. "A judgment will not be reversed by the supreme court on account of the refusal to grant a continuance unless there has been an abuse of a sound legal discretion by the district court." *Dilley v. State*, 97 Neb. 853.
3. **Arson**: SUFFICIENCY OF EVIDENCE. Upon examination, *held* that the verdict is amply supported by the evidence.

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

Charles E. Martin and *A. L. Tidd*, for plaintiff in error.

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

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

DEAN, J.

Steve Biddick, defendant, was convicted of arson in Cass county and sentenced to serve an indeterminate period of not more than three and not less than one year in the penitentiary. He prosecutes error.

October 18, 1924, at about eight in the evening, a destructive fire was discovered in a Burlington railroad company warehouse at Plattsmouth. When the city fire department arrived, very shortly thereafter, the building was enveloped in flames and in a few hours with its contents, was entirely destroyed, causing a loss approximating $17,000. The building was roofed with fireproof material and no refuse was within or about it which might have caused the fire or hastened its progress. No electric wiring was used, nor was there any within a block of the building, nor was any locomotive there after 3 o'clock in the afternoon.

The chief of the fire department is an experienced fire fighter and inspector of fire-swept structures. His evidence, and that of other witnesses, tends to prove that, from the rapidity in which the flames spread after the fire was first discovered, inflammable material had been placed in and about the warehouse by an incendiary.

Defendant worked under William Baird, shop foreman, for about two years, but was discharged by the company a few weeks before the fire because he was the cause of a serious injury to another employee. He resented the discharge and wrote a letter voicing his complaint to the president of the railroad company at Chicago. He also held a grudge against Baird because of his loss of employment, and wrote an anonymous letter to him, October 27, 1924, at Plattsmouth. He admitted authorship of the letter, but denied mailing it. But the jury doubtless noted the evident similarity of the handwriting of the letter and the envelope. The letter follows:

"William Baird this is not a threat you have outlived your usefulness here. We give you two days to get out of town dead or alive."

Donald Smiley, a car repairer, testified that defendant complained to him about having been discharged, but said there was plenty of time "to get even;" that he caused the fire, and that the proof having been destroyed he had an alibi; that he lamented the fire was not more destructive,

and attributed this to the fact that there was not "wind enough and they fought fire better than I thought they could." Defendant explained to the witness in detail how he started the fire. In substance he said that he took candles and a flask of gasoline to the warehouse and concealed the lighted candles from view and from the wind by a cover, which he described. He explained that when the flame burned down to the socket of a candlestick it came in contact with the oiled waste and, when ignited, the fire quickly spread over the building. But his incendiary contrivance was so timed that about an hour and a half would elapse before the burning flame from any of the candles could reach the waste, and this gave him time to make his escape before the fire could be discovered. Defendant also told the witness that he held membership in a secret organization for 35 years, and that in 3 days, with help from his fellow members, in St. Louis, he could put Baird out of the way. He further informed him that he was "figuring on a damage suit," and that "half of it (the proceeds) was to go" to those who helped him get it.

It seems that another witness overheard defendant's talk to Smiley in which defendant explained that registry in a hotel was good proof of an alibi. Aside from this, the witness testified that he did not know the import of defendant's talk, other than that it indicated a deep seated and malevolent dislike for shop foreman Baird.

Defendant testified in his own behalf. As noted above, he admitted authorship of the letter, and that he kept candles on hand when he lived at the hotel and also at a private home when he boarded there. But he said he kept them for use in the event the electric lights at either place should go out. Doubtless the jury were not favorably impressed by his explanation of the candle incident, nor by the Baird letter, nor by the following statements attributed to him by witness Smiley, namely: That he "had a good alibi on the shop fire * * * because he was registered at the hotel; * * * and that he could be 500 miles away and establish an alibi by the hotel register;" and in that he tried

to induce Smiley "to start fires to burn out the shops;" and of his threat "to put 100 pounds of dynamite under Mr. Baird's house." These admissions, if believed by the jury, when considered with all the evidence in the record, doubtless tended strongly to convince the jury of guilt. But he denied the truth of Smiley's evidence in respect of practically all of his admissions except as herein noted. It will be remembered, however, that this evidence was in part corroborated by the witness who overheard some of the conversation between Smiley and defendant. Defendant also introduced some evidence in an attempt to establish an alibi, but the jury evidently gave no credence to the testimony which he offered in this behalf. In brief, all of the evidence, disclosed by the record, was submitted to the jury under instructions which properly informed them of their duty in respect of every material issue. And the jury were not only the triers of questions of fact but of the credibility of the witnesses as well. It follows that, where the verdict is supported by the evidence, as here appears, the judgment will not be reversed.

Complaint is made in that, on the cross-examination, the county attorney asked defendant certain questions which tended to reflect upon his conduct at another town in Nebraska in which he formerly lived. Defendant's objections to these questions were promptly sustained. There was, however, another immaterial question put to defendant on the cross-examination, which bore no relation to the facts involved here, and to which he objected, but the question did not impute moral turpitude to defendant nor to any other person. Defendant complains because his objection was overruled. For the reasons given, we do not think reversible error can be predicated on the court's ruling.

It is elementary that persons accused of crime are to be tried upon competent evidence alone and none other. On this vital issue, the court repeatedly and in varying forms of explicit expression so instructed the jury. It may however be observed that if, by inadvertence or mistake, or if for any reason, incompetent evidence should be submitted,

which would tend to prejudicially affect any of the defendant's substantial rights, it is the duty of the court upon proper objection, to inform the jury that such evidence is not to be considered by it as tending to prove the guilt of the defendant. We conclude, as above noted, that on this feature of the present case, in view of the entire record, and in view of the cautionary instructions given by the court, reversible error does not appear.

Counsel for defendant requested the court to give 24 separate instructions to the jury, and of these 4 were given and the remainder were refused. An examination of all the instructions given discloses that the jury were properly instructed on every material issue involved here. Reversible error does not appear in the court's refusal to give the tendered instructions which were refused.

Defendant complains because the court refused to grant a continuance, which defendant's counsel Honorable Charles E. Martin, who was appointed to conduct the defense, deemed necessary to permit him to prepare for trial; and this, in part, on the ground that counsel, so appointed, informed the court that he was inexperienced in the conduct of criminal defenses. Neither the record, nor the argument made before us, seems to support counsel's plea in this behalf. The defense was ably and skilfully conducted throughout and the rights of defendant were well guarded at every point. The court seems to have made no mistake in its appointment, nor in denying the showing for a continuance.

In a recent opinion we said: "A judgment will not be reversed by the supreme court on account of the refusal to grant a continuance unless there has been an abuse of a sound legal discretion by the district court." *Dilley v. State*, 97 Neb. 853. In respect of an application for a continuance in criminal defenses generally, a recent authority says: "Since the court trying the cause is, from personal observation, familiar with all the attendant circumstances, and has the best opportunity of forming a correct opinion upon the case presented, the presumption will be in favor of its

action; and in no case will the exercise of this discretion be reviewed where it manifestly appears that justice has been done without sacrificing the rights of defendant." 16 C. J. 452, sec. 822. We conclude that the court's denial of a continuance comes clearly within the rule announced in both of the above citations, and that the court's ruling did not, on any ground appearing in the record, show an abuse of sound judicial discretion.

Other assignments of alleged error have been presented, which we have examined, but do not find it necessary, in the proper disposition of the present case, to discuss nor to decide. Reversible error has not been shown. The judgment is

AFFIRMED.

JOSEPH F. HUBKA V. STATE OF NEBRASKA.

FILED OCTOBER 26, 1925. No. 24551.

