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ELIZA N. GALE, APPELLEE, V. KRUG PARK AMUSEMENT COMPANY, APPELLANT.

FILED MARCH 3, 1926. No. 25172.

1. **Master and Servant:** INJURY TO EMPLOYEE: COMPENSATION. To warrant a recovery under our compensation act, the accident which caused the injury complained of must be one arising out of and in the course of the employment. Comp. St. 1922, sec. 3032.
2. ———: ———: ———. Such compensation act does not authorize an award in case of injury or death from a peril which is common to all mankind, to which the public in general is exposed.
3. ———: ———: ———. Record examined, and *held* not to disclose a hazard imposed upon plaintiff's husband greater than that to which the general public was exposed.
4. *Boyce v. Burleigh*, 112 Neb. 509, considered, and *held* that paragraphs 1 and 2 of the syllabus thereof should be construed together.

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

McGilton & Smith, for appellant.

Jesse L. Root and *Herman E. Kuppinger*, *contra.*

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

THOMPSON, J.

This action was instituted by Eliza N. Gale, widow of Charles S. Gale, deceased, hereinafter called plaintiff, against the Krug Park Amusement Company, a corporation, hereinafter called defendant, before the compensation commissioner, to recover compensation in the sum of $15 a week for 350 weeks, beginning on the 3d day of June, 1925, and hospital and burial expenses, together with attorney's fees. The issues were duly joined, and trial had before the commissioner, and the claim allowed and ordered paid as prayed. An appeal was taken by the defendant to the district court for Douglas county, where issues were joined

and trial had, resulting in an affirmance of the finding and judgment of the compensation commissioner. To reverse this judgment, the defendant appeals.

It is conceded by defendant that the deceased received the injuries complained of by plaintiff, and that his death resulted therefrom; and that such injuries were received during the course of his employment; and further conceded that the deceased's average earnings at the time of receiving such injuries were $44 a week. However, recovery is challenged for the reason that the injuries did not arise out of or by reason of such employment. Defendant contends that the injuries were caused solely by an act of God, and therefore non-compensable under our compensation act.

The record discloses the following facts: That the deceased, prior to the injuries complained of, was employed by defendant to paint certain buildings in the park, the latter furnishing the material and paying deceased for his labor the sum of $44 a week; that deceased entered upon his duties, and on June 3, 1925, he and another employee, who was assisting him, had finished painting a building at about 3:20 p. m. (at which time a storm was indicated by darkness and dust-laden clouds); that deceased and his helper went to and into the building in question, where the paints for their use were stored; that this building, an ordinarily substantial one of its kind, faced the south, with doors, windows, and an open porch to the south, was about 14 feet in width and from 44 to 46 feet in length, was of frame type, with L-shaped roof, the longer slant being to the south, was constructed out of shiplap one inch thick, and the studdings and rafters were mostly 2 by 4 timbers, some 2 by 6; as to the floor, some say it was one-inch material, and others say two-inch material; the roof was one-inch shiplap covered with paper; the building was set on a wood block foundation and was divided into six or seven compartments; that, as deceased and his helper were placing their paint utensils on the floor of this building, the storm, then of abnormal force and destructive violence, coming from the south, struck that part of the park and the building in

question, and threw the latter with great force, some say against a tree about 30 feet distant, others say that the building was thrown so that it rested upside down; that deceased was found in a very short time lying in a gutter some distance north and east of where the building lay, unable to get up and calling for help; that his helper was thrown some distance from him, but not so far from the building; that the two men were picked up and carried to a hospital; that deceased was found to have sustained a broken arm, internal injuries, bruises about the head and face, from which injuries he died on June 5, 1925. It is further shown by the record that this storm covered a territory about five miles in length and two miles in width, and within this territory was a strip one-fourth to one-half mile in width and about five miles in length which suffered the most damage; that in this strip of land, in area of two or three blocks, much damage was done to trees and buildings; that, within the park, trees 18 inches in diameter, perhaps a dozen or more, located close to the approach to the building, were broken off like match sticks; roofs and porches were torn away from houses; telephone and telegraph poles were broken off; chimneys thrown down; trees uprooted and others broken off; that Krug Park was in the direct path of the most violent and destructive part of the storm.

The only question for us to determine is: Did the injuries which caused the death of Mr. Gale arise out of the employment, within a liberal interpretation of our compensation act, remembering that this act provides that the injury, in order to give rise to a cause of action, must be one which not only arises in the course of the employment, but also arises out of the employment? These two propositions must be present in order that recovery may be had. In *Pierce v. Boyer-Van Kuran Lumber & Coal Co.*, 99 Neb. 321, it was held: "An employee is not entitled to compensation for injury under the employers' liability act unless the accident which caused the injury happened in the course

of his employment, and arose out of his employment." See, also, *Feda v. Cudahy Packing Co.*, 102 Neb. 110.

Boyce v. Burleigh, 112 Neb. 509, is cited by counsel for plaintiff as being contrary to this view. In this he seems to have been misled by his failure to construe the two paragraphs of the syllabus together, as they should be.

Ordinarily, an injury which occurs in the course of the employment will be one which arises out of the same. This, however, is not necessarily true. It might, as in this case, arise in the course of the employment, and yet not out of such employment. Here, the injury arose while deceased was in the line of his duties as such employee, but it would be an unwarranted conclusion to hold that it arose out of the employment. To so find would be to hold that our compensation act makes the employer an insurer against all injuries received in the course of the employment, when in fact such law limits recovery to injuries received in the course of and out of the employment.

As is well said in *Larke v. Hancock Mutual Life Ins. Co.*, 90 Conn. 303: "An injury 'arises out of' an employment when it occurs in the course of the employment and as a proximate cause of it; that is, when the injury is a natural and necessary incident or consequence of the employment. * * * The phrase points to the origin or source of the injury, and presupposes the existence of a causal connection between it and the employment."

Can it be said that a sudden violent storm, such as reflected by the evidence in this case, is one incidental to the employment, or one arising out of it? To so hold would be to reason without a premise. There was no connection, causal or otherwise, between the employment and the cause of the injury, as reflected by the evidence in this case. As said in *Urak v. Morris & Co.*, 107 Neb. 411: "There must be somewhere a dividing line, and unless we are to hold that all accidents or injuries which result during the term of employment, or hours of duty, are covered by the act, it would seem that this accident must be excluded."

The accident or incident giving rise to the injury must be

such as is peculiar to the employment, and must arise within the employment, not without and independent thereof. To conclude otherwise would lead us far afield, and beyond a liberal construction of our compensation act.

In *Socha v. Cudahy Packing Co.*, 105 Neb. 691, quoting with approval from *Hulley v. Moosbrugger*, 88 N. J. Law, 161 (wherein the following language is quoted from *McNicol's Case*, 215 Mass. 497), we said: "It arises 'out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. * * * The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

In *Socha v. Cudahy Packing Co.*, 105 Neb. 691, 695, quoting with approval from the opinion in *Dennis v. White & Co.*, L. R. App. Cas. 1917 (Eng.) 479, it is said: "Where the risk is one shared by all men, whether in or out of employment, in order to show that the accident arose out of the employment it must be established that special exposure to it is involved."

In *Larke v. Hancock Mutual Life Ins. Co.*, 90 Conn. 303, it is said: "If the employment brings with it no greater exposure to injurious results from natural causes, and neither contributes to produce these nor to aggravate their effect, as from lightning, or severe heat or cold, than those to which persons generally in that locality, whether so em-

ployed or not, are equally exposed, there is no causal connection between the employment and the injury."

It is well said in 28 R. C. L. 804, sec. 93: "The compensation act, it has been very generally held, does not authorize an award in case of injury or death from a peril which is common to all mankind, or to which the public at large is exposed. The argument seems to be that, if the workman were permitted to recover in such cases, he would enjoy privileges above those of the public generally, and in effect be insured against every sort of calamity, which is not the intention of the statute."

Thus, we conclude that injuries resulting from exposure to the elements, such as abnormal heat, cold, snow, lightning, or storms, are generally classed as risks to which the general public is exposed, and as not coming within the purview of workmen's compensation acts, unless the record discloses a hazard imposed upon the employee by reason of the employment greater than that to which the public generally is subjected.

To attempt to harmonize or to distinguish the different holdings of the different courts and text-writers would be without purpose, if not to undertake an impossibility. However, with all due respect to the holdings out of harmony with that expressed herein, to us the holding in *Larke v. Hancock Mutual Life Ins. Co., supra,* more nearly reflects the true intent of the act under consideration.

Industrial Commission v. Anderson, 69 Colo. 147, and *Central Illinois Public Service Co. v. Industrial Commission,* 291 Ill. 256, 13 A. L. R. 967, 974 and note, will be found replete with instructive analogies.

The judgment of the trial court is without evidence to sustain it, and is reversed and the action dismissed.

REVERSED AND DISMISSED.

Note—See Workmen's Compensation Acts, C. J. pp. 40 n. 95, 72 n. 69, 73 n. 80, 74 n. 86, 77 n. 96, 98, 115 n. 37.

WILLIAM MIDDAUGH, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED MARCH 19, 1926. No. 23805.

1. **Continuance:** DISCRETION. When, upon the trial of a cause, one of the parties is represented by two attorneys, a senior, or general attorney, and a junior, or local attorney, and, after a jury has been impaneled and some evidence taken, the senior, or general attorney, is prevented by sickness from further participation in the trial, an application for an adjournment of the trial because of such sickness is, under section 8831, Comp. St. 1922, directed to the sound legal discretion of the court, and unless an abuse of discretion is shown, the ruling of the court will be sustained.

2. ———: ———. On the record presented, it is *held* that, in ruling upon appellant's application for an adjournment of the trial, the court did not abuse its discretion.

3. **Railroads:** INJURY TO ANIMALS: LIABILITY. Under section 5396, Comp. St. 1922, a railroad company may be liable for injuries to domestic animals that go upon its track at a place where the company is required to build and maintain a fence along the line of its right of way, although there be no actual collision between any of its trains and the animals injured.

4. **Trial:** RULINGS. The rulings of the court on the instructions requested by appellant are *held* free from error.

5. **Constitutional Law:** STATUTE REQUIRING RAILROAD TO FENCE RIGHT OF WAY. Section 5396, Comp. St. 1922, which requires a railroad company to erect and maintain fences along its right of way, and fixes a liability for damages occasioned by its failure to comply with the statute, does not deprive such company of its property without due process of law, or deny it the equal protection of the law, so as to violate the Constitution of Nebraska, or the Fourteenth Amendment to the Constitution of the United States.

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

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

J. C. Cook and *John Gumb, Jr., contra.*

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

MORRISSEY, C. J.

Plaintiff sued defendant in the district court for Dodge county. The petition alleges that, at a point where defendant is required by statute to erect and maintain a fence along its right of way, defendant permitted its fence to become, and remain, out of repair; that a number of plaintiff's horses passed through, or over, this fence onto defendant's right of way, where they were so frightened by one of defendant's trains that they ran onto a bridge forming a part of defendant's track and were thereby injured to the damage of plaintiff in the sum of $590. The cause was tried to a jury, which returned a verdict in favor of plaintiff for $400, and from a judgment entered thereon defendant appeals.

When the cause was reached for trial, there were present to represent defendant its general attorney, and also its local attorney. Both of these attorneys participated in the impaneling of the jury. The taking of testimony proceeded for a short time, when the general attorney for defendant became ill, and was not longer able to participate in the trial. Thereupon the local attorney asked that the trial of the cause be adjourned, and filed his affidavit showing that he was only a local attorney for defendant; that, while he had assisted the general attorney in impaneling the jury, he was not informed generally in relation to the case and was not prepared to proceed with the trial. The motion for continuance was denied, and the trial proceeded.

The first assignment of error is based upon the refusal of the court to continue the trial of the cause.

By statute, section 8831, Comp. St. 1922, it is provided that the court may grant or refuse an application for an adjournment of a trial, "and no reversal of such cause or proceeding by the supreme court shall be had on account of the action of the court in granting or refusing such ap-

plication, except when there has been an abuse of a sound legal discretion therein by the lower court."

Did the trial court fail to exercise a sound legal discretion? The questions to be tried were neither new to the jurisprudence of this state nor difficult of presentation. The trial court was fully acquainted with the character of the cause to be tried and with the skill of defendant's local attorney, who had practiced for many years at that bar. The record presented to this court is in good form. The small amount of the recovery shows that the rights of defendant were not prejudiced by the ruling of the court. The court did not abuse its discretion.

In subdivision two of the argument, appellant alleges that the court erred in failing to direct the jury to return a verdict in favor of defendant. This assignment is based upon the contention that the injury to plaintiff's horses did not arise within the terms of section 5396, Comp. St. 1922, which provides generally that a railroad company shall erect and maintain fences along the sides of its right of way sufficient to prevent cattle, horses, etc., from getting upon the right of way, and that upon failure so to do it shall be liable for "all damages which shall be done by the agents, engines or trains of any such corporation, or by the locomotives, engines or trains of any other corporations permitted and running over or upon their said railroad, to any cattle, horses, sheep or hogs thereon." The first point sought to be made under this assignment is based upon the contention of defendant that plaintiff's horses were not injured in such a manner as to fall within the statute, that is to say, without any act on the part of any agent of defendant, and without having come in collision with any train upon defendant's tracks, the horses were entrapped upon a bridge, or trestle, and thereby suffered the injuries for which recovery is sought in this action. On the other hand, plaintiff contends that the horses were frightened by defendant's locomotive and train of cars and ran upon the trestle. There is evidence in the record to support each theory. The jury, by its verdict, resolved this question in

favor of plaintiff. The rights of the parties under such a state of facts was before this court in *Chicago, B. & Q. R. Co. v. Cox,* 51 Neb. 479, and it was there expressly held that the railroad company was liable.

Defendant requested the court to give two instructions, the effect of which, if given, would have been to tell the jury that the adjoining landowner has no right, without the permission of the railroad company, to use the right of way fence as a party fence, and that, if plaintiff was using the right of way fence as a party fence without the permission of the railroad company, he could not complain of the defective condition of the right of way fence; and that, where the adjoining landowner uses the right of way fence of a railroad company as a party fence, with or without the consent of the railroad company, it is as much the duty of the landowner to keep the right of way fence in repair as it is the duty of the railroad company, etc. The court refused to give the requested instructions. This ruling is assigned as error.

It is argued in the brief that sections 2417-2431, inclusive, Comp. St. 1922, deal with the erection and maintenance of line or party fences, and that under these provisions of the statute the respective parties were equally bound to share in the cost of maintenance.

Without indicating that it is in any way material, it may be said, in passing, that appellant's brief fails to cite the evidence, if any there be, to show that plaintiff used the right of way fence as a party fence, or that intersecting fences attached to or became a part thereof.

In connection with this assignment, counsel assert that, if section 5396, Comp. St. 1922, be construed so as to require a railroad company to erect and maintain, at its own expense, a fence for the use of adjoining landowners, it is unconstitutional, because it works a taking of private property for private use without just compensation. We cannot accede to appellant's view of the law. A statute which requires a railroad company to erect and maintain fences along the sides of its right of way, and fixes a liability

upon it for damages occasioned by its failure to comply with the statute, does not deprive such company of its property without due process of law, or deny it the equal protection of the law, so as to violate the Constitution of Nebraska, or the Fourteenth Amendment to the Constitution of the United States. 12 C. J. 1245, sec. 1026, and 1268, sec. 1072; *Missouri P. R. Co. v. Humes*, 115 U. S. 512; *Missouri P. R. Co. v. Harrelson*, 44 Kan. 253.

All disputed questions of fact were properly submitted to the jury. The evidence is sufficient to sustain its verdict, and the judgment is

AFFIRMED.

S. P. GAINSFORTH, APPELLANT, V. S. C. PETERSON, APPELLEE.

FILED MARCH 19, 1926. No. 24878.

Appeal: FINAL ORDER. A final order of a county court in a proper proceeding to set aside a fraudulent judgment rendered therein at a former term is reviewable by appeal to the district court.

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

Beeler, Crosby & Baskins, for appellant.

Hoagland & Carr, contra.

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

ROSE, J.

This is a proceeding commenced by petition and service of summons in the county court for Keith county to set aside a judgment therein after expiration of the term at which it was rendered. The action in which the assailed judgment was recovered was a term case beyond the jurisdiction of a justice of the peace and within the concurrent jurisdiction of the county court and the district court. The county court refused to vacate its judgment. An appeal

to the district court was dismissed on the ground that a proceeding in error was the sole method of review. The case was brought to the supreme court by appeal from the district court.

The original action in the county court was begun by S. C. Peterson to recover from S. P. Gainsforth a balance of $210.41 on the purchase price of 105.18 tons of hay. The answer to the petition contained the plea that Gainsforth received only 97.68 tons, a part of which was of an inferior grade and three stacks of which were filled with weeds, resulting in damages of $120—the basis of a counterclaim. After expiration of more than three terms of the county court, the case was set for hearing April 15, 1921. On that date Gainsforth did not appear, and judgment was rendered against him for $222.06, including interest.

In the county court the present proceeding was instituted by Gainsforth June 30, 1922, to vacate the judgment at a subsequent term under statutory authority. Comp. St. 1922, secs. 9160-9168. Fraud in setting the original case for trial, in failing to give notice of the hearing, and in procuring the judgment without an opportunity for a defense, the nature of which is shown, seems to be pleaded in the petition as a ground for relief. Is the order of the county court, refusing to set aside its judgment, reviewable by appeal in the district court? Gainsforth argues the affirmative, and Peterson takes the position that a review is limited to a proceeding in error, and that the right of appeal from the county court in a case of this kind does not exist because it has not been expressly conferred by statute.

Under the Constitution and statutes of Nebraska, county courts are courts of record, and "have concurrent jurisdiction with the district court in all civil cases in any sum not exceeding one thousand dollars," with a number of exceptions not applicable to the present controversy. Const., art. V, sec. 16; Comp. St. 1922, sec. 1128. At a subsequent term a district court has statutory power to set aside its own judgment on grounds enumerated by the legislature. Comp. St. 1922, sec. 9160. This power applies to the county

court in term cases. Comp. St. 1922, sec. 9168; *Oakdale Heat & Light Co. v. Seymour,* 78 Neb. 47, 50; *In re Estate of Kelly,* 103 Neb. 513, 524. Statutory provisions for setting aside a judgment at a subsequent term of the district court are concurrent with independent equity jurisdiction. *Munro v. Callahan,* 55 Neb. 75; *Van Every v. Sanders,* 69 Neb. 509; *Abbott v. Johnston,* 93 Neb. 726; *Kulhanek v. Kulhanek,* 106 Neb. 595; *Krause v. Long,* 109 Neb. 846. With the exceptions of enumerated limitations, the Constitution does not prevent the legislature from conferring upon the county court equity jurisdiction. Power thus conferred upon the county court is not limited to probate matters, and may include functions formerly within the exclusive jurisdiction of courts of chancery. *Wilson v. Coburn,* 35 Neb. 530; *Glade v. White,* 42 Neb. 336; *Oakdale Heat & Light Co. v. Seymour,* 78 Neb. 47, 50. Final orders of the district courts in suits in equity and in other civil actions are reviewable by appeal. Comp. St. 1922, secs. 9137-9141; *Williams v. Miles,* 73 Neb. 193. In the district court an order vacating a judgment rendered at a former term is appealable. *Wunrath v. Peoples Furniture & Carpet Co.,* 98 Neb. 342. In a civil action under the chapter of the statutes relating to county courts, either party may appeal from the judgment "in the same manner as provided by law in cases tried and determined by justices of the peace." Comp. St. 1922, sec. 1160.

It has often been held that county courts have equity jurisdiction incidental to powers properly conferred by statute. After the term, the vacation of a judgment procured by fraud requires an exercise of chancery power. In district courts the chancery power to vacate a fraudulent judgment at a subsequent term came from a self-executing provision of the Constitution, as well as from a legislative enactment. Considered from either source, the authority of a district court to set aside a judgment of its own after expiration of the term at which it was rendered is an attribute of equity. The nature of this power was not changed when conferred by statute, as it was, upon county

courts. It still remains equitable in its nature, and is invoked in the county court by a formal petition and service of a summons, the whole being equivalent to a suit in equity or a civil action for the purposes of a trial and a reveiw of the resulting judgment. In either aspect appeal is a proper method of review, as distinguished from the right of review by a proceeding in error. It follows that the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

JOHN H. SMITH V. STATE OF NEBRASKA.

FILED MARCH 19, 1926. No. 25034.

1. **Criminal Law:** EVIDENCE OF ANOTHER CRIME. "The general rule is that evidence of the participation by an accused person in the commission of a crime, other than that for which he is placed on trial, cannot ordinarily be admitted in evidence against him. But the rule has its exceptions which are as well established as the rule itself, and may be applied in a given case, not to establish the other crime but as confirmatory of the evidence tending to show the commission by defendant of the crime for which he is being tried." *Welter v. State*, 112 Neb. 22.
2. ———: PROOF. QUESTION FOR JURY. Whether proof of the unlawful conversion of goods by defendant, for which he was not informed against, tended to prove the unlawful conversion of goods, which he was charged with having converted, is a question of fact for the jury. *Welter v. State*, 112 Neb. 22.
3. **Embezzlement:** AFFIRMANCE. Upon examination of the record, we conclude that the verdict is supported by the evidence.

ERROR to the district court for Douglas county: CHARLES A. GOSS, JUDGE. *Affirmed.*

D. H. Oliver, for plaintiff in error.

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

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

DEAN, J.

John H. Smith, defendant, obtained a diamond ring and a gold watch, of the alleged aggregate value of $115, from the J. J. Dreyer Company, an Omaha firm which dealt in jewelry. Upon complaint, by the firm, the county attorney filed an information wherein defendant was charged with having "feloniously converted" the property "to his own use with an intent to steal the same." The jury found defendant guilty, whereupon the court sentenced him to serve a term of 18 months in the penitentiary. Defendant has appealed.

The action was brought under section 9631, Comp. St. 1922, which provides:

"If any bailee of any money, bank bill or note, goods or chattels shall convert the same to his or her own use, with an intent to steal the same, he shall be deemed guilty of larceny in the same manner as if the original taking had been felonious; and on conviction therefor, shall be punished accordingly."

Defendant obtained the property under a written agreement wherein, among other things, the property was "valued at $115," for which he agreed to "pay the rent of $12.50 in advance for the first month and the weekly rent of $2.50 in advance on Wend. of each wk. thereafter or return said property in good order."

Whether the written instrument between the parties, and the facts, constituted defendant a bailee of the property, as the state contends, or whether it was a conditional sale, as defendant contends, is one of the main questions here.

A signed confession is before us, which was given by defendant to a policeman, which defendant contends is incompetent. In this confession, which seems to have been voluntary, defendant stated that he gave Dreyer "a bad check for $12.50," as an initial payment. In fact, he never made any payment to Dreyer. However, on the same day that defendant obtained the property, he pawned it and obtained $35 thereon from the pawnbroker.

Defendant also stated in his confession that, a few weeks

before the Dreyer transaction was consummated, he obtained a watch and ring from another dealer, valued at "about $110," on which he paid $27.50 and turned in "an old watch" and chain valued at $15 therefor. This ring he pawned for $25 at one pawnshop and the watch for $11 at another pawnshop, giving the name of "Frank Ingram" to the pawnbroker to whom he pawned the watch, instead of his own name. Evidence of the two other like transactions appear in the record, in addition to those noted above, which need not be here discussed. The evidence, in its entirety, doubtless convinced the jury that, from the inception of the transaction with Dreyer, defendant was possessed of an "intent to steal" the property. We cannot agree with counsel's argument that the verdict is not supported by competent evidence. The issuance by defendant of the worthless check, and the giving of an anonymous name to one of the dealers, when considered with all of the evidence, was sufficient to convince the jury that defendant had embarked on a career of thievery and that he unlawfully converted the Dreyer property to his own use. In an early case we said:

"In a prosecution for the statutory crime of larceny by a bailee the gravamen of the charge is the felonious conversion, and the intent may be shown to have been entertained as of the time of the reception of the possession of the property or to have arisen during the continuance of such possession." *Davis v. State,* 54 Neb. 177.

It is elementary that a voluntary confession of a defendant is competent evidence in a criminal case. In *Cohoe v. State,* 82 Neb. 744, it was held that such confession, with even slight corroborating circumstances, may be sufficient to establish the *corpus delicti.* In the *Cohoe* case it was also held that, in a prosecution for the crime of larceny of money by a bailee, evidence that the accused obtained other sums of money in like manner and about the same time, and the disposition he made of such money, may be received, as tending to show guilty knowledge and intent. Clearly,

the case at bar comes within the meaning of the above citations.

In *Welter v. State,* 112 Neb. 22, the same principle is discussed, and reference is there had to decisions which support the view expressed in this opinion. The following are among the cases there cited: *Jones v. United States,* 179 Fed. 584, is a case in which the court held:

"On the trial of a defendant for conspiracy to defraud the United States of public lands, evidence that he had previously been engaged in the illegal acquisition of public lands elsewhere by a different method was admissible as bearing upon the questions of intent, purpose, and design." *People v. Mead,* 50 Mich. 228; *Frazier v. State,* 135 Ind. 38; *State v. Franke,* 159 Mo. 535; *People v. Moeller,* 260 Ill. 375; *State v. Valwell,* 66 Vt. 558; *Moore v. United States,* 150 U. S. 57.

It is important to note, too, that by the terms of the contract herein defendant had an option to make the payments, as therein designated, "or return said property in good order." In Williston, Sales (2d ed.) sec. 336, it is pointed out that an instrument of this character is not a conditional sale contract, where it contains a provision that the contract can be terminated "at any time by returning the property."

The following case, which has been cited many times with approval, sustains the contention of the state. And it announces a wholesome rule of law which seems, with peculiar fitness, to apply to the facts before us:

"Where by the contract the vendee receives a chattel which he is to keep for a certain period, and if in that time he pays for it the stipulated price, he is to become the owner, but if he do not pay the price, he is to pay for its use, the vendee receives it as a bailee, and the right of property is not changed until the price is paid." *Rose v. Story,* 1 Pa. St. 190.

Substantially the same rule was restated by the same court in this language:

"Where by a contract the vendee receives a chattel to

keep for a certain time, and to become the owner of it then, if he has paid the stipulated price, but if otherwise to pay for its use, the vendee receives it as bailee, and the property is not changed till the price is paid." *Enlow v. Klein,* 79 Pa. St. 488.

It will be noted that the present case comes within the rule announced in the *Rose* and *Enlow* cases, in that the agreement here provided, in effect, for payment for the use of the property, unless returned.

Defendant's argument that the confession is incompetent is based largely on the fact that it relates to the commission of other crimes which defendant says he committed, and that the court therefore erred in permitting it to go to the jury. The objection is not well founded. The law is well settled, in federal and state courts, that while evidence of the participation by an accused person in the commission of a crime, other than that for which he is placed on trial, cannot ordinarily be admitted in evidence against him, the rule, nevertheless, has its exceptions, which are as well established as the rule itself, and may be applied in a given case, not to establish the other crime, but as confirmatory of the evidence tending to show the commission by defendant of the crime for which he is being tried. On this proposition the Minnesota court said:

"Evidence disclosing a general system practiced by defendant of stealing or receiving stolen automobiles and so disfiguring them as to render identification by the owner difficult or impossible, and then disposing of them on the market, is admissible in corroboration of the inference of guilt arising from the possession and control by him of a recently stolen automobile which, while so in his possession, had been subjected to the systematic treatment given other stolen cars." *State v. Monroe,* 142 Minn. 394.

It fairly appears from his confession that defendant, when he obtained goods from one pawnshop, promptly, and perhaps on the same day, pawned and obtained money on the same goods at some other pawnshop. And, besides giving a check to Dreyer, on a bank where he had no funds,

he gave a fictitious name to one of the pawnbrokers with whom he dealt. The facts here, as disclosed by defendant's confession, and the record generally, were properly submitted to the jury. There is no reasonable doubt that, under the facts and the law, defendant was a bailee of the goods in question.

Defendant testified in his own behalf, and, just before the case was closed, he was asked if there was anything in his written statement that was not true. He answered: "No, sir; not as I know of." There is nothing in the record which tends to show that coercion was used in obtaining the confession. On the contrary, it seems clearly to appear that the confession was voluntarily made. It may be noted that the court, to further safeguard defendant's rights, instructed the jury that, "in weighing the testimony of police officers, greater care should be used than in weighing the testimony of ordinary witnesses because of the natural and unavoidable tendency of police officers to procure and remember with partiality such evidence as would be against defendant."

Defendant has presented additional assignments of alleged error, including objections to certain instructions, which we think are not well taken and do not find it necessary to discuss.

We conclude that the facts and the law sustain the contention of the state and the verdict of the jury as well. The court did not err in refusing to sustain defendant's motion for a new trial. The judgment is right, and it must be, and hereby is, in all things

AFFIRMED.

ROBERT H. PARKER, APPELLEE, V. HAROLD P. SUTTON ET AL., APPELLANTS.

FILED MARCH 19, 1926. No. 23435.

Evidence examined, and *held* to support the judgment of the district court.

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

John F. Cordeal and *Frank M. Colfer,* for appellants.

Bernard McNeny and *Scott & Scott, contra.*

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

DAY, J.

Robert H. Parker, plaintiff, brought this action against Harold P. Sutton to foreclose a mechanic's lien. The plaintiff claimed a balance due of $2,923.38 for work done and materials furnished under two written contracts supplemented by verbal contracts for the construction and remodeling of a building upon premises owned by defendant.

The principal controversy arises over a large number of extras furnished in the construction of the building and involves an accounting between the parties. The defendant denied that there was anything due the plaintiff and filed a cross-petition in which he claimed damages for breach of the contract between himself and the plaintiff in the sum of $6,500. Defendant asked that the National Surety Company, which was the plaintiff's bondsman, be made a party to the action and it was accordingly brought in. The trial resulted in favor of the plaintiff for $707.22 with interest, which totaled $752.18. From this judgment defendant has appealed.

It appears that the plaintiff and defendant entered into a written contract by which the plaintiff was to furnish certain materials and perform the labor in the construction of a building for the defendant for the sum of $3,682.50. Later a second written contract was entered into between the parties by which the plaintiff was to furnish the materials and perform the necessary labor in the construction of the second story to the building for $1,250. During the progress of the work numerous additions were made to the

plans which were not provided for in the contract. These extras form the basis of the present action.

Before the trial commenced the plaintiff asked that the cause be heard before a jury, which was granted. During the trial it was stipulated between the parties that the defendant had paid on account of the contract $6,250.20. In answer to the special interrogatories propounded to the jury they found there was due the plaintiff for extras not included in the original contracts $2,544.92. The jury also found that the defendant had been damaged in the sum of $520 by reason of the breach of contract as set forth in the cross-petition. In a tabulated form the statement would be as follows:

Amount due plaintiff as per written contract	$4,932.50
Extras furnished as found by jury	2,544.92
Total	$7,477.42
Paid as stipulated	6,250.20
Balance due plaintiff	1,227.22
Less damages sustained by defendant	520.00
Net balance due plaintiff	707.22
Interest thereon	44.96
Amount of judgment	$ 752.18

In making out his case the plaintiff testified, in reference to the 61 items which made up the extras claimed to have been furnished by him in the performance of the work, that they were furnished in accordance with the verbal directions given by the defendant and that the amount charged was just and reasonable for the service performed. Some of the extra items were admitted by the defendant. If the plaintiff's testimony is to be entirely believed it would sustain his bill for extras of $2,923.38 in full. It will be observed, however, that the jury found the value of the extras to be $2,544.92, thus reducing plaintiff's claim $378.46. The defendant has attacked a large number of

items in the bill for extras as being exorbitant, and especially the items of extras furnished in constructing a room known as the "accessory room."

The plaintiff's charges in connection with this room amount to $782.40 and from the testimony appears to be an excessive charge. The condition of the record is such that it is impossible to determine whether the deduction made by the jury was on account of excessive charges in the items relating to the "accessory room" or whether the deduction was on account of excessive charges on other items which were also attacked.