1. Evidence examined, and *held* sufficient to support the verdict.
2. Rape: SENTENCE. Evidence examined, and *held* that the sentence imposed of twenty years in the penitentiary was excessive and is reduced to three years.

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

Hazlett, Jack & Laughlin and *Lloyd Crocker*, for plaintiff in error.

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

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

DAY, J.

Joseph F. Hubka, hereinafter referred to as the defendant, was convicted in the district court for Gage county of the crime of statutory rape, and sentenced to a term of twenty years in the penitentiary.

Alleging that there was error upon trial, the defendant

has brought the record of his conviction to this court for review. In the information the venue was laid in Gage county. Upon the oral argument two main questions were urged for a reversal of the judgment: First, that the evidence is not sufficient to support the judgment because the venue was not established; second, that the sentence imposed was unduly oppressive.

The defendant, while a witness in his own behalf, admitted the act of intercourse, but testified that it occurred in Johnson county, which is the county directly east of Gage county. It is elementary that the venue is one of the essential elements to be established in criminal prosecutions. The record shows that at the time in question the prosecutrix was almost 17 years of age; that she and the defendant, a young man just past 21 years of age, were out riding in an automobile. The prosecutrix testified that the act of intercourse took place in Gage county about 2 or 2½ miles east of the village of Filley, which was 3½ miles west of the Johnson county line. She described the location with considerable minuteness. Other witnesses testified the place which she described was in Gage county. Some effort was made to discredit her testimony by showing that upon the preliminary examination she had testified that the place where the act occurred was 5 miles east of Filley, which would be in Johnson county. Upon the trial she testified that she had not made such a statement. Under this state of the record, it was clearly for the jury to determine whether the venue, as charged, had been established beyond a reasonable doubt. It being a question for the jury and their finding being supported by the evidence, we are not disposed to disturb their verdict.

It is next urged that the penalty imposed was unduly oppressive. Our statute, in so far as applicable to the present situation, provides in substance that if any male person of the age of 18 years or upwards shall carnally know any female child under the age of 18 years with her consent, unless such female child is over 15 years of age, and previously unchaste, he shall be deemed guilty of rape,

and shall upon conviction be imprisoned not less than three years nor more than twenty years. It is obvious from this wide range in the penalty prescribed for this offense that the legislature had in mind that cases might arise in which the minimum as well as cases in which the maximum penalties would properly apply. In our view the present case does not call for the extreme penalty. This case is not one where an assault or violence was resorted to. The prosecutrix assented to the act, although under the statute she could not consent to the violation of her person. It was a moral surrender on the part of both.

An examination of cases in this court involving somewhat similar circumstances discloses that the sentence imposed in this case was far more severe than in any other case we have been able to find. In view of the entire record, we think the ends of justice will be served and the law vindicated by reducing the penalty from twenty years to three years.

In the brief other alleged errors are discussed, including criticism of the instructions given by the court. We find no merit in these alleged errors. The defendant's rights were carefully protected and the issues submitted to the jury under proper instructions.

As thus modified, the judgment of the district court is affirmed.

AFFIRMED: SENTENCE REDUCED.

VLADISLAV POLICKY V. STATE OF NEBRASKA.

FILED OCTOBER 26, 1925. No. 24703.

1. Jurors: DISQUALIFICATION. A sheriff is disqualified to select and summon a special panel of jurors to serve in a criminal case in which he is the prosecuting witness.
2. ———: ———. In such case, where timely objection is made to the special panel on the ground that the sheriff was disqualified to select the jury, it is error to overrule the objection.

ERROR to the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Reversed.*

George N. Gibbs, for plaintiff in error.

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

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

DAY, J.

Defendant was convicted of violating the liquor law of the state, as set forth in section 3252, Comp. St. 1922, and adjudged to pay a fine of $500 and to serve a term of 30 days in the county jail. He has brought the record of his conviction to this court for review. The principal point urged by the defendant for a reversal of the judgment is that the court erred in overruling the challenge to the special panel of jurors and in compelling him to go to trial before jurors selected and summoned by the sheriff. The contention is made that the sheriff was disqualified to select the special panel because he was the prosecuting witness. The record shows that the defendant was first tried before the court and a jury at the March, 1924, term of court. At the November, 1924, term of court the case was again tried to the court and jury and again resulted in a disagreement. Thereupon, on November 26, 1924, the court made an order discharging the regular panel and directed that the cause be tried at the then present term of court. The court further ordered the sheriff to summon without delay from the body of the county 18 good and lawful men possessing the qualifications of jurors to be and appear before the district court at 10 a. m. on November 28, 1924, to serve as petit jurors for the November, 1924, term of court. In obedience to this command, the sheriff selected and summoned 18 men to serve as petit jurors. When the case was called for trial, counsel for the defendant objected to trying the cause before the special panel for the reason that the jurors had been selected by the sheriff who was the principal, as well as the only, witness for the state as to the essential elements of the crime. The objection was over-

ruled, the trial ordered to proceed, and 12 jurors out of the 18 selected by the sheriff were chosen to try the case.

The right of the court to order a special panel of jurors cannot be questioned. Section 9078, Comp. St. 1922, was in force at the time of trial. This section has since been repealed by the enactment of chapter 70, Laws 1925. As it originally existed, the section, in so far as applicable to the present situation, provided, in substance, that whenever at any general or special term of court for any cause there is no panel of petit jurors, or the panel is incomplete, the court may order the sheriff, deputy sheriff, or coroner to summon without delay good and lawful men having the qualifications of jurors to serve as a petit jury. Section 5013, Comp. St. 1922, is as follows:

"Every county clerk shall serve and execute processes of every kind, and perform all other duties of the sheriff, when the sheriff shall be a party to the case, or whenever affidavits shall be made and filed as provided in the next succeeding section; and in all such cases he shall exercise the same power and proceed in the same manner prescribed for the sheriff in the performance of similar duties."

Section 5014, Comp. St. 1922, provides, in substance, that whenever any party, his agent, or attorney shall make and file an affidavit that he believes the sheriff will not, by reason of partiality, prejudice, consanguinity, or interest, faithfully perform his duties in any suit commenced in the court the clerk shall direct the process to the county clerk, who shall execute the same in a like manner as the sheriff might or ought to have done. It will be observed that, when a showing is made conforming to the provisions of the statute above referred to, it is then mandatory that the clerk direct the county clerk to perform the duties of the sheriff. In the case at bar, the defendant had no opportunity to make objections to the sheriff selecting and summoning the special panel until after he had done so. We think, however, that the objections to the panel, made by the defendant at the time the case was called, was not only timely, but was sufficient to challenge the attention of the court to the fact;

that the sheriff under the circumstances shown was disqualified from selecting the jury. The court takes judicial notice of its own records and in this case knew that the sheriff was the principal witness for the state and that a conviction of the defendant would turn upon a question of veracity between the sheriff and the defendant. It is essential to the fair and impartial administration of justice that a jury shall not be selected by an officer having an interest in the result of litigation to be tried before such jury.

We think, under the facts disclosed by the record, the court erred in not sustaining the objection to the special panel. As the case must be tried again, we refrain from commenting on the evidence.

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

REVERSED.