The trial court adopted the findings of the jury as its own and rendered judgment accordingly. While there is a dispute as to the reasonable value of the extras furnished, and in some instances the plaintiff's bill appears to have been padded, yet upon a review of the entire record we think the evidence supports the judgment of the trial court and we are not disposed to disturb it. The defendant complains of the action of the court in calling a jury and submitting certain questions of fact for their determination. The power of the court in an equity case to submit questions of fact to a jury cannot be disputed. *Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 580; *Alter v. Bank of Stockham*, 53 Neb. 223; *Lewis v. North*, 62 Neb. 552. In such cases the findings of the jury are advisory only, and where the court adopts the findings as its own no error can be predicated upon the action of the court, in submitting an issue of fact to a jury. *Welch v. Tippery*, 66 Neb. 604.

Upon a *de novo* examination, we are satisfied with the judgment of the trial court, and it is

AFFIRMED.

HENRY C. KLECKNER, APPELLEE, V. OPHELIA BARNES ET AL., APPELLANTS.

FILED MARCH 19, 1926. No.23870.

Evidence examined, and *held* to support the judgment of the district court.

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

Wymer Dressler and *Ernest F. Armstrong,* for appellants.

R. F. Neal and *Kelligar & Ferneau, contra.*

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

DAY, J.

Henry C. Kleckner brought this action against Ophelia Barnes and her husband to foreclose a mortgage for $4,000, dated March 12, 1919, upon 40 acres of land belonging to Ophelia Barnes. The answer of the defendants admitted that they executed a document which they believed was a mortgage upon the land in question, but denied that they ever received the sum of $4,000 from the plaintiff, or any other sum, and that there was no consideration for the mortgage.

By way of cross-petition the defendants sought to cancel the cloud upon the title of the land by reason of the mortgage, and also to recover the sum of $240, one year's interest, paid to the plaintiff thereon. The trial resulted in a decree in favor of the plaintiff. Defendants appeal.

The only question presented by the record is whether there was any consideration for the giving of the mortgage. The evidence shows that a number of persons living in the vicinity of Howe, Nebraska, became interested in developing an oil speculation in Wyoming. Among the enthusiastic promoters of the project were Wilton Barnes, a son of the defendants, and John T. Cox, cashier of the Bank of Howe. Wilton Barnes was instrumental in inducing his mother to borrow $4,000 on her farm and join with the others in the enterprise. The scheme contemplated that the different interested parties should contribute such sums as they desired in the joint enterprise of developing an oil well; that a corporation should be organized, known as the "Howe Oil

& Gas Company," and that when organized the different persons contributing to the enterprise should receive stock in the corporation to the amount contributed by them. The general idea of the scheme was reduced to writing and signed by the parties participating therein, including the defendant Ophelia Barnes. Meanwhile the interested parties were doing their developing under the name of the "Howe Oil & Gas Company."

The plaintiff took no part personally in negotiating the loan, but authorized John T. Cox to make it, and also authorized him to pay the money out of the plaintiff's account. It is the contention of the defendant Ophelia Barnes that she never received the $4,000, or any part thereof. On this issue Cox testified on behalf of the plaintiff. He testified that Mrs. Barnes directed him to credit the amount of the loan to the Howe Oil & Gas Company, which he did, and the same was paid out from time to time in the development of the enterprise. Mrs. Barnes denied that she ever gave such instructions to Cox. She testified that her purpose in borrowing the money was to invest it in the Howe Oil & Gas Company enterprise; that she intended that her sons, Delbert and Barton, should have an interest of $1,000 each and she have $2,000 interest. It appears that she and her two sons above named signed the trustees' agreement indicating their interest in the proportion subscribed by each and that certificates of interest were issued to them. It also appears that the original certificates of interest were stolen from the bank, and that on August 8, 1921, Ophelia Barnes and her two sons made a request that duplicate certificates be issued to them. The defendant Ophelia Barnes on March 12, 1920, paid one year's interest on the loan.

If Cox paid the amount of the loan to a third party under the direction of Mrs. Barnes, it would be equivalent to a payment of that amount to her. While there is a dispute upon this issue, the circumstances seem to corroborate the testimony of Cox. It is hardly probable that she would be claiming an interest in the project a year and a half after making the mortgage, and that she would pay one year's

interest on the loan, unless she considered that the amount of the loan had been paid to her.

Upon a *de novo* consideration of the case, we conclude that the judgment of the district court should be, and it is,

AFFIRMED.

ALTA CHRISTMAN, APPELLANT, V. R. HENRY CHRISTMAN, APPELLEE.

FILED MARCH 19, 1926. No. 25138.

Evidence examined, and *held* sufficient to sustain a decree of divorce.

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

Gray, Brumbaugh & McNeil, for appellant.

John P. Breen and *Palmer & Palmer, contra.*

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

DAY, J.

Alta Christman, plaintiff, brought this action against R. Henry Christman for divorce upon the ground of extreme cruelty. Defendant made no appearance.

On August 31, 1925, upon the plaintiff's testimony, supplemented by the report of the juvenile court officers, the trial court granted the plaintiff a decree of absolute divorce and approved a property settlement made between the parties by which defendant was to pay plaintiff $700 and turn over to her their household goods. The defendant complied with the terms of the decree. On October 23, 1925, without notice, the trial court vacated the decree. October 30, 1925, the case came on for further hearing. Defendant did not appear at this time, but testimony was taken in resistance of the petition by a stranger to the action as *amicus curiæ.* At the conclusion of the trial, upon consideration of the testimony, the court denied the plaintiff a

divorce and dismissed the action. From this judgment the plaintiff has appealed.

A number of interesting questions are argued in the plaintiff's brief, among them the question of the right of a third party to defend in an action of this character. It seems unnecessary to discuss these questions in the view we have taken of the merits of the case as presented by the record.

It appears that the parties were married at LaCrosse, Wisconsin, in 1912. Soon thereafter the plaintiff commenced an action for divorce upon the ground of cruelty, but upon promises of the defendant the difficulty was patched up and the action dismissed. Subsequently the parties moved to Omaha, where they resided about four years prior to the commencement of the present action. The testimony on behalf of the plaintiff tends to show that soon after the parties came to Omaha the defendant commenced a course of cruel conduct toward the plaintiff, first by way of humiliation and indifference, culminating in physical violence. Without going into an analysis of the evidence, it is sufficient to say that the proof showed a condition which was intolerable and amply sufficient to support a decree of divorce.

Mrs. Helen Joseph appeared as *amicus curiæ* and objected to the granting of a divorce. Whether a stranger, in the interest of public policy, should be permitted to defend an action of this character we do not decide. In our conclusion we have considered the testimony, in behalf of the objector, in granting the decree. The testimony of Mrs. Joseph indicates that she was very much concerned lest her son should marry the plaintiff after the latter obtained her divorce. Mrs. Joseph testified that she was a divorced woman, 52 years of age; that she made her home with her son, a young man 30 years of age; that she had exacted from her son a promise that he would never marry without her consent and permission, and that she was opposed to his marrying the plaintiff. She detailed some of her observations which tended to confirm her suspicions

that the young people were becoming much interested in each other and that a marriage might be the result. Many of the incidents which she related were denied by the plaintiff. It was not claimed that the plaintiff was guilty of any immoral conduct or that she was unworthy in any particular. One cannot read the testimony of Mrs. Joseph without becoming convinced that the main cause of her interest in this divorce action was the possibility of her losing her son and her home. She did not want a condition to arise that would make it possible for her son to marry plaintiff.

It would serve no useful purpose to review the evidence in detail. The objections of the mother to a decree of divorce, prompted no doubt by parental love, do not in our judgment show such a situation as to justify a denial of the decree of divorce.

The judgment of the district court is reversed, with directions to enter a decree in favor of the plaintiff and to preserve the settlement as provided in the original decree.

REVERSED.

WILLIAM J. GARTNER, APPELLANT, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLEE.

FILED MARCH 19, 1926. No. 23769.

Carriers: INJURY TO CARETAKER: CONTRIBUTORY NEGLIGENCE. A caretaker of live stock is, as a matter of law, guilty of such contributory negligence as to preclude a recovery for personal injuries, where it appears that he was experienced in riding on trains as a live stock caretaker; that, while riding at night in a caboose, on a drover's contract, as the train is moving out of the station, he is informed by the conductor that the next stop will be at a named station where he can look after his live stock; that soon thereafter, because of engine trouble, the train stops between stations, with the caboose resting on a bridge or trestle; that the conductor and brakeman both leave the caboose, making no announcement; that the caretaker, without inquiry of or direction from any railway employee attempts to alight from the train to look after his live stock; that at the time he has in his possession a flashlight, by the use of which he could and

would have ascertained the position of the caboose on the bridge and the danger in attempting to alight at such place; that he fails to use the flashlight, and, in attempting to alight, falls from the bridge and is injured.

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

M. F. Harrington and *Gerald F. Harrington,* for appellant.

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

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

Good, J.

This is an action for personal injuries in which defendant had judgment of dismissal on a directed verdict. Plaintiff appeals.

Plaintiff, accompanying a car of hogs as caretaker, was riding in one of defendant's freight trains. In the night season, when the train had stopped, plaintiff, assuming that the train was at a station, attempted to alight for the purpose of looking after his live stock. Because of engine trouble, the train had stopped between stations, the caboose being on a bridge over a stream. Plaintiff, in stepping from the caboose, and being unaware that it was on a bridge, fell to the bottom of the stream below and received the injuries of which he complains.

Plaintiff in his petition charged the defendant with negligence in the following respects: In not affording him a safe place in which to alight from the caboose to examine his hogs; in stopping the train, with the caboose on a bridge and over a stream, and in advising and directing plaintiff to alight from the caboose in the night season at a dangerous place, without warning him of the dangerous condition.

Defendant admitted that the plaintiff received injuries at the time alleged; denied negligence, and averred that

plaintiff was being carried on a drover's contract, which contained the following provision: "That the person in charge of the shipment shall ride and remain in the caboose while the train is in motion, or about to start, and shall not visit his stock or care for same except when train has stopped at a regular station, and that in case of injury or death of such person, resulting from his failure to observe these requirements, the carrier shall not be liable therefor, whether caused by its negligence or otherwise." Defendant further averred that whatever injuries plaintiff received were due to his own negligence and want of care. In his reply plaintiff denied any contributory negligence.

The errors assigned are that the verdict is contrary to the evidence, and that the court erred in not submitting the issues of fact to the jury for their determination.

Where the issues of negligence and contributory negligence are involved, the rule is that, where different minds may reasonably draw diverse conclusions from the facts proved, as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the jury. *Perrine v. Union Stock Yards Co.*, 81 Neb. 790; *Leon v. Chicago, B. & Q. R. Co.*, 102 Neb. 537; *Casey v. Ford Motor Co.*, 108 Neb. 352.

The facts, as disclosed by the record, are that for a number of years plaintiff, from time to time, had been accompanying shipments of live stock over railroads as a caretaker. When he sustained the injuries of which he complains, he was accompanying a shipment of hogs from Node, Wyoming, to South Omaha, Nebraska. Plaintiff testified that, as the train was moving out of O'Neill, Nebraska, at about 11 o'clock p. m., the conductor informed him that the next stop would be at Inman, where he could look after his stock; that a few minutes later the train stopped, and the conductor took his lantern, climbed on the car in front of the caboose, and went forward over the train, while the brakeman took his lantern and went out of the rear door of the caboose. The trainmen did not call or announce that a station had been reached. Plaintiff, as-

suming that the train was at Inman ,and without any announcement from the trainmen, or any inquiry of or any direction from them, attempted to alight for the purpose of inspecting his car of live stock. He did not attempt to leave the caboose until after the trainmen had departed. Because of engine trouble, the train had stopped about three miles out of O'Neill, with the caboose standing on a bridge or trestle over a stream. Plaintiff stepped from the caboose, supposing that he would alight upon the ground; instead, he fell to the bottom of the stream. At the time plaintiff attempted to alight from the train, he had in his possession a flashlight, but he did not use it. He admitted that, had he used the light, it would have disclosed that the caboose was standing upon a bridge and that it was a place of danger.

Plaintiff argues that the evidence is sufficient to sustain a finding that defendant was guilty of negligence, which caused the injury to plaintiff, and that it is insufficient to require a finding that plaintiff was guilty of such contributory negligence as to defeat a recovery. He contends that the facts in this case are so nearly like the facts in *Otto v. Chicago, B. & Q. R. Co.*, 87 Neb. 503, that the decision in that case should control our decision in the instant case.

In the *Otto* case, plaintiff, a caretaker, became ill while accompanying a shipment of stock, and it became necessary for him to leave the train to relieve his distressed condition. He informed the conductor of his condition, who told him that they would reach the next station, Nodaway, in about 15 minutes, and that the train would stop there long enough for him to attend to his necessities. About 15 minutes later the train stopped. Plaintiff inquired if the stop was Nodaway and was answered in the affirmative. The brakeman left the rear of the caboose with his lantern, and plaintiff followed shortly afterwards. It appeared that the train had stopped some distance out of Nodaway, with the caboose resting on a bridge or trestle over a river. Plaintiff, holding the handrail, let himself down to what he supposed was the ground or roadbed, then

took a step in the direction of the light from the brakeman's lantern, and was precipitated to the bed of the stream and thereby injured. It was held that the evidence warranted the finding of negligence on the part of the railroad company, and that the facts did not disclose contributory negligence.

We think the facts in the instant case are quite dissimilar. In the *Otto* case, the plaintiff was informed that the train was at the station, and the trainmen knew, or, in the exercise of ordinary care, should have known, that it was not at the station, but was at a place dangerous to alight. Under the circumstances, it was the duty of the trainmen to warn plaintiff of the danger. Defendant, impliedly at least, invited him to alight at the particular place and invited him into a position of danger. In the instant case, when the train stopped plaintiff made no inquiry, but assumed that it had reached the station of Inman. He was not inexperienced in traveling upon freight trains, and he must have known what every person of ordinary intelligence who travels on railway trains does know, viz., that frequently trains are required to stop between stations, sometimes on account of engine trouble; because a railway track may be obstructed or out of repair; at railroad crossings; because live stock or vehicles may be upon a crossing, and for various other reasons. Had plaintiff, when the train stopped, inquired of the conductor or brakeman if the train was at the station of Inman, and had been informed that it was, then there would have been an implied invitation for him to alight, but such is not the case. The trainmen made no announcement that the train had reached Inman, but when the train stopped the conductor and brakeman both left the caboose. Shortly thereafter plaintiff attempted to alight. The trainmen, therefore, had no knowledge of his going, or attempting to go, into a place of danger. In the *Otto* case, there was nothing to disclose that plaintiff had the means in his possession of seeing where he was going, while in the instant case plaintiff had a flashlight, and, had he used it, the dangerous con-

dition would have been obvious. Upon his initiative, plaintiff left the train in the dark, with the means in his possession to disclose if the place where he was about to alight was dangerous, but disregarding the fact that it was dark, and disregarding the means in his possession to light the way before him, he incurred the injuries of which he complains.

The rule of comparative negligence obtains in this state. Under that rule, if plaintiff is guilty of contributory negligence, it will defeat a recovery, unless the negligence of defendant is gross and that of the plaintiff slight in comparison therewith. Under the facts disclosed, we think it is apparent and beyond question that plaintiff was guilty of contributory negligence, and that the record does not show that the negligence of the defendant was gross, or that of the plaintiff was slight in comparison.

As we view the record, a verdict for defendant was properly directed, and the judgment of the district court is therefore

AFFIRMED.

MORRISSEY, C. J., dissenting.

Believing that the question of the comparative negligence, if any, of the respective parties should have been submitted to the jury, I dissent from the majority opinion.

EBERLY, J., concurs in the dissent.

NAT R. SIMMONS, APPELLEE, V. FARMERS UNION COOPERATIVE ASSOCIATION OF BRADSHAW, DEFENDANT; C. MCCARTHY ET AL., INTERVENERS, APPELLANTS.

FILED MARCH 19, 1926. No. 23776.

1. **Corporations**: CONTRACTS ULTRA VIRES: ESTOPPEL: RECOVERY QUANTUM MERUIT. A corporation that has received the benefits of a strictly *ultra vires* contract is not estopped to set up that defense when sued upon such contract. But, as a general rule, a recovery may be had against the corporation on *quantum meruit* where benefits are received and retained by the corporation under an *ultra vires* contract.
2. ———: ———: RECOVERY. In such case, the action is not

maintained upon the unlawful contract nor according to its terms, but upon an implied contract of the corporation to return, or, failing so to do, to make compensation for, property or money which it has no right to retain.

APPEAL from the district court for York county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Thomas, Vail & Stoner, for appellants.

C. E. Sandall and *W. L. Kirkpatrick, contra.*

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

GOOD, J.

Plaintiff, as assignee of certain of the directors of the defendant corporation, brought this action against the corporation to recover the sum of $29,595.98, which was alleged to be owing plaintiff by reason of his assignors having executed and paid certain accommodation promissory notes for the corporation. The defendant corporation defaulted in answer, and certain of its stockholders intervened and denied liability of the corporation, on the ground that the indebtedness sued upon was incurred in excess of the statutory and charter limit of two-thirds of the paid-up capital stock of the corporation, and that, as to such excess, the indebtedness was *ultra vires* of the corporation. A trial to the court without the intervention of a jury resulted in a judgment for plaintiff in the full amount sued for. The interveners have appealed.

Defendant corporation was organized in June, 1915, under the laws of this state, with an authorized capital of $20,000, of which only $11,600 was issued. Pursuant to the requirements of section 462, Comp. St. 1922, the articles of incorporation fixed the highest amount of indebtedness or liability, to which the corporation should at any time be subject, at a sum not in excess of two-thirds of the paid-up capital stock. The corporation purchased a grain elevator and operated the elevator, a coal yard, lumber yard and an

agricultural implement business. Its capital was insufficient to carry on the several lines of business in which it engaged. The directors of the corporation, in order to raise money for it, executed their individual promissory notes to several banks. The proceeds of these loans were placed to the credit of the corporation and used by it in the transaction of its business. In 1920 the amount of these accommodation notes of the directors aggregated $69,500. At this time there was some dissatisfaction among the stockholders with the management of the corporation, and a new board of directors was elected. The old directors declined to surrender the management until they were relieved from liability upon their accommodation notes. Thereupon, the new directors executed promissory notes to the several banks for the aggregate sum of $69,500, and with these notes paid and discharged the accommodation notes of the old directors.

In 1921 it became apparent that the corporation was insolvent and was unable to meet its obligations and carry on its business. A committee of the stockholders was appointed to sell the tangible assets of the corporation and discharge its liabilities, to the extent of the proceeds arising from the sale. The committee performed this duty, and, after applying all of the proceeds to the payment of liabilities, there still remained due upon the accommodation notes, signed by the new directors, the sum of $29,595.98. These accommodation notes were paid by the directors, and they assigned their claims against the corporation to the plaintiff, who brought action against the corporation to recover the amount. The money advanced upon the accommodation notes of the directors went into the treasury of the corporation and was used by it in the transaction of its business.

It is evident that plaintiff, as assignee of the directors, who had been compelled to pay these accommodation notes, is entitled to be reimbursed by the corporation, unless the fact that the indebtedness incurred in excess of two-thirds of the paid-up capital stock of the corporation relieves the

latter of liability. The amount that was paid to the directors from the sale of the corporate assets exceeded in amount two-thirds of the paid-up capital stock, so that all that remained unpaid is in excess of the amount of indebtedness that the corporation was authorized to incur.

As a general rule, the defense of *ultra vires* is available to a corporation when sued upon an executory contract which it had no authority to make. In many of the jurisdictions the rule obtains that, where a contract, *ultra vires* of a corporation, has been fully executed on one side, and the corporation has received and retained the benefits of the illegal contract, it will be estopped from urging the defense of *ultra vires*. The more logical view, however, is that a corporation that has received the benefits of a strictly *ultra vires* contract is not estopped to set up that defense when sued upon such contract, but the rule is generally recognized that a recovery may be had at least upon *quantum meruit* for the benefits received by a corporation under an *ultra vires* contract. A corporation may not, in violation of its charter, enter into a contract, whereby it receives and retains the benefits of its illegal contract, and then shield itself from liability for benefits received by pleading *ultra vires* as a defense. *Healy, Owen-Hartzell Co. v. Montevideo Farmers & Merchants Elevator Co.*, 206 N. W. (Minn.), 646.

In many of the decisions of the courts of this country the view is taken that a recovery directly upon an *ultra vires* contract should be denied, but the courts adopting this view have generally striven to do justice between the parties, so far as could be done, consistent with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation made therefor. In such cases, the action is not maintained upon the unlawful contract nor according to its terms, but upon an implied contract of the corporation to return, or, failing so to do, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but

to disaffirm, the unlawful contract. A recovery on *quantum meruit* for benefits received under the contract is allowed. 7 R. C. L. 678, sec. 680, 679, sec. 681.

The precise question, so far as we are aware, has not been heretofore decided by this court, but in *Bank of College View v. Nelson,* 106 Neb. 129, a contract, entered into by a bank to loan money in excess of that permitted by the statutes, was held enforceable, and the bank, for a breach of the contract, was held liable in damages. In principle, there seems to be no distinction between that case and the one under consideration. In the instant case, the defendant, pursuant to the contract, has received, used in its business and still retains the proceeds of the loans made by its directors. Since the identical money cannot be identified and recovered, the defendant should be required to make compensation to the extent of the benefits that it received. If defendant's position is sound, then it would follow that the defendant corporation might have purchased grain from the farmers to the extent of $50,000, agreeing to pay therefor when the grain was sold and shipped. It might have thereafter shipped the grain and received the proceeds, and, if the defense of *ultra vires* were available, then it could have retained its ill-gotten gains and not have been required to respond for the benefits conferred. Such a rule is contrary to reason and justice and will not be sanctioned by the court. It may be urged that in this case the proceeds of the loan were invested in the business and lost, but the right to interpose *ultra vires* as a defense does not depend upon whether the corporation has made a provident or improvident use of the property or money which it obtained by the illegal contract. The right of recovery depends upon the receipt and retention of benefits under or by virtue of the *ultra vires* contract.

We find no reason for disturbing the judgment of the district court.

AFFIRMED.

LEWIS H. HERRMANN, APPELLANT, V. FRANLKIN ICE CREAM COMPANY, APPELLEE.

FILED MARCH 19, 1926. No. 24834.

1. **Master and Servant:** PERSONAL INJURIES: COMMON-LAW ACTION. The common-law action for personal injuries, occasioned by the negligence of the employer, remains open to all employees in this state who are not subject to the provisions of the workmen's compensation act.
2. **Courts:** ACTION FOR PERSONAL INJURIES: VENUE. An action for personal injuries is transitory in its nature and, ordinarily, may be brought wherever the defendant can be served with process. Such an action may be maintained in the courts of Nebraska on a cause of action accruing in a sister state, unless contrary to the public policy of this state, or contrary to abstract justice, good morals, or calculated to injure the state or its citizens.
3. ———: DISCRETION: ACTION BY NONRESIDENT. The courts of this state are not vested with discretion to refuse to entertain jurisdiction of a cause of action, brought by a nonresident of the state, because of such nonresidence, when the policy of the state accords the right to its own citizens to bring and maintain such action. To permit the exercise of such discretion would be contrary to the provisions of section 2, art. IV of the federal Constitution.

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

T. J. Madden, Harry R. Freeman, Claude S. Wilson and *Albert S. Johnston,* for appellant.

Reavis & Beghtol and *Wilson Overall, contra.*

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

GOOD, J.

Action by an employee to recover for personal injuries, alleged to have been caused by the negligence of his employer. Defendant is a Nebraska corporation, with its principal place of business in the city of Lincoln. It also

operates a plant in Kansas City, Missouri. Plaintiff is a resident of Missouri and sustained the injuries, of which he complains, while in the employ of defendant in its plant at Kansas City. The action was brought in Lancaster county, Nebraska, where the defendant has its principal place of business. Defendant filed objections to the jurisdiction of the court over the subject of the action, which were sustained, and the action was dismissed with prejudice to a future action in this state. Plaintiff appeals.

The objections to jurisdiction are two-fold: (1) That a common-law action for personal injuries, resulting from negligence of an employer, is prohibited by statute and contrary to the public policy of this state; (2) that Nebraska courts are vested with a discretion to entertain or decline to entertain jurisdiction of an action, brought by a nonresident, where a trial in Nebraska would put the defendant to great and unnecessary expense and inconvenience.

The basis for the first ground of objection to jurisdiction is that the state of Nebraska, by enacting its workmen's compensation law, thereby abrogated the common-law action for personal injuries to an employee arising out of, and in the course of, his employment, and has thereby limited the employee's relief to that provided for by the compensation act, and that it is contrary to the declared public policy of this state to permit such action as plaintiff has brought to be maintained in the courts of the state.

The common-law action by an employee against his employer for personal injuries, arising out of, and in the course of, his employment, though resulting from the negligence of the employer, no longer exists in this state, where the employee and the employer are subject to and governed by the workmen's compensation act. *Navracel v. Cudahy Packing Co.*, 109 Neb. 506. But this applies only to such employees as come under, and are subject to, the provisions of the compensation act. The compensation act, however, does not apply to all employees. Cer-

tain classes of employees and employers are, by the terms of the statute, expressly exempted from its operation. The act permits employers and employees to elect not to be bound by its provisions. The common-law action for personal injuries, occasioned by the negligence of the employer, therefore remains to all employees who are not subject to the provisions of the compensation act, whether exempted from its operation by statute or because of election not to be bound by its provisions. It cannot be strictly said, therefore, that the common-law action for an injury to an employee, occasioned by negligence of the master, has been abolished in this state. An action for personal injuries is transitory and, ordinarily, may be brought wherever service may be had upon the defendant. When such an action has been brought in this state on a cause of action accruing under the laws of a sister state, and jurisdiction of the defendant obtained by the service of process, it may be maintained, unless contrary to the public policy of this state, or contrary to abstract justice, good morals, or calculated to injure the state or its citizens. In such cases, the right to recover is governed by the *lex loci* and not by the *lex fori*. Under the principles of comity, the courts of one state will recognize and enforce rights arising in another state, unless recognition thereof would be contrary to the laws or public policy of the state in which such enforcement is sought. 15 C. J. 1181, sec. 655.

It appears that, at the time plaintiff sustained the injuries of which he complains, Missouri had no workmen's compensation law, and that plaintiff could have maintained in the courts of that state such an action as in the instant case. He had a right of action which was enforceable in Missouri. Such action not being contrary to the laws of our state and not being contrary to public policy or good morals, it follows that the action may properly be maintained. The identical question has been before the supreme court of Washington, in *Reynolds v. Day*, 79 Wash. 499, L. R. A. 1916A, 432. It was there held that the common-law action for an injury to an employee in another

state is not prevented by the fact that the statute of Washington has abolished actions for such injuries and has provided, instead, a system of industrial insurance. See, also, *Herrick v. Minneapolis & St. L. R. Co.*, 31 Minn. 11; *Northern P. R. Co. v. Babcock*, 154 U. S. 190; *Chicago & E. I. R. Co. v. Rouse*, 178 Ill. 132, 44 L. R. A. 410. The rule applies even though the plaintiff could not have maintained the action, had the injury occurred in the state where the action was brought. *Walsh v. New York & N. E. R. Co.*, 160 Mass. 571, 39 Am. St. 514.

Defendant cites and relies upon *Hagenbeck & Great Wallace Show Co. v. Randall*, 75 Ind. App. 417, and *American Radiator Co. v. Rogge*, 86 N. J. Law, 436, as sustaining its contention. A careful examination of the opinion in these cases discloses that they are not contrary to the views heretofore expressed in this opinion. In the Indiana case, the servant entered into a contract with the master in the state of Ohio, to work for the defendant in the various states of the Union, and in the contract of employment was a provision that all matters relating to the contract of employment or actions sounding in tort between the parties should be governed by the laws of the District of Columbia. Defendant was an Indiana corporation, and while the employee was working for the defendant in the state of Indiana he met with an accident, in which he lost his life. A dependent relative of the workman sought and obtained allowance of compensation under the workmen's compensation law of the state of Indiana. The court held that the contract, entered into in Ohio and contemplating that work should be done in the state of Indiana, was not binding and would not be enforced in the state of Indiana, contrary to the provisions of its compensation law. A similar ruling was made in the New Jersey case.

Defendant's second ground of objection is supported by an affidavit, in which it sets forth that the witnesses, by whom it would sustain its defense, were mostly employees in its Kansas City plant; that it would be impracticable to take the depositions of these witnesses, and that their pres-

ence would be needed at the trial; that to transport these witnesses to Nebraska would be a source of great expense and would also entail the shutting down of defendant's plant in Kansas City during the time of the trial; that it would cause great expense and inconvenience to the defendant to submit to a trial of plaintiff's action in the courts of Nebraska; that for these reasons the court should exercise its discretion in refusing to entertain jurisdiction. Defendant's position in this respect is sustained by *Burdick v. Freeman*, 46 Hun (N. Y.) 138, and *Arizona Commercial Mining Co. v. Iron Cap Copper Co.*, 233 Mass. 522.

Whether the courts of this state, in their discretion, may entertain or refuse to entertain jurisdiction in a transitory action, brought by a nonresident, must be determined by statutory and constitutional provisions. The decisions of other courts, save as they construe similar provisions, afford no precedent or guide in reaching a decision on the question herein involved. It is conceded that if plaintiff were a resident and citizen of Nebraska the court could not decline to entertain jurisdiction. Plaintiff is a resident, and presumably a citizen, of the state of Missouri. Section 2, art. IV of the federal Constitution, provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." In applying and construing this constitutional provision, the United States supreme court, in *Chambers v. Baltimore & O. R. Co.*, 207 U. S. 142, said:

"But, subject to the restrictions of the federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different states may have different policies, and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords

to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land." In the course of the opinion (p. 148) it is said: "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend on the comity between the states, but is granted and protected by the federal Constitution."

In *Corfield v. Coryell,* 4 Wash. C. C. 371, the court held that among the particular privileges and immunities that are deemed fundamental in the constitutional provision, above referred to, is the right to institute and maintain actions of any kind in the courts of this state.

Speaking of the same constitutional provision, in *Slaughter-House Cases,* 16 Wall. (U. S.) 36, 77, the court said: "Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their existence, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

In *Cole v. Cunningham,* 133 U. S. 107, 113, it is said: "The intention of section 2 of article IV (Fed. Const.) was to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances, and this includes the right to institute actions."

In *Blake v. McClung,* 172 U. S. 239, 256, it is said: "A state cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people."

We are not unmindful of the fact that in *Morrison v. Illinois C. R. Co.*, 101 Neb. 49, this court, in speaking of the right of a nonresident to maintain a transitory action in the courts of this state, held that the trial court, in the exercise of sound judicial discretion, had jurisdiction to hear and determine the action. In that case, however, the contention was being made that the court, in the exercise of its discretion, should have declined to entertain jurisdiction, and the holding was clearly intended to mean that the court did not abuse its discretion. It was not, in fact, held that it was a matter of discretion, though that inference might be drawn from the language used.

If the legislature of the state could not deny to a nonresident the right to bring and maintain an action in the courts of this state, when such right is given to its citizens to maintain a like action, certainly it does not lie within the power of the court, in the exercise of a discretion, to deny such a right. Section 1084, Comp. St. 1922, provides: "The district courts shall have and exercise general, original and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided."

There is no provision of our statute denying a nonresident of Nebraska the right to maintain an action in the courts of this state. The statute above quoted does not purport to vest any discretion in the court, and even if it did so we have no doubt that it would be invalid, as contravening the above-quoted provision of the federal Constitution. The statute is mandatory that the district court shall exercise jurisdiction and it is not in its power to discriminate between residents and non-residents.

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

REVERSED.

CITY OF HASTINGS, APPELLANT, V. WILLIAM SAUNDERS, APPELLEE.

FILED MARCH 19, 1926. No. 24968.

1. **Master and Servant:** EMPLOYERS' LIABILITY ACT: TIME FOR FILING CLAIM: LATENT INJURY. Where an employee is accidentally injured, and such injury is latent and of a progressive nature, and subsequently culminates in a compensatory disability, a claim for such injury under our employers' liability act may be filed with the compensation commissioner at any time within one year after the culmination thereof.
2. **Evidence** examined, and *held* sufficient to sustain the judgment of the trial court.

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

Charles E. Bruckman, Paul E. Boslaugh and *Edmund P. Nuss,* for appellant.

Tibbets, Dungan & Tibbets, contra.

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

THOMPSON, J.

In this action William Saunders, an employee of the city of Hastings at the date of the accident here involved, seeks to recover under our compensation act for total permanent disability. The district court for Adams county found in his favor, from which judgment the city appeals, challenging recovery on two grounds: That claimant did not lodge his claim with the compensation commissioner within one year after the accident; and that settlement of all damages was had between the parties and full payment made long prior to such filing with the commissioner.