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1. Affidavits submitted to the district court cannot be considered in the supreme court unless preserved in the bill of exceptions. *Walker v. State*..... 19
2. Evidence procured by an unauthorized search and seizure *held* admissible. *Walker v. State*..... 19
3. The statute prohibiting transportation of intoxicating liquor is not unconstitutional as authorizing cruel or unusual punishments. *Walker v. State*..... 19
4. Sentence of three years imposed for manslaughter. *Howard v. State*..... 67
5. It is highly improper for the prosecuting attorney to express his belief in accused's guilt, unless given as a deduction from the evidence. *Olsen v. State*..... 69
6. Harmless error is not ground for a new trial. *Olsen v. State*..... 69
7. Nonprejudicial errors may be considered in ruling on the

assignment of error in overruling motion for new trial. *Olsen v. State* 69
8. Communication to juror by prosecuting attorney after submission of case *held* prejudicial error. *Olsen v. State* .. 69
9. Error not causing substantial miscarriage of justice should be disregarded. *Marchand v. State* 87
10. In a prosecution for rape, failure to allege that accused is a male person *held* not reversible error, in view of the evidence. *Marchand v. State* 87
11. Motion for new trial for newly discovered evidence is addressed to the discretion of the court and its ruling will not be disturbed unless abuse of discretion is shown. *Phegley v. State* 138
12. A conviction of aiding and abetting in forging a county warrant cannot be sustained where there is no proof of the forgery. *Goucher v. State* 352
13. Noninstruction will not work a reversal, when proper instructions were not requested. *Mauer v. State* 418
14. Excluding the opinion of a psychologist as to the effect of parental suggestion on the imagination of a child witness *held* discretionary. *Abbott v. State* 517
15. A plea in bar to a felony, based on a former conviction for a misdemeanor, may be overruled, where the accusations do not disclose identity of offenses. *Abbott v. State* .. 517
16. Permitting employment of special counsel is discretionary, and ordinarily it is only for misconduct on his part that a conviction will be reversed because of his employment and services. *Abbott v. State* 517
17. In a prosecution for sodomy, former instances of sexual depravity may be admitted in evidence, under exceptional circumstances. *Abbott v. State* 517
18. Errors in giving and refusing instructions which do not prejudice accused *held* not grounds for reversal. *Abbott v. State* 517
19. Where a single offense is charged, and the state attempts to prove several offenses, a motion to elect should be sustained. *Abbott v. State* 524
20. Where a single offense is charged, and evidence is introduced as to several transactions, it is error to so instruct the jury that they may found their verdict on any one of the acts disclosed. *Abbott v. State* 524
21. As a general rule, proof of independent offenses is inadmissible. *Abbott v. State* 524
22. On a trial for sodomy, it is error to admit evidence of a former offense not related to the offense charged. *Abbott v. State* 524

23. Sentence of imprisonment does not begin until the prisoner is taken into custody or offers to surrender himself. *Riggs v. Sutton* 556
24. Time for beginning sentence of imprisonment is not an essential part of the judgment; the essential elements being the kind and amount of punishment. *Riggs v. Sutton* 556
25. If accused asked for or acquiesced in delay in executing warrant of commitment, the time which elapses before he is actually taken into custody is not a part of the sentence. *Riggs v. Sutton* 556
26. Where motion for new trial for misconduct of a juror or attorney is overruled, the ruling will not be set aside on appeal unless clearly wrong. *Williams v. State* 606
27. A new trial will not ordinarily be granted, overruling the trial court, on the ground of newly discovered cumulative or impeaching evidence. *Williams v. State* 606
28. Omission of words, "beyond reasonable doubt," from an instruction *held* not prejudicial, in view of other instructions. *Williams v. State* 606
29. Instruction defining "intent" *held* not erroneous. *Williams v. State* 606
30. In the absence of request, failure to instruct as to a lesser crime involved in and incident to a greater is not error. *Williams v. State* 606
31. Request for a new trial on ground of newly discovered evidence should be supported by affidavit of accused and each of his attorneys. *Williams v. State* 606
32. Affidavits cannot be considered on appeal, unless incorporated in bill of exceptions. *Williams v. State* 606
33. In a felony case, not capital, accused out on bail may waive his right to be present at the trial during some of the proceedings. *Scott v. State* 657
34. Voluntary absence of accused during the giving of additional instructions held not error. *Scott v. State* 657
35. Refusal to give instructions as to self-defense *held* not prejudicial error, in view of instructions given. *Scott v. State* 657
36. It is proper practice to send to the jury-room all instruments, articles and documents received in evidence which will aid the jury. *Edwards v. State* 698
37. In absence of statute, it is largely left to the discretion of the court as to what papers, books and other matters will be sent to the jury-room. *Edwards v. State* 698
38. The acts and declarations of each conspirator in further-

ance of the common design are the acts and declarations of all. *Edwards v. State* 698
39. Unless the evidence is wholly insufficient, the finding of the jury will not be disturbed, except for error of law. *Martin v. State* 755
40. Refusal of instruction on a proposition of law covered by an instruction given, *held* not error. *Martin v. State* 755
41. The constitutional limitation on the power of the governor to reprieve *held* not to prohibit granting of successive reprieves which in the aggregate may exceed 30 days. *Simmons v. Fenton* 768
42. Where a criminal is not executed at time fixed in death warrant, a new date for execution may be fixed by the proper court. *Simmons v. Fenton* 768
43. One cannot be convicted of a felony on his own unsupported extra-judicial confession that a crime has been committed. *Egbert v. State* 790
44. A voluntary admission tending to prove a crime may, with slight corroborating circumstances, be sufficient to warrant conviction. *Egbert v. State* 790
45. Circumstances capable of an innocent construction may be interpreted in the light of admissions of the accused. *Egbert v. State* 790
46. Articles of clothing worn by the victim of a homicide *held* admissible as tending to clarify controverted issues. *Egbert v. State* 790
47. The words "wholly accidental" in an instruction on manslaughter *held* not to place an undue burden on accused. *Egbert v. State* 790
48. Accused must be tried on competent evidence. *Biddick v. State* 851
49. A judgment will not be reversed for refusal of a continuance, in absence of abuse of discretion. *Biddick v. State* 851

Damages.

1. Evicted lessee may recover loss of profits for unexpired portion of term of lease of theatre, and book entries from original accounts showing receipts and expenses before eviction, admitted with consent of defendant, *held* competent evidence. *Kenney v. Braun* 12
2. If damages for breach of contract are uncertain, speculative and incapable of definite computation, recovery may be allowed for the amount of the undertaking. *Van Horn v. Ericson Lake Co.* 332
3. Damages may be recovered for miscarriage as the proxi-

mate result of fright produced by another's negligence. *Hanford v. Omaha & C. B. Street R. Co.* 423
4. Physical injury proximately resulting from fright produced by negligence is actionable. *Hanford v. Omaha & C. B. Street R. Co.* 423
5. Verdict for $2,000 for miscarriage and attendant suffering *held* not excessive. *Hanford v. Omaha & C. B. Street R. Co.* 423
6. The measure of damage for failure to pay money is ordinarily interest on the amount due at the legal contract rate. *Scheer v. Nelson* 821

Deeds.

1. The equitable title passes to a purchaser for a valuable consideration by delivery of the deed, though the deed does not contain the name of any grantee. *Nebraska Wesleyan University v. Smith* 208
2. Inadequacy of price alone will not invalidate a sale of land. *Bechtel v. Price* 313
3. Evidence *held* to sustain decree refusing cancelation of deed for incompetency of grantor and undue influence. *Bechtel v. Price* 313
4. Any lot owner may enforce building restrictions imposed for development of an addition to a city against other owners purchasing with notice, actual or constructive. *Dundee Realty Co. v. Nichols* 389
5. Evidence *held* insufficient to establish delivery of a deed. *Haecker v. Haecker* 587

Divorce.

1. Unjustifiable conduct which destroys the objects of matrimony may constitute extreme cruelty. *Broz v. Broz* 31
2. Evidence *held* insufficient to sustain decree of divorce for extreme cruelty. *Kerker v. Kerker* 653

Drains.