As we view the record, the employment is admitted, and also that the accident arose out of and in the course of the same; that the disability caused thereby is total and of a permanent nature. We further find that the injuries suffered by the claimant were, as to a part thereof, of such a

character as not to be easily detected; that they were of a progressive nature, slow in their development, and did not fully culminate until within about eleven months before the claim was lodged with the compensation commissioner; that the city, as well as the insurance company indemnifying it, and the claimant, at all times recognized that compensation was due the claimant by reason of the accident; and the city and such insurance company so dealt with the claimant up until about five months before the lodgment of this claim.

Considering the above facts, together with others reflected by the record, to hold with the city that this claim was barred by reason of not having been filed with the commissioner within a year from the date of the accident would be a denial of justice, and would be to give the act a strict rather than a liberal construction, as the act provides, and as we have held, should be done. As we view the situation here presented, the law as applied to the facts in the cases of *Selders v. Cornhusker Oil Co.*, 111 Neb. 300, and *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609, is controlling in the case now under consideration, and the conclusion of the trial court that the claim was not barred is right.

The contention on the part of the city that settlement was had under, and in accordance with, the compensation act stands denied by the claimant, and resisted on the ground of fraud and mistake. On the issue thus raised, conflicting evidence was introduced, and was of such a nature as would warrant the court in finding for or against such contention. However, as the court under these conditions found in favor of the claimant, this finding will be followed in this court unless clearly wrong (*Anderson v. Kiene*, 103 Neb. 773), which latter is not so found by us.

The judgment of the trial court is, in all things,

AFFIRMED.

LUDLOW KING, ADMINISTRATOR, APPELLEE, V. DOUGLAS COUNTY, APPELLANT.

FILED MARCH 19, 1926. No. 23727.

1. **Highways:** MAINTENANCE: LIABILITY OF COUNTY. Where the proper authorities engage in grading or paving a highway which the county is liable to keep in repair, and do not close the same, but permit the continuance of public travel thereon, or on parts of said highway not under construction, or not occupied by the improvements in the course of construction, and damages accrue in consequence of the insufficiency or want of repair of the portion of the public highway over which the continuance of such travel is permitted, the person sustaining the same may recover in a proper case against the county.
2. ———: PRESUMPTION. The presence of a well-traveled track, obviously in recent use, situated within the confines of a regularly established rural highway, and connecting with a public highway open to travel, with no barriers thereto, and no warning signs thereon, constitutes a continuing invitation to the traveling public to use the same, and justifies the assumption that those chargeable with its maintenance have performed their duties, and that the portion of the highway occupied by such traveled tracks is reasonably safe for the accommodation of the public.
3. ———: MAINTENANCE: CARE REQUIRED. Where the boundary of a public highway, and also the traveled portion thereof, are within two feet of the perpendicular banks of a ditch, the bed of which is fifteen feet below the traveled track of said road, ordinary care requires the erection and maintenance of a barrier.
4. ———: INJURY TO TRAVELER: LIABILITY OF COUNTY. Where injury results to a traveler upon a highway, caused by the combined effect of the county's negligence and another cause, over which the party injured has no control, and for which he is not responsible, and which the county has not in any manner occasioned, but which, the county's negligence not concurring, would not have resulted in the injury suffered, the county is liable for the injury thereby inflicted.

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

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

Baker & Ready, contra.

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

EBERLY, J.

Action to recover damages for the death of his intestate by Ludlow King, as administrator of the estate of Emma Nancy King, deceased, against the county of Douglas and Allied Contractors, Inc., for failure to properly construct and maintain a public highway extending east from Elkhorn, Nebraska, and also for failure to establish and maintain suitable barriers and warnings thereon. On the trial in the district court for Douglas county, Nebraska, there was an instructed verdict for Allied Contractors; plaintiff had verdict and judgment against Douglas county, and the defendant county has appealed.

The record discloses that the road in question is a section of the Lincoln highway, then and theretofore one of the principal thoroughfares of the state, established and in general use for many years. During the year 1920 that portion of the highway on which the accident occurred was graded, and a roadway 18 feet in width on the southerly side of that highway was paved. During the construction and before completion of this improvement the accident occurred.

The scene of the accident may be roughly described as a somewhat irregular triangle formed by the north line of the Lincoln highway pavement, the north boundary of the then traveled portion of that highway, and the north and south public road which intersects the Lincoln highway near Elkhorn. The base at the line of this intersection may be taken as 75 feet; the perpendicular and hypotenuse extending eastward from the base unite at a point approximately 775 feet from the base line. A ditch situated north of the Lincoln highway, at a point approximately 600 feet east of the base, makes a bend to the southward and its banks, for a short distance at the point of its nearest approach, are vertical and some 15 feet in height roughly parallel to and within 2 feet of the traveled track forming

the north boundary of the triangle described, and within 15 feet of the paving thereon. Westward from the point of nearest approach the course of this creek or ditch is screened by trees, bushes, and weeds. At the time of the accident no barriers guarded the banks of this ditch at or west of the place of the accident. At this place also the excavated earth deposited on the north side of the pavement on the Lincoln highway caused a sharp incline sloping from the pavement to the north. The traveled track at the time of the accident passed over and across this incline. The evidence as to the sharpness of the incline varies somewhat; some witnesses testifying that the south wheel track at this point was ten inches higher than the north wheel track, and other witnesses estimating the difference in height at two feet. At all events the fact must be admitted that trucks, autos, wagons, and other conveyances made common use of the passageway as a public road during the paving of the Lincoln highway, and that all points embraced within the triangle herein described were within the confines of the traveled portions of the Lincoln highway.

About 4:30 p. m. in October, 1920, deceased, driving a Ford touring car *en route* from Aurora, Nebraska, to Omaha, Nebraska, approached the intersection of the Lincoln highway and the public road from the north. The contractors were just finishing the pavement at the point of junction between the two roads. On inquiry she was advised by the employees of the contractors to proceed by the traveled dirt road forming the hypotenuse of the triangle described. As she entered it presented the appearance of a well-traveled highway. There were several tracks well traveled which merged into a single track 600 feet ahead of her. There were no signs or barriers to warn her that the road was closed or dangerous. There is no evidence of what transpired at the time of the accident or immediately prior thereto. A short time later the automobile, with its rear end slued around to the eastward, was found in the ditch opposite the point of its nearest approach to the highway. Mrs. Ludlow King, the driver, was killed,

and the children were too young to tell the story of the accident.

On the roadway above and slightly to the west of where the automobile lay in the ditch, it appeared, according to some witnesses, that the dirt had been scooped or scraped outward from the south track of the traveled way toward and to the brink of the ditch. This would indicate a lateral movement of the automobile, and in connection with the position of the Ford in the ditch below, and in consideration of the other evidence of the case, would justify the jury in the conclusion that during the occurrence of the accident there had been a skidding of the rear wheels toward and into the ditch.

While it may be said that the real cause of the skidding may never be known, yet it is patent from the evidence that, whatever the cause of the accident was, it was beyond the power of the driver to control. Mrs. King was an entire stranger to the vicinity, making her first trip over this highway. Even aside and apart from the direction given her by the employees of the contractors to proceed by the dirt highway, the entrance thereto being unobstructed by barrier or sign, presenting the appearance of a generally traveled public highway in present use, and being within the confines of a long-established road, she had a right to assume that it was reasonably safe for the accommodation of the public at large. *City of Central City v. Marquis*, 75 Neb. 233. The evidence in the record is that she was a careful driver, and that the automobile had been overhauled that very day and was in good condition.

There were no eye-witnesses. There is no substantial evidence of want of care of the deceased preceding or during the accident. Thus, the record as an entirety is not such as would necessarily impose on the jury the duty, as a matter of law, to find that the deceased, at the time of the accident, was guilty of negligence in any degree. Contributory negligence is an affirmative defense, pleaded and tendered by the defendant county. The form of the defense imposed on this defendant is the burden of proof. *Rapp v. Sarpy*

County, 71 Neb. 382; *O'Brien Co. v. Omaha Water Co.*, 83 Neb. 71.

It follows that the verdict of the jury in this case, in so far as it necessarily determines the issue of contributory negligence, is supported by the evidence.

There were no barriers at the point where the automobile left the roadway and was precipitated into the ditch. The unguarded banks of the ditch at this place were 15 feet in depth and within less than 2 feet of the traveled track, which there passed over an incline sloping from the pavement on the right to the brink of the ditch on the left.

The duty of the county to maintain its highway in a reasonably safe condition for travel by persons using the same in a reasonably prudent manner is not discharged by keeping the traveled portions thereof free from obstructions and defects, but requires that ordinary care be used to protect such persons from the dangerous places near such traveled portions thereof outside of it, and so long as any portion of the traveled highway may be fairly said to be within a zone of danger it must be deemed insufficient, within the language of our statute, whether the primary cause of the danger be within the highway or outside thereof. The insufficiency of highways is to be determined from effects of causes, and not by the location of the same.

In view of the evidence, it may fairly be said that the brink of the ditch with its steep banks within two feet of the traveled track of the public highway at this point created a condition which imposed upon the county authorities the duty to provide barriers of sufficient strength to have made said road reasonably safe for travel by the usual modes, including automobile. The automobile involved in the present case was a Ford touring car, a comparatively light machine with ordinary power. It would seem that the striking power of this machine moving laterally, or moving, in fact, straight ahead, on consideration of the condition of the roads at this point, would not be beyond the power of any reasonably constructed barrier to resist. Indeed, one of the real questions underlying the case, which

the jury in this case determined by verdict in favor of plaintiff, was whether a barrier sufficient for travel generally would have restrained this automobile and prevented the accident. Such a barrier the county authorities were required to erect and maintain if travel was to be permitted. Their failures so to do rendered the county responsible for the resulting insufficiency of the highway and liable for the damage occasioned thereby.

But the further question remains. The evidence plainly discloses that probably the dangerous condition of the highway at the point of the accident might not have been the sole cause thereof; that another cause in addition to the insufficiency of the road concurred to produce the results. This may be granted. The evidence, however, fully sustains the conclusion that, whatever the cause or causes contributing, in addition, to the insufficiency of the road may have been, there were none of the causes for which the deceased can be held responsible. And it also appears that, but for the failure of the county to warn travelers, or close the highway, or to erect sufficient barriers, the accident would not have occurred.

The rule which the facts in the instant case invokes is that the mere fact that some other cause operates in conjunction with the negligence of the defendant to produce the injuries does not relieve the defendant from liability. The original wrong concurring with some other cause, and both operating proximately at the same time, in producing the injuries, makes it liable, whether the cause was one for which the defendant was responsible or not. *Beebe v. Scotts Bluff County,* 92 Neb. 501. See, also, *City of Indianapolis v. Moss,* 74 Ind. App. 129; *Bond v. Billerica,* 235 Mass. 119.

We deem, then, for the above and foregoing reasons, the judgment of the district court must be affirmed, and in affirming the judgment we have not overlooked the assignment of errors of appellant not discussed in this opinion, but we deem the facts and principles stated herein to be controlling.

The judgment of the district court is accordingly

AFFIRMED.

ROSE, J., dissenting.

In my opinion the evidence is insufficient to prove actionable negligence on the part of Douglas county.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE, V. CITY OF OMAHA ET AL., APPELLANTS.

FILED MARCH 19, 1926. No. 25225.

1. **Municipal Corporations:** DISCRETIONARY POWERS. "The courts will not ordinarily inquire into the motive of a city council in its exercise of a discretionary power conferred upon it by the legislature." *Enders v. Friday*, 78 Neb. 510.
2. **Highways:** RIGHT TO USE. The right to use the public highways of the state by the ordinary and usual means of transportation is common to all members of the public without distinction, and extends to those engaged in the business of carrying passengers or freight for hire by such ordinary and usual means of transportation, as well as to individuals pursuing a strictly private business, subject to the power of the state, by legislative enactment, to impose reasonable and impartial regulations upon such use, which power may be delegated by the legislature to the governing bodies of municipal corporations.
3. **Franchises.** A franchise is a special privilege conferred by government upon individuals which does not belong to the citizens of the country, generally, of common right.
4. **Municipal Corporations:** ORDINANCE REGULATING AUTOMOBILES. Ordinance No. 12696 of the city of Omaha, passed and approved June 30, 1925, examined and construed, and *held* to be regulatory in its character, and not of a class of ordinances properly described as "any ordinance or resolution granting, extending, changing, or modifying the terms and conditions of a franchise;" and that permits granted in accordance with its terms are valid.

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

John P. Breen, for appellants.

John L. Webster, contra.

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

EBERLY, J.

Upon the petition of plaintiff, a Nebraska corporation engaged in the operation of a street car system in Omaha under a franchise not exclusive by its terms, a permanent injunction was granted by the district court for Douglas county, Nebraska, inhibiting the city of Omaha and its officials from in any manner enforcing ordinance No. 12696, passed and approved June 30, 1925, and from issuing permits or licenses thereunder to any person, firm, or corporation, to operate auto-busses upon the streets of said city as common carriers. From this judgment the defendants have appealed.

Ordinance No. 12696, against which this action proceeds, defines, and regulates the use of auto-busses as common carriers of persons within the city of Omaha. It provides, among other requirements, for investigation of applicants seeking to engage in the business defined, either as proprietors of vehicles sought to be employed, or as drivers thereof; provides rules to be observed by those engaged in said employment; confines operations of licensees to routes having fixed termini; restricts charges for services to a definite sum; requires as a condition precedent to commencement of business the filing of a good and sufficient bond, conditioned for the payment of all damages sustained by any person due to negligence committed in the operation of the auto-busses licensed; prohibits under penalties any person from engaging in said business without compliance with the terms of the ordinance, including receipt from proper authorities of a written permit or license, and by its terms subjects the permit so granted to revocation by the city authorities for failure to observe the terms and conditions of the ordinance; provides that "no permit granted under this ordinance shall give the holder thereof a vested right to use any of the streets of the city, nor operate as an estoppel against the city in the event the city

should, at any time, see fit to modify or amend the provisions hereof, or entirely revoke the right to operate under such permit by modification or repeal of this ordinance."

The plaintiff contends that the city of Omaha has no inherent or statutory power to issue permits to auto-busses to operate as common carriers upon its streets; that the ordinance before us is an attempt by the city to confer upon licensees, to whom permits might be granted therefor, "a franchise;" that, assuming this power to exist, it is necessary in order to accomplish the end sought that the provisions of section 3719, Comp. St. 1922, be complied with; that this was not done, and the ordinance, in the form attempted, is wholly unauthorized by law and void; that no rights could be conferred upon the permit-holders thereunder to, in any manner, compete with the plaintiff in carrying on the business of common carriers of passengers on the public streets of Omaha; that any acts of competition by any such parties would be an impairment or infringement of the rights granted to plaintiff by the terms of the charter; and that the mayor and council can be and are lawfully, therefore, restrained from attempting to proceed under the terms of said ordinance.

It may be said in passing that the court has not overlooked the contentions of plaintiff based upon the alleged bad faith and improper motives of certain of the defendant officers. It is thought, however, that this court may not review the legislative acts of the mayor and council of the city of Omaha if the same are within its constitutional and statutory limitations. In other words, it is well settled that the motives of the city council in enacting an ordinance cannot, as a general rule, be inquired into by the courts. *Enders v. Friday*, 78 Neb. 510; *Huston v. City of Des Moines*, 176 Ia. 455; *Schoenfeld v. City of Seattle*, 265 Fed. 726; *Soon Hing v. Crowley*, 113 U. S. 703.

In the consideration of the question of the inherent or statutory powers conferred upon municipalities of the metropolitan class to accomplish the result intended, evidenced solely by the terms of the ordinance involved in this contro-

versy, our attention is challenged to the inherent nature of the right involved to which this ordinance applies. It is to be remembered that the power to create and confer a right not heretofore existing is distinct and different from permitting under proper regulation the exercise of power possessed by the citizens generally of common right. Is therefore the carriage of persons in auto-busses over the public streets of Omaha by common carriers exercised solely pursuant to grant, or is it, in the absence of legislation, the exercise of a common right? In other words, is the ordinance a grant or a regulation?

"A highway is a public way for the use of the public in general, for passage and traffic, without distinction. * * * The restrictions upon its use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement, and the inconveniences must be submitted to when they are only such as are incident to a reasonable use under impartial regulations. * * * A highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them; and if the law should preclude the adaptation of the use to the new methods, it would defeat, in greater or less degree, the purpose for which highways are established." *Macomber v. Nichols*, 34 Mich. 212. A public street is a public highway.

"The right to use the public highways of the state by the ordinary and usual means of transportation is common to all members of the public without distinction, and extends to those engaged in the business of carrying passengers or freight for hire by such ordinary and usual means of transportation, as well as to individuals pursuing a strictly private business, subject to the power of the state, by legislative enactment, to impose reasonable and impartial regulations upon such use, which power may be delegated by the legislature to the governing bodies of municipal corporations. 13 R. C. L. 251-255; *White Oak Coal Co. v. Manchester*, 109 Va. 749, 132 Am. St. Rep. 943; *Bogue v. Ben-*

nett, 156 Ind. 478, 83 Am. St. Rep. 212; *Commonwealth v. Stodder,* 2 Cush. (Mass.) 562, 48 Am. Dec. 679; *Sumner County v. Interurban Transportation Co.,* 141 Tenn. 493, 5 A. L. R. 765; *Cicero Lumber Co. v. Cicero,* 176 Ill. 9, 42 L. R. A. 696, 68 Am. St. Rep. 155." *Dent v. Oregon City,* 106 Or. 122.

It follows, therefore, that the terms of the ordinance in controversy in this action must be construed, not as a grant, but as a regulation of a right pre-existing. This conclusion disposes of plaintiff's contention that the ordinance in question is one of the class described as "any ordinance or resolution, granting, extending, changing, or modifying the terms and conditions of a franchise." Comp. St. 1922, sec. 3719.

At common law a "franchise" is a royal privilege or branch of the King's prerogative subsisting in the hands of the subject. Being, therefore, derived from the crown, they must arise from the King's grant; or in some cases to be held by prescription which, as has been frequently said, presupposes a grant. 1 Cooly's Blackstone (3d. ed.) * 37.

A somewhat earlier definition than that we find in Blackstone is: "A franchise (understood properly) is a hereditament, and a thing of interest and assignable and transferable. But a license is only *relaxatio juris,* a dispensation with the law, a privilege to a certain person to do an act with impunity. * * * When the King grants a market he creates and grants a real thing; but when he gives liberty to trade he does not create or grant a real thing, but only discharges or prevents a penalty inflictable for trading without leave."

A later author defines the term "franchise" as follows: "A franchise can be acquired only by royal grant, actual or presumed, and may be assigned by deed." Holland, Elements of Jurisprudence (8th ed.) 191.

The term has been defined by the supreme court of the United States as follows: "Franchises are special privileges conferred by government upon individuals, and which

do not belong to the citizens of the country generally, of common right." *Bank of Augusta v. Earle,* 13 Pet. (U. S.) * 519.

The conclusion follows therefore that, the ordinance in controversy, properly construed, being a regulatory enactment, and not a grant, the rights conferred cannot be denominated a franchise, nor their legality be in any manner affected by a failure to submit the same to the vote of the electors, as provided for in section 3719, Comp. St. 1922. See, also, *Ex parte Dickey,* 76 W. Va. 576; *Burgess v. Mayor and Aldermen of Brockton,* 235 Mass. 95; *Boise City Artesian H. & C. Water Co. v. Boise City,* 123 Fed. 232; *Grand Rapids, G. H. & M. R. Co. v. Stevens,* 219 Mich. 332.

Nor do we find this ordinance vulnerable to the objection that the provisions thereof are in excess of the powers now possessed by the cities of metropolitan class.

Section 8390, Comp. St. 1922, provides: "Nothing contained in the provisions of this article shall be construed to limit the power of local authorities to make, enforce and maintain any ordinances, rules or regulations, in addition to the provisions affecting motor vehicles."

Section 1, ch. 39, Laws 1925, authorizing the plaintiff to extend, add to, and supplant its street railway lines with motor-propelled busses contains the following as a proviso thereto: "Nothing in this act shall be construed to deprive any city of this state of the right and power to grant licenses issued by the proper city authorities to other auto or motor-busses, taxicabs or vehicles, to use the streets of the city in carrying passengers for hire, and to regulate such carriers as to rates, fares and service."

The city charter itself contains the following provisions: That cities governed by this act shall have the power by ordinance: "(a) To regulate the transportation of articles through the streets, and to prevent injuries to the streets from overloaded vehicles, and regulate the width of wagon tires, and tires of other vehicles; (b) to regulate the use of vehicles propelled by steam, gas, electricity, or other motive

power, operated on the streets of the city; (c) to raise revenue by levying and collecting a tax on any occupation or business within the limits of the city and regulate the same by ordinance; (d) 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."

It is plain from the foregoing that the integrity of the original grants of power to cities of metropolitan class has been maintained and has in no manner been impaired. In construing this charter, this court has announced the rule:

"A city of the metropolitan class has control of its streets, and, while it cannot prohibit the general and ordinary use for which the streets are constructed, it is within the reasonable discretion of the authorities of such city to prescribe the uses to which a street may be put and to regulate the traffic thereon." *State v. Omaha & C. B. Street R. Co.*, 100 Neb. 716.

A general construction of the terms of the charter in the light of this decision leads to the conclusion that the ordinance in question is within the powers conferred upon the mayor and council. Indeed, if this ordinance be given full force and effect, it does no more than afford to the traveler a regular and certain service between definite termini by competent and careful drivers, in vehicles properly constructed and maintained and operated under the rules established to promote safety for a definite consideration, with

the added assurance that responsibility for the results of negligence of the driver or proprietor is secured.

The enactment of this ordinance appears to be within the reasonable exercise of the powers granted by the charter involved, and to constitute merely the adoption by the proper authorities of a measure deemed by them to be "necessary for the accommodation and protection of strangers and the traveling public in person and in property." Comp. St. 1922, sec. 3489, subd. 5. So considered, the ordinance in question is valid, and the district court for Douglas county erred in enjoining the enforcement thereof, and its judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE, V. BOULEVARD TRANSIT COMPANY, APPELLANT.

FILED MARCH 19, 1926. No. 23664.

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

Smith, Schall, Howell & Sheehan, for appellant.

John L. Webster, contra.

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

EBERLY, J.

All questions of importance and major consideration presented in this case having been determined adversely to the appellee herein in *Omaha & C. B. Street R. Co. v. City of Omaha, ante,* p. 483, in pursuance to the rule announced therein, this case is reversed and dismissed.

REVERSED AND DISMISSED.

PETERS TRUST COMPANY, APPELLEE, V. ROBERT CRANMORE ET AL.: ARTHUR J. ABBOTT, APPELLANT.

FILED APRIL 9, 1926. No. 23903.

Equitable Estoppel. "To constitute an equitable estoppel, there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice." *Walker v. Ehresman*, 79 Neb. 775.

APPEAL from the district court for Garden county: P. J. BARRON, JUDGE. *Affirmed.*

Daniel F. Osgood, C. E. Sanden and *E. H. Boyd*, for appellant.

T. B. Dysart, J. P. Moore, Jr., and *T. B. Murray, contra.*

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

MORRISSEY, C. J.

Plaintiff filed a suit in the district court for Garden county to foreclose a real estate mortgage which, on the records of that county, stood as a first lien upon the lands described in the petition. The mortgage was executed March 29, 1918, by Robert Cranmore and James Cranmore, who were the owners of the real estate. Subsequent to the execution of the mortgage, the Cranmores conveyed the land, subject to plaintiff's mortgage, to Thomas J. O'Neil. And Mr. and Mrs. O'Neil, as a part of the purchase price, executed and delivered to the Cranmores a second mortgage covering the premises. Subsequently, Mr. and Mrs. O'Neil executed a mortgage, covering the same premises, but subject to the mortgages theretofore existing, in favor of Arthur J. Abbott. All conveyances were placed of record in the

order of their execution. Prior to the bringing of this suit, the note and mortgage executed and delivered by O'Neil to the Cranmores had been sold and assigned to Christopher J. Abbott, and O'Neil and wife had conveyed by deed all their interest in the real estate to Arthur J. Abbott in consideration of his canceling and surrendering up notes and mortgages which they had theretofore executed to him. In this transaction Arthur J. Abbott not only released O'Neil from further liability because of the mortgage he held against the land involved in this suit, but he likewise released and surrendered up chattel securities.

Arthur J. Abbott filed a separate answer and cross-petition in which he alleged, so far as it is necessary to set out the allegations here, that he was the owner of the last mortgage executed by O'Neil; that before accepting a deed to the land from O'Neil, and surrendering up the notes and mortgages which he then held, he employed Mr. Mann, a banker of Hyannis, Nebraska, to write plaintiffs "regarding a release of the mortgage of plaintiff upon the lands;" that Mr. Mann wrote plaintiff a letter in the following terms:

"March 13, 1923.

"Peters Trust Company, Omaha, Nebr.

"Gentlemen:

"About 5 years ago we commenced negotiations for a real estate loan from two parties by the name of Cranmore (brothers). My correspondence shows that this loan was not consummated, and as there is a mortgage on file in Garden County in your favor on this land, would you kindly look up the matter, and let me know definitely about the matter.

"If you are holding no lien against this land which did belong to the Cranmores will you sign a release of the mortgage on file providing one is forwarded to you?

"Your answer will be much appreciated.

"Yours very truly,

"J. W. Mann."

That in response to the letter written by Mr. Mann, plaintiff, through its loan supervisor, wrote the following letter:

"April 16th, 1923.

"25502—Robert Cranmore.

"Mr. J. W. Mann, Hyannis, Nebr.

"Dear Sir:

"Your favor of the 13th at hand relative to our releasing a mortgage in the above named case.

"Our files show that we drew mortgage papers here but they were canceled and the executed note and mortgage were never sent to us. We have nothing to prepare a release from. If you will send us the mortgage, which you state is recorded, we will be pleased to have the release prepared.

"Yours very truly,

"J. O. Wentworth, Loan Supervisor."

That defendant relied upon the statements contained in the letter written by plaintiff's loan supervisor, and, so relying, accepted from O'Neil a deed to the land, subject to all incumbrances of record, and released O'Neil of all debts then owing to defendant, in the sum of $12,682.21, and released all securities which defendant held which had been pledged by O'Neil for the payment of his debt; that the indebtedness due upon the second mortgage, the mortgage then held by Christopher J. Abbott, and the indebtedness due to defendant Arthur J. Abbott, constituted the full value of all the land involved in this suit; and alleged that, by reason of the facts pleaded, "the plaintiff is barred and estopped from claiming a lien upon said land against this defendant, the owner of the fee title thereof."

There was a prayer that plaintiff's mortgage be canceled and discharged of record and for general equitable relief.

All affirmative matter in the answer and cross-petition of defendant Arthur J. Abbott was traversed by plaintiff's reply, and upon the trial the court found generally in favor of plaintiff, and against defendant Arthur J. Abbott, fixed and established the mortgage of plaintiff as a first lien upon the real estate, and the mortgage of Christopher J. Abbott as a second lien, and ordered a sale of the premises in the usual way.

Defendants Cranmore and Abbott made no appearance

and decree was entered against them by default. Arthur J. Abbott has appealed.

The issue is concisely stated by appellant as follows: "Appellant contends that the court erred in holding that plaintiff, appellee, was not estopped to assert a first lien on the property in question."

Although it may not be material, a fuller understanding of the situation of the parties may be had by reciting a few of the uncontroverted facts. In 1917, Robert Cranmore and James Cranmore, being the owners of the land covered by plaintiff's mortgage, made application to plaintiff company through J. W. Mann, a banker at Hyannis, Nebraska, for a loan upon the real estate. These negotiations progressed so far that a mortgage was executed by the Cranmores in the sum of $7,800 in favor of M. D. Cameron, vice-president of plaintiff company. This mortgage was recorded in Garden county, November 15, 1917. For reasons not disclosed by the record, the notes which the mortgage was intended to secure were not delivered by the Cranmores to the mortgagee; no money was passed and, apparently by mutual agreement, the negotiations were closed by Mr. Cameron executing a release of the mortgage, which was duly filed for record January 30, 1918.

In March, 1918, the Cranmores made a new application to plaintiff company for a loan of $7,000 through a banker at Alliance, Nebraska. In due season this loan was made and forms the basis for this foreclosure proceeding. When Mr. Mann, the banker at Hyannis, wrote the letter heretofore set out, at the request of Mr. Abbott, he had no knowledge of the loan that had been made through the Alliance banker. He had in mind the negotiations which had been conducted through him in 1917. When Mr. Wentworth, plaintiff's loan supervisor, replied to the letter written by Mr. Mann, he had no knowledge of the loan made through the Alliance banker but had in mind the negotiations conducted through Mr. Mann. The serial number 25502, at the upper left corner of his letter, is the serial number relating to the mortgage originally drawn in

the name of the vice-president of the company, and later released. When the loan superintendent promised that a release of the loan would be made he had in mind the mortgage which had theretofore been recorded in the name of the vice-president of his company which had, in fact, been released. The testimony of the loan superintendent makes it clear that he did not know that the release had been recorded, and that another release was promised merely as an accommodation to the banker, or to the parties interested. It is clear that plaintiff and its agent acted throughout in good faith. There was no reasonable ground to anticipate that defendant would change his position by surrendering his securities, or otherwise, to his detriment, on the faith of any statement contained in the letter written by plaintiff's agent.

"It is an essential element of an equitable estoppel that the acts, representations, or silence relied on to create the estoppel must have been wilfully intended to lead the party setting up the estoppel to act upon them, or there must have been reasonable grounds to anticipate that he would change his position or in some way act on the faith of the conduct to his detriment." 21 C. J. 1120, sec. 124.

"To constitute an equitable estoppel, there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice." *Walker v. Ehresman,* 79 Neb. 775.

The judgment of the district court is

AFFIRMED.

ALPHA FAY TARRY ET AL., APPELLEES, V. RAY S. JOHNSTON ET AL., APPELLANTS.

FILED APRIL 9, 1926. No. 25143.

1. **Injunction:** SUIT TO RESTRAIN PHYSICIAN UNDER RESTRICTIVE AGREEMENT. A suit for an injunction to prevent a licensed physician from practicing his profession within a restricted territory in violation of his contractual obligations is one of equitable cognizance.
2. ———: PHYSICIAN'S RESTRICTIVE AGREEMENT. A licensed physician who purchases the good will and other property of a sanitarium and agrees not to practice his profession within a radius of 150 miles therefrom, if he fails to pay the purchase price and subsequently loses possession by default, may be enjoined in equity from violating his restrictive agreement, when that remedy is essential to the protection of the seller's contractual rights.
3. **Physicians and Surgeons:** EMPLOYMENT OF PHYSICIANS BY OWNER OF SANITARIUM. An owner of a sanitarium may employ physicians to practice their profession therein without subjecting himself to penalties for practicing medicine without a license.
4. **Damages:** LOSS OF GOOD WILL. In an action at law for the loss of good will, the evidence must contain sufficient data to enable the jury, with a reasonable degree of certainty and exactness, to estimate the actual damages.
5. **Injunction:** CONTRACT: BREACH: PARTIAL RELIEF. An action at law on purchase-money notes representing only portions of the consideration for the sale does not afford an adequate remedy for the purchaser's breach of the contract, where unpaid accruing net profits of a lucrative business included in the sale are also portions of the purchase price.
6. **Contracts:** VALIDITY: PROVISION FOR LIQUIDATED DAMAGES. A contract of sale providing that partial payments of the purchase price during a stipulated period of years may be retained as liquidated damages for the purchaser's breach of contract is not necessarily void.
7. ———: PHYSICIAN'S RESTRICTIVE AGREEMENT. A licensed physician who purchases the good will and other property of a sanitarium may bind himself by an agreement not to practice his profession within a radius of 150 miles therefrom, if the restriction is necessary for the protection of the seller's contractual rights and does not injure the public by restraining trade.

8. ———: ———: LIMITATION. A contract which fails to specify in direct terms the time limit of restraint on a physician's right to practice medicine in a restricted area is not for that reason void, a reasonable time being implied.

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

Burkett, Wilson, Brown & Wilson and *McKenzie, Lower & Sheehan,* for appellants.