1. Evidence *held* insufficient to sustain special assessments. *Chicago, B. & Q. R. Co., v. Platte Valley Drainage District* 49
2. In the apportionment of a drainage district, county roads are sufficiently described by "public highways." *Scottsbluff Drainage District v. Scotts Bluff County* 187
3. Relief from special taxes in excess of benefits is by a direct proceeding. *Scottsbluff Drainage District v. Scotts Bluff County* 187
4. In absence of timely objection, irregularities not affecting jurisdiction are not a defense, after apportionment and

assessment of special taxes. *Scottsbluff Drainage District v. Scotts Bluff County* 187
5. Interest at 10 per cent. *held* allowable on drainage assessments. *Scottsbluff Drainage District v. Scotts Bluff County* 187
6. Landowners *held* entitled to enjoin reconstruction of a ditch in such manner as to make it useless as a soil drain according to contract. *Goff v. Weiss* 599
7. The right of supervisors to keep a drainage ditch in repair includes the right to straighten its channel and better its outlet. *Richardson County v. Drainage District No. 1*.. 662
8. The determination of the board levying drainage assessments cannot be enjoined unless the assessments are void. *Richardson County v. Drainage District No. 1* 662
9. Federal statute relating to drainage assessment on tribal Indian lands *held* not to apply after the lands have been patented. *Richardson County v. Drainage Distirct No. 1*.. 662

Election of Remedies.

1. Forfeiture and foreclosure of contract as a mortgage are inconsistent remedies, and cannot be pursued concurrently. *Barnes v. Barker* 113
2. A petition for forfeiture and to foreclose a contract as a mortgage is demurrable, and subject to a motion for election unless the plea is in the aspect of pursuing one remedy if the other should fail. *Barnes v. Barker* 113
3. Plea of election of remedies *held* not available. *Abrahams v. Studebaker Corporation* 721

Embezzlement.

To convict of conversion as bailee, it must be shown that defendant was in the rightful possession of the subject of the crime. *Cremens v. State* 175

Escrows.

A depository is not guilty of tort in holding property in dispute between the depositors, and in case of suit he may protect himself by interpleader. *Farming Corporation v. Bridgeport Bank* 323

Estates.

Doctrine of merger applied to estates of mortgagor and mortgagee resulting in a merchantable title. *McLaughlin v. Nelson* 308

Estoppel.

1. Parties are not estopped from asserting a mutual mistake

of facts by recitals or assumptions in the contract. *Union Life & Accident Ins. Co. v. American Surety Co.* 300
2. The state cannot by estoppel become bound by an unauthorized contract of its officer. *State v. Cochran* 846

Evidence.
1. Where a mortgagee seeks to hold a third party under an assumption clause in an unrecorded deed, such third party can show the real contract between himself and his grantor, though the testimony contradicts recitals in the deed. *Nebraska Wesleyan University v. Smith* 208
2. A written contract for sale of land may be shown by parol to have been substituted for a former written contract for sale of a different tract of land. *Stanton Nat. Bank v. Swallow* 336
3. It may be shown by parol that part of the consideration for substitution of a land contract for a former one was an oral promise by vendor to pay a purchase-money note. *Stanton Nat. Bank v. Swallow* 336
4. Manner of determining weight of evidence, stated. *Thornton v. Davis* 529
5. Declarations by grantee, after death of grantor, as to delivery of deed are incompetent as against claimant under grantor not present when they were made. *Haecker v. Haecker* 587
6. The court takes judicial notice of matters of common knowledge, and evidence of witnesses will not be received thereon. *Lawson v. Union P. R. Co.* 745

Executors and Administrators.
Executor's bondsmen *held* liable for executor's failure to account for proceeds of sale of land. *In re Estate of Halley* 73

False Imprisonment.
1. "False imprisonment" is unlawful restraint. *Grebe v. State* 327
2. Accused *held* not guilty of false imprisonment. *Grebe v. State* 327

False Pretenses.
Proof of criminal intent to defraud is necessary to conviction. *Eselin v. State* 839

Forgery.
1. The forgery statute is directed principally against the false making of an instrument in writing. *Goucher v. State* 352

2. The genuine making of a false instrument in writing is not generally forgery. *Goucher v. State* 352
3. The genuine making of a false instrument is not generally within a statute against the false making of an instrument. *Goucher v. State* 352
4. A county warrant, if the making is genuine, is not generally a forgery, though false and intended as a means to defraud. *Goucher v. State* 352

Fraud.
1. Evidence of insolvency is required as of the time alleged. *Scovel v. Isham* 238
2. Elements of false representations, stated. *Scovel v. Isham* 238

Fraudulent Conveyances.
1. Conveyances between members of a family will be closely scrutinized, and the burden of proof is on the vendee to establish *bona fides*. *Blanchard v. McMillan* 275
2. Son *held* to have purchased land from father in good faith. *Reed v. Barnes* 414
3. One purchasing a stock of merchandise in bulk, without complying with the statute, becomes a trustee for creditors and liable as garnishee. *Home Pattern Co. v. Gore* .. 535

Garnishment.
After judgment, a summons in garnishment from one county to another in aid of execution is unauthorized. *Hinds State Bank v. Loffler* 110

Guardian and Ward. SEE INSANE PERSONS.

Highways.
1. County commissioners may, without petition or notice, make a preliminary order establishing a section line road, but before it can be opened there must be proceedings upon proper notice to ascertain damages. *Mosier v. Herman* 318
2. Proceedings of county commissioners *held* ineffectual to establish section line road. *Mosier v. Herman* 318
3. Use of land as a road by passive permission of the owner for less than the prescriptive period does not make it a public road. *Mosier v. Herman* 318
4. Evidence *held* insufficient to show establishment of a public road by prescription. *Mosier v. Herman* 318
5. Authority for a structure on a public highway is in the legislature. *World Realty Co. v. City of Omaha* 396
6. Evidence *held* to sustain judgment on contract for construction of public roads. *Peterson v. State* 546

Homestead.

A contract for sale of a homestead, not acknowledged, if performed by tender of a deed properly signed and acknowledged, may be enforced. *Marodolac v. Uhe* 450

Homicide.

1. Material declarations of deceased, made in belief of approaching death, are admissible, and such belief may be shown by any competent witness. *Howard v. State* 67
2. Evidence *held* to sustain conviction for manslaughter. *Howard v. State* 67
3. The Constitution continues in force the law relating to murder. *Phegley v. State* 138
4. Information for murder in the first degree *held* sufficient. *Phegley v. State* 138
5. Instruction as to an intervening cause of death approved. *Phegley v. State* 138
6. Instruction that jury must determine whether or not accused acted with malice and intent, *held* not reversible error. *Phegley v. State* 138
7. Evidence *held* to sustain verdict for murder in second degree. *Phegley v. State* 138
8. In a prosecution for homicide in procuring an abortion, dying declarations of the deceased are admissible. *Edwards v. State* 698
9. The weight and credibility of dying declarations are for the jury. *Edwards v. State* 698
10. Principle on which dying declarations are admitted, stated. *Edwards v. State* 698
11. The rules ordinarily applicable to admission in evidence of the spoken word do not always apply with the same strictness to dying declarations. *Edwards v. State* 698
12. The admission of a dying declaration is a question to be determined by the nature of each case. *Edwards v. State* .. 698
13. Dying declarations need not be made in any prescribed form or manner. *Edwards v. State* 698
14. Dying declarations of a person whose death resulted from an operation to procure an abortion *held* admissible. *Edwards v. State* 698
15. Evidence *held* to sustain conviction for manslaughter. *Egbert v. State* 790

Indictment and Information.