Benjamin S. Baker and *Ralph T. Wilson, contra.*

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

ROSE, J.

This is a suit in equity to protect violated rights of plaintiffs under a contract by them to sell and by Ray S. Johnston to buy the business and property of the "Dr. E. R. Tarry Sanitarium." The answer to the petition challenged jurisdiction in equity and contained pleas that the contract was fraudulent and void. The district court rendered a decree in favor of plaintiffs. Defendants appealed.

The subject-matter of the sale was formerly the property and business of E. R. Tarry, a practicing physician in Omaha and the proprietor of a sanitarium there. He was a proctologist—a specialist in the treatment of rectal diseases. He employed a secret method of treatment and by advertisements and cures during a period of years he built up an extensive and lucrative practice with patients from many places throughout the United States. He employed as an assistant, for $150 a month, Ray S. Johnston, a physician with about a year's practice at Waterloo, a village near Omaha. This arrangement was continued for nearly a year. In 1918 Johnston's compensation was changed to 25 per cent. of the net profits of Tarry's professional business but the duties of Johnston's employment and his relationship to Tarry and to the sanitarium remained the same until Tarry died intestate March 20, 1920,

leaving as his only heirs his widow, Alpha Fay Tarry, and their infant daughter, Virginia K. Tarry. All the inheritable property of Tarry passed to his heirs under the statutes of descent. His widow was appointed guardian of the infant daughter and his estate was duly administered. After Tarry's death Johnston was retained to carry on the business of the sanitarium for three-fifths of the net profits, the other two-fifths being the share of the heirs named. There was no change in the terms of the employment of Johnston or in the management of the sanitarium until the heirs received from a third person and rejected an offer of $30,000 for their proprietory rights in the institution. June 23, 1920, the contract of sale and purchase in controversy was executed. Under it Johnston was in charge of the sanitarium and business thereof until the present suit was begun October 1, 1925.

According to the terms of the contract the property purchased by Johnston included the business of the "Dr. E. R. Tarry Sanitarium" and the use of that name; also the furniture, fixtures, surgical instruments and equipments, the advertisements, the Tarry method of treatment in the practice of proctology, the good will of the business as well as the leased location in rooms 240 and 242 on the east side of the second floor of the Bee Building in Omaha, now the Peters Trust Building.

A portion of the purchase price was $40,000, $500 payable in cash and the remainder in four equal payments due in one, two, three and four years, respectively, from date, evidenced by purchase money notes bearing annual interest at 6 per cent. In addition defendants agreed to pay 10 per cent. of the net profits for an ensuing period of five years.

Following are some of the conditions of the sale: Title to the purchased property to be retained by the sellers until performance by Johnston of his obligations; all business to be conducted in the name of the "Dr. E. R. Tarry Sanitarium," correspondence to be thus signed and no other name to be used in any of the advertisements; vouchers for

disbursements required; books of account open to the inspection of the parties to be kept; money and checks to be deposited in the Omaha National Bank; violation of the contract by Johnston obligated him not to practice medicine within a radius of 150 miles from Omaha and permitted the sellers to retain as liquidated damages payments on the purchase price. The contract also provided for the employment of Joseph Dawson at the sanitarium and prescribed his duties and obligations.

The widow and infant daughter of Tarry are plaintiffs and Johnston and Dawson are defendants.

Plaintiffs made the contract a part of the petition in equity and alleged in effect that defendants violated their contractual obligations, including those already outlined herein, absorbed for their own benefit part of the business of the sanitarium, retained a portion of plaintiffs' share of the net profits, refused to pay their second, third and fourth instalments, evidenced by their notes, and were in default in the aggregate sum of $25,000. Plaintiffs offered to surrender the unpaid notes for cancelation. The petition also contained pleas that defendants are unable to respond in damages and that plaintiffs have no adequate remedy at law. There was a prayer for equitable relief generally, for restoration of the purchased property to plaintiffs, for retention of all payments of purchase money as liquidated damages, and for an injunction to prevent Johnston from practicing medicine within a radius of 150 miles from Omaha.

In substance the principal defenses were as follows: The action was not cognizable in equity. If plaintiffs were damaged they had an adequate remedy at law. By means of a fraudulent representation by Alpha Fay Tarry that the property was worth $40,000 defendants were induced to enter into the contract. It would never have been executed in the absence of fraud inducing the sale. The provisions for the forfeiture of payments on the purchase price were not necessary agreements for the protection of plaintiffs' interests and were unenforceable. The restraints on

the right of Johnston to practice medicine were violative of public policy and were unreasonable and void. In any event plaintiffs were not entitled at the same time to liquidated damages, to a return of the property sold and to an injunction preventing Johnston from practicing his profession. The facts on which these defenses were based were pleaded in detail in the answer and were denied in the reply.

On the issues of fact and law the findings of the district court were in favor of plaintiffs. Under the decree possession and control of the sanitarium and of the business, property and interests connected therewith were restored to plaintiffs and the latter were permitted to retain the payments made on the purchase price as liquidated damages, but plaintiffs were required to surrender the unpaid notes for cancelation. Johnston is enjoined from practicing medicine or surgery within a radius of 150 miles from Omaha so long as plaintiffs or their assigns carry on the business of the sanitarium. Defendants, however, were permitted to repossess the property and rights in controversy by paying the remainder of the purchase price within 20 days from November 3, 1925, the injunction in that event to be dissolved. It is from this decree that defendants appealed.

The first question for consideration is the jurisdiction of a court of equity to grant the relief sought by plaintiffs. On this point defendants insist there is a total lack of proof that they are insolvent or that they are unable to respond in damages or that they cannot pay their notes. They argue, therefore, that the suit in equity is not maintainable. In this connection reference is made to evidence tending to show that defendants at various times paid in money items aggregating $24,724.26 on the purchase price. They take the position that a court of equity cannot properly forfeit that sum and at the same time restore the sanitarium and business to plaintiffs and enjoin Johnston from practicing his profession. This point, though ably presented, does not seem to be conclusive. Whether the case

is one of equitable cognizance depends upon the peculiar facts disclosed by the record. If the contract is valid in all its parts equity is clearly a proper remedy. The purchase price was not merely $40,000. In addition, plaintiffs were entitled to 10 per cent. of the net profits for five years from the date of the sale. This was not unreasonable in view of the earning capacity of the sanitarium with its established business, advertising and good will. The owners of hospitals and sanitariums may legally employ physicians and surgeons to perform professional services therein. Both before and after the death of Tarry, Johnston had managed, or assisted in managing, the business for a percentage of the profits. He knew and practiced Tarry's methods of treatment and was familiar with the advertising which attracted patients to the sanitarium. Defendants did not carry out their obligations in good faith. Johnston intended to practice proctology in Omaha on his own account before paying in full the consideration for his purchase. The business was not conducted wholly in the name of the sanitarium. Defendants did not pay all their notes as they matured. At the time of the trial the unpaid portion of the purchase price exceeded $25,000. Johnston transacted at least a substantial part of the business in his own name. He did not keep all the records of his transactions open to the inspection of plaintiffs. There was no attempt to take Johnston's professional life as security for the purchase price, a charge made by defendants in an earnest argument. The parties to the contract agreed that plaintiffs should retain title while obligations of Johnston remained unperformed. The agreement was reasonable and was one which could lawfully be made. The security on which plaintiffs rely is the title to the property sold. If Johnston should be permitted to retain good will and other property rights the security to that extent would be destroyed or lost. With Johnston practicing proctology contrary to his agreement, in rivalry with the established business of the sanitarium, good will and other property rights flowing from plaintiffs' title could not be fully protected. In an

action at law involving a recovery for the loss of good will the evidence must contain sufficient data to enable a jury, with a reasonable degree of certainty and exactness, to estimate the actual damages. Restoration of the property to protect plaintiffs' title and security would not be complete without a full return of good will and other property rights. An action at law on the notes would not afford a full measure of recovery. Plaintiffs' percentage of the net earnings was a substantial part of the purchase price. With the available records of the office failing to show accurately the gross earnings and disbursements of the institution, proof by plaintiffs of losses would be difficult, if not impossible. Relief, under the peculiar circumstances of the present case, required an injunction—an instrument of equity—to restore to plaintiffs possession and control of the sanitarium and to prevent the rivalry of Johnston who used his contract of purchase profitably for a five-year period and violated the obligations under which his lucrative privileges were acquired. Jurisdiction in equity to protect the security of plaintiffs was not, therefore, based on the ethics of Shylock. Besides, defendants themselves pleaded affirmatively for a cancelation of the contract on the ground of fraud and for other equitable relief and thus invoked an exercise of the judicial powers of which they now complain. The conclusion is that the trial court did not err in overruling the challenge to jurisdiction.

Complaint is also made because the district court permitted plaintiffs to retain the payments of purchase money as liquidated damages. This provision of the decree is characterized by defendants as a forfeiture abhorrent to equity, though responding to a stipulation of the parties. The case made by plaintiffs does not depend upon the forfeiture, abandonment or annulment of any part of the contract. The relief sought is based on conditions to which Johnston had agreed. Equity was sought on the terms of the written instrument after he had received pecuniary benefits under it for a period which seemed at the date of its execution to be sufficient for full performance on his part.

There are circumstances under which parties may stipulate in advance for liquidated damages in the event of nonperformance. The situation, in view of what subsequently transpired, appears to have justified the precautions taken in the present instance. In making the contract the parties naturally contemplated a situation following the sale. Plaintiffs entrusted defendants with the control of the sanitarium for a period of five years. Under the terms of the purchase the earnings of an established, profitable business were in Johnston's hands. The benefits of advertising, the good will and the other property rights of the institution were committed to his keeping. The temptation to serve himself at the expense of plaintiffs was constantly present. Under his contractual rights he met and treated privately patients who called at his office. The accounts of earnings depended on services guarded by his professional privileges as a physician and surgeon. With these and other surrounding circumstances in contemplation, the stipulation for liquidated damages does not seem to be unreasonable. The district court, however, as a condition of granting to plaintiffs equitable relief, allowed defendants to repossess the property purchased, title and all, by paying the remainder of the purchase price, thus permitting them to prevent what they now denounce as a forfeiture. On this phase of the controversy the finding on appeal is the same as that of the district court.

A further argument of defendants is based on the contention that the restriction on the right of Johnston to practice medicine within a radius of 150 miles from Omaha is not necessary for the protection of plaintiffs' rights, is violative of public policy, is an unreasonable restraint of trade and is an invasion of his privileges as a licensed physician. The good will of a professional business may be legally sold in connection with other property rights to which it is attached. In making a sale of that kind reasonable restraints on the practice of a profession may be imposed, if necessary for the protection of contractual rights. This is well established by precedent and the reasonable-

ness of such a restraint is the test of its validity. In the present case plaintiffs, for reasons already mentioned in considering other questions, were justified in imposing restraints to protect their security—the title to the property sold. On this feature of the litigation Johnston insists, nevertheless, that the area from which he was excluded in the practice of his profession was unreasonable. It is true, as stated in the argument of defendants, that a radius of 150 miles from Omaha includes a vast, populous territory, but some of Tarry's patients had come from places far beyond the boundary of the restricted area. Johnston was not excluded from practice in Nebraska or in the surrounding states. With present methods of transportation it was common knowledge that patients residing more than 150 miles from Omaha could make the trip to the sanitarium by airplane in less than two hours and by automobile in half a day. The evidence shows that other physicians in Omaha were qualified to practice the Tarry method of proctology there. Testimony that the public will suffer from the restraints imposed on Johnston is not convincing. Outside of the restricted territory the area is even more extensive and populous than that from which the decree excluded him. From the standpoint of both the public and Johnston, therefore, the restraint of which the latter complains does not seem unreasonable.

There is a further contention that the contract is void because the restriction on Johnston's right to practice his profession in the territory specified is without limit as to time. That informality does not necessarily destroy the contract. A reasonable period of restraint sufficient for the protection of plaintiffs' rights was fairly implied from the entire instrument. So long as plaintiffs or their assigns shall carry on the business of the sanitarium is the period of restraint fixed by the decree. This was a proper condition on which equitable relief was granted to plaintiffs and was not the making of a contract for the parties. Moreover, the injunction was not absolute. Defendants, by paying the remainder of the purchase price, were permitted to retake

the property without any restraint on the right of Johnston to practice his profession.

The relief granted responds to the contract. If the conclusions reached are correct, the position that plaintiffs are not entitled at the same time to the property, to the payments made, and to the injunction is untenable.

In all material respects the findings on appeal are the same as those of the district court. Owing to the delay necessarily incident to the appeal the time in which defendants may pay the remainder of the purchase price, and thus repossess the property and rights in controversy with the injunction dissolved, is extended 20 days after the mandate is delivered to the clerk of the district court. With the time for payment thus extended the judgment is

AFFIRMED.

VOLNEY CARSON EASTEP, APPELLEE, V. NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, APPELLANT.

FILED APRIL 9, 1926. No. 24895.

1. **Appeal:** FINDINGS BY COURT. After the evidence was submitted in a law action, the opposing parties each moved for a directed verdict. The motion was sustained. Thereupon the jury was discharged and the court rendered its judgment. In such case it is elementary that the findings of fact by the court are equivalent to a verdict by a jury.
2. **Insurance:** JUDGMENT. Evidence examined, and *held* that, under the insurance policy in suit, and the submitted facts, the court did not err in rendering a judgment in favor of plaintiff, in the sum of $2,000 and interest, nor did the court err in overruling plaintiff's motion to increase the amount of the judgment in the sum of $500 with interest.
3. ———: INCAPACITY. The injured, under a life and accident insurance policy, received a personal injury which fractured both bones of one of his legs in such manner that the ends of the fractured bones protruded through the flesh and the skin. Failing to secure a union of the bones, the leg was amputated about five inches below the knee, which rendered the insured incapable of "following any gainful occupation" for a period of four years. *Held*, that, in view of the facts, insured came within the terms of the policy and was entitled to recover thereon.

4. ———: ACCIDENT POLICY: CONSTRUCTION. "The several provisions contained in an accident insurance policy will be given a practical and rational construction, one consistent with reason and common fairness, and with a view to avoiding, rather than enforcing, a forfeiture, if the terms of the instrument will fairly and justly permit it." *Rathbun v. Globe Indemnity Co.*, 107 Neb. 18.

5. ———: ———: ———. "Where the language of a special provision in an accident insurance policy is susceptible of but one construction, and that construction inevitably leads to an unreasonable or absurd result and substantially defeats the object and the purpose of the entire contract, such provision will be rejected as inoperative, and, ignoring the same, the court will look to the whole instrument and gather therefrom the manifest intention and purpose of the parties and adjudicate accordingly." *Rathbun v. Globe Indemnity Co.*, 107 Neb. 18.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Sears, Horan & Shaw, E. D. Crites and *F. A. Crites*, for appellant.

Samuel L. O'Brien and *Allen G. Fisher, contra.*

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

DEAN, J.

This action was begun in Dawes county to recover five annual disability instalments, of $500 each, on a life and accident insurance policy. The action grew out of a personal injury accident which befell plaintiff in 1919, near Wilsall, Montana, where he then resided with his wife and six minor children. When the evidence was submitted plaintiff and defendant each moved for an instructed verdict. The motions were sustained. The court thereupon rendered its judgment wherein plaintiff prevailed in part only and recovered judgment for $2,000, with interest. Plaintiff filed a cross-appeal. Defendant appealed generally.

The following material facts are disclosed by the record.

Sometime in the latter half of 1919, plaintiff was violently thrown from a horse and fell with such force that his right leg was broken between the ankle and the knee and the impact was such that both broken bones protruded through the flesh and the skin. For this injury to his limb plaintiff was treated by physicians for about four years. He was a patient at several hospitals, twice at Mayo's, at Rochester, Minnesota, in an effort to save his fractured leg. The effort was fruitless and, sometime in the latter part of 1923, having found no relief, plaintiff, under professional advice, had his leg amputated about five inches below the knee. During all this several year period, pain was constantly present and an offensive discharge from the region of the broken bones was continuous.

The insurance policy contains the following provisions:

"If the insured, while less than sixty years of age, and while this policy is in full force and effect, shall become totally and permanently disabled as hereinafter provided, the company will waive the payment of future premiums and will also pay annually to the insured an income of one-tenth of the face amount of the policy, in addition to paying the face amount at death or maturity, subject to the following conditions and provisions:

"(a) The insured shall furnish due proof to the company at its home office that he has become totally and permanently disabled by bodily injury or disease, so that he is, and will be thereby permanently, continuously and wholly prevented from performing any work for compensation, gain or profit, or from following any gainful occupation, and that such disability has then existed for not less than sixty days.

"(b) Commencing with the premium due next succeeding the receipt of such proof, the company will waive payment of each premium as it thereafter becomes due; and six months after receipt of said proof the company will begin to pay an annual income of one-tenth of the face amount of the policy and continue to pay the same during such total and permanent disability until the death of the

insured or the maturity of the policy as an endowment (if carried on the accelerative endowment dividend plan), when the full amount of the policy shall be paid in accordance with its terms without deduction for any income payments or premiums waived. If there is any indebtedness on this policy the interest thereon shall be deducted from each income payment.

"(c) The company may at any time, but not more frequently than once a year, require proof of the continuance of such disability and if the insured fails to furnish such proof or if it appears that the insured is no longer wholly disabled as heretofore provided, no further premiums shall be waived and no further income shall be paid.

"(d) It is agreed that the entire and irrecoverable loss of the sight of both eyes or the severance of both entire hands or both entire feet, or of one entire hand and one entire foot, shall be considered total and permanent disability without prejudice to any other cause of disability."

Defendant devotes much the greater part of its brief to the proposition that the above quoted subdivision "d" prevents defendant from coming within the protective provisions of the policy and cites authorities in support of its argument.

But the action is not based on an injury to plaintiff's foot. When he was thrown violently from his horse to the ground, as above noted, the bones of his right leg were so broken that the fractured ends protruded through the flesh and the skin. And the result of this injury to the bones was continuous and unremitting from thence until the leg was amputated about five inches below the knee. Throughout the years the bones were scraped and treated in an effort to cause a union of the fractured parts, but without avail. In view of the proven facts will it be seriously contended that the amputation of the fractured bones of the right leg, five inches below the knee, was an amputation of the right foot? Clearly not. It was the broken bones of the right leg that caused plaintiff's incapability to labor.

Defendant cites *Buckner v. Jefferson Standard Life Ins. Co.*, 172 N. Car. 762, wherein a provision, similar to subdivision "d" herein, was considered. In the *Buckner* case, plaintiff's left hand was severed five inches above the wrist by a moving locomotive. The accident was sudden and the severance was instantaneous. Recovery was denied. The court observed: "It is unfortunate for the plaintiff, but 'it is so nominated in the bond.'" The *Buckner* case is not applicable to the facts here. *Whitton v. American Nat. Ins. Co.*, 17 Ga. App. 525, is cited. In the *Whitton* case plaintiff lost the sight of one eye while the policy provided for loss of the sight of both eyes. Recovery was therefore denied. Clearly, this citation is not in point. See *Jones v. Fidelity & Casualty Co.*, 207 N. W. (Minn.) 179; *Lobdill v. Laboring Men's Mut. Aid Ass'n*, 69 Minn. 14.

Counsel finally argues that the business of life insurance has been so developed that "each policy is a plain and simple problem in mathematics." Is it nothing more than a simple problem in mathematics? Plaintiff paid the insurer in good faith and he should not now, in his extremity, be deprived of that for which he paid. In *Rathbun v. Globe Indemnity Co.*, 107 Neb. 18, we said:

"The several provisions contained in an accident insurance policy will be given a practical and rational construction, one consistent with reason and common fairness, and with a view to avoiding, rather than enforcing, a forfeiture, if the terms of the instrument will fairly and justly permit it.

"Where the language of a special provision in an accident insurance policy is susceptible of but one construction, and that construction inevitably leads to an unreasonable or absurd result and substantially defeats the object and purpose of the entire contract, such provision will be rejected as inoperative, and, ignoring the same, the court will look to the whole instrument and gather therefrom the manifest intention and purpose of the parties and adjudicate accordingly."

The petition is based on the theory that plaintiff, by rea-

son of the injury, became totally and permanently disabled. He therefore sought to recover $500 a year for a period of five years under the terms of the policy. The judgment for $2,000 was for a four year period but the court denied recovery for the fifth year upon the theory that the plaintiff was no longer suffering a total permanent disability. Our decision must, of course, be based on a proper construction of the terms of the policy and the evidence. And it may be added that the evidence conflicts on practically every material question involved in the case.

It will be observed that the contract does not in direct terms contain provisions for the payment of any benefits for disability unless the disability is a total permanent disability. However, subdivision "d" of the policy, above quoted, fairly construed recognizes the possibility of a total disability other than those enumerated in the policy. After reciting that the loss of both eyes, hands and feet shall be regarded as total permanent disability these words are added, namely, "without prejudice to any other cause of disability." It appears that, if a person under the policy should be stricken by an incurable disease which rendered him incapable of engaging in a "gainful occupation" the company would be liable under a foregoing provision of the contract. The agreement that certain conditions would amount to a total permanent disability does not preclude other causes. This question is then presented, namely, does the loss of a leg, as in the present case, which resulted in a total disability for a period of four years, constitute a total permanent disability as contemplated by the policy. Subdivision "c" above quoted indicates that cases might arise where a person was entitled to recover under the general provisions of the policy for a limited time because it is provided in that subdivision that the company might require proof of the continuance of the disability and that if it appears that the insured is no longer wholly disabled that "no further premiums shall be waived and no further income shall be paid." It is elementary that, in the construction of a contract, the instrument must be construed as a

whole giving force and effect to all of the provisions of the contract. *Advance-Rumely Thresher Co. v. Bartzat, ante,* p. 35. The policy, when so construed, seems to support the proposition that the company was to pay one-tenth of the face of the policy annually in case of a total permanent disability, but in the event that what was once regarded as a total permanent disability should prove to be a total temporary disability the provision of the policy should be construed to render the company liable for that period only. Any other construction would eliminate the provision of subdivision "c" which is above quoted.

Each of the parties, at the close of the evidence, having moved for an instructed verdict, as hereinbefore observed, the judgment, in respect of disputed facts, under the long familiar and oft repeated rule, has the force and effect of a verdict by a jury. In the performance of his duty in the premises the court found generally that plaintiff, at the time of his bodily injury, became totally and permanently disabled, and so remained continuously and was thereby wholly prevented from doing any work for compensation, gain or profit, or from following any gainful occupation; that plaintiff furnished proof thereof to the defendant within the time required under the policy; that, commencing with the premium due next succeeding the receipt of such proof, under the terms of the policy the payment of premiums, as they thereafter became due, were waived; that six months after the receipt of the proof of loss, to wit: "On the 30th day of February, A. D. 1921, the defendant became liable for the payment of an annual income in the sum of $500, being one-tenth of the face amount of the policy, pending such total and permanent disability, but that said permanent and total disability terminated on said 15th day of April, 1924, the same being the date of the acquirement by plaintiff of his artificial limb."

Thereupon the court, as above pointed out, rendered its judgment in favor of plaintiff in the sum of $2,000 with interest. Notwithstanding the conflict in the evidence, the

judgment throughout is amply sustained thereby. The court further found and ordered that an attorney's fee of $400 should be, and it thereby was, taxed as costs against the plaintiff.

Plaintiff's motion that the court increase his recovery in the additional sum of $500 seems to us to be without substantial merit. We therefore conclude that the court did not err in denying the motion.

Reversible error has not been shown. The judgment of the district court, attorney's fee included, is therefore in all things

AFFIRMED.

IN RE ESTATE OF JOHN F. KEES.
FREDERICK D. KEES ET AL., APPELLEES, V. FRITZ D. KEES, APPELLANT.

FILED APRIL 9, 1926. No. 23958.

1. **Wills**: CONTEST: BURDEN OF PROOF. In an action to set aside a will because of improper or undue influence exerted upon the testator, the burden of proof is ordinarily upon contestant. *In re Estate of Fenstermacher*, 102 Neb. 560, followed.
2. ———: ———: DIRECTION OF VERDICT. Evidence examined, and *held* that the court did not err in peremptorily directing the jury to return a verdict sustaining the will.

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

Pemberton & O'Keefe, for appellant.

Hazlett, Jack & Laughlin and *Sackett & Brewster, contra.*

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

DAY, J.

This is an appeal from a judgment of the district court of Gage county admitting to probate the will of John Frederick Kees, who died February 2, 1923. The will was

executed November 14, 1919, and a codicil thereto dated September 21, 1920. The proponent, Frederick D. Kees, was named as executor in the will and also one of the legatees. The contestant, Fritz D. Kees, is a nephew of the testator, being a son of John Berkhardt Kees, a deceased brother of the testator.

The contestant alleged lack of mental capacity on the part of the testator to make the will and also that the will was made by reason of improper and undue influence exerted by the proponent upon the testator.

At the close of the testimony the trial court directed the jury to return a verdict sustaining the will and codicil and, upon this being done, entered judgment accordingly. It is earnestly urged by the contestant that the court erred in thus directing the jury.

It appears that the testator emigrated from Germany to the United States in 1864, and finally located, in 1867, on a farm near Filley in Gage county, Nebraska, where he lived until his death. By exercising the virtues of economy and industry and with the help of a good wife, he accumulated considerable fortune and at the time of his death had property of the approximate value of $60,000. His wife died in 1902 and the couple were childless. After the death of his wife, testator lived on the farm, making his home with his tenants, except occasionally spending a part of the winter at an hotel in Beatrice.

The father of the testator had five children, all born in Germany. Besides testator, they were Frederick D. Kees, of Beatrice, John George Kees, of Nebraska City, John Berkhardt Kees, who remained in Germany, and Ernestina Bock, who also remained in Germany. Frederick D. Kees, the proponent, located in Beatrice and became a prominent and successful business man. He had three children. John George Kees located in Nebraska City, and, while a man of good character and standing, did not prosper financially as did his brothers, the testator and the proponent. He had several children, among them a son who was crippled. John Berkhardt Kees died in 1918 leaving four children,

viz., Fritz D. Kees, the contestant, of Beatrice, George Kees, of Chicago, Jean Kees and Henrietta Kropp, both of whom remained in Germany. Ernestina Bock, the testator's sister, died in Germany, in 1920. She had four children, two of whom, Frederick and John Bock, came to the United States and located in Kansas, and two, Daniel and George, remained in Germany. George died survived by a second wife and a son, Fritz Bock, a child by his first wife.

After making the usual provisions with respect to the payment of debts, funeral charges and expense of administration, the will provided that the residue should be divided among the testator's relatives as follows: To John George Kees, a brother, one-fourth; to Frederick D. Kees, a brother, one-fourth; to the children of Frederick D. Kees, John, Clara and Daniel, equally one-fourth; to Ernestina Bock, a sister, one-fourth. The will also made provisions for a further distribution of the share devised to Ernestina Bock in the event of her death. It will be observed that the heirs of John Berkhardt Kees are not remembered in the distribution of the testator's estate, and the contestant is one of them.

At the time of the execution of the will, the testator was between 84 and 85 years of age, and although somewhat enfeebled by years and a stroke of paralysis, which affected his articulation, he was mentally alert and was perfectly able to understand and transact his business. All of the witnesses who testified on this subject agreed that his infirmity did not affect his mental capacity. In fact, we do not understand that the contestant seriously urges the lack of mental capacity to make the will, except that his weakness rendered him more susceptible to undue influence. Under the evidence there can be no doubt that the testator had the mental capacity to make the will.

Was the will the result of improper and undue influence exerted by the proponent upon the testator? The testimony upon this phase of the case is entirely to the effect that no undue influence was exercised by any one in procuring the execution of the will. The testimony shows

that the testator went alone to the office of his attorney, who had been his counselor for years, and told him the disposition he desired to make of his property, and thereupon the will was drafted and executed in accordance with his wishes. The proponent testified that he had never talked to the testator concerning the disposition of his property and did not know of the contents of the will until it was opened after the testator's death; that testator told the proponent it was his wish that proponent be his executor, but aside from that he knew nothing about the will. It appears in evidence that, for a number of years prior to the death of the testator, the proponent managed one of the farms owned by the testator. Proponent looked after all the details pertaining to the management of the farm, such as renting the property, keeping it in repair, paying the taxes and collecting the rent. The money so received would be credited to the account of the testator on the business books of the proponent. This farm was sold, however, before the testator's death. The management of the home farm where the testator lived was looked after by himself. It appears that at one time the testator had made a will in which his brothers and sister were placed on a parity as the recipients of his bounty, but after the death of John Berkhardt Kees, in 1918, the present will was executed in 1919, over three years before testator's death. If the will as written did not express the wish of the testator, it would seem that he had ample time to change it. During that period he frequently called at the store of the nephew, the contestant, and visited with him.

The most that can be said in support of the contestant's theory of undue influence is that an opportunity was afforded proponent to influence the testator, coupled with the fact that in 1905 the testator had made a codicil in which he named his brothers and sister as equal beneficiaries, and the further fact that testator in 1910, while on a trip to Germany, stated that all his relatives should share in his estate. The will recited: "In omitting from this will those of my relatives who are not named herein, I am not un-

mindful of such omissions, nor are such omissions on account of any hostility of feeling or lack of friendliness but for reasons which are sufficient to me."

The question of undue influence in the making of wills has been frequently before this court, and it has been held that the burden of proof is ordinarily upon the party who alleges undue influence to prove that fact. In *In re Estate of Stuckey,* 105 Neb. 641, it was held: "An unequal distribution of property among the children of testator, of itself, raises no presumption of the exercise of undue influence. Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own." In *In re Estate of Fenstermacher,* 102 Neb. 560, it was held: "In an action to set aside a will because of improper or undue influence exerted upon testatrix, the burden of proof is ordinarily upon contestant." In *In re Estate of Dovey,* 101 Neb. 11, it was held: "When it is shown that a will has been signed and attested by the statutory number of witnesses, and it is conceded that the testator was of sound mind, the will is presumed to be valid. In order to set it aside on the ground that it has been procured by undue influence, competent proof is required, and the burden of proof is ordinarily upon the contestant." In *Boggs v. Boggs,* 62 Neb. 274 it was held: "The burden is upon the contestants to establish undue influence, and in so doing it is not enough to show that the circumstances attending execution of the will are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis."

Under this will, one-half of the testator's estate is given to the proponent and his children, who according to the evidence are prosperous and financially well fixed, while other relatives in far less favorable circumstances are omitted. Whatever may be our individual views of the justice of the will, it must be conceded that, where capacity exists and no undue influence is exerted, a man has the legal right to

dispose of his property, except as restricted by law, as he sees fit.

In the light of the foregoing authorities, there is no aspect which may be taken of the evidence in which it may be said that undue influence entered into the execution of the will. This being true, it was proper for the court to direct the jury to return a verdict sustaining the will. The judgment of the district court is

AFFIRMED.

ALBERT KRUG, EXECUTOR, APPELLANT, V. DOUGLAS COUNTY, APPELLEE.

FILED APRIL 9, 1926. No. 23816.

1. **Taxation:** INHERITANCE TAX. Where persons take property by virtue of a will devising or bequeathing it to them, they are liable for the inheritance tax imposed by section 6153, Comp. St. 1922, on their right of succession under the will; and it is immaterial that the devises or bequests were made for the purpose of carrying out a previous contract between testatrix and her husband, who had formerly owned the property; and it is further immaterial that the devisees and legatees might have otherwise established their right to the property through such contract.

2. ———: LEGACIES: TIME OF PASSING. Subject to the payment of costs of administration, taxes and debts of a testator, title to a legacy passes to his legatee on the death of the testator, notwithstanding that his will is not admitted to probate until after the death of the legatee.

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

Isidor Ziegler, for appellant.

Henry J. Beal, W. S. McEachron and *S. L. Winters, contra.*

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

GOOD, J.

From a finding and decree of the county court of Douglas county, that certain devises and legacies under the will of Anna Krug, deceased, were liable to an inheritance tax amounting in the aggregate to $2,164.29, and ordering the executor to pay the amount to the county treasurer of said county, the executor appealed to the district court, and therein filed his petition as plaintiff, alleging the facts on which he relies as exempting from liability for inheritance tax the property so devised and bequeathed. Defendant, Douglas county, filed a general demurrer to the petition, which was sustained. Plaintiff elected to stand on his petition and not to further plead. Thereupon his petition was dismissed. The executor appeals to this court to review the ruling of the district court on the demurrer to his petition.

The following is a summary of the facts set forth in the petition: On the 24th day of August,1917, Frederick Krug and his wife, Anna, entered into an oral agreement, whereby he was to make his will and leave to her all of his property, and she was to make a will, simultaneously, in which she would dispose of all of the property received under his will to their children, in the same proportions as would be provided in the will of Frederick Krug, it being further agreed that she would not in any manner during her lifetime sell or dispose of the property so received. Pursuant to this agreement, Frederick Krug executed his will, leaving all of his property to his wife, and by other provisions directing that, in the event his wife should not survive him, his property should go to their children in certain proportions. On the same day Anna Krug also made her will, in which she disposed of all of her property to their children in the same manner and proportions as provided in the will of Frederick Krug. November 18, 1919, Frederick Krug departed this life, and on December 21, 1919, his will was admitted to probate. Two-thirds of the property, less $10,000, was adjudged to be subject to inheritance tax, which was paid. On the 20th day of December, 1919, Anna Krug departed this life. Her will above referred to was duly admitted to

probate and an inheritance tax levied against the legacies and devises to the children of Mr. and Mrs. Krug.

Plaintiff contends that Anna Krug took the entire estate of Frederick Krug merely as trustee for the children of Frederick and Anna Krug; that title did not pass from her to the legatees, named in her will, by virtue thereof, but that the property passed to those legatees pursuant to the oral agreement between Frederick Krug and his wife; that the execution of her will was merely the carrying out of a naked trust. It is also contended that, since Anna Krug died on the day before her husband's will was admitted to probate, she never, in fact, came into possession of the property devised by the will of her husband; that the title to the personal property, constituting by far the greater part of the estate of Frederick Krug, never vested in his widow, and that she, never having acquired title or possession in her lifetime, could not pass title by her will, and for these reasons the legacies in her will are not subject to the tax.

We are required to determine whether, under the facts alleged, the property devised and bequeathed by the will of Anna Krug is exempt from or liable to an inheritance tax. The decision of the question must be governed by a proper interpretation of section 6153, Comp. St. 1922, which, *inter alia,* provides:

"All property, real, personal and mixed which shall pass by will or by the intestate laws of this state from any person who may die seised or possessed of the same while a resident of this state, * * * or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift made in contemplation of the death of the grantor, or bargainer or intended to take effect, in possession or enjoyment after such death, to any person or persons or to any body politic or corporate in trust or otherwise, or by reason thereof any person or body corporate shall become beneficially entitled in possession or expectation to any property or income thereof, shall be and is subject to a tax, at the rate hereinafter specified."

While the question presented is new in this jurisdiction, similar statutes, under a similar state of facts, have been interpreted by many of the courts of sister states. Their decisions are illuminating. From these decisions it would appear that, where the property passes by the will, it is subject to an inheritance tax, even though the devise or bequest was made with the intention of carrying out a previous contract. Among the decisions, in effect so holding, are: *State v. Mollier*, 96 Kan. 514; *In re Kidd's Estate*, 188 N. Y. 274; *Clarke v. Treasurer and Receiver General*, 226 Mass. 301, L. R. A. 1917D, 800; *Leavell's Admr. v. Arnold*, 131 Ky. 426; *People v. Porter, Admr.*, 287 Ill. 401, 7 A. L. R. 1041; *In re Estate of Orvis*, 223 N. Y. 1, 3 A. L. R. 1636; *Hill v. Treasurer and Receiver General*, 227 Mass. 331; *People v. Estate of Field*, 248 Ill. 147, 33 L. R. A. n. s. 230.

In *Matter of Edson*, 38 App. Div. (N. Y.) 19, on rehearing, 159 N. Y. 568, it was decided that, where a devise in a will is absolute in form, and it requires extrinsic evidence to prove that the property was held in trust, the property, nevertheless, passes by the will, is subject to inheritance tax, and the state is not bound by the extrinsic evidence, even though, in accord with the evidence, equity would impress the property with a trust. A like holding was made even where the trust relation had been enforced in another action. *Fairchild v. Edson*, 154 N. Y. 199; *Edson v. Bartow*, 10 App. Div. (N. Y.) 104.

In *State v. Gerhards*, 99 Kan. 462, it is held: "Where persons assume to take property by virtue of a will bequeathing it to them, they are liable for the inheritance taxes imposed on the exercise of their right of succession under the will, and it is immaterial that they might have otherwise established their right to the property through a contract or as *cestuis que trust*."

The position taken by plaintiff that Mrs. Krug was never seised or possessed of the property devised and bequeathed to her by the will of her husband, because she departed this life previous to the admission of his will to probate, is untenable. The probate of the will merely established

of record the fact that title and right of possession to the property devised and bequeathed were vested in her from the instant that her husband departed this life. The position is also in conflict with that taken wherein plaintiff asserts that Anna Krug took merely as trustee.

It is apparent from the record that the entire estate of Frederick Krug, except the one-third thereof which by law would belong to his wife, by his will passed to his widow, subject, of course, to costs of administration, the payment of taxes and debts of decedent. That part of his estate which passed to her by his will, except the statutory exemption of $10,000, was subject to inheritance tax, which was duly paid by the executor of the will of Mr. Krug. The tax so paid was upon his widow's right of succession to property by will. *State v. Vinsonhaler*, 74 Neb. 675; *In re Estate of Rudge, ante*, p. 335. It also appears that the property which Mrs. Krug had acquired under the will of her husband passed to her children under her will. The title and right of possession to which they succeed is from her and goes to them by her will. They did not take from the father through his will; nor do they take and accept title under any oral contract. It is therefore wholly immaterial that, in equity, they might have compelled performance of the oral agreement, had Mrs. Krug sought to disregard it. The fact remains that they receive and accept succession of title and right of possession by the will of their mother. In fact, the oral agreement by its terms contemplated that the children shall take under the will of their mother and not under the will of their father. The devises and legacies in question fall within the provisions of the statute and are subject to the tax. Nor are the legacies in question subject to a double tax, as argued by plaintiff. The one tax was upon the widow's right of succession to property under one will; the tax in question is on her children's right of succession under another will.

The record is free from error and the judgment is

AFFIRMED.

LEVI J. HITCHCOCK, EXECUTOR, ET AL., APPELLANTS AND CROSS-APPELLEES, V. HARRY GUILLIAMS, APPELLEE AND CROSS-APPELLANT: DELLA GUILLIAMS, APPELLEE.

FILED APRIL 9, 1926. No. 23754.

1. **Deeds:** CANCELATION: MENTAL CAPACITY: BURDEN OF PROOF. "Where it is sought to cancel a deed for the want of mental capacity of the grantor to make the instrument, the burden of proof is on the one who alleges the mental incapacity." *Brugman v. Brugman*, 93 Neb. 408.
2. ———: ———: UNDUE INFLUENCE. "The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor." *Clark v. Holmes*, 109 Neb. 213.
3. **Evidence** examined, and found to amply sustain the decree of the district court.

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

Reavis & Beghtol, for appellants.

Neal & Hawxby and *John Wiltse, contra.*

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

THOMPSON, J.

This suit is one commenced in the district court for Richardson county by the executor of the estate of Eliza S. Clark, late of such county, and her nephews and nieces and grand nephew and niece, each of the state of New York, they being her sole heirs, appellants, hereinafter called plaintiffs, to have canceled and set aside a deed in usual form purporting to convey to the defendant Harry Guilliams, one of the appellees, hereinafter called the defendant, an 80 acres of land in such county, the petition alleging as grounds therefor, in apt language, lack of consideration, mental incapacity on the part of the grantor, said Eliza S. Clark; further, that such deed was caused to be made and delivered by and through the undue influence of de-

fendants. And, as an additional cause of action, it was alleged that defendant Harry Guilliams had, without authority from Eliza S. Clark, obtained and converted to his own use a $500 certificate of deposit, of that value, and prayed judgment against him for that amount with interest. Defendants filed answer admitting all but the three challenges to the deed and the second count, to each of which they interposed a denial, and alleged affirmatively, in substance, that the deed was executed for a valid consideration, to wit, for $1, past services of the defendants for grantor, and love and affection held by her for them; and that such deed was her free and voluntary act. To this plaintiffs interposed a general denial. Trial to court, judgment for defendants as to deed, and judgment for plaintiffs as to the certificate. Plaintiffs appeal, and defendant Harry Guilliams cross-appeals. Defendant seeks reversal on the ground that the judgment against him is not supported by the evidence. The plaintiffs seek reversal for the reasons that the evidence is insufficient to warrant the decree sustaining the deed, and for errors of law occurring during the trial, each thereof being separately and aptly set forth.

Taking up the cross-appeal of defendant, the evidence does not show authority on the part of the defendant to possess himself of the certificate or to negotiate the same. Nor does the record disclose facts showing that a confidential relation existed between Mrs. Clark and Guilliams, either as to the certificate, or any other of her business, or property from which such authority might be inferred.

There is some evidence of an inquiry having been made of Dr. Boose, who had received this certificate from defendant Guilliams, when Boose's claim against Mrs. Clark's estate was being considered in the county court. However, the answer does not aver an adjudication by such court of the question involved, and neither does the record reflect proof warranting the conclusion that such an adjudication had been had.

Plaintiffs' challenge to the findings and judgment of the trial court presents for our consideration largely questions

of fact. We have, with much care, read the entire record, together with the very able and helpful briefs furnished.

The deed in question was made in accordance with the requirements of the law of our state. While it is true that Mrs. Clark was at the time of the execution and delivery of such deed near 84 years of age, and somewhat handicapped by reason of a second stroke of paralysis, however, she could and did by signs as well as by words make herself understood, and did suggest to and direct others as to what she wanted done; and, as we find, was of sound mind and memory, mental faculties alert, and able to grasp the transaction in its fullness. She was then, as before and after, an exceptionally farseeing, calculating woman, possessed of an unusual grasp of business and business methods applicable to her calling, that of a farmer's wife and farmer. She had successfully conducted her own business by direction and otherwise ever since her husband's death in 1897. She knew her property and the extent thereof, its value and its practical uses, and the disposition she desired to make of it. She at the time also knew and appreciated her relationship to others, both those arising from blood connection as well as those arising out of friendship. She knew her condition as to health, that her time here at best was short. With this in mind, the Saturday afternoon previous she had called around her some few of her friends, and divided her personal belongings, and delivered thereof to those present, and of others thereof she ordered them labeled and directed that these be delivered, and, at the same time remarked that she "intended to give away all that she had," not disposed of by her will, as we conclude from the evidence. This will was holographic, was executed in 1920, and from it this 80-acre tract was by Mrs. Clark intentionally not included. In this will each of the plaintiffs, save the executor, was in a substantial way remembered. Mrs. Clark died June 5, 1922, and on July 5, 1922, her will was duly admitted to probate, without contest. This was prior to the commencement of the present action.

On Sunday following the aforementioned Saturday dis-

tribution of personal belongings, the deed in question, which Mrs. Clark had ordered prepared by disinterested parties, was presented and read to her, and was by her signed, acknowledged and delivered. This transaction is in perfect harmony with her then wish and also oft-expressed intent both before and after the execution and delivery of such deed. While there is some evidence which tends to show incapacity, taking the evidence as a whole, it strongly preponderates in favor of the findings and judgment of the trial court. The burden as to the lack of mentality on the part of the grantor at the time she executed and delivered the deed in question is on the plaintiff to both allege and prove. *Brugman v. Brugman,* 93 Neb. 408. This burden as to proof plaintiffs failed to meet. As we said in *Brugman v. Brugman, supra:*

"In determining the mental capacity of the grantor to execute a deed, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of his property, and what he proposed to do with it, and to decide intelligently whether or not he desired to make the conveyance, it cannot be said that he was incompetent or incapable of executing the instrument."

As to undue influence: "The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor." *Clark v. Holmes,* 109 Neb. 213. This record is without any evidence bringing this suit within the above rule. As before stated, her mind was clear and unconfused; she knew what she was doing and did it with her own free and voluntary will, at all times directing the transaction. She recovered to the extent of being able to be up and around the premises, talked with the leading contestant, after he knew of the execution, delivery and the recording of the deed. He never mentioned the fact of such knowledge to her, though he had ample opportunity to do so. He and others of the nephews settled a contention of long standing with her involving the ordinary unpaid tax and drainage assessment on the 80

acres on which she lived, in which she held a life estate by reason of the provision of a will of her deceased husband. The nephews insisted that she pay not only the ordinary tax on the land, but also a part of the drainage tax. She contended that, as the drainage tax went to the betterment of the freehold, which they would soon get possession of, that was for them to pay, and she the ordinary tax which, she claimed, was what she could be required to pay. This was as she had always contended. The matter was thus adjusted, her will controlling. The record is replete with facts showing this strength of mind and self-reliance, both on the date of the execution of such deed and at all other times. While the Guilliams were her close friends and attended to her little needs, she at all times directed and controlled her own business affairs, without even an attempted interference on their part.

As to the claimed errors of law occurring at the trial, concerning the admission of, and refusing to strike out, what is challenged as incompetent evidence, which plaintiffs cite for our consideration, we find it sufficient to say: The suit is one triable to the court without a jury, and is here for our determination *de novo*, and as we find, without considering the evidence thus involved, there is ample competent evidence to support the judgment of the district court, and our conclusion herein, it becomes unnecessary for us to further consider such challenges.

The judgment of the district court is, in all things,

AFFIRMED.

WILLIAM WHITLA, APPELLEE, V. T. H. CONNOR ET AL., APPELLANTS.

FILED APRIL 9, 1926. No. 23929.

1. **Municipal Corporations:** TEMPORARY SIDEWALKS. Sections 4180, 4283, 4285, and 4329, Comp. St. 1922, considered and *held*, that section 4285 governs the construction of temporary walks on ungraded and unimproved streets; that sections 4180 and 4283 do not apply in such case; that an ordinance directing the con-

struction of such walk may be enacted by a majority vote of such village board, under section 4329.

2. ———: SPECIAL ASSESSMENTS: IRREGULARITIES: WAIVER. Technical "errors, irregularities and inequalities in the making of special assessments or in proceedings prior thereto, not raised by proper objection before the city council (in this case the village board), are waived." *Chicago, R. I. & P. R. Co. v. City of Centerville,* 172 Ia. 444.

3. ———: ———. "It is neither required nor necessary that the amount of special benefits assessed against each lot in a paving district bear any proportionate relation to the actual value of the lot." *Chicago & N. W. R. Co. v. City of Albion,* 109 Neb. 739.

4. ———: VILLAGE BOARDS: SIDEWALKS: BURDEN OF PROOF. The action of the village board in ordering sidewalk placed, and providing that cost thereof shall be assessed upon the abutting lot, is a legislative determination that the improvement is expedient and proper, and that such property will be benefited by reason thereof, and such determination cannot be denied its effect in a judicial proceeding, in a case where it was within the board's power to so act. And one challenging its authority carries the burden of alleging and proving the invalidating facts.

APPEAL from the district court for Boyd county: ROBERT R. DIXON, JUDGE. *Reversed, with directions to dismiss.*

Byron Clark, Jesse L. Root and *John A. Davies,* for appellants.

W. T. Wills, contra.

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

THOMPSON, J.

In this suit the appellee, hereinafter called plaintiff, seeks to enjoin the collection of a special assessment imposed by the village board of Butte, its officers and the county treasurer of Boyd county. Trial to the court, judgment for plaintiff, and defendants appeal, which appellants will hereinafter be designated as the village.

As reflected by the record, the facts necessary for our

consideration are as follows: The village is one of about 600 inhabitants; the plaintiff is the owner of the lot in question, which is situated on an unimproved street in such village; the ordinance in question was duly passed and approved as an ordinance providing for the construction of temporary sidewalks generally in the village of Butte, treating the entire village as one district, under section 4285, Comp. St. 1922, as we find this to be. So much of such ordinance, material for our consideration, is:

"If the owner, his agent or the person occupying such lot, shall fail or neglect to construct such sidewalks within thirty days after notice shall have been served upon him or her, it shall be the duty of the street commissioner of said village, to construct said sidewalk and furnish the board of trustees of said village an itemized statement of all expenses incurred in building said sidewalk, and such expenses shall be assessed against said property and collected in the manner provided by law."

The provision in this ordinance in reference to the law was approved by us in *Broghamer v. City of Chadron*, 107 Neb. 532.

In pursuance of this ordinance an order, duly promulgated by the village board, was served on the plaintiff, requiring him to construct a sidewalk of stone, cement or brick in front of the lot in question. Plaintiff failed to comply with this order, and thereupon the street commissioner laid the walk at an expense totaling $129.20, and furnished the village board with an itemized statement of such expense incurred, which was assessed against the lot and duly certified to the village treasurer for collection, and, not being paid, was by him certified to the county treasurer.

The plaintiff relies on section 4283, Comp. St. 1922, and contends that, as the provisions of such section were not complied with, the claimed assessment is void. However, in the answer of the defendants it is alleged: "That the sidewalk so constructed was a temporary walk upon the natural surface of the ground without regard to grade, on a street not permanently improved, and that the ordinance

and proceedings thereunder so had and taken by the defendants substantially comply with the requirements of the statute governing the construction of sidewalks, and that the lien on said lot of plaintiff for such special improvements is a valid and subsisting lien thereon." No reply was filed to this answer, hence the part thereof above quoted stands admitted, except as to the conclusion as to the lien, and the case was so tried. Thus, the issues were limited to section 4285, Comp. St. 1922, and not to 4283 thereof. Section 4285 reads as follows: "To provide for the laying of temporary plank, brick, stone or concrete sidewalks, upon the natural surface of the ground, without regard to grade, on streets not permanently improved, at a cost for plank walks not exceeding fifty cents a linear foot, or for brick, stone or concrete walks not exceeding one dollar and twenty-five cents a linear foot and to provide for the assessment of the cost thereof on the property in front of which the same shall be laid."

In *Gibson v. Troupe,* 96 Neb. 770, we held in substance that section 4285, Comp. St. 1922, governs the construction of temporary walks on ungraded and unimproved streets; that sections 4283 and 4180 do not apply in such case; further, that an ordinance directing the building of such walks, not being of a general or permanent nature, may be enacted by a majority vote of the council or village board, as provided in section 4329.

The record discloses that, after the enactment of the ordinance and before the assessment was made, the plaintiff lodged with the village board a remonstrance against such assessment as follows:

"Ordinance No. 59 is of no force or effect, having been introduced, read the first, second and third times and passed at one meeting, with but three members present, contrary to law. No petition signed by three-fifths of the residents of said street along which sidewalk has been constructed was ever signed or presented to this village board asking for the construction of said sidewalk." As to this remonstrance, a hearing was duly had and the board denied the

same, and found, as shown by its records: "That whereas due notice of this meeting has been given to Mr. Whitla as required by law, and after considering the benefits derived and the cost of such improvement in consequence of the construction of a sidewalk along said lot, therefore be it resolved by the village board of trustees of Butte, Nebraska, that for the purpose of paying the cost thereof there be and there hereby is levied upon the following described lot (the one in question) the amount set after said tract to be known as special tax for improvements, and to be charged and collected as other village taxes: 'William Whitla, lot 6, block 21, Butte Village Orig., $129.20.'"

Thus, it will be seen that the board considered the benefits derived, and that the same was an improvement to the property affected. As we said in *Biggerstaff v. City of Broken Bow*, 112 Neb. 4: "The council found the value of the improvement. To be an improvement it must necessarily be in excess of the injury, if any injury there be, but the record fails to show anything in connection with this improvement which could possibly be regarded as an injury" to the lot. The other questions as to the injury herein raised are also considered by our holding in the case last cited.

While the ordinance fails to detail what is meant by "such expense shall be assessed against said property and collected in the manner provided by law," reference to the statute in lieu of embracing its provisions in the ordinance was not more than an irregularity; and as we said in *Biggerstaff v. City of Broken Bow, supra:* "Where the board has acquired jurisdiction by substantial compliance with the statute, mere irregularities in the proceedings will not render the assessment void," citing *Darst v. Griffin*, 31 Neb. 668. And it was further said: "As indicated by the opinion in *Schneider v. Plum, supra* (86 Neb. 129), it is not required that the council's record shall be faultless, especially against a collateral attack," as in this case. Substantial compliance with the statute is all that is demanded where jurisdiction has been acquired. Jurisdiction to enact

such an ordinance is without question vested in such village board. Section 4329, Comp. St. 1922. And, as we held in *Chicago & N. W. R. Co. v. City of Albion,* 109 Neb. 739: "It is neither required nor necessary that the amount of special benefits assessed against each lot in a paving district bear any proportionate relation to the actual value of the lot."

As held by us in *Broghamer v. City of Chadron, supra:* "Ordinarily the propriety of the plan of apportionment of the tax and the necessity of expenditure for those things which might, within the discretion of the board, have been considered by it essential and incidental parts of the main project will not be reviewed on error, where the complaining parties did not appear before, nor make objections to, the board, since the board is entitled to a fair opportunity while it is in session to avoid error and to meet such objections."

The evidence received at the hearing on plaintiff's remonstrance was not preserved, and an error proceeding from the action of the board thereon was not taken. It will be seen that, while plaintiff appeared before the board, the objections he presents here, to wit; that by reason of such plan plaintiff was discriminated against, that the assessment was greater than the benefits, and that an injustice to plaintiff was being done, were not lodged with the board at such hearing. Thus, if proceedings in error had been had, such challenges to the procedure of the board could not have been considered. And, further, we held in *Webster v. City of Lincoln,* 50 Neb. 1: "As a general rule, a proceeding in error to review the order of a board of equalization, in a matter within its jurisdiction, will afford an adequate remedy." And in substance, in an action such as we are considering, when it is claimed a remedy by error proceedings would be inadequate, the facts upon which claim is based must be pleaded and proved. The pleadings herein raise no such issue.

In *Weaver v. Palmer Brothers Co.,* United States supreme court, 46 Sup. Ct. Rep. 320, it is said: "Legisla-

tive determinations expressed or implied are entitled to great weight; but it is always open to interested parties to show that the legislature has transgressed the limits of its power. *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393, 413. Invalidity may be shown by things which will be judicially noticed (*Quong Wing v. Kirkendall,* 223 U. S. 59, 64), or by facts established by evidence. The burden is on the attacking party to establish the invalidating facts. See *Minnesota Rate Cases,* 230 U. S. 352, 452."

In the *Minnesota Rate Cases, supra,* it is held: "This court does not sit as a board of review to substitute its judgment for that of the legislature or of the commission lawfully constituted by it, as to matters within the province of either." See *State v. Cornell,* 53 Neb. 556.

Our holdings in *State v. Lancaster County,* 4 Neb. 537, and *State v. Dodge County,* 8 Neb. 124, are illuminating and instructive as to the matters here under consideration. In the former, it is held: "The taxing power vested in the legislature is without limit, except such as may be prescribed by the Constitution itself." And further: "The maxim, *expressio unius est exclusio alterius,* does not apply in the construction of constitutional provisions regulating the taxing power of the legislature." In 8 Neb. 124, *supra,* the above rules were affirmed, and this court further added, quoting from *State v. Lancaster County, supra:* "And so in an inquiry as to whether a statute is constitutional, it is for those who question its validity to show that it is prohibited." And further: "The authority of the legislature to vest cities, towns, and villages with power to make local improvements by special taxation of property benefited, is not a grant of power. The authority already existed, and the Constitution merely prescribes the rule by which taxes shall be apportioned."

As stated in *Chicago, R. I. & P. R. Co. v. City of Centerville,* 172 Ia. 444, which case is cited with approval in *Broghamer v. City of Chadron, supra:* "Speaking generally, there is a fair presumption that all real estate receives some degree of benefit from the permanent (or temporary) improvement of a street upon which it abuts. It is upon

such presumption that the whole system of special assessments for local improvements is justified and sustained. Acting upon such presumption, city councils have been clothed with a certain degree of legislative power to determine when it is expedient and proper to pave any given street or streets, and to provide, within certain limitations, how the cost thereof shall be defrayed. * * * In other words, the action of the council, in ordering the pavement and providing that the cost be assessed upon the abutting property, is a legislative determination that the improvement is expedient and proper, and that the property abutting upon the improvement will be benefited thereby; and such determination cannot be set aside or overruled in a judicial proceeding. * * * In other words, while the owner of abutting property may object that it has been over-assessed, he cannot, if the proceedings have otherwise been regular, be heard to say that it is not liable to be assessed at all."

It is also contended on the part of plaintiff that section 4285 contravenes section 6, art. VIII of our Constitution. That part of such section 6 applicable here is as follows: "The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited." It will be seen that this constitutional provision leaves the mode of its application to the judgment of the legislature and the legislature has provided the manner by section 4285. The record does not disclose any laches of commission or omission on the part of the village board in this regard, as it is without allegation or proof of the size of this lot, or of a lack of uniformity as to the levy made, or even that the charge made was not reasonable and usual. Plaintiff only says he could have placed the walk at a less expense. After legal notice given, he had for more than a year a free hand but did not avail himself of the opportunity.

The judgment of the trial court was undoubtedly based on a consideration of the requirements of section 4283,

Comp. St. 1922, instead of section 4285 thereof, which latter section we find is the one applicable to the issues joined, as well as to the facts reflected by the evidence.

For the foregoing reasons, the judgment of the trial court is reversed, and the action ordered dismissed at plaintiff's costs.

REVERSED AND REMANDED.

Note—See (4) 28 L. R. A. (n. s.) 1168; 25 R. C. L. 140; 3 R. C. L. Supp. 1406; 4 R. C. L. Supp. 1572; 5 R. C. L. Supp. 1312.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. THEDFORD BANK: C. F. KIRKMAN, CLAIMANT, APPELLEE: VAN E. PETERSON, RECEIVER, APPELLANT.

FILED APRIL 9, 1926. No. 24577.

1. **Banks and Banking:** DEPOSITORS: UNLAWFUL ENTRIES. The president of a bank organized under the laws of this state has no implied authority to pay his individual debts by entering the amount of them as a credit upon the pass-book of his creditor, who keeps an account with the bank, and permitting the creditor to exhaust such account by checks which are paid, the bank having received nothing of value in the transaction.

2. ———: ———: ———: RECOVERY. If the president of a bank, without actual authority so to do, should undertake to pay his individual debts in the manner stated, the bank may recover of his creditor the amount of money it may pay out upon checks drawn upon the faith of the unauthorized pass-book entries.

3. ———: ———: ———. The fact that the president is personally interested in a transaction of the character described is sufficient to put his creditor upon inquiry as to the actual extent of the president's power.

4. ———: ———: ———: BURDEN OF PROOF. When it appears that the president of a bank, under the circumstances and the manner herein set forth, has paid and satisfied his individual indebtedness by entries of credits in the pass-book of a depositor, and such transaction is challenged by a receiver of the bank, lawfully appointed, the burden of establishing that such bank has received the money or its equivalent to cover the entries thus made is upon such depositor.

APPEAL from the district court for Thomas county: EDWIN P. CLEMENTS, JUDGE. *Reversed.*

C. M. Skiles and *Stewart, Perry, Stewart & Van Pelt,* for appellant.

Evans & Evans, contra.

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

EBERLY, J.

The Thedford Bank, defendant, is an insolvent state bank, organized under the laws of Nebraska, in the possession and control of a receiver duly appointed, and to whom the provisions of the law guaranteeing lawful deposits was applicable. In this proceeding, claimant Kirkman prosecutes two causes of action against the bank, its receiver, and the guaranty fund; one based upon a certificate of deposit of $1,000 issued by the defendant bank, the validity of which is not questioned, and one upon an alleged deposit of $450 in the form of a checking account on which it was alleged there was still unpaid the sum of $269.59 due claimant. Claimant prevailed in district court. Judgment was there entered as prayed, and from this determination the defendant bank and receiver appeal.

The facts out of which this controversy arises are practically without dispute in the record. Prior to December 13, 1923, Nelson, then president of the defendant bank, owned, as his private property, a farm. Claimant was in the personal employ of Nelson and engaged in the construction of improvements thereon. On December 13, 1923, the work was completed and there was due claimant under his contract of employment from Nelson individually the sum of $450. On December 13, 1923, claimant called on Nelson at the banking house of the defendant and demanded from him the payment of the $450. To this demand Nelson responded: "The money is ready." Claimant replied that he wanted it in checking account in the bank. Nelson then entered the sum of $450 in claimant's depositor's pass-book,

claimant then being a patron of the bank and possessed of a checking account therein. It is conceded that in this transaction the bank actually received nothing. No money or credit of value was ever deposited by Nelson or any other person with the bank for claimant. It further appears that the sole record of the transaction is the record in the pass-book, and that no entries were made of this deposit on the books of the bank, nor was any memorandum preserved in the records thereof of that institution. So far as the record discloses, all knowledge of the transaction was confined to Nelson and claimant. Commencing on the day of the transaction and continuing until February 4, 1924, eleven checks were drawn by claimant upon the defendant bank, which checks it paid and charged to his account, which resulted in an overdraft as shown by the bank records in the sum of $180.41.

The defendants contend that the president had no authority to pay his individual debt to the depositor by giving him credit in the bank and permitting him to draw checks without its having received something of value therefor; that the entry of the credit upon the depositor's pass-book was an act beyond the scope of the president's power; that because nothing appears on the books of the bank to give notice of the facts, and the bank having received nothing of value, the bank was not bound; and that upon the claimant, he having full knowledge of the facts that the transaction was one in which the bank officer was paying his individual obligations by and with the property of the bank, was imposed the duty of ascertaining the authority and powers of the president to act for the bank in the transaction; that likewise there was imposed upon him the burden of proof of showing, in absence of express authority conferred on the president, that money or its equivalent had actually been received by defendant to cover the entry made in the pass-book. We find that the contention of the defendant bank and its receiver is not only sustained by the great weight of authority but by the decisions of this jurisdiction.

On the subject presented here, the case of *Hier v. Miller*, 68 Kan. 258, appears to be a leading case. In this case a cashier of the bank, in sole charge of its affairs, pretends to make payments to one of his individual creditors, a depositor of the bank, by giving credit for such payments in the depositor's pass-book. No money, however, was received by the bank and no record of the transaction was made upon the records of the bank. Ultimately a final settlement was had between this cashier and this cashier's individual creditor which resulted in the surrender by the creditor to the cashier of the latter's individual promissory note and an entry of the amount then due upon the instrument surrendered by the cashier in the creditor's pass-book as a deposit in the bank. This creditor, as depositor, then demanded her balance in the bank. Pursuant to the demand the cashier then balanced the pass-book, and she drew a check for the amount shown by the pass-book to be due her, and the cashier gave her a cashier's draft upon a bank in St. Joseph, Missouri, which draft was duly paid and returned. During this transaction all checks issued by the depositor were by the cashier paid as presented and charged on the books of the bank against the depositor.

There were, however, no sums credited on this account as deposits, and the total amounts of all checks drawn appeared as an "overdraft." No officer of the bank had any actual knowledge of the transaction except the cashier and the "depositor" herself, who acted in good faith. On this state of facts the supreme court of Kansas in *Hier v. Miller, supra,* sustained the right of the bank and its receiver to recover from the cashier's creditor the entire amount of the overdraft thus created. The opinion of the court in this case contains a careful examination of the authorities of all jurisdictions, in addition to its own, and states the conclusion of the court in the following language: "The cashier of a bank organized under the laws of this state has no implied authority to pay his individual debts by entering the amount of them as a credit upon the pass-book of his creditor, who keeps an account with the bank,

and permitting the creditor to exhaust such account by checks which are paid, the bank having received nothing of value in the transaction. If the cashier of a bank, without actual authority so to do, undertakes to pay his individual debts in the manner stated, the bank may recover of his creditor the amount of money paid on checks drawn upon the faith of the unauthorized pass-book entries. The fact that the cashier is personally interested in a transaction of the character described is sufficient to put his creditor upon inquiry as to the actual extent of the former's power." See, also, *Home Savings Bank v. Otterbach,* 135 Ia. 157; *DeBaca v. Higgins,* 58 Colo. 75; *Bank of Proctorville v. West,* 184 N. Car. 220.