1. It is permissible to show commission of offense on earlier date than that alleged. *Abbott v. State* 517
2. A complaint charging sodomy in the language of the statute *held* not fatally defective for the purposes of a

preliminary examination and a plea in abatement. *Abbott v. State* 517
3. Information for blackmail in words of statute is sufficient. *McKenzie v. State* 576
4. Information for blackmail *held* sufficient. *McKenzie v. State* 576
5. An information for felony must allege that the crime was committed within the jurisdiction of the court. *Poulsom v. State* 767

Injunction. SEE STATES, 1.
1. One seeking injunction must establish every controverted fact necessary to relief. *World Realty Co. v. City of Omaha* 396
2. An attempt to take or damage another's land without compensation may be enjoined, although for a public purpose. *Goff v. Weiss* 599
3. The liquidated damages provided for in contracts between wheat growers association and its members *held* not to afford an adequate remedy. *Nebraska Wheat Growers Ass'n v. Norquest* 731

Insane Persons.
1. A suit to set aside a judgment appointing a guardian of an insane person, in which other relief is sought, *held* to be a collateral attack. *In re Estate of Ramp* 3
2. Judgment appointing a guardian *held* not void. *In re Estate of Ramp* 3
3. If a person is incapable, through age or weakness of mind, to conduct his own affairs, suit may be maintained by his next friend. *Stephan v. Prairie Life Ins. Co.* 469
4. Petition for appointment of guardian for incompetent *held* good on general demurrer. *Keiser v. Keiser* 645
5. Finding of incapacity authorizing appointment of a guardian will not ordinarily be disturbed on appeal. *Keiser v. Keiser* 645
6. Examination for appointment of a guardian for an alleged incompetent should be limited to inquiries as to his mental condition. *Keiser v. Keiser* 645
7. The words, "mentally incompetent," "incompetent" and "incapable," in the statute, pertaining to appointment of guardian, defined. *Keiser v. Keiser* 645
8. "Mental incompetency" is established by showing an essential privation of reasoning faculties, or incapacity of understanding and acting with discretion in the ordinary affairs of life. *Keiser v. Keiser* 645
9. A guardian should be appointed where a person has in-

sufficient mental capacity for the just protection of his property. *Keiser v. Keiser* 645
10. Admissions, declarations, and facts inconsistent with mental soundness are admissible on the issue of sanity. *Keiser v. Keiser* 645
11. A person may be sane in the sense that it is not necessary to confine him in an asylum, and be incompetent to manage an estate. *Keiser v. Keiser* 645
12. A court may appoint a guardian of the person, or the estate, or both. *Keiser v. Keiser* 645

Insurance.

1. Death of insured by external, violent and accidental means within the meaning of the policy may be established by circumstantial evidence. *Smith v. National Accident Ins. Co.* 222
2. Evidence *held* to show that death of insured was caused through external, violent and accidental means. *Smith v. National Accident Ins. Co* 222
3. One who has transferred a certificate of deposit is not thereafter a depositor within the meaning of a bank depository bond because he is liable as indorser on the certificate. *Union Life & Accident Ins. Co. v. American Surety Co* 300
4. Only deposits at the time of suspension are protected by a bond securing bank deposits. *Union Life & Accident Ins. Co. v. American Surety Co* 300
5. Where both parties to a bank depository bond are mistaken as to the existence of material facts, there is no contract. *Union Life & Accident Ins. Co. v. American Surety Co* 300
6. Where parties execute a bond under mistake of facts, tender of the consideration paid in the petition to cancel the contract is sufficient. *Union Life & Accident Ins. Co. v. American Surety Co* 300
7. An action for loss cannot be maintained on a policy cancelled for nonpayment of premium. *Gould Land & Cattle Co. v. Commercial Union Assurance Co* 385
8. An insurance policy must be construed according to the laws of the state where the application was written, the premium paid, and the policy delivered. *Stephan v. Prairie Life Ins. Co* 469
9. Under the law of Iowa, an insurance company is liable for death from influenza while in military service. *Stephan v. Prairie Life Ins. Co* 469
10. An insurance company is bound by its agent's contract

within the scope of his real or apparent authority, although in violation of private instruction. *Cline v. Fidelity Phenix Fire Ins. Co* 481
11. An oral contract of insurance which is certain as to parties, time, amount, rate, and property is valid. *Cline v. Fidelity Phenix Fire Ins. Co* 481
12. Evidence as to whether a contract of insurance was within the scope of an agent's authority *held* to present a question for the jury. *Cline v. Fidelity Phenix Fire Ins. Co.* 481
13. Evidence *held* to sustain verdict for theft of automobile. *Nelson v. National Automobile Ins. Co* 553
14. Evidence *held* to sustain finding that an automobile was stolen. *Nelson v. National Automobile Ins. Co* 553
15. A fraternal society is not estopped from pleading *ultra vires* as to a contract beyond its statutory powers. *Schell v. Grand Lodge, A. O. U. W* 585
16. Under the valued policy law, the valuation written in the policy is the measure of recovery in case of total loss. *Fadanelli v. National Security Fire Ins. Co* 830
17. Where the property insured under a valued policy is totally destroyed as the result of two or more fires, the measure of recovery is the amount written in the contract, less amounts paid in settlement of previous losses. *Fadanelli v. National Security Fire Ins. Co* 830

Intoxicating Liquors.

1. An information *held* sufficient to support forfeiture of an automobile used in unlawful transportation of liquors. *Walker v. State* 19
2. A vehicle voluntarily placed in possession of one using it for unlawful transportation of liquor will be forfeited. *Sandlovich v. Hawes* 374
3. The owner of an automobile forfeited for unlawful transportation of liquor has no greater right to the proceeds of sale than to the vehicle. *Sandlovich v. Hawes* 374
4. Evidence *held* to sustain conviction of unlawful possession of still. *Mauer v. State* 418

Judgment. SEE INSANE PERSONS, 1, 2.

1. The judgment of a court of general jurisdiction is not void because every jurisdictional fact does not appear upon the face of the record. *In re Estate of Ramp* 3
2. County courts have exclusive original jurisdiction of guardianship proceedings, as to which matters their judgments are as conclusive as those of any other court of record. *In re Estate of Ramp* 3

3. Error in holding a petition sufficient will not render the judgment subject to collateral attack. *Brandeen v. Lau*.... 34
4. Omission of allegation of a jurisdictional fact is cured by proof of its existence, and where the judgment is silent as to such fact jurisdiction will be presumed. *Brandeen v. Lau* 34
5. The county court may enter judgment *nunc pro tunc* on motion and notice after the term. *Brandeen v. Lau*..... 34
6. A judge at chambers has no jurisdiction to modify or correct a decree of court, except by consent of all parties. *Nicholson v. Getchell*..... 248
7. A dismissal as to a defendant is no defense in a subsequent action on an obligation not pleaded in the former case. *Stanton Nat. Bank v. Swallow*..... 336
8. Petition to vacate a judgment verified by next friend of a party *held* to perform the function of a jurisdictional affidavit and answer. *Nelson v. Nelson*..... 453
9. Equity may enjoin collection of a judgment until the debtor litigates an unliquidated claim against his creditor, and if the debtor succeeds the court may set off the judgments. *State v. Farmers State Bank*..... 497
10. In order that *res judicata* may avail as a plea in bar, it must be upon the same claim or demand. *Abrahams v. Studebaker Corporation*..... 721

Jury. SEE NEW TRIAL, 1-3.