The conclusion above set forth is based upon the familiar rule of the law of agency which forbids that an agent shall act for himself and his principal in one and the same transaction. "This doctrine has its foundation, not so much in the commission of actual fraud as in that profound knowledge of the human heart which dictated that hallowed petition, 'Lead us not into temptation, but deliver us from evil,' and that caused the announcement of the infallible truth that a man cannot serve two masters." From this follows the rule that an agent may not deal in the business of his agency for his own benefit. His duty to his principal requires that his efforts shall be in behalf of, and for the benefit of, his principal alone. He cannot perform this duty if he attempts to use his agency for his own purposes. It really appears that this court has taken more advanced ground on this subject than that evidenced by the supreme court of Kansas in *Hier v. Miller, supra.*

Pursuant to the principles above set forth, this court has announced the rule as applied to managing officers of banks as follows:

"The general authority of a cashier of a bank does not authorize him to issue drafts of the bank for himself or for his private use.

"When it appears that he has thus issued drafts, there is no presumption that they were paid for when issued, and

the burden is on the party claiming that they were thus paid for to prove it." *Mendel v. Boyd,* 71 Neb. 657.

In the case above cited, a cashier of an Iowa bank became indebted to James E. Boyd, a former governor of this state, in certain business transactions. The indebtedness was his individual obligation. He attempted to discharge this indebtedness by drafts on the correspondents of the bank of which he was cashier. Some of these drafts were signed by this cashier and some by the assistant cashier employed in the bank, but all of the drafts, irrespective of the signature thereto, were actually issued by the cashier himself to James E. Boyd, the payee therein named, and for the purpose of satisfying and discharging the individual debt of the cashier to Boyd. The bank drawing these drafts received nothing in value for them and sought to recover the moneys thus received by the payee named in the instruments. The effect of the judgment of this court, affirming the bank's right to recover, is that a person accepting payment of the individual debt of a bank officer, through the medium of funds or credits received from such officer in his official capacity, must take notice of the fact that in the transaction the interests of the bank officer are adverse to the principal (the bank), and that upon the party taking advantage of such transaction and receiving the benefits thereof was imposed the burden of establishing express authority of the bank officer involved or proving that the bank had received actual value for what was turned over for the individual benefit of the bank officer. The case of *Mendel v. Boyd, supra,* has never been in any manner qualified by this court. It has been cited approvingly in *State v. Farmers State Bank,* 111 Neb. 585, and *Packers Nat. Bank v. Rushart,* 98 Neb. 354.

If this be true, and certainly the case of *Mendel v. Boyd, supra,* so holds, then in the instant case we have a situation wherein the president, who is managing officer of the bank, without authority, pays his individual obligations by an entry of a deposit in a pass-book, which deposit was, in truth and in fact, not made. The relation of the parties and the

situation was known to the claimant in this case. He knew he made no deposit. If he trusted the president of the bank to make it for him, he did so at his peril.

Under the rule announced in *Mendel v. Boyd, supra,* and in the event of the validity of the transaction is challenged, the claimant must be held to know that under the circumstances of this case the general authority of the president did not authorize nor justify him to make the entry of the "deposit" without the prior or contemporaneous receipt by the bank of the money or its equivalent. The burden of proof was imposed on claimant to establish these facts as a condition precedent to the bank's liability. No proof appears in the record and no proof was offered.

It follows therefore that the district court erred in its determination of this case. The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

GUST E. SWANSON, ET AL., APPELLANTS, V. A. S. DOLEZAL, COUNTY CLERK, ET AL., APPELLEES.

FILED APRIL 9, 1926. No. 25156.

Statutes: VALIDITY. Chapter 89, Laws 1925, attempting to incorporate within itself solely by reference, and without reenactment, certain provisions of chapter 67, art. VII, Comp. St. 1922, which article VII, together with chapter 169, Laws 1923, amendatory thereof, were, in the case of *Elliott v. Wille,* 112 Neb. 78, adjudged to be void, and said chapter 89 aforesaid, being by its terms made expressly supplemental to said invalid legislation, *held,* that chapter 89, Laws 1925, is void, and therefore no rights may be based on, nor may any duties be imposed by, or pursuant to, its terms.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Reversed, with directions.*

Joe F. Berggren and *Peterson & Devoe,* for appellants.

Stout, Rose, Wells & Martin and *J. H. Barry, contra.*

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

EBERLY, J.

Action for injunction to permanently restrain the defendants in their respective official capacities from proceeding under provisions of chapter 89, Laws 1925, to validate certain proceedings relating to the formation of the First Farmers Electric District, bonds issued by the same, and to provide for the levy of proper assessments for the payment of said bonds and the interest accruing thereon. To this petition defendants demurred. Demurrer was sustained, and plaintiff, electing to stand upon his petition, judgment was entered in favor of the defendants. From this judgment plaintiff appeals.

The record discloses without dispute that the First Farmers Electric District of Saunders county was originally organized under the provisions of section 7147-7154 (ch. 67, art. VII) Comp. St. 1922, as amended by chapter 169, Laws 1923. In *Elliott v. Wille,* 112 Neb. 78, this legislation was adjudged by this court to be void as being repugnant to certain constitutional provisions. By chapter 89, Laws 1925, it was attempted to cure the defect in the provisions above referred to, and to validate certain proceedings by the districts had and certain of its obligations outstanding.

An examination of chapter 89, Laws 1925, discloses that it is not a complete act within itself, but is, in material parts, dependent upon the provisions of the act heretofore determined to be void and which provisions were not reenacted. Then, too, it appears by its terms that it is to be considered as "cumulative and supplementary to chapter 67, art. VII, Comp. St. 1922."

In *Elliott v. Wille, supra,* it was determined that sections 7147-7154, Comp. St. 1922, as amended by chapter 169, Laws 1923, in terms authorized the taking of private property for public use without just compensation, provided for the taking of private property without due process of law, and are therefore violative of both the state and federal Constitutions.

It is to be remembered that an unconstitutional law confers no rights, imposes no duties, and affords no protection; it is, in legal contemplation, as inoperative as though it had never been passed. *Norton v. Shelby County*, 118 U. S. 425.

The general rule is that an unconstitutional statute is invalid from its inception and is as ineffectual as though it had never been passed. *State v. Several Parcels of Land*, 78 Neb. 703.

It must be admitted that a decision by a court of last resort determining a statute is unconstitutional has the effect of rendering such statute absolutely null and void from the date of its enactment, and that all acts amendatory thereto are without force and effect, and that "no rights may be based on, nor any duties be imposed by, an unconstitutional statute." 12 C. J. 801, sec. 230.

In *City of Plattsmouth v. Murphy*, 74 Neb. 749, this court held: "An act of the legislature amendatory of, or supplemental to, an unconstitutional law is unconstitutional and void."

In *Central Nat. Bank v. Sutherland*, 113 Neb. 126, it was announced: "If a legislative act when enacted is violative of the provisions of our Constitution, it cannot subsequently become a valid law merely because the reason for its invalidity has been removed, without being subsequently reenacted by the legislature."

It must be conceded that the proceedings here under investigation depend for their validity wholly upon chapter 89, Laws 1925. This act expressly attempting to incorporate within itself by reference a portion of the provisions of chapter 67, art. VII, Comp. St. 1922, without reenacting the same, and which act was expressly intended as supplementary to such unconstitutional legislation, is void and affords no basis upon which the judgment entered in this cause by the court below may be sustained.

We do not determine that a curative act may not afford the relief desired in this case. But we are of the opinion

that, because of the defects of the act under consideration, it has not accomplished that result.

The judgment of the district court is reversed and the cause remanded for further proceedings, with instructions to enter a judgment in accordance with this opinion, and as prayed for in plaintiffs' petition.

REVERSED.

ARVESTA NORTHEY V. STATE OF NEBRASKA.

FILED APRIL 22, 1926. No. 24813.

Homicide: INSUFFICIENT EVIDENCE. The substance of the evidence on which the state relies to support the verdict of murder returned by the jury is outlined in the opinion and is *held* insufficient to sustain the verdict.

ERROR to the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

A. P. Schnell and *H. L. Wilson,* for plaintiff in error.

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

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

MORRISSEY, C. J.

On a trial in the district court for Custer county, defendant was convicted of murder in the first degree and sentenced to serve the term of her natural life in the penitentiary. As plaintiff in error, she has brought the record of her trial, conviction and sentence to this court for review.

The information, which follows, as closely as the facts will permit, the form outlined in *Nichols v. State,* 109 Neb. 335, charges that one Frank Bruner and this defendant, by the administration of poison, caused the death of Monna Bruner, wife of Frank Bruner, on November 24, 1924.

It is the theory of the state that Frank Bruner admin-

istered the poison which caused the death of Monna Bruner, but the information directly charges defendant Arvesta Northey with the administration thereof, as it is provided by chapter 89, Laws 1923, may be done.

The form of the information is challenged, but as it follows the statute and the form heretofore approved by this court, *Nichols v. State, supra,* this assignment may be disregarded.

There is one vital question presented, namely, the sufficiency of the evidence to sustain the verdict of the jury.

November 24, 1924, Monna Bruner died in the village of Sargent, Custer county, Nebraska, from mercury bichloride poisoning. Her husband was employed in the Chicago, Burlington & Quincy roundhouse at Sargent, and for a number of years he and this defendant, who had a husband, had maintained illicit relations. It is the theory of the state that Frank Bruner and this defendant, having become enamored of one another, desired the death of Frank Bruner's wife, and that, through some method which is not shown by this record, Bruner administered the fatal poison.

The state made proof of the long-continued misconduct of Bruner and defendant and, undertaking to show some causal relation between their improper relations and the death of Bruner's wife, offered in evidence statements made by defendant, after her arrest under the charge made against her in this case.

The sheriff, called as a witness for the state, testified that the county attorney, the deputy county attorney, and the sheriff interviewed defendant in the jail; that the county attorney told her, in substance, that if she had anything to say they were ready to listen; that defendant then said that she had already told everything she knew about the affair; that immediately after she had made that answer, he, the sheriff, was called to the telephone; that, on his return soon thereafter, the deputy county attorney, in the presence of the county attorney and defendant, said to the sheriff, "Mrs. Northey has said that she gave the tablets to Bruner and that she bought them at Gothenburg, Ne-

braska;" that the witness then said, "Now, Mrs. Northey, * * * did you really buy these tablets at Gothenburg and give them to Bruner?" and she said, "I have lied. I told them that, but I didn't have anything to do with it. I didn't buy the tablets there, and I didn't give them to Bruner, but Bruner wanted me to do that—Bruner wanted me to tell that." The state also offered in evidence an affidavit signed by Mrs. Northey, in which she admitted her criminal relations with Frank Bruner; that these relations had extended over a term of years, and that, in September preceding the death of Monna Bruner, defendant and Frank Bruner had made an extended trip in an automobile, giving the date on which the trip began and the names of a number of cities through which they passed. Among the cities mentioned is the city of Gothenburg, Nebraska.

The statement recites that she and Bruner had frequently talked about Bruner securing a divorce from his wife; that Bruner had told her his wife objected to his procuring a divorce, and that Bruner said that "he was going to get rid of his wife and I suspicioned that he might poison her;" that Bruner suggested to her that she get rid of her husband "by slipping a pill into his coffee;" and that Bruner visited at her house the day before the death of his wife.

Although Gothenburg is a comparatively small city, situated only a short distance from the county seat of Custer county, no witness was called from there to show that defendant procured any poison there. There is no evidence in this record showing that defendant ever had mercurial bichloride in her possession, or that in any way she administered poison to Monna Bruner, or that she furnished poison to Frank Bruner that he might administer it to Monna Bruner. The state attempted to introduce statements made by Bruner after the death of his wife. What these statements might disclose we know not, for, upon objection, they were excluded by the trial court.

Bruner was not called as a witness, nor was any witness called from whom defendant purchased poison. If she had purchased it at Gothenburg, it ought to have been shown,

and it will probably be done upon a new trial. The evidence is wholly insufficient to sustain the verdict; the judgment is, therefore, reversed, and the cause remanded.

REVERSED.

DEAN, J., dissenting.

Frank Bruner and Mrs. Arvesta Northey were jointly informed against by the county attorney of Custer county, and there charged with having committed murder in the first degree, by having feloniously administered poison to Monna Bruner, the wife of defendant Frank Bruner, and from its effects she shortly thereafter died. Both defendants were charged as principals pursuant to section 9541 (section 1), ch. 89, Laws 1923, which provides: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." Mrs. Northey was prosecuted separately.

It seems that this defendant had a talk with V. C. Talbot, the sheriff of Custer county, and with the county attorney and the deputy county attorney in the jail after her arrest. Talbot testified that the county attorney first said this to defendant: "'We feel that you have something more that you want to tell us that you haven't told us, and if that is true we are ready to listen,' or words to that effect. I couldn't say the exact words. Q. What else did she say? A. She said that she had told all, she said, 'I have told all I know about it,' something like that. Q. Then what was said to her? * * * Yes, and by whom. A. Well, I don't remember exactly what happened just—I know the county attorney told her that he—he said, 'Now, Mrs. Northey, you understand that what you say at this time will be used against you in your hearing, and all we ask of you is to tell us the exact truth,' and I think she again said, 'I have told you all I know about it;' and about that time the 'phone rang, and I stepped out to the 'phone and was out there some little bit, and on my return Mr. Runyan (deputy county attorney) says, 'Mrs. Northey has said—'" The following objection was here interposed: Mr. Wilson: "Wait a minute. That is objected to as hearsay." (No

ruling.) The Court: "Well, was it said in the presence of Mrs. Northey? A. It was." The Court: "Answer." (Exception.) "A. That Mrs. Northey has admitted giving the—has said that she gave the tablets to Bruner, and that she bought them at Gothenburg, Nebraska. Q. What else was said there then, and by whom? A. I (the sheriff) said, 'Now, Mrs. Northey, did you buy these—did you really buy these tablets at Gothenburg and give them to Bruner?' And she said, 'I have lied. I told them that, * * * I didn't give them to Bruner, but Bruner wanted me to do that—Bruner wanted me to tell that.'"

The question arises: Which of defendant's statements reflected the truth? Was it the admission "that she gave the tablets to Bruner, and that she bought them at Gothenburg," or was it the statement that she "lied" when she "told them that?" Had the tablets been other than poison, would defendant have denied giving them to Bruner? To the jury the denial was doubtless another link in the chain of proof connecting defendant with the crime. Counsel say: "The denial is more reasonable than the affirmation." I do not think so. The affirmation seems to be consistent with her sworn statement, which follows, and the denial is not consistent with the statement when the evidence is considered as a whole. Anyhow, this was a question of fact for the jury. And the trial court's ruling, in effect, so held. Clearly, in view of all the evidence, it was for the jury to pass upon the question as to which of defendant's statements was true and which was false. It is elementary that in the trial of questions of fact, in cases of this class, it is the duty of the jury to consider all the evidence together, and not isolated portions of it, and if, when so considered, the jury is satisfied beyond a reasonable doubt that the defendant is guilty, its sworn duty is to so find by its verdict.

December 4, 1924, defendant signed the sworn statement, which is above referred to, and which was introduced in evidence. After being read to defendant the statement was signed by her and verified before the clerk of the district

court. He testified that no person other than affiant and himself were present when it was read and signed and verified, and that no inducement was offered to obtain her signature. The clerk's statement stands unchallenged. Defendant's statement follows:

"State of Nebraska,
"County of Custer. } ss.

"I, Arvesta Northey, being first duly sworn, freely and voluntarily, and without threats or promises of any kind or character and desiring only to tell the truth do make the following statements: I am forty-seven years of age and reside at Sargent, Nebraska, and have resided there for many years, that I became acquainted with one Frank Bruner a number of years ago and about eight years I have seen him frequently, he visiting me at my home at night and other times and meeting me frequently in stores and other places in Sargent, going riding with me in automobiles, sometimes alone, and sometimes accompanied by my daughter and for some time past he has given me money and some supplies for my home. About the 5th of September, 1924, Frank Bruner and I by prearrangement met at Grand Island where I purchased a Ford automobile in which to make a trip. We stayed in Grand Island together two or three nights and then Frank Bruner and I went in the car alone to Hastings, on to Red Cloud, Nebraska, where we spent the first night. From Red Cloud, Frank Bruner and I continued our journey in the automobile going down into Kansas, stopping at Beloit and Russell and then following the U. P. Railroad to Denver. In Denver we stayed one night and part of two days. We then crossed the mountains and continued our journey going up into Nevada a short distance. We really planned on going to California but Frank Bruner was afraid that he would be brought back to Sargent, Nebraska, for deserting his family so we decided to return to Sargent, we accordingly turned back and came in the automobile back to Sargent, Nebraska, by the way of North Platte, Gothenburg and

Ansley. On this journey we camped out staying at tourist parks and other places in towns and cities we visited, and slept in the car. Frank Bruner paid for part of the expense of this trip and I paid for part of the expense. On this journey we were gone 21, 22 or 23 days and no one accompanied us on any part of the journey.

"I further state that Frank Bruner and I became very much attached to each other a number of years ago and frequently during the past several years we have sustained illicit relations with each other, and have frequently talked with each other about his securing a divorce from his wife and he has told me that his wife would not agree to a divorce. He has also told me that he was going to get rid of his wife some way but did not know how, and this statement he made since we returned from the trip in September, 1924. I told him that my husband would not cause any trouble, he stated that his wife would cause trouble. About a year ago Frank Bruner suggested to me that I get rid of my husband by slipping a pill into his coffee. I do not remember whether Frank Bruner discussed with me the subject of poisoning his wife but he has frequently told me that he was going to get rid of his wife and I suspicioned he might poison her.

"Frank Bruner visited me in my home at Sargent, Nebraska, on the Saturday night before his wife died and also on the Sunday night immediately preceding her death the following day.

"On the afternoon of the death of Frank Bruner's wife I was at home alone nearly all the time as my daughter left early in the afternoon and did not return until late.

"Mrs. Arvesta Northey.

"Subscribed and sworn to before me this 4th day of December, 1924. Herman F. Hanson, Clerk of the District Court of Custer County, Nebraska. (Seal)"

Following the introduction of the statement in evidence the record proceeds: "Mr. Schnell (examiner): We object to this on the ground that it is not a voluntary statement under all the facts and circumstances in the case.

We further object for the reason that the matters set forth in this instrument have already been testified to and are in evidence in the case. The Court: Overruled. Exception." The record does not seem to sustain the objection of counsel on either point, and it was properly overruled.

Frank Bruner, Mrs. Bruner's husband, was a roundhouse foreman, or hostler, for the Burlington railroad at Sargent. He worked at night and slept in the daytime. On the day in question, namely, Monday, November 24, 1924, he was at home. At about 3 o'clock on Monday afternoon, the evidence shows that Mrs. Bruner complained that she was ill. About this time in the afternoon, according to the evidence of Addis Monroe, Bruner's fellow employee, Bruner came to the depot and told him that his wife was sick, and in about ten minutes he, Monroe, left the depot and went to Bruner's home shortly after Bruner had arrived there. Upon inquiry, Mrs. Bruner said: "I am awful sick." She told him that she was hanging out the washing when the clothes line fell and when she stooped to pick it up the blood rushed to her head. Monroe then, at her request, took her to Dr. Taylor's office in his car. Before they left, Bruner suggested, "Why not get the doctor down here?" and Mrs. Bruner said, "No, I'll go with Addis." In the meantime Frank Bruner was in the kitchen. He did not go to the doctor's office with his wife. Upon arrival at his office, the doctor prepared some medicine for Mrs. Bruner, and very shortly she returned to the car and started for her home with Monroe. When they had proceeded three or four blocks on their way Mrs. Bruner fainted. Monroe then returned with her to the doctor's office and she was carried in and laid on a couch where she died within a few minutes. Dr. Taylor and two other physicians removed Mrs. Bruner's stomach and it was sent by them to a state chemist at Lincoln. The evidence of the chemist disclosed that the stomach contained a deadly poison. Dr. Taylor named it "a violent poison, an irritant."

It seems that Mrs. Bruner ate no breakfast nor did she partake of any refreshments at the noon hour except a cup

of tea. Did Bruner, who was at home in the forenoon, surreptitiously drop a poison pill into his wife's tea, or did he, at all, administer the fatal poison to her, in any manner, which was afterward found in her stomach? And, if so, did defendant aid and abet him, in his murderous deed, within the meaning of section 9541 (section 1), ch. 89, Laws 1923, which is above cited? If so, both, under the law, are equally guilty. What is it to "abet" another in the commission of a crime? Following is an accepted definition: "Abet: To incite, encourage, or instigate (a person);—now used chiefly in a bad sense." Webster's Dictionary. Of course, the legislature used the words "aid," "abet," and "procure" in their ordinary sense.

The evidence is, in part, circumstantial. In their brief defendant's counsel concede this, and also that the state chemist found bichloride of mercury, a deadly poison, in Mrs. Bruner's stomach "in sufficient quantity to produce death." In 3 Greenleaf, Evidence (16th ed.) sec. 30, it is said:

"The proof of the charge in criminal causes involves the proof of two distinct propositions: First, that the act itself was done; and, secondly, that it was done by the person charged, and by none other; in other words, proof of the *corpus delicti*, and of the *identity of the prisoner*. It is seldom that either of these can be proved by direct testimony; and therefore the fact may lawfully be established by circumstantial evidence, provided it be satisfactory."

Did any witness see Bruner put the poison vial to the lips of his wife or did any witness see or hear his temptress aid and abet him in the act? No. Such deeds are not done nor are the plans laid in the presence and hearing of witnesses. Did Bruner have the will to get rid of his wife? His paramour, defendant here, says he told her that he did. Does the evidence show that Bruner and defendant entertained, in common, a felonious desire for Mrs. Bruner's death? Let the record answer.

It will be recalled that defendant stated in her affidavit that, after she and Bruner had returned to Sargent from

their automobile trip of approximately three weeks, Bruner told her "that he was going to get rid of his wife somehow," and advised her to get rid of her husband, who was past 70, "by slipping a pill into his coffee." Soon afterward defendant abandoned her aged husband and moved away into another house in Sargent.

The motive of defendant, and of Bruner, for the taking of Mrs. Bruner's life seems to have been clearly shown by the circumstances surrounding the entire case. The record plainly shows that the infatuation of defendant and Bruner, each for the other, was altogether mutual. And this was observed by many citizens in the vicinity. The town marshal testified that, after defendant moved away from her husband into another house, she and Bruner were together almost every day. A lady living next door to the house in question testified that Bruner came and stayed there two or three hours at each visit. And many other witnesses testified to the frequency of their unseemly conduct in public places. The notoriously licentious conduct of Bruner and defendant for a period of years, as disclosed by defendant's voluntary statement, and corroborated in part by the evidence of disinterested witnesses, when considered with all of the evidence, tends strongly to establish a common motive and a concerted evil design on the part of both defendant and Bruner to take such steps as were necessary to get rid of Bruner's wife "because she would not agree to a divorce." And this, of course, that these people might marry. True, defendant's husband remained alive. But Bruner advised that his doom be fixed by "slipping a pill into his coffee." Counsel argue: "The important evidence, therefore, upon which conviction must stand or fall, is the testimony of the sheriff and the written statement of the defendant." This plainly concedes that the jury's verdict must stand unless "the testimony of the sheriff and the written statement of the defendant" are both incompetent. And this has not been shown, nor has it been scarcely attempted. Of course, if, in any criminal case, the court should strike out sufficient of "the important evidence" of the state, the prosecution

would fail and the defendant would be discharged. But it was not stricken out, in the present case, nor has it been shown, anywhere, that the evidence as submitted to the jury was incompetent.

Briefly then, what are some other of the main points which tend to support the conviction? In whose company was defendant on the Saturday night and the Sunday night immediately preceding Mrs. Bruner's death, which fell on the following Monday afternoon? Let defendant answer: "Frank Bruner visited me in my home at Sargent, Nebraska, on the Saturday night before his wife died and also on the Sunday night immediately preceding her death the following day." The jury, of course, noted the identity of defendant's nightly visitor; the place where, and the two nights when defendant was "visited" by Bruner at her newly made home away from possible interruption or detection by the husband whom she had recently deserted. And this intimate relationship, existing for years, no doubt tended strongly to establish in the minds of the jury that it was on the occasion of these last two nocturnal "visits" that the fate of Mrs. Bruner was finally and definitely agreed upon and fixed, for a day certain, by defendant and her paramour, and that she then and there abetted, that is to say, incited, or encouraged, or instigated Bruner to commit murder. It is said in defendant's brief: "The evidence is circumstantial." Certainly it is so in part. And the jury were properly instructed in respect of circumstantial evidence.

Counsel argue: "It must constantly be remembered that Mrs. Northey was not at the Bruner home on the day of her death." Clearly, in view of the incriminating evidence, defendant knew that Bruners home was no place for her on that day. But where was she? In her affidavit she says this: "On the afternoon of the death of Frank Bruner's wife I was at home alone nearly all the time." Naturally she would be "at home alone" on that fateful afternoon. Did the jury conclude that defendant was at home waiting for expected tragic "news" from the bedside of the hapless

victim of a poisoner? To this inquiry the record does not supply a vocal answer. And, for obvious reasons, there was none. The poisoner talks to no one other than his accomplice. He makes no boasts. His stealthy tread gives no warning of his approach nor of his departure. He calls no one to witness his cowardly act. With a turn of the hand the poison pill is dropped into the cup of his unsuspecting victim and soon, all is over, except detection. And high heaven hath ordained that a murderer shall not escape his just dues.

In view of all the evidence, could a reasonable juror, under his oath, do otherwise than find defendant guilty? He considers all the evidence. "A voluntary confession of a defendant is competent evidence in a criminal case, and may, with even slight corroborating circumstances, be sufficient to establish the *corpus delicti.*" *Cohoe v. State,* 32 Neb. 744. The present case comes within the rule. *State v. Kennedy,* 77 Ia. 208, is a case where defendant was convicted of the murder of his wife on evidence which was wholly circumstantial. It was held that the verdict could not be interfered with by the supreme court on the ground that the evidence was insufficient. The court, in the present case, cautioned the jury that an admission made out of court is to be "received and considered with caution," and of itself will not support a conviction, but is a circumstance to be considered in connection with other facts.

Applying the language of Wharton to the facts before us, it seems that the strands in the rope of circumstantial evidence, when considered with all the competent evidence submitted to the jury, are "strong enough to establish the guilt of the accused beyond a reasonable doubt." 2 Wharton, Criminal Evidence (10th ed.) sec. 872. The learned author further observes: "When proof has been made of the *corpus delicti* in a homicide prosecution, all facts and circumstances that tend to show motive on the part of the accused are relevant, and equally relevant are the relations between the accused and the deceased, and all feeling that existed between them. * * * Motive in homicide is a

question of fact to be determined by the jury; it may be inferred from the crime itself, or from the actions of the accused. The conduct and attitude of the parties toward each other are circumstances relevant on proof of motive, in connection with the other facts and circumstances surrounding the act." 2 Wharton, Criminal Evidence (10th ed.) secs. 895, 896.

Siebert v. People, 143 Ill. 571, is a case where a wife and her paramour were tried for poisoning her husband. The court there held that evidence of adultery was admissible, not for the mere purpose of proving the commission of adultery, but that it was admissible on the question of motive. To substantially the same effect is *Pate v. State,* 94 Ala. 14, where it was held competent, as tending to show motive, for the state to show the fact of adultery by the acts of the parties and the admissions of the defendants.

In *Parrish v. State,* 14 Neb. 60, in an opinion by Lake, J., we said: "It is a presumption of law, applicable in criminal trials, that a person intended to do that which he voluntarily and wilfully did in fact do. * * * If the proof of guilt be of such moral certainty as convinces the minds of the jury, as reasonable men, beyond all reasonable doubt, it is sufficient."

In *Burnett v. State,* 88 Neb. 638, we said: "In a criminal prosecution, the determination of the credibility of witnesses and the weight of the evidence being peculiarly within the province of the jury, a verdict of guilty, based upon sufficient competent evidence, will not be disturbed, even though this court may entertain doubt as to the correctness of the jury's findings."

It is doubtful if a more degrading recital of human depravity has been disclosed in the criminal annals of this state in recent years. Of what avail is the Criminal Code, of what avail are our trial courts and our juries, as deterrents of proved, premeditated murder, if a crime so abhorrent, after a fair and impartial trial, and a verdict pronouncing the guilt of the defendant, based upon sufficient competent evidence, is to go unwhipt of justice?

What is the ultimate object of the enforcement of the law against murder? Is it for the sake of wreaking vengeance upon the head of the guilty party? In the last analysis is it not in large part to warn men, by making an example of the guilty, that murder shall not go unpunished?

For the reasons herein expressed, I respectfully dissent from the opinion of the majority. And this on the ground that, in my judgment, under the evidence and the law applicable thereto, the verdict of the jury and the judgment of the learned trial court should have been sustained.

JOHN CONNOLLY, APPELLEE, V. JAMES C. DAVIS, APPELLANT.

FILED APRIL 22, 1926. No. 23775.

Evidence: TELEPHONIC CONVERSATION. Where a shipper of delayed freight calls the yardmaster at a division station of the carrier and gets from one who says he is the yardmaster an answer indicating that the delay was caused by negligence, the shipper, as a witness, may testify to the conversation, if otherwise competent, though he did not recognize the voice of the person talking. The syllabus in *Bernstein v. State*, 106 Neb. 337, considered as a general rule of law, overruled.

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

E. E. Whitted, Mothersead & York, J. L. Rice and *J. H. Barwise, Jr.*, for appellant.

Morrow & Morrow, contra.

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

ROSE, J.

This is an action to recover damages for a day's delay in transporting by rail 78 steers in three freight cars from Bingham by way of Bridgeport, a railroad junction, to Minatare, and for failure to feed and otherwise properly care for the animals in transit. Plaintiff loaded and billed

the cars February 26, 1919. They arrived at Bridgeport February 27, 1919, were kept there until the next day and were not delivered at Minatare until February 28, 1919. It is charged in the petition that in the usual course of transportation the shipment should have arrived at Minatare February 27, 1919, and that plaintiff was damaged by the negligence of defendants to the extent of $1,774.08. This estimate included two items: Injury to steers, $780; loss of profits on a prearranged sale, $994.08. Defendants denied the negligence charged and pleaded further that the carrier was prevented by a snow storm from transporting the steers from Bridgeport to Minatare February 27, 1919, and that injury to the steers, if any, was unavoidably due to weather conditions. Upon a trial of the issues the district court disallowed the claim for profits on the anticipated sale and the jury returned a verdict in favor of plaintiff for $780. Defendant appealed.

The sufficiency of the evidence to sustain the verdict is challenged on the ground there was no competent proof that the animals were in good condition when loaded; or that the carrier was negligent in detaining the shipment at Bridgeport; or that there was a failure to feed, water and otherwise care for the stock in transit; or that the injuries to the animals, if any, were not due to the storm; or that there were substantial damages in an ascertainable amount based on the difference between the market value of the steers when delivered and the market value as they should have been, delivered a day earlier.

Disregarding for the moment the competency of testimony adduced by plaintiff, there is evidence from which the following facts and conclusions are fairly inferable: The cattle were in good condition when loaded. The shipment arrived at Bridgeport February 27, 1919, and in the regular course of transportation should have been attached to a local freight train and taken to Minatare later the same day. The shipment missed the local freight through the negligence of the carrier. The storm did not prevent the usual trip by the local freight February 27, 1919, and was not

the cause of the delay. The cattle were not unloaded or fed and watered at Bridgeport and suffered from the negligence of the carrier. Plaintiff had been buying and selling cattle for 30 years and as a dealer in livestock, and as the owner of the consignment, he was acquainted with values and knew what the steers were worth. They were not worth more than $100 a head when delivered, and would have been worth $116 a head if delivered a day earlier without the injuries resulting from delay and want of care. The verdict, therefore, seems to be sustained by the evidence, if the questions of competency are disregarded. It must be conceded, however, as contended by the carrier, that the estimate of $116 a head appears in the testimony as the anticipated sale price, an issue taken from the jury, but it may be inferred from other testimony by plaintiff that the estimates of $100 and $116 were the differences in values owing to delay and neglect.

The verdict, nevertheless, cannot be permitted to stand unless a telephonic communication from the yardmaster's office at Bridgeport to plaintiff at Minatare was properly admitted in evidence over the objection of defendants. Without this telephonic communication the evidence failed to show that the steers were not unloaded, fed and watered at Bridgeport—elements inhering in the verdict for damages. There is testimony by plaintiff tending to prove that on the morning of February 28, 1919, he called the yardmaster at Bridgeport by telephone, that there was a response to the call and that the speaker at the carrier's office said he was the yardmaster. What followed was told by plaintiff on the witness-stand as follows:

"I asked him why they didn't get my cattle out the day before, and he said, 'They missed them there,' and he said, 'We were going to send them out last night but we didn't have an engine available, but we will get them out today.' I said, 'Did you feed them today?' He said, 'No; we didn't. They are still in the cars.' "

The objection to this testimony is that there was nothing to identify the yardmaster as the person talking, his voice

not being recognized by plaintiff. There was no positive identification, but the answer came in the usual course of telephonic service from the carrier's office where a yardmaster was employed at a railway division point for freight. The answer by telephone indicated that the speaker was familiar with the shipment and with the duties of a yardmaster. The condition of the cattle when they arrived at Minatare indicated they had not been fed or watered. The telephonic communication had the same import. The telephone is used by the carrier in the transaction of its business for the mutual benefit of itself and shippers. In a yardmaster's office a telephone is an invitation to shippers to use it in proper transactions relating to the transportation of freight. The telephonic instrument in the office of the yardmaster is under the control of the carrier. Its use by shippers is not confined to those who can recognize the voice of the yardmaster in answering calls. The means of detecting misuse of the telephone at a division station are not equally available to shipper and carrier, the latter having the advantage. To discredit or deny transactions by telephone, unless the voice of the speaker is recognized, is to impair the usefulness of that instrument when applied to the business of a common carrier. A rule of conduct which permits a common carrier to procure shipments by telephone and at the same time denies to a shipper the benefit of an answer when he inquires what has become of his property, if he does not recognize the voice of the person called, is open to question. The courts differ on this point, but the better reasoning and the weight of modern authority seem to sanction the admissibility of testimony like that challenged in the present case as incompetent.

A careful annotator who made a critical analysis of precedents recently said:

"By the weight of authority evidence is admissible as to conversations over the telephone, where the witness has called for a designated person at his place of business and the one answering the telephone and carrying on the conversation claims to be the person called for. This rule is based upon the apparent necessity, in view of the constant

use of telephones, of holding that where a telephone conversation is carried on in the ordinary and usual manner, and is had in the usual way, evidence of the conversation must be admissible, the weight attached thereto to be a matter for the consideration of the jury in view of all the surrounding circumstances, including the admissions or denials of the other party to the conversation." L. R. A. 1918 D, 720, and cases cited in note.

The syllabus in *Bernstein v. State,* 106 Neb. 337, without an examination of the opinion, is susceptible to misapplication as a general rule that a telephonic communication is inadmissible unless the voice of the person talking is recognized by the witness, and for that reason is overruled. The testimony there under consideration, however, was erroneously admitted and the judgment, therefore, was properly reversed.

With the principal question decided adversely to defendants, there is no error prejudicial to them in the record.

AFFIRMED.

NORFOLK NATIONAL BANK, APPELLANT, V. FIRST NATIONAL BANK OF BRISTOW, APPELLEE.

FILED APRIL 22, 1926. No. 23863.

Bills and Notes: LIABILITY. One whose name nowhere appears on a negotiable promissory note is not generally chargeable as indorser.

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

Charles H. Kelsey and *M. D. Tyler,* for appellant.

Jesse L. Root, John A. Davies, W. J. Wills and *J. A. Donohoe, contra.*

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

ROSE, J.

This is an action on an unpaid note in the following form:

Note—See 40 Harvard Law Review, 494.

"$4274.72. Bristow, Nebraska, April 21, 1922.

"July 22, 1922, after date, for value received, I promise to pay to the order of C. T. Samuelson, forty-two hundred seventy-four and 72/100 dollars.

"Payable at the First National Bank, Bristow, Nebraska. With interest at the rate of ten per cent. per annum from maturity until paid; payable semi-annually.

"The indorsers, sureties, guarantors, and assignors, severally waive presentment for payment, protest and notice of protest for non-payment of this note, and consent that the time of payment may be extended without notice.

"(Signed) Bert Loomis.

"O. O. Lynch, Nebr., R. 1.

"No. 15622. Due July 22, 1922. 2.26."

The indorsements on the back of the note are as follows:

"Payment Guaranteed.

"Protest, demand and notice of non-payment waived.

"C. T. Samuelson.

"Payment guaranteed. Protest, demand, notice of non-payment waived.

"Woods Credit Company,
"By F. W. Woods, Pt.
"F. W. Woods.

".86 cents I. R. S. duly canceled."

The Norfolk National Bank is plaintiff and pleads that it purchased the note in due course of business for full value before maturity. The action is one at law to recover from the First National Bank of Bristow, the only defendant, as indorser, the unpaid principal and interest. It is alleged in the petition that in these transactions the business, pursuant to custom, was conducted on the part of defendant in the adopted name of "C. T. Samuelson"—the name appearing on the face of the note as that of payee and on the back of the note as that of indorser. "C. T. Samuelson" was the name of the vice-president and managing officer of defendant. The facts on which the action is based, including the charge that defendant is payee and indorser, are pleaded formally in detail. The note and the

indorsements thereon are parts of the petition. Defendant denied liability as an indorser. A jury was waived and the district court upon a trial of the issues dismissed the action. Plaintiff appealed.

Is a national bank whose name nowhere appears on a negotiable promissory note, except to designate the place of payment, liable as indorser in an action at law on the note to recover the unpaid principal and interest?

Plaintiff insists that defendant, the First National Bank of Bristow, in fact lent to Loomis the money for which he gave the note in controversy, that defendant was the real payee and the first indorser, that in these transactions defendant conducted, pursuant to custom, the business in the adopted name of C. T. Samuelson, and that the liability on the actual indorsement is the same as if the name of the First National Bank of Bristow, defendant, had appeared in the note as payee and in the indorsement as indorser. The position outlined does not seem to be tenable. Under such a custom personal transactions of C. T. Samuelson in accepting and transferring a note would be identical with that of defendant—the bank of which he was the managing officer. Identity of parties is an important factor in banking affairs. Without attempting to reform the note, plaintiff demanded the enforcement of an obligation not expressed or implied in the writing itself. This required oral proof at variance with what is clearly expressed on the face and back of the note on which the action was based. It also required oral proof of a custom showing that the written contract of the parties in unambiguous terms is not what it purports to be. A negotiable instrument with indorsements thereon, if any, has a definite import in commerce, carrying generally on its face and back its obligations and the names of the obligors. In the channels of trade it is not intended to be a bearer of fictitious names or undisclosed obligations. Furthermore a national bank is a creature of federal law with a corporate name to be used in conducting the business of banking. It seems clear, therefore, without a reformation of the note, in absence of fraud

or mistake, that parol evidence was inadmissible for the purpose of showing that the writings did not disclose on their face their true import, or that custom created an unexpressed obligation, or that C. T. Samuelson was an adopted name of defendant. The controlling principle is that one whose name nowhere appears on a negotiable promissory note is not generally chargeable as indorser. There are exceptions to the rule, but none of them applies to the facts of the present case. It follows that the action was properly dismissed.

AFFIRMED.

THOMPSON and EBERLY, JJ., dissent.

WILHELM DOMANN ET AL., APPELLEES, V. CHARLES DOMANN ET AL., APPELLANTS.

FILED APRIL 22, 1926. No. 23942.

1. **Evidence** examined, and *held* to support the judgment setting aside the deed.
2. **Trial:** PLEADING AND PROOF... The findings of facts and judgment must conform to and be supported by the allegations of the pleadings.
3. **Pleadings** examined, and *held* not sufficient to support the personal judgment rendered against Marie Domann.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed in part and reversed in part.*

D. W. Livingston, for appellants.

W. W. Wilson, Pitzer & Tyler, W. F. Moran and *Edwin Moran, contra.*

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

DAY, J.

Originally this action was commenced in the name of Wilhelm Domann by his daughter, Kate Guermann, as his

next friend, against Charles Domann and his wife, Antonette, to set aside a deed to 240 acres of land executed to Wilhelm Domann and his wife to Charles Domann.

While this action was pending Wilhelm Domann died and by stipulation the action was revived and proceeded in the name of the heirs of Wilhelm Domann. Besides his widow, Marie, Wilhelm Domann left surviving him four children by a prior marriage, to wit: Kate Guermann, Sherman, Charles and Louis Domann. After the issues were made up Kate Guermann and her brother, Sherman, were aligned as plaintiffs seeking to have the deed set aside. Charles and his wife, Antonette, and Louis were aligned as defendants asking that the deed be sustained. Marie Domann intervened praying the same relief as the plaintiffs, but on slightly different grounds.

The plaintiffs' case is based upon the theory that on September 15, 1922, the date of the execution of the deed in question, Wilhelm Domann was mentally incompetent to make the deed; that no consideration was paid thereof, and that its execution was procured through undue influence practiced upon the grantor by Charles Domann and others.

The defendants denied the lack of mental capacity on the part of Wilhelm Domann; denied that undue influence was exerted to procure the deed, and alleged that the deed was executed in pursuance of an agreement made many years before between the grantor and Charles and Louis Domann, whereby, in consideration of Charles and Louis remaining on the farm and paying a mortgage debt thereon, the grantor would convey to them the title of the farm, reserving to himself the use of the land during his life; that they performed their part of the agreement, remained on the farm without receiving wages, and paid off the mortgage, amounting to $4,200 with interest, and that the deed was made to Charles for the benefit of himself and his brother, Louis.

The reply of the plaintiffs denied the allegation of new matter set up in the answer, and alleged that a full settlement of all differences between Wilhelm Domann and his

sons, Charles and Louis, was had in the fall of 1909, and that at the time the deed in question was made Wilhelm Domann owed nothing to his sons.

Marie Domann filed a petition alleging that she is the surviving widow of Wilhelm Domann, who died intestate on February 16, 1923; that prior to September 15, 1922, Wilhelm Domann was the owner of the lands in question; that she has a right of inheritance in said lands; that she is 67 years of age; that she was born in Germany, and does not read the English language and cannot converse in it intelligently; that when she signed the deed with her husband conveying the land to Charles Domann she did not understand that she was conveying away her rights of inheritance in said lands; that the deed was made without consideration, and was procured by undue influence, deceit and fraud on the part of Charles Domann. She joins in the prayer of the plaintiffs that the deed be declared null and void; that it be canceled and set aside.

The defendants for answer to the petition of Marie Domann admitted that she is the surviving widow of Wilhelm Domann, and that Wilhelm Domann died intestate; that she married Wilhelm Domann August 15, 1918. The answer further alleged that Wilhelm Domann, in addition to settling debts which might arise against his estate, conveyed to Marie Domann valuable real estate and delivered to her money and valuable securities in large sums in full satisfaction of her interest in the estate of Wilhelm Domann. The answer also alleged that the deed from Wilhelm Domann to Charles Domann was made in pursuance of an agreement between Wilhelm Domann and his sons, as heretofore set forth in the answer of the defendants to the petition of Kate Guermann and Sherman Domann. The defendants prayed that the petition of Marie Domann be dismissed.

Upon the issue thus presented, the court found generally in favor of the plaintiffs; that there was no consideration for the deed; that at the time the deed was executed Wilhelm Domann was incompetent and unable to understand

the import of the transaction, and that the deed was procured through undue influence, and entered judgment setting the deed aside. With respect to Marie Domann there was a finding as follows: "The court further finds that Marie Domann participated in the undue influence used and exercised on Wilhelm Domann and benefited thereby in the sum of $5,700, which in equity should be returned to the estate of Wilhelm Domann, deceased." On this finding the court rendered judgment against Marie Domann for $5,700 with interest at 7 per cent. from October 21, 1922, in favor of the estate of Wilhelm Domann, deceased. From this judgment, in so far as it sets aside and cancels the deed, the defendants Charles, Antonette and Louis Domann have appealed. Marie Domann has filed a cross-appeal from this judgment wherein a money judgment is rendered against her.

Upon the issues presented between the plaintiffs and defendants, we think the evidence is decidedly in favor of the plaintiffs' contention. It will serve no useful purpose to discuss the evidence in detail, suffice it to say that at the time the deed was made Wilhelm Domann was suffering from senile dementia, and from the testimony was incapable of comprehending the nature of the business he was transacting. He was in a state of mind to be easily influenced. He had some years before the making of the deed drafted a will in which he left his property to be divided between his wife and four children. Nothing afterwards occurred as a reason why he should suddenly conclude to deed the greater part of his property to one son to the exclusion of his other children, especially to a son with whom he had not been on friendly terms for some years.

We now come to consider the personal judgment of $5,700 entered against Marie Domann, the cross-appellant. An examination of the pleadings clearly shows that none of the parties to the action were seeking a personal judgment against Marie Domann. The only issue presented by the pleadings was whether the deed to Charles Domann should be set aside. In entering a personal judgment against Marie

Domann the court went beyond any issue presented by the pleadings or tried in the case. While there is some proof indicating that Wilhelm Domann had transferred some of his property to his wife at about the same time, these transactions were only incidental to the real issue in the case. The rule is well established that the findings of fact and the judgment must conform to and be supported by the pleadings. *Clemons v. Heelan,* 52 Neb. 287; *Traver v. Shaefle,* 33 Neb. 531.

From what has been said, it follows that the judgment setting aside the deed from Wilhelm Domann to his son, Charles Domann, should be affirmed, and should be reversed in so far as it renders a personal judgment against Marie Domann.

AFFIRMED IN PART AND REVERSED IN PART.

CITIZENS STATE BANK OF STRATTON, APPELLEE, V. FRANK P. STRAYER, APPELLANT.

FILED APRIL 22, 1926. No. 24715.

1. **Banks and Banking:** REGULATION. The banking business, carried on pursuant to a state charter, is quasi-public and, for protection of the public and in its interests, is subject to reasonable regulation by the state.

2. ———: IMPAIRED CAPITAL: POWERS OF DIRECTORS. Section 8031, Comp. St. 1922, construed, and *held* to vest in the stockholders of a bank, whose capital is impaired or reserve depleted, power to determine whether they will repair the capital and restore the reserve to legal requirements and continue in business, or suffer the business of the bank to be voluntarily liquidated or liquidated at the hands of the state in the manner provided by law; and *held,* further, to authorize the directors of such bank to levy an assessment upon the stock, to repair the capital or restore the reserve, only when first authorized so to do by the stockholders of such bank.

3. **Constitutional Law:** STATUTES: CONSTRUCTION. Where a statute is susceptible of two constructions, one of which would render it constitutional and the other unconstitutional, the former is to be preferred.

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

Norval Bros., Letton, Brown & Dibble and *J. F. Ratcliff*, for appellant.

Stewart, Perry, Stewart & VanPelt and *Butler & James, contra.*

Allen G. Fisher, amicus curiæ.

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

GOOD, J.

In March, 1924, the capital of the plaintiff bank was impaired and its reserve depleted. Because of these facts, the department of trade and commerce of the state of Nebraska took possession of the bank, and in April following requested the bank to make an assessment of 100 per cent. on its capital stock, for the purpose of restoring the impaired capital and depleted reserve. On the 18th of April, 1924, the directors of the plaintiff bank adopted a resolution declaring an assessment of 100 per cent. on its capital stock, and notified the stockholders to pay such assessment by a date named. The stockholders had not authorized the directors to make any such assessment. Defendant was the owner of 19 shares of the capital stock of the plaintiff bank, of the par value of $100 each. He neglected and failed to pay the assessment. Pursuant to a notice given to defendant, the directors sold his 19 shares of stock for $100, which was applied on the assessment, leaving an unpaid balance of $1,800, to recover which this action was brought.

The above stated facts were set forth in detail in plaintiff's petition, to which defendant filed a general demurrer, which was overruled. Defendant elected to stand upon his demurrer and not to further plead. Judgment went against him for the full amount demanded in the petition. Defendant appeals.

Plaintiff bases its right to make and enforce collection

of the assessment on the provisions of section 8031, Comp. St. 1922. That section provides:

"After the department of trade and commerce or receiver shall have taken possession of any bank under the provisions of this article, the stockholders thereof may repair its credit, restore or substitute its reserves, and otherwise place it in condition; but such bank shall not be permitted to reopen its business until the department of trade and commerce, after careful investigation of its affairs, is of the opinion that its stockholders have complied with the law, that the bank's credit and funds are in all respects repaired, all advances, if any made from the depositor's guaranty fund, with interest, fully paid, its reserve restored or sufficiently substituted, and that it should be permitted again to reopen for business; whereupon said department of trade and commerce is authorized to issue written permission for resumption of business under its charter. The directors shall have power and authority to levy and collect assessments on the stock for the purpose of repairing the credit of the bank and any deficiency that may occur by reason of the impairment of the capital stock of said bank. If any shareholder or shareholders of such bank shall neglect or refuse, after three weeks notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction after three weeks notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders."

Defendant contends that if the section quoted shall be construed to authorize the board of directors to levy an assessment upon the capital stock for the purpose of repairing its impaired capital or restoring its depleted reserve, without first being authorized by the stockholders of the

bank, it would be void because in conflict with sections 4 and 7, art. XII of the Constitution. It also contends that, in any event, the statute does not authorize the taking of a personal judgment against a shareholder, but that the right to enforce the assessment can, in no event, go farther than the sale of the shareholder's stock.

In determining what was the purpose and intent of the legislature in enacting section 8031, Comp. St. 1922, it is proper to consider the situation and the rights of the parties to be affected, viz., the state, the bank and its stockholders. In this state the banking business may be carried on only by corporations. The banking business is declared to be quasi-public and is therefore subject to reasonable regulation for the protection of the public. It is entirely proper to require a bank, as a condition to its continuing in business, to keep its capital unimpaired and its reserve intact for the protection of its depositors and creditors. Anything that might injuriously affect the depositors and the business interests of the community is a matter of public concern. It is right and proper that the state should require that such business shall be conducted in such a manner as not to injure the public. But what of the rights and obligations of the bank and its stockholders? The stockholders are the owners of the bank and are the ones vitally interested in its success, and in determining whether they shall continue the existence of the bank under such reasonable regulations and conditions as the state may impose. It is their undoubted right to determine whether they shall continue in or retire from business. If they find the business unprofitable, they may liquidate in the manner provided by law. It is not the province of the directors to compel the stockholders to continue the operation of a losing business. The directors may or may not be heavy stockholders. They may be the owners of a majority of the bank's capital stock, or the owners of a small percentage of it. Usually, the officers who control and manage the bank are selected from the directors. They may have a personal interest in keeping the bank open, so

that they may continue to draw their salaries, even though the business may be unprofitable to the stockholders. They may be willing to forego dividends upon their stock, or even willing to pay assessments thereon, for the purpose of keeping the bank open and themselves employed at profitable salaries. If the bank cannot operate and continue in business except at a loss to its stockholders, it is not to the interest of the public to compel its continued operation. Whenever such a condition arises, the stockholders may, in the manner provided by statute, voluntarily liquidate and discontinue the business. So long as the bank operates or attempts to operate, if it fails to comply with the reasonable regulations, the state may take charge and liquidate its legal obligations and close the bank.

We think that the purpose and end to be attained by the legislature in the enactment of section 8031, *supra,* was not to compel the bank to continue in business, regardless of whether it was profitable so to do, or regardless of the wishes of its owners, but, rather, it was to protect the public in the event the owners of the bank desired to continue in business. It was within the province of the legislature to say to the bank: "If you wish to continue in the banking business, you must keep your capital unimpaired and your reserve at the legal requirement. Failing so to do, the state will take charge of the bank, close its doors and enforce liquidation." To permit a minority of the stockholders, over the wishes and protests of a majority, to dictate the continuance of a losing business, would not be in the public interests, nor to protect the public, but quite the reverse. The banking business should be in the hands of careful, prudent men. If the right to retire from such business, when it proves to be unprofitable, is denied them, careful, prudent men will not invest their funds in the business. In the long run, it would be to the great detriment of the public, if such were the rule. The undoubted purpose of the legislature, in the enactment of section 8031, *supra,* was the protection of the public by requiring the reparation of capital and the restoration of

reserve, if the stockholders of the bank deemed it advisable to continue in business. That they might do so, the statute provided, when the bank was in charge of the department of trade and commerce because its capital was impaired or its reserve depleted, that the stockholders might continue upon condition that they repair the capital and restore or substitute the reserve. A later provision in the statute authorizes the directors to levy and collect assessments on the stock, for the purpose of repairing the credit of the bank. The language of the statute is not as clear and explicit as could be desired, but we think a fair interpretation thereof is that the option was given to the stockholders to determine whether or not they would continue in the business. If they determined to continue, then they were required to repair the capital and restore the reserve. Then, and then only, was it intended that the directors should levy an assessment to carry out the previously expressed purpose and wish of the stockholders. The authority given to the directors to levy an assessment presupposes that the stockholders have determined upon such course.

We have been favored with elaborate briefs and able arguments. The cases cited, however, we think are not applicable to the situation here under consideration. We find no case where similar constitutional and statutory provisions are involved. The decisions of other courts upon constitutional and statutory provisions, unlike our own, afford but little light. It is quite probable, though we do not so decide, that if the statute were given the construction contended for by plaintiff it would be violative of constitutional provisions and would be, therefore, of no force or effect. Where a statute is susceptible of two constructions, one of which would render it constitutional and the other unconstitutional, the former is to be preferred.

The conclusion reached as to the proper construction of the statute renders it unnecessary to consider the other questions which have been argued and briefed.

From what has been said, it follows that the judgment

of the district court should be and is hereby reversed and the action dismissed.

REVERSED AND DISMISSED.

Note—See (2) 23 A. L. R. 1367; 3 R. C. L. 387 et seq. 5 R. C. L. Supp. 170. (3) 25 R. C. L. 1001; 3 R. C. L. Supp. 1437; 4 R. C. L. Supp. 1615; 5 R. C. L. Supp. 1358.

CITY OF OMAHA ET AL., APPELLEES, V. HUGH MURPHY CONSTRUCTION COMPANY ET AL., APPELLANTS.

FILED APRIL 22, 1926. No. 25260.

1. **Nuisance:** INJUNCTION. It is error to perpetually enjoin the operation of an asphalt plant on the ground that the plant, as operated, constitutes a nuisance, in the absence of a showing that it cannot be operated in such manner as not to constitute a nuisance.
2. ———: ———. In such case the plaintiffs, who are injuriously affected by the operation of the plant, are entitled only to have the continuance of the nuisance enjoined.
3. **Landlord and Tenant:** NUISANCE. Mere ownership of real property imposes no responsibility for a nuisance created thereon by a lessee of such owner, unless the owner is instrumental in causing the nuisance. The tenant, however, is liable for a nuisance by him created on the leased premises.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed in part, and in part modified and affirmed.*

W. H. Herdman, for appellants.

John F. Moriarty, Merrow & Murphy, Hugh A. Myers, Leslie F. Johnson and *Dana B. VanDusan, contra.*

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

GOOD, J.

Plaintiffs brought this action, praying that defendants be enjoined from operating and maintaining an asphalt

plant on the premises described in the petition, on the ground that the plant, as operated, is a nuisance. The trial resulted in a decree permanently enjoining the defendant Hugh Murphy Construction Company, a corporation, its successors and assigns, from operating an asphalt plant upon said premises, and permanently enjoining the defendant Hugh Murphy Company, a corporation, and its successors and assigns, from permitting the use of said premises for the operation of an asphalt plant. Defendants appeal.

The issues presented are: (1) Is the asphalt plant, operated in the location and under the conditions disclosed by the evidence, a nuisance? (2) If a nuisance, are the plaintiffs entitled to a decree permanently enjoining the operation of the plant on its present location, or entitled only to a decree enjoining the operation of the plant in such manner as to constitute a nuisance?

Defendants contend: (1) that the evidence does not warrant the finding that the plant, as operated, is a nuisance; (2) that the defendant Hugh Murphy Company has no interest in the asphalt plant and is merely the owner of the real estate on which the plant is situated; that it leases this real estate to its codefendant Hugh Murphy Construction Company, and that there is no ground for any injunctive relief as to the Hugh Murphy Company. It is further contended that in no event are the plaintiffs entitled to a permanent injunction against the operation of the plant, and that the most to which they are entitled is an injunction preventing the operation of the plant in such a manner as to constitute a nuisance.

The asphalt plant in question is located on a tract of ground owned by the Hugh Murphy Company and by it leased to the Hugh Murphy Construction Company, which owns and operates the plant. The real estate is a tract of land about 750 feet long from north to south, lying east of and adjacent to Sherman avenue, or North Sixteenth street, in the city of Omaha, Nebraska. It is bounded on the north by Laird street and on the south by Pratt street. As designated by the zoning ordinance of the city of Omaha,

the real estate is in an unrestricted district; that is, within a district where such a plant may be operated, provided, of course, it does not constitute a nuisance. The territory immediately to the west, southwest and northwest of the plant is designated by the zoning ordinance as a residential district and is a thickly settled part of the city of Omaha. The plant is used for the purpose of making or mixing surface coats of asphalt pavement and concrete asphalt pavement. Large quantities of gravel, chats, broken stone, sand, lime dust and asphaltum are used in the making of the paving material. The asphaltum is heated in tanks or kettles to a temperature of 250 to 325 degrees Fahrenheit, and gives off a disagreeable odor. Some of the other materials are heated, and the asphaltum, with two or more of the other ingredients, is mixed in a mixing machine, and the mixture, used for paving, is hauled in trucks from the plant to the location where paving is being constructed. When the plant is being operated, from 65 to 85 tons a day are mixed and hauled away. Three and a half or four tons of coal are burned daily, and it fairly appears from the evidence that large quantities of smoke, dust, vapors, gases and odors are carried in the air over and into the homes of the people residing in close proximity to the plant, and particularly when the wind is from an easterly direction. The dust and gases are of such a nature and in such quantity, as to injuriously affect the lawns, prevent the growing of flowers, and cover the houses and porches with dust. When the doors and windows of the homes are open, the houses are filled with dust and smoke; the furniture, carpets and draperies therein are injuriously affected, and the occupants of the houses are greatly annoyed by the dust, soot, smoke and odors.

The evidence is sufficient to convince us that the asphalt plant, as operated, constitutes a nuisance, and that plaintiffs are, in equity, entitled to have the nuisance abated and to enjoin its continuance. It does not necessarily follow, however, that they are entitled to have the operation of the plant enjoined. A court of equity will not go beyond the

necessities of the particular case. In this instance, the plant is alleged to be a nuisance because of the emission of smoke, dust, odors, gases and vapors, which are carried into and over the homes of the plaintiffs. For aught that appears in the record, it may be possible to so operate the plant as not to constitute a nuisance. If it can be so operated, then its operation in that manner should not be enjoined.

In *Francisco v. Furry*, 82 Neb. 754, it is held: "A decree enjoining the use of a feed yard and limiting the use of the owner to the yarding of cattle and hogs therein temporarily and in limited numbers, where the evidence does not make it apparent that it cannot be used as a feed yard without becoming a nuisance, is erroneous." In that case, as in this, the evidence disclosed that the feed yard, as operated, constituted a nuisance, but the evidence did not show that it could not be so operated as not to be a nuisance. The decree of the court was against the continuance of the nuisance, but not against the use of the feed yard, if it could be so used as not to constitute a nuisance.

In *Collins v. Wayne Iron Works*, 227 Pa. St. 326, 19 Ann. Cas. 991, the rule is stated in this language: "Where the facts and equities call for it, a chancellor is required to give relief by injunction; but such injunction should never go beyond the requirements of the particular case; and under no circumstances should a decree be entered the apparent practical effect of which will be to close an industrial plant, if it is possible to frame another form of decree which will give such relief as the plaintiff is entitled to." A like rule is announced in *Faucher v. Grass*, 60 Ia. 505, and in *Lorenzi v. Star Market Co.*, 19 Idaho 674.

Under the rule as herein set forth, the injunction granted went farther than the necessities of the case required. It should go no farther than to enjoin the operation of the plant, as it was operated at the time of the trial, or in such manner as to permit the escape of smoke, dust, gases, vapors and odors into or over the premises of the plaintiffs, to such an extent as to constitute a nuisance.

Furthermore, the decree makes the injunction perpetual, so that at no time in the future could an asphalt plant be operated on the premises, no matter what the changed conditions might be in the vicinity where the plant is located. It may be that in time the use and occupancy of the properties in the vicinity of the plant may be so changed that such a plant, as now operated, would not injuriously affect any one, and in such case, of course, it would not be contended that the operation of the plant should be enjoined. Operation of the plant should be enjoined only to the extent that, and so long as, it is a nuisance.

It does not appear from the evidence that the defendant Hugh Murphy Company owns, or participates in the operation of, the asphalt plant. It appears that this corporation is the owner of the real estate, which is leased to its codefendant Hugh Murphy Construction Company, and that the latter company only is interested in the ownership and operation of the plant. Mere ownership of real property imposes no responsibility for a nuisance on it, unless the owner is instrumental in causing the nuisance. A tenant in possession is liable for a nuisance by him created on the premises of his landlord, but the landlord is not liable for such a nuisance created by his tenant, unless the landlord authorized or contributed to the causing or maintaining of the nuisance. 29 Cyc. 1203, 1204.

It necessarily follows that the injunction should not run against the Hugh Murphy Company, and that the judgment as to this defendant should be reversed and the action dismissed. As to the defendant Hugh Murphy Construction Company, the decree of the district court is modified so as to enjoin this defendant from operating its asphalt plant in the manner in which it is now operated, or in such manner as to cause or permit the escape of smoke, dust, gases, vapors and odors, to such an extent as to injuriously affect the plaintiffs in the enjoyment of their respective homes, or in such manner as to constitute a nuisance. As thus modified, the judgment of the district court is affirmed as

to the defendant Hugh Murphy Construction Company.

REVERSED IN PART AND IN PART MODIFIED AND AFFIRMED.

Note—See (3) 50 L. R. A. (n. s.) 288; 16 R. C. L. 1077 et seq. 3 R. C. L. Supp. 624; 5 R. C. L. Supp. 923.

UNION PACIFIC RAILROAD COMPANY, APPELLANT, V. SCHOOL DISTRICT NUMBER NINE ET AL., APPELLEES.

FILED MAY 4, 1926. No. 24671.

Schools and School Districts: BONDS: NOTICE OF ELECTION: STATUTE. Statutes authorizing posted notices of an election to vote bonds in a rural school district having less than 150 pupils were not impliedly repealed by subsequent amendatory acts requiring newspaper notice of school bond elections in school districts having more than 150 pupils. *Dictum* to the contrary in *State v. Marsh*, 108 Neb. 749, disapproved.

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

N. H. Loomis, Edson Rich, C. A. Magaw, T. W. Bockes, John C. Martin and *D. F. Smith*, for appellant.

Elmer E. Ross, contra.

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

ROSE, J.

This is a suit in equity to enjoin School District Number Nine, Merrick county, and its officers from selling school bonds in the sum of $10,000, for the purpose of raising money for a school building at Chapman. The relief sought is based on pleas that there was no legal notice of the bond election and that the issuance of the bonds was not authorized by three-fifths of the qualified voters of the school district. The trial court sustained a demurrer to the petition and dismissed the action. Plaintiff appealed.

There is no dispute about the facts. The parties disagree on the statutes applicable to the voting and issuing of bonds

by a rural school district having less than 150 pupils, the class to which School District Number Nine, Merrick county, belongs. The questions presented are involved in difficulties owing to the unintelligibility of some of the legislation on these educational subjects and of the biennial amendment and repeal of school laws without proper observation of the distinction between school districts of different classes.

Plaintiff assails the bonds because they were not voted and issued in compliance with statutes requiring notice of a bond election for at least 20 days in one or more newspapers, and because the affirmative vote was not cast by three-fifths of the qualified voters of the entire school district. Comp. St. 1922, sec. 6342, as amended by Laws 1923, ch. 58, sec. 1. If these provisions apply to a rural school district having less than 150 pupils, the bonds were not legally authorized and consequently defendants should be enjoined from selling them. To the argument of plaintiff the defendants reply that the statutes cited, in so far as they relate to notice and to the necessary vote, apply to school districts having more than 150 pupils, but not to a rural school district with less than that number. Defendants insist that the bonds were authorized under statutes providing for 20 days' notice "by posting up copies thereof in three public places within the district," and for a three-fifths' affirmative vote of the qualified electors present and voting. Comp. St. 1922, secs. 365, 366, 367, 6270. The school district complied with the provisions last cited, and if they are in force and are applicable to the bond issue under consideration plaintiff is not entitled to an injunction. The rejoinder to the argument in favor of this defense is, however, that the statutes authorizing posted notices were impliedly repealed by subsequent amendments requiring newspaper notice. In this connection reference is made to *State* v. *Marsh,* 108 Neb. 749. In that case the opinion contains an expression recognizing such a repeal by implication, but the ruling is *dictum,* because it was there held that the bonds then in question were valid, regardless of any defect in the notice of the bond election. A reexamination of the question ex-

tending to the history of the school laws, in view of recent amendments, leads to the conclusion that the *dictum* mentioned is not well founded. For the purposes of legislation and the government of school districts, the legislature long since enacted separate provisions applicable to school districts of different classes. The distinction has been generally observed in subsequent acts, though many provisions are common to districts generally. The posting of notices of a meeting or of an election in a rural district having less than 150 pupils, and existing under a democratic organization, with three school officers, was regarded by the legislature as sufficient, while newspaper publication was required in districts with more pupils. In the amendatory acts there is no direct repeal of the provisions for posting notices. With the distinction between school districts of different classes in mind, there is no repugnancy or inconsistency amounting to a repeal of the statutes containing provisions for posting notices. The different provisions are capable of enforcement. The *dictum* in the case cited by plaintiff is therefore disapproved.