1. A sheriff is disqualified to select and summon a special panel of jurors to serve in a criminal case in which he is prosecuting witness. *Policky v. State*..... 858
2. Overruling of timely objection to special panel of jurors selected by sheriff who was prosecuting witness *held* error. *Policky v. State*..... 858

Licenses.

One acquiring license to go on another's land for a purpose beneficial to the owner does not acquire a right to go on the land for another purpose destructive of such benefit. *Goff v. Weiss*..... 599

Limitation of Actions.

1. Payment of interest on a note by a principal without authority by the surety will not stop the running of limitations as to the surety. *Hall v. Rogers*..... 290
2. A payment on a note by one of several joint debtors without authority of the others will not toll the statute of limitations as to them. *Hall v. Rogers*..... 290

3. Necessary allegations to avoid the statute of limitations. *Reed v. Barnes* 414
4. The statute of limitations runs against married women during coverture since the enactment of the married woman's act. *Watkins v. Adamson* 715
5. Plea of statute of limitations *held* without merit. *Abrahams v. Studebaker Corporation* 721
6. The statute of limitations does not run on a debt due a corporation from its manager, while the manager conceals the debt. *Farmers Cooperative Mercantile Co. v. Shultz* 801

Master and Servant.

1. Duty of employer to employee, stated. *Hansen v. Jasmer* 372
2. One who relies on a lump-sum settlement of compensation must bring himself within the statute. *Ostegaard v. Adams & Kelly Co* 393
3. To avoid a settlement and release of compensation, a party must allege and prove mistake as to material facts. *Ostegaard v. Adams & Kelly Co* 393
4. Evidence *held* to sustain recovery for injuries by explosion. *Thornton v. Davis* 529
5. "Seasonal" refers to occupations ordinarily performed only in certain seasons. *Lincoln Gas & Electric Light Co. v. Watkins* 619
6. Compensation is based on wages received at time of accident. *Lincoln Gas & Electric Light Co. v. Watkins* 619
7. A mother wholly dependent on her son is entitled to two-thirds of his wages for 350 weeks, not exceeding $15 a week. *Lincoln Gas & Electric Light Co. v. Watkins* 619
8. Costs of accidents are charged to the industry. *Lincoln Gas & Electric Light Co. v. Watkins* 619
9. Counsel for compensation claimant *held* entitled to attorney's fees on appeal. *Lincoln Gas & Electric Light Co. v. Watkins* 619
10. Loss of use of leg *held* compensable as for loss of leg. *Schroeder v. Holt County* 736

Mechanics' Liens.

1. Evidence *held* insufficient to sustain decree establishing a mechanic's lien for materials furnished a tenant. *Frost, Curyea & Murtey v. Ronne* 655
2. Immaterial errors will not defeat lien. *Rivett Lumber & Coal Co. v. Linder* 567
3. Lien is confined to material used in structure covered by contract. *Rivett Lumber & Coal Co. v. Linder* 567

4. Materials must be furnished under one contract. *Rivett Lumber & Coal Co. v. Linder* 567
5. Items not furnished will not invalidate the lien, if due credit is given therefor. *Rivett Lumber & Coal Co. v. Linder* 567

Monopolies.

Cooperative wheat growers association *held* not an unlawful combination in restraint of trade. *Nebraska Wheat Growers Ass'n v. Norquest* 731

Mortgages.

1. Mortgages on land in which the mortgagor has a vested interest under a will *held* valid and subject to foreclosure on condition broken. *Howells State Bank v. Pont* 181
2. A purchaser who assumes a mortgage is liable therefor, though no name appears in the deed as grantee. *Nebraska Wesleyan University v. Smith* 208
3. Appointment of receiver rests in the sound discretion of the court. *Lackey v. Yekel* 382
4. When foreclosure of a mortgage and appointment of a receiver are sought in one petition, and defendant joins issue therewith, no other notice or application is required. *Lackey v. Yekel* 382
5. Taking stay of sale is a waiver of errors in appointment of a receiver as in granting foreclosure. *Lackey v. Yekel* .. 382
6. A pledge of a real estate mortgage without the note is void. *Linn v. Dodge County Bank* 446
7. Evidence *held* to show consideration for notes and mortgage. *Praest v. Quesner* 485
8. Where denied, plaintiff must prove that no action at law has been instituted to recover the debt. *Quesner v. Novotny* 827

Municipal Corporations.

1. An abutting owner may enjoin obstruction to light, air, and view. *World Realty Co. v. City of Omaha* 396
2. A metropolitan city may issue bonds for parkways, when authorized by vote of the electors. *Rasp v. City of Omaha* 463
3. A majority of votes cast on proposition to issue bonds for parkways is sufficient. *Rasp v. City of Omaha* 463
4. An instruction to the canvassing officer, in an ordinance submitting a bond proposition, to certify the bonds as carried if 60 per cent. of the votes are in the affirmative will be treated as surplusage. *Rasp v. City of Omaha* 463

Negligence.

1. Evidence as to negligence at a crossing *held* properly sub-

mitted to the jury, and sufficient to support the verdict. *Hall v. Union P. R. Co.* 9
2. Negligence is a question for the jury. *Muir v. Omaha & C. B. Street R. Co.* 243
3. Comparative negligence rule, stated. *Stanley v. Chicago, R. I. & P. R. Co.* 280
4. Evidence *held* insufficient to sustain judgment for negligence at crossing. *Stanley v. Chicago, R. I. & P. R. Co.* 280
5. Question of negligence is for the jury. *Dougherty v. Omaha & C. B. Street R. Co.* 356
6. Where one is placed by another's negligence in a position of reasonably apprehended peril, and is injured in a reasonable attempt to escape, the negligent person is liable. *Hanford v. Omaha & C. B. Street R. Co.* 423
7. Plaintiff may not prove acts of negligence not pleaded. *Scharf v. Frontier County* 688
8. Overruling of motion for leave to amend petition to conform to proof of negligence not pleaded *held* within the discretion of the trial court. *Scharf v. Frontier County* 688

New Trial.

1. A juror who unofficially visits the *locus in quo* and reaches a conclusion as to material facts disqualifies himself. *Kelley v. Adams County* 377
2. Where a juror does not disclose knowledge of material facts on his *voir dire* and the complaining party could not have discovered it, ordinarily a new trial should be granted. *Kelley v. Adams County* 377
3. When new trial granted for failure to disclose material facts on *voir dire*. *Kelley v. Adams County* 377
4. A verdict for nominal damages *held* erroneous. *Meier v. Bridgeport Irrigation District* 344
5. When new trial for newly discovered evidence not granted. *Mauer v. State* 418

Nuisances.

A private person seeking to restrain a public nuisance must show special injury. *World Realty Co. v. City of Omaha* 396

Officers.

A criminal charge for usurpation of an office that does not exist cannot be sustained, nor can one be convicted of usurpation of any office without proof that his usurpation is wilful. *Grebe v. State* 327

Parent and Child.

1. A court will award custody of an infant for best interests of the child. *Steward v. Elliott* 421

2. Parents have a right of action for deprivation of custody of a minor son, although the son sought the employment. *Tavlinsky v. Ringling Bros. Circus* 632
3. Where parents retain wages of their minor son wrongfully employed by another, with knowledge of the material facts, they waive their right to sue for deprivation of his custody. *Tavlinsky v. Ringling Bros. Circus* 632
4. Refusal of an instruction as to ratification of employment of minor child *held* reversible error. *Tavlinsky v. Ringling Bros. Circus* 632

Partition.

In a partition suit, the district court has jurisdiction to construe a will determining the rights of the parties. *Krause v. Krause* 22

Partnership.