In this view of the law, plaintiff is not entitled to an injunction.

AFFIRMED.

CHARLES C. DAVIS, APPELLANT, V. RICHARDSON COUNTY, APPELLEE.

FILED MAY 4, 1926. No. 23615.

Taxation: SALES FOR TAXES: NOTICE: DESIGNATION OF NEWSPAPER. The provisions of section 6110, Comp. St. 1922, relating to the designation of newspapers for the publication of notices, required by the scavenger tax law, construed, and *held* to authorize the county board, when any of the notices required by the scavenger tax law are to be published, to designate the newspaper in which such notices shall be published. The board may designate a different newspaper for each of the required notices. If the board fails to designate a newspaper for any one of the required notices, then, as to such notice, the county treasurer is authorized to designate a newspaper for the publication of that particular notice only.

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

Charles B. Letton and *John C. Mullen,* for appellant.

F. N. Prout, contra.

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

GOOD, J.

Plaintiff appealed from an order of the county board of Richardson county disallowing his claim for the publication of a notice of tax sale under the scavenger tax law. A trial in the district court resulted adversely to the plaintiff, and he has appealed to this court.

This action involves the proper construction of a provision of the scavenger tax law in section 6110, Comp. St. 1922. The provision of the section requiring an interpretation is in the following language: "The county board of each county shall designate the newspaper in which the notice, and in which all notices of tax sales made by the county treasurer hereinafter provided for, shall be published: Provided, the county treasurer shall designate such newspaper where the county commissioners fail to do so."

Pursuant to the provisions of the scavenger tax law, the county treasurer prepared his petition for the foreclosure of delinquent taxes on real estate. The county board having failed to designate a newspaper in which the notice of the pendency of the action should be published, the treasurer designated the plaintiff's newspaper as the one in which it should be published. After hearing, a decree was entered in the tax foreclosure action, and, under the law, a notice of tax sale was required to be published. Subsequent to the publication of the notice of the pendency of the action and prior to the time for the publication of the tax sale notice, the county board designated another newspaper as the one in which the latter notice should be published. Both newspapers published the notice and filed claims for its publication. The county board allowed the claim of the news-

paper which it had designated to publish the notice, and disallowed the plaintiff's claim.

It is plaintiff's contention that the statute contemplates that all notices of tax sales, including the notice of the pendency of the action, shall be published in one newspaper, and that but one designation is required; that the county board had the right, in the first instance, to designate the paper in which all of these notices should be published; that, it having failed to designate prior to the publication of the first notice, then the designation by the county treasurer required the publication of all of the notices, incident to that proceeding, in the same newspaper.

On the other hand, the defendant argues that it was within the power of the board to designate a newspaper for each particular notice required to be published, and that its failure to designate a newspaper for the publication of the first notice authorized the treasurer to designate a newspaper for that particular notice only; that the county board had authority to thereafter designate the newspaper in which the subsequent notices, if any, should be published; and, the board having exercised its authority in that respect, the newspaper by it designated was the only one authorized to publish the notice; that the publication of the sale notice in plaintiff's newspaper was unauthorized and his claim was rightfully disallowed.

Were we to consider the language of the statutory provision, above quoted, standing alone and without regard to other provisions of the scavenger act, we might be inclined to agree with the plaintiff's contention. We think, however, that, in determining what effect should be given to the particular provision, the entire act must be considered as a whole. It is possible that no other notice than that of the pendency of the action may be required. If all the delinquent taxes were paid prior to the entry of the decree in the foreclosure action, no tax sale notice would be necessary. However, that is rather an improbable situation. Another provision of the scavenger act requires two tax sale notices at different periods, and also further provides that if the

treasurer so elects there may be four such notices published. Notice of the pendency of the action is required to be published some time between the 1st day of June and the 10th of July. Section 6120, Comp. St. 1922, requires the first tax sale notice to be published in October. Section 6135 requires two sale notices and contemplates one shall be published in October and the other immediately previous to the first Monday in May, and that section further provides that if the county treasurer so elects four tax sales may be held. In the event of quarterly sales, the additional notices would be required to be published immediately prior to the first Monday in February and the first Monday in August, respectively. It is apparent that the same county board and the same treasurer may not be in office when the second and subsequent tax sale notices are published. It is a matter of common knowledge that newspapers cease publication and go out of business. Sometimes two or more newspapers consolidate and merge into one, and some of the newspapers lose their identity. A newspaper plant may be destroyed by fire or other casualty, and may be unable to continue publication for a considerable period. In the event any such contingency should arise, we think no one would doubt that the tax sale notices may be published in a different newspaper than that in which the notice of the pendency of the action was published. In such event, who shall designate such newspaper? Evidently, the legislature intended that the duty of selecting such newspaper should be first vested in the county board and, in the event of its failure to act, then in the county treasurer. In the present instance, the county treasurer rightfully designated plaintiff's newspaper in which to publish the notice of the pendency of the action. Suppose that thereafter the plaintiff's newspaper plant had been destroyed or was unable for a time to publish its newspaper. Would it be seriously contended that another newspaper could not be designated in which the tax sale notice should be published? We do not think so. It seems improbable that the legislature intended that the county board should designate the publica-

tion of notices that would be published long after the county board might be out of office and a new board in its place; or that the county treasurer might designate a newspaper for the publication of notices long after his successor was in office. To give to the statutory provision the construction contended for by plaintiff might result in placing the county officials in an embarrassing and distressing position, from which they would be unable to extricate themselves.

We think a fair interpretation of the provision is that the county board is vested with the power to designate a newspaper for each notice, as the same is required, and that the county board, in office at the time, is the one that shall designate such newspaper; and, in the event of the failure of the board to exercise the power so conferred, then the duty of designating the newspaper for the particular notice devolves upon the then county treasurer. If this interpretation is correct, it follows that the newspaper designated by the county board was the only one that was authorized to publish the notice of the tax sale, and that plaintiff's newspaper was not authorized to publish such notice.

It follows that the judgment of the district court should be and is

AFFIRMED.

O'GARA COAL COMPANY, APPELLEE, V. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, APPELLANT.

FILED MAY 4, 1926. NO. 23939.

1. **Evidence:** CONTRACTS: CUSTOMS AND USAGES. Evidence of trade custom or usage may be admitted to aid in the interpretation of a contract, but not for the purpose of changing the intrinsic character thereof.
2. **Contracts:** EXCLUSION OF CUSTOMS AND USAGES. Trade custom or usage may be excluded from a contract by express statements therein or by implication reasonably drawn from the terms used.
3. ———: CONSTRUCTION. Where the terms of a contract are clear and unambiguous, they cannot be varied or contradicted by evidence of trade custom or usage.

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

Crofoot, Fraser, Connolly & Stryker, James T. English, C. S. Jefferson and *O. W. Dynes,* for appellant.

Woods, Woods & Aitkin and *Stout, Rose, Wells & Martin, contra.*

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

THOMPSON, J.

This action was brought in the district court for Douglas county by the O'Gara Coal Company, hereinafter called plaintiff, a corporation organized under the laws of the state of New York, against the Chicago, Milwaukee & St. Paul Railway Company, hereinafter called defendant, a corporation organized under the laws of the state of Wisconsin, with articles of incorporation duly filed in this state, to recover damages for alleged breach of contract in the sum of $204,430.86, with interest from April 1, 1921, and costs. The case was tried to a jury, verdict for plaintiff, on which judgment was rendered for $82,801.03. Defendant appeals, and seeks reversal for claimed errors occurring at the trial, hereinafter considered.

The parts of the contract here involved, material for our consideration, are as follows:

"That the seller, in consideration of the payments, covenants and agreements to be made, kept and performed by the buyer, as hereinafter specified, hereby agrees to sell and deliver to the buyer on cars at the mine of the seller on tracks of the Illinois Central Railroad at Eldorado, Ill., from September second, nineteen hundred and twenty, to March thirty-first, nineteen hundred and twenty-one, not less than thirteen hundred and fifty tons nor more than fifteen hundred tons per working day of mine run coal (entire output of mine—mine No. 11), such coal to be of the first quality of its class, free from dirt and impurities, and in every way satisfactory to the buyer or its inspectors, who shall at all

reasonable times during the continuance of this contract have access to the seller's mines, tipples, screens, scales and yards where any coal to be furnished under this agreement is mined or handled by the seller.

"The buyer agrees to purchase and take such coal, provided the same is delivered to it in the per diem quantities above specified, and to pay the seller therefor the sum of four dollars per ton of two thousand pounds, such payments to be made on or before the 20th day of each month for all coal so delivered during the preceding month.

"It is mutually agreed that the prices named herein are based on existing rates of pay for all mine labor, and that the prices will be subject to readjustment in event existing rates of pay are changed.

"All settlements under this agreement are to be governed by actual track scale weights, ascertained at the mine or at the usual point at which car-load shipments from the mines shipping hereunder are weighed.

"Shipments made by the seller to the buyer during any one month shall constitute fulfilment of this contract for that month and the tonnage herein contracted shall be cumulative only for such one month period, except as may be otherwise mutually agreed.

"It is mutually agreed that should either party be prevented from promptly carrying out the terms hereof, by reason of strikes, lockouts, or other conditions beyond its reasonable control, such failures shall not be construed as a breach of the terms hereof, but when the cause of such failure shall have been removed, the party affected shall, and will, without delay, continue to perform its part of this contract.

"There are no understandings or agreements relative to the subject of this contract, that are not fully expressed herein, and no changes shall be made in this contract except by written agreement signed by both parties.

"It is understood that the buyer is to furnish cars."

This contract is, in law, an Illinois contract. It will be noted that the coal was to be delivered, accepted, and paid for in such state.

The material parts of the petition are: That defendant breached the contract, and by reason thereof the plaintiff was damaged as follows: Loss on difference between contract price and market price of coal sold to others, $58,431.09; loss on coal contracted for and not mined, 77,926.04 tons, upon which if mined and sold at the agreed price, plaintiff would have received a net profit of $113,756.04; cost of keeping the mine in readiness equipped for mining and delivery, $25,819.80; interest on payments not made of coal delivered when payment was due and payable, $6,423.93, amounting in all to $204,430.86. An itemized account of the above respective amounts sought to be recovered is attached to the petition, as is also a copy of the contract hereinbefore quoted; and in apt language the petition alleged compliance on part of plaintiff, and readiness and willingness at all times to comply.

The material parts of the amended answer, after admitting the incorporation of the parties, the purposes of each as set forth in the petition, and the execution of the contract, are as follows:

"Defendant denies * * * that it has failed and refused to take the entire output of said mine as required by said contract, and alleges the fact to be that it has taken all of the coal which it was obligated to take under the terms and conditions of the contract, and, in that connection, alleges that during the time of said contract it did not take all the coal which it was possible for the plaintiff to mine and produce for the reason that it was 'prevented from promptly carrying out the terms, by reason of * * * conditions beyond its reasonable control,' of which the plaintiff herein was given due and timely notice.

"Defendant says that at the time said contract was executed and for a long time prior thereto and during the period for performance of said contract, it was understood by the parties to the contract and was established by the customs, usages and practices of the coal industry of the state of Illinois, and in connection with contracts of the kind and nature of the contract between the parties hereto, that

'conditions beyond its reasonable control,' or other words of like meaning or purport in a contract for the purchase and sale of coal, meant that if the purchaser was unable to burn or use the coal specified in the contract on account of unusual conditions arising over which the party had no control, such as depressed business conditions or a large surplus of coal accumulating by reason of the inability of the purchaser to use same and other coal contracted and ordered, that the purchaser would only be required, during the time that said conditions continued, to take the amount of coal under the contract that would meet his requirements by prorating under all contracts and orders and that as the conditions change the purchaser should resume fulfilling the contract by taking the quantity agreed to be taken.

"That it was further understood by the parties and established by the custom, usage and practice of the coal industry that, if a car shortage existed so that cars were not available for the carrying out of the literal terms of the contract, similar to the one in question, the seller was only bound to furnish such quantities of coal as could be moved with the available car supply and in the proportion that the contract in question bore to the total amount of contracts for sale or purchase of the parties involved." That it has complied with each and every condition on its part under the contract up to the 5th day of November, 1920.

"That commencing about November 1, 1920, there was a radical change in conditions, in that, whereas a shortage of coal cars had existed for a long period of time on the railroads in the country, there was from that time forward a large and growing surplus of coal cars, during the balance of the period of the contract, and, as a result thereof, all persons and companies having contracts to furnish coal to the defendant immediately shipped to defendant the full amounts contracted for, until within a very short time the tracks of the railroad company were congested with loaded cars of coal and all of its storage spaces were filled; that coincident with said change in the coal car situation a very

unusual and unforeseen condition arose in the transportation business, in that business generally declined both in passenger and freight traffic to such an extent that the carloads of defendant company decreased during the contract period from twenty-five to forty per cent. below normal and below what the defendant could have reasonably anticipated at the time the contract was executed; that by reason thereof the requirements of the defendant rapidly decreased and the amount of coal in storage and on cars rapidly increased, and it became impossible for the defendant under proper economic, efficient and honest management of its railroad to take all of the coal specified in plaintiff's contract and under its contract with many others besides the plaintiff.

"That the defendant, under the terms and conditions of the contract and in accordance with the usages and customs hereinbefore alleged, promptly and from time to time notified and kept the plaintiff advised of the conditions that existed, and the plaintiff and defendant in carrying out the terms of the contract agreed that the defendant should be relieved of taking coal from the plaintiff from November 5, 1920, until November 16, 1920, and thereafter the defendant kept the plaintiff fully advised as to the existing conditions and carried out the contract by taking such coal from the plaintiff as it could use in view of the conditions that existed and its contracts with others."

The reply contains a general denial, and also specifically denies the allegations of the answer; and further states that plaintiff relied on the provisions of the contract in its entirety, and especially that part thereof that defendant was to take the entire output of mine No. 11, providing the cars necessary; and that defendant supplemented the contract with a letter written by its purchasing agent, Sackett, which letter is a part of plaintiff's petition; and that defendant is estopped by its acts in the premises from alleging or proving a custom as contained in its answer, or otherwise.

The record is so voluminous, and the questions propounded on the part of the defendant, the rulings of the court, and offers of proof of matters here presented for our considera-

tion, are so numerous as to make it impossible to take them up seriatim. However, at the trial defendant offered to prove each and every material disputed fact as to the customs pleaded and their application as alleged in its amended answer. To such questions and offers presented by defendant when seeking to prove such facts, plaintiff lodged objections, for the reasons, in substance: That the contract by its terms excluded the customs sought to be proved, if such existed; that to permit such evidence as offered would be to permit the introduction of oral testimony to vary and contradict the plain terms of a written instrument, and therefore inadmissible. The rulings of the trial court in sustaining these respective objections are here assigned as error.

It will be noted that in the amended answer the defendant alleges in its third paragraph: "That during the time of said contract it did not take all the coal which it was possible for the plaintiff to mine and produce for the reason that it was 'prevented from promptly carrying out the terms, by reason of * * * conditions beyond its reasonable control,' of which the plaintiff herein was given due and timely notice." And, then applies the custom as including in such a provision the words "car shortage" and "depressed business conditions," and that such custom was known to the parties and entered into such provision of such contract; but omits from such clause its controlling words, "strikes and lockouts." If not for the words, "strikes and lockouts," appearing in this part of the contract, then the interpretation given to the provision pleaded, by the trade, for such a length of time as to permit it to grow into a custom of including therein "car shortage" and "depressed business conditions," would be reasonable and enforceable; but that is not the situation here presented. The contract provides: "It is mutually agreed that should either party be prevented from promptly carrying out the terms hereof, by reason of strikes, lockouts, or other conditions beyond its reasonable control, such failures shall not be construed as a breach of the terms hereof, but when the cause of such failure shall

have been removed, the party affected shall, and will, without delay, continue to perform its part of this contract." This provision, taken as a whole, in law, excludes every doubt as to its meaning. It means that the contract shall not be considered as breached if either party thereto is prevented from promptly carrying out its terms by reason of strikes, lockouts, or other causes of like import and significance. If the parties desired to have included in the instrument conditions such as those arising from car shortage or extreme depression in business, they each knew the meaning of such terms and conditions and their effect upon their respective lines of business; but, notwithstanding this fact, such terms were omitted therefrom, and the parties limited the things covered by the clause to strikes, lockouts, and conditions of a kindred nature. Not only that, but, as we have seen, they followed this clause by one explanatory thereof, which is: "There are no understandings or agreements relative to the subject of this contract, that are not fully expressed herein, and no changes shall be made in this contract except by written agreement signed by both parties."

The proper construction of the clause now being considered is so aptly and succinctly stated in *Misch v. Russell,* 136 Ill. 22, 25, as to merit quoting:

"By the application of the maxim *ejusdem generis,* which is only an illustration or specific application of the broader maxim *noscuntur a sociis,* general and specific words which are capable of an analogous meaning being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general. * * * But it has never been supposed that the rule required the rejection of the general terms entirely, but only that they should be restricted to cases of the same kind as those expressly enumerated."

As we view the contract here, the intent is plainly discoverable from its context, and to permit proof of the custom pleaded of interpolating therein the words, "car shortage," or "depressed business conditions," would be to per-

mit proof of a custom which would change the intrinsic character of the clause. Such proof is not permissible. "Custom or usage in a trade or business may be shown for the purpose of interpreting a contract or controlling its execution, but not for the purpose of changing its intrinsic character." *Milwaukee & Wyoming Investment Co. v. Johnston,* 35 Neb. 554, 561. See, also, *McKee v. Wild,* 52 Neb. 9.

The contract as framed is in words of plain and easily understandable import, and that to the extent of leaving it without ambiguity or uncertainty.

"Where the terms of an express contract are clear and unambiguous, they cannot be varied or contradicted by evidence of custom or usage." 17 C. J. 508, sec. 77.

"Where a contract is clear, certain and distinct, it cannot be modified by proof of usage, for the reason that it disposes of all customs by its own terms which alone regulate the rights of the parties and determines their liabilities." *Van Hoesen v. Cameron,* 54 Mich. 609, 614.

As well said in *Postal Telegraph-Cable Co. v. Willis,* 93 Miss. 540: "It would be in the highest degree impolitic, and be the cause of introducing interminable confusion into contracts, if, when the terms of a contract are express, clear, and valid under the law, its legal effect could be controlled by some local or trade custom."

"It (evidence) is not admissible to prove a custom or usage the effect of which will be to add to an express agreement a condition or limitation which is repugnant to or inconsistent with the agreement itself. Such evidence is never admitted to vary or contradict, either expressly or by implication, the terms of an agreement, written or verbal." *Gilbert & Co. v. McGinnis,* 114 Ill. 28.

We have recognized the potency of trade customs, their applicability to trade contracts, and their impelling force when contracts such as the one here in question have been before us, and have permitted them to be introduced in evidence to assist in arriving at, as well as aiding in carrying out, the intent of the parties; but this was in instances

where doubt or uncertainty existed owing to some ambiguity in the contract. Never have we permitted evidence of custom to vary or contradict the plain terms of a contract, nor has such evidence been permitted where the contract by its terms expressly or impliedly has excluded such custom therefrom.

The trial court did not err in excluding the proffered testimony.

The judgment of the district court is,

AFFIRMED.

Note—See 3 L. R. A. n. s. 248; 27 R. C. L. 172; 3 R. C. L. Supp. 1509; 5 R. C. L. Supp. 1467.

IN RE ESTATE OF MATTHEW WILSON.
JOHN W. WILSON, APPELLEE, V. JOSEPH WILSON ET AL., APPELLANTS.

FILED MAY 25, 1926. No. 23944.

1. Trial: INSTRUCTION. Where on the trial of a cause to a jury they are instructed to find a general verdict and also to answer special interrogatories and are instructed by the court that in case they agree upon a verdict at a time when the court is not open and ready to receive the verdict, to seal it in an envelope, place it in charge of the foreman, and that, having done so, they may separate until the reconvening of court, it is not error for the court, upon the reading of the verdict and the discovery of the failure of the jury to answer the interrogatories propounded, to direct the jury to return to the jury room and agree upon answers to the interrogatories.
2. ———: CONDUCT OF JURY. Error cannot be predicated upon the fact that in the room used by the jury during its deliberations there were law reports, with markers therein, covering cases similar in character to the case submitted to the jury, in the absence of a showing that any of these books were examined or used by a member of the jury.
3. Wills: CONTEST: BURDEN OF PROOF. "Where it is alleged that the execution of a will was procured by undue influence, the burden is upon the party alleging it to establish that the testator was induced by improper means to dispose of his property differently from what he intended." *Seebrock v. Fedawa*, 30 Neb. 424.

4. **Evidence** examined, and *held* to support the verdict.

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

N. P. McDonald, W. K. Hodgkin and *Cook & Cook,* for appellants.

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

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

MORRISSEY, C. J.

Appellee, John W. Wilson, commenced this action in the county court for Dawson county by which he sought to probate an instrument purporting to be the last will and testament of his father, Matthew Wilson, a widower, who died January 28, 1923, at his home near Overton, Nebraska, leaving surviving him six children, namely, Joseph Wilson, John W. Wilson, Charles Wilson, Mary Wilson, Emma Moorehead and Matthew H. Wilson. By this will testator devised and bequeathed to his son Matthew H. Wilson a half section of land in Dawson county and the sum of $10,000 in cash. To each of the other children, except John W. Wilson, proponent, testator bequeathed the sum of $10,000, and the balance of the estate, which it is claimed will exceed $100,000, was devised and bequeathed to proponent.

Appellants, Mary Wilson, Emma Moorehead and Joseph Wilson, filed objections to the probate of the will. After a hearing had in the county court, the instrument was admitted to probate. On appeal to the district court, John W. Wilson filed his petition asking for the probate of the will and the three above-named contestants filed separate answers and objections. Aside from objections as to form, the substance of the respective answers is that, at the time testator made the will now sought to be probated, he was so enfeebled by long illness as to be mentally incompetent to make a will, and that the instrument was executed by

testator by reason of the undue influence exercised upon him by proponent and his brother, Matthew H. Wilson. Proponent filed a reply, in substance a general denial, to each answer. The issues were tried to a jury, which returned a verdict finding generally in favor of proponent. The will was admitted to probate.

After the jury had arrived at a general verdict, the court not then being in session, the verdict was sealed in an envelope and the jurors were permitted to separate under the instructions theretofore given by the court. When the jury were reassembled and the verdict returned into court on the following morning, it was discovered that the jury had failed to answer certain special interrogatories propounded to them by the court. The trial judge then sent the jury back to the jury room for the purpose of drafting answers to these interrogatories. It is claimed by appellants that it was error to allow the jury to separate after finding a general verdict and then reconvene to answer special interrogatories. By section 8792, Comp. St. 1922, it is made discretionary with the trial judge whether or not to allow the jury to separate before returning a final verdict, and since nothing prejudicial to contestants is shown to have resulted from the method followed in this case, this assignment of error cannot be sustained.

Appellants predicate error upon the fact that while the jurors were locked in the jury room they had access to several copies of the Nebraska reports containing marked cases involving contested wills, which volumes had been used by the court in preparing instructions. There is no showing made that any of the jurors actually read any of these reports or that they were influenced in their verdict by the presence of these books. In the absence of such a showing the assignment is without merit.

The main contention of appellants is that, since proponent, John W. Wilson, stood in a confidential relationship to testator and was by the will largely preferred, the burden of proof was upon him "to rebut the presumption of undue influence."

"Where it is alleged that the execution of a will was procured by undue influence, the burden is upon the party alleging it to establish that the testator was induced by improper means to dispose of his property differently from what he intended." *Seebrock v. Fedawa*, 30 Neb. 424. See, also, *Boggs v. Boggs*, 62 Neb. 274; *In re Estate of Dovey*, 101 Neb. 11; *In re Estate of Fenstermacher*, 102 Neb. 560; *In re Estate of Kees, ante*, p. 512; 40 Cyc. 1150.

"So also no presumption of undue influence changing the burden of proof arises from the relation of parent and child, unless circumstances indicating actual dominion are shown." 40 Cyc. 1153.

We have carefully examined the testimony adduced and find nothing to indicate any unusual circumstances which would cast the burden of proof upon proponent to show that there was no undue influence exercised. On the other hand, there was the competent testimony of the witnesses to the will, the attending physicians, and others who had known testator in his lifetime, which we think fairly shows that at the time the will was made testator was mentally capable of making a will and was free from undue influence.

Objections have been made to the rulings of the trial court on minor grounds such as usually arise on the trial of causes. These have been carefully considered, but no prejudicial error is found in any of the rulings of the court and the evidence is found sufficient to sustain the verdict.

The judgment is

AFFIRMED.

BOARD OF COMMISSIONERS OF HAMILTON COUNTY, APPELLEE, V. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY ET AL., APPELLANTS.

FILED MAY 25, 1926. No. 23986.

1. **Drainage District:** ORGANIZATION: NOTICE TO MORTGAGEES: PRIORITY OF LIENS. The word "landowner" as used in section 1724, Comp. St. 1922, embraces not only the owner of the fee,

but mortgagees, whose mortgages are of record, and notice to them of the proposed organization of a drainage district under article III, ch. 17 (secs. 1718-1743), Comp. St. 1922, must be given before special assessments levied against the land affected can become liens superior to the liens of the mortgagees.

2. ———: ———: ———: ———. When upon the organization of a drainage district under article III, ch. 17, Comp. St. 1922, the notice provided by the statute is not given to the holders of mortgages of record, special assessments made against the land covered by the mortgages will be held subject to the liens of the mortgages.

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

Fred C. Foster, O. K. Perrin, S. M. Kier and *John A. Whitmore,* for appellants.

Hainer, Craft, Edgerton & Fraizer, contra.

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

MORRISSEY, C. J.

The board of county commissioners of Hamilton county, which under the statute constitutes the drainage board of that county, brought this suit to foreclose a lien arising under a special asesssment levied against a quarter section of land within the "Liebhart-Vetters Drainage District." The holders of mortgage and judgment liens upon the land, as well as the holders of the fee, were made defendants. From a decree establishing plaintiff's lien as superior to all other liens and equities, defendants have appealed.

In plaintiff's petition it is alleged that the district was organized under the provisions of article III, ch. 17 (secs. 1718-1743), Comp. St. 1922, and this allegation is expressly admitted in paragraph two of the answer. Prior to the organization of the district, the owners of the fee title executed and delivered the mortgages now held by the mortgage lien holders, and these mortgages were placed on record. In the decree the court fixed the order of priority of

the defendants' liens, and held them all to be inferior to the lien created by the special assessment.

It is claimed by appellants that the decree is contrary to law. They point out that section 1734, Comp. St. 1922, which constitutes a part of article III, ch. 17, under which the district was organized, does not in express terms make the assessment levied against the property for the improvement a specific lien upon the property. In the brief of appellee it is said that the assessment became a lien under the provisions of section 1687, Comp. St. 1922, as well as under section 1728, Comp. St. 1922. It is also said that if the court reaches the conclusion that the district was organized under article III, ch. 17, Comp. St. 1922, and that that article constitutes a separate and distinct plan of drainage, "then the special assessment becomes taxes or liens upon the land within the district." But as it is alleged in the petition and admitted in the answer that the district was organized under article III, ch. 17, Comp. St. 1922, it is not for the court to make a holding on that question. That is fixed by the pleadings.

By section 5826, Comp. St. 1922, which was enacted in 1921, subsequent to the levy here sought to be enforced, it is provided:

"All special assessments, regularly assessed and levied as provided by law, shall be a lien on the real estate on which assessed, but shall be subject to the general taxes mentioned in the last preceding section."

Appellants contend that the section quoted (5826) is not capable of making an assessment for special improvements a lien upon the land superior to appellants' liens because at the time they acquired their liens the assessments were not a lien, and that section 1724, Comp. St. 1922, under which the district was organized, required that notice of organization, assessment, etc., be given to "all landowners whose lands or lots may be damaged, taken, affected or crossed."

The notice required by statute was not given to any of the appellants, nor was notice waived by any of them.

What is the meaning of the word "landowner" as used in the statute? It has been said that the term "owner" has no exact technical meaning (1 Hare, American Constitutional Law, 355), but as used in the law has generally been treated as including all persons having a claim or interest in the property although the same might fall far short of an absolute ownership. *Lozo v. Sutherland,* 38 Mich. 168. And in dealing with the word "landowner" in a statute giving the right of eminent domain upon payment of damages, it was held that the word embraces not only the owner of the fee, but a lessee for years, and any person who has an interest in the property affected by the condemnation proceedings. *Woodstock Hardwood Spool Mfg. Co. v. Charleston Light and Power Co.,* 84 S. Car. 306.

In *Omaha Bridge & Terminal Co. v. Reed,* 69 Neb. 514, it is held that "A mortgagee is an owner within the meaning of the statute providing for the taking of land under the power of eminent domain." See, also, *Dodge v. Omaha & S. W. R. Co.,* 20 Neb. 276.

In the light of the adjudicated cases, it appears that appellants were "landowners" within the terms of section 1724, Comp. St. 1922. Subsequent sections of the statute provide for a hearing before the board if any party files objections to the report of the appraisers appointed, and grant the right of appeal to "any interested party" to the district court from any order made by the board. This is a valuable right of which appellants may not be deprived. *Elliott v. Wille,* 112 Neb. 86.

The statutory notice not having been given, it follows that the special assessment, in so far as it affects the rights of the mortgage lien holders, is void. See *Rooney v. City of South Sioux City,* 111 Neb. 1.

The judgment of the district court is reversed and the cause remanded, with directions to enter a judgment in accord with this opinion.

REVERSED.

CITY NATIONAL BANK OF LINCOLN, APPELLEE, V. LLOYD DENSLOW ET AL., APPELLANTS.

FILED MAY 25, 1926. No. 24136.

1. **Bills and Notes:** RENEWALS. The taking of a new note is a renewal of the old indebtedness and not a payment thereof, unless there is a specific agreement between the parties for the extinguishment of the original debt.
2. ———: CONTRACT FOR REPURCHASE: RENEWALS. Contract by one bank and its officers to repurchase from another bank and pay for notes discounted by the latter set out in opinion and *held* not to include renewals of notes already discounted.
3. **Guaranty.** Ordinarily a guaranty has a prospective operation and is not applicable to past transactions unless so stated.
4. **Evidence.** Extrinsic proof of a custom is not available for the purpose of changing obligations expressed in the plain language of a written instrument.
5. **Guaranty:** CONSTRUCTION. If an obligee in a guaranty draws it in a form requiring an explanation, guarantor is a favorite of the law in the interpretation of ambiguous provisions.

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

Morrow & Morrow, for appellants.

A. R. Honnold and *Stewart, Perry, Stewart* and *Van Pelt, contra.*

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

ROSE, J.

This is an action by the City National Bank of Lincoln, plaintiff, to recover from Lloyd Denslow, Oscar W. Gardner and Carl A. Henatsch, defendants, unpaid debts and accrued interest evidenced by 27 promissory notes aggregating $76,539.02. It is alleged in the petition that plaintiff from time to time purchased the notes from Denslow, who indorsed them, and from the State Bank of Gering, a banking corporation in which the defendants were stockholders and financially interested, and that in consideration of such

purchases defendants guaranteed payment of the notes at maturity, obligating themselves to plaintiff in an accepted writing as follows:

"To The City National Bank,

"Lincoln, Nebraska.

"We, the undersigned, being stockholders and financially interested in the State Bank of Gering, of