1. A petition in a suit against a partner to recover net profits on isolated transactions is generally demurrable if it fails to show dissolution of the firm or final settlement of accounts or a purpose to wind up the partnership affairs. *Sanley v. Davies* 614
2. On a controverted issue as to the existence of an oral profit-sharing agreement, the speech and conduct of the parties may prove or disprove intention to form a partnership. *Sanley v. Davies* 614
3. Evidence of profit-sharing in real estate transactions does not necessarily prove a partnership. *Sanley v. Davies* 614
4. Convincing evidence is required to prove a partnership, where alleged partners are the only litigants. *Sanley v. Davies* 614
5. Evidence *held* insufficient to prove an oral partnership agreement for general purpose of buying and reselling real estate. *Sanley v. Davies* 614

Payment.

The burden of proving plea of payment rests on him who pleads it. *Farmers Cooperative Mercantile Co. v. Shultz* .. 801

Pleading.

1. Allegations of petition and proof must agree. *Scovel v. Isham* 238
2. Petition *held* to state a cause of action only against maker of notes in suit. *First Bank of Ulysses v. Warren* 361
3. Amendment offered at close of testimony, changing cause of action, *held* properly refused. *Marodolac v. Uhe* 450
4. When an action commenced in an inferior court is, by agreement of parties, dismissed without prejudice, plain-

tiff may sue in the district court without regard to the issues pleaded in the inferior court. *Yoho-Venner Motor Co. v. Anderson Motor Co.* ... 514
5. Reply *held* to negative allegation in petition of wrongful enticement, inducement, and pursuasion of son to leave plaintiffs' custody. *Tavlinsky v. Ringling Bros. Circus*.... 632
6. Plaintiff may not plead a cause of action *quantum meruit* and, over objection, prove a cause of action based on express contract. *United States Rubber Co. v. Grigsby*.... 695
7. A general denial yields to admissions. *Carson v. Hunt*.... 727

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In absence of special authority, a pledgee cannot sell commercial paper. *Linn v. Dodge County Bank*.... 446

Principal and Agent.

1. A principal is liable for the torts of his agent, only when committed in the course of the principal's business and within the scope of the agency. *Division No. 1, Railway Employees v. American State Bank*.... 196
2. Where a principal, with full knowledge of the facts, accepts and retains the consideration for an agent's contract, proof of agent's authority is not required. *Stanton Nat. Bank v. Swallow*.... 336

Principal and Surety.

Where the liabilities of sureties in a judgment are equal, the judgment creditor can collect from any of the judgment debtors. *Peterson v. Kinney*.... 214

Process.

1. A sheriff's return on a summons can be impeached only by clear and convincing evidence. *Ault v. Stewart*.... 47
2. Action in county of indorser of note who is not liable will not authorize issuance of summons to another county. *Adams v. Guthrie & Co.*.... 192
3. A summons cannot be lawfully issued to another county, unless there is a joint demand against the nonresident defendant. *First Bank of Ulysses v. Warren*.... 361
4. Where a suit to quiet title is properly begun in any county, process may issue to any other county to bring in parties in interest. *McCrea v. Day*.... 538

Railroads. SEE CARRIERS. STREET RAILWAYS.

1. Negligence in failing to look for a train at a railroad crossing is ordinarily a question for the jury. *Hall v. Union P. R. Co.*.... 9

2. Duty of person approaching crossing, stated. *Stanley v. Chicago, R. I. & P. R. Co.* ... 280
3. A right of way through the public domain is subject to the police power of the state. *Lindemann v. St. Joseph & G. I. R. Co.* ... 284
4. Automobile driver *held* barred from recovery by his negligence. *Tyson v. Missouri P. R. Corporation* ... 504
5. A breach of rules for government of railroad employees is not evidence of negligence in action by third person. *Lawson v. Union P. R. Co.* ... 745

Rape.
1. Chastity *held* a question for the jury. *Marchand v. State* ... 87
2. Previous voluntary intercourse with accused held a defense. *Marchand v. State* ... 87
3. Evidence *held* to sustain conviction. *Hubka v. State* ... 856
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Reference. SEE TRIAL, 4.

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The obtaining of judgment and return of execution unsatisfied are conditions precedent to an action on a replevin bond. *Allen v. Lowe* ... 443

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1. Sec. 2464, Comp. St. 1922, *held* not to include a mortgage. *General Motors Acceptance Corporation v. Hupfer* ... 228
2. A purchaser of warranted machinery continuing to use it after a full test *held* to have accepted it. *Skinner Mfg. Co. v. Carrier Engineering Corporation* ... 365
3. A purchaser of warranted machinery who accepts it is liable for its value, in absence of agreement as to price. *Skinner Mfg. Co. v. Carrier Engineering Corporation* ... 365
4. A purchaser, induced by fraud or false representations to accept property other than that covered by his contract, may rescind without showing pecuniary damage. *Howells State Bank v. Hekrdle* ... 561
5. Evidence as to false representations *held* insufficient to sustain verdict for defendant. *Bloom & Co. v. Lewis* ... 739

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A warrant for search of premises at "any time" authorizes a search at night. *Heese v. Plantz* ... 17

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1. Testimony as to principal fact may be corroborated by circumstantial evidence of other witnesses. *Abbott v. State* 517
2. Evidence *held* not to affirmatively show venue. *Abbott v. State* 524

States.

1. A resident taxpayer, without showing any interest or injury peculiar to himself, may enjoin illegal expenditures by a public board or officer. *Fischer v. Marsh* 153
2. Funds covered into the state treasury which may be used in payment of claims against the state can be withdrawn only pursuant to an appropriation by the legislature. *Fischer v. Marsh* 153
3. The auditor of public accounts can issue a warrant only against an appropriation for a specific purpose, and where it is established that the warrant is for that specific purpose and that the claim is just. *Fischer v. Marsh* 153
4. Warrants drawn to pay for gasoline purchased by the state for sale to the public are unauthorized. *Fischer v. Marsh* 153
5. Territorial laws were saved on admission of state to the Union. *Lindemann v. St. Joseph & G. I. R. Co* 284
6. The state may be sued on a contract with the department of public works after a claim thereon has been presented to the auditor of public accounts and disallowed by him. *Peterson v. State* 546
7. Contracts of executive state officers in excess of authority are not binding on the state. *State v. Cochran* 846

Statute of Frauds.

An oral promise by a vendor to pay a purchase-money note transferred to an innocent holder is not within the statute of frauds, if based on a new consideration. *Stanton Nat. Bank v. Swallow* 336

Statutes.

1. An invalid statute does not subsequently become valid by removal of the cause of its invalidity without it being reenacted. *Central Nat. Bank v. Sutherland* 126
2. It will be presumed that lawmakers intended that every word used in a statute will be given its usually accepted meaning. *Lincoln Gas & Electric Light Co. v. Watkins* 619

Street Railways.

1. Liability for injury arises when the peril is discovered. *Dougherty v. Omaha & C. B. Street R. Co* 356

2. A motorman approaching a street intersection must keep a sharp lookout and have his car under control. *Hanford v. Omaha & C. B. Street R. Co.* 423
3. Question of negligence of motorman is for the jury. *Hanford v. Omaha & C. B. Street R. Co.* 423
4. The reasonableness of fright caused by street cars colliding and subsequent conduct of plaintiff *held* questions for the jury. *Hanford v. Omaha & C. B. Street R. Co.* 423

Subscriptions.

1. The assumption of an obligation by a university to keep an endowment fund intact may be implied from acceptance of a subscription thereto. *In re Estate of Griswold.* 256
2. An obligation by a university to keep an endowment fund intact and apply the income thereof to payment of salaries and expenses is a sufficient consideration for a subscription thereto. *In re Estate of Griswold.* 256

Taxation.

1. Sec. 5887, Comp. St. 1922, taxing bank stocks at a greater rate than other moneyed capital, *held* unconstitutional. *Central Nat. Bank v. Sutherland.* 126
2. Sec. 6162, Comp. St. 1922, prescribes the procedure for recovery of an inheritance tax erroneously paid. *In re Estate of Woolsey.* 218
3. On appeal from finding of board of equalization, the issues are confined to those raised before the board. *Bute v. Hamilton County.* 230
4. Shares of stock in a foreign corporation, owned by a resident of Nebraska, are taxable at their actual value. *Bute v. Hamilton County.* 230
5. Providing one mode of taxation of stock in foreign corporations, and a different one for stock in domestic corporations, is not void for lack of uniformity. *Bute v. Hamilton County.* 230
6. Taxation of capital stock of a foreign corporation at its domicile does not prevent taxation in Nebraska of shares of its stock owned and possessed by a resident of this state. *Bute v. Hamilton County.* 230
7. Where the value of shares of stock of a domestic trust company has been included in the valuation of the capital stock, such value will be deducted in determining the actual value of such stock for taxation. *Peters Trust Co. v. Douglas County.* 596
8. Double taxation is avoided wherever possible. *Peters Trust Co. v. Douglas County.* 596

9. The state cannot directly tax capital stock of a corporation owning property permanently located in another state without deducting for enhancement which the value of such property gives to the value of the stock. *Peters Trust Co. v. Douglas County* 596
10. In fixing the value of shares of stock in a domestic corporation for taxation, no deduction is permitted for bonds, warrants or other evidences of indebtedness of the state or its governmental subdivisions. *Allied Contractors, Inc., v. Board of Equalization* 627
11. Statutory provision for taxation of evidences of indebtedness of the state or governmental subdivisions *held* unconstitutional. *Allied Contractors, Inc., v. Board of Equalization* 627
12. Evidences of indebtedness of the state or its governmental subdivisions are not taxable. *Allied Contractors, Inc., v. Board of Equalization* 627
13. A laundry used in charitable institution *held* exempt from taxation. *House of the Good Shepherd v. Board of Equalization* 489
14. Laundry property *held* to be used exclusively for educational, religious and charitable purposes. *House of the Good Shepherd v. Board of Equalization* 489
15. The jurisdiction of a county board of equalization, although limited to a session of 20 days, may by adjournments continue until such time as will enable the assessor to forward a copy of the assessment to the state board of equalization on or before July 10. *Hiller v. Unitt* 612

Tenancy in Common.

Evidence *held* to show $2,298.09 due on an accounting. *Brayton v. Jackson* 40

Trial. SEE APPEAL AND ERROR. CRIMINAL LAW.

1. Instruction stating the issues *held* based on proper interpretation of the evidence. *Nissen v. Burnham* 108
2. Issues presented and necessary to determination of case should be decided either by finding by court or verdict of jury. *Nicholson v. Getchell* 248
3. Instructions must be construed as a whole. *Stephan v. Prairie Life Ins. Co* 469
4. An answering defendant held barred from participating in funds distributed by a referee. *McCrea v. Day* 538
5. Failure to instruct on issues raised by the pleadings and supported by evidence is reversible error. *Carson v. Hunt* .. 727

Trusts.

1. Precatory expressions will not create a trust unless it clearly appears that they were used in an imperative sense, and that creation of a trust was intended. *Howells State Bank v. Pont* 181
2. A promise by a trustee binds him personally, unless he stipulates to the contrary. *Stanton Nat. Bank v. Swallow* .. 336
3. Conveyance *held* to create a resulting trust in favor of creditors. *Bodie v. Robertson* 408

Vendor and Purchaser.

1. A contract to purchase land, failing to state time of payment, implies payment within a reasonable time. *Barnes v. Barker* 113
2. In foreclosure of a land contract, not stating time for payment, it is necessary to plead payment on request, made and refused, or within a reasonable time, which has elapsed. *Barnes v. Barker* 113
3. Severability of contract for two tracts of land, for purpose of performance, may be inferred from apportionment of the consideration to each tract. *Barnes v. Barker* 113
4. A purchaser under a contract for sale of land is not entitled to possession until full performance, unless the contract so provides. *Stukenholtz v. Parriott* 296
5. The possession of a tenant is that of the holder of the legal title as against a purchaser under an executory contract of purchase not giving present right of possession. *Stukenholtz v. Parriott* 296
6. The possession of a tenant, who attorned to the purchaser from the holder of the legal title, is not constructive notice to subsequent purchaser of claims of the purchaser under the first contract. *Stukenholtz v. Parriott* 296
7. Time is of the essence of a contract if so expressly provided. *McLaughlin v. Nelson* 308
8. Tender of performance is excused where tender would be refused. *McLaughlin v. Nelson* 308
9. A vendee who demands cancelation of contract for nonperformance must show compliance with its terms or tender of performance. *Sponsler v. Max* 477
10. Evidence *held* to sustain decree foreclosing land contract. *Sponsler v. Max* 477
11. Vendor in land contract taking quitclaim deed from assignee of his vendee does not assume obligations of a contract of exchange of such land between such assignee and a third person. *Scheer v. Nelson* 821
12. Legal interest *held* properly allowed on default in a cash

payment, notwithstanding deferred payments were to draw a smaller rate of interest. *Scheer v. Nelson* 821
13. A vendor holding under a contract to purchase may not charge his defaulting vendee with the expense of procuring a loan to secure a conveyance, as damages for default. *Scheer v. Nelson* 821
14. Assignee of land contract *held* properly decreed to pay purchase price to vendor succeeding to interest of vendee in the original contract. *Scheer v. Nelson* 821

Venue.

The state may be sued in the district court of the county where the capital is situated, on claims founded on contract or law. *Peterson v. State* 546

Waters.

1. Refusal to validate issue of bonds of irrigation district *held* not error. *Kinnan v. France* 99
2. A charge for stand-pipe in a private building *held* authorized. *Keystone Investment Co. v. Metropolitan Utilities District* 132
3. Charge for stand-pipe for private fire protection *held* reasonable and not discriminatory. *Keystone Investment Co. v. Metropolitan Utilities District* 132
4. Failure of an irrigation district to distribute water equitably may create a liability for damages. *Meier v. Bridgeport Irrigation District* 344

Wills.

1. A will *held* not to vest devisee with power to devise. *Krause v. Krause* 22
2. Provisions of a will must be construed together, as a devise and an attempt to devise over. *Krause v. Krause* 22
3. No particular words or conventional forms of expression are necessary to make testamentary disposition of property; the court endeavors to ascertain the testator's will. *Krause v. Krause* 22
4. The intent of the testator, and not the construction of a will, must be consistent with rules of law. *Krause v. Krause* 22
5. "Charge upon land" distinguished from a "devise of land in trust." *Howells State Bank v. Pont* 181
6. Will *held* not to create a trust, but that title vested immediately, subject to a stated charge. *Howells State Bank v. Pont* 181
7. Subscription contract to university endowment *held* not

testamentary because payment is postponed until death of maker. *In re Estate of Griswold* 256

Witnesses. SEE EVIDENCE.

1. A child six years of age, shown to be competent, may be permitted to testify. *Abbott v. State* 517
2. One having a direct legal interest in the result of the suit is an incompetent witness to conversations with testator, as against a claimant through a devisee. *Haecker v. Haecker* 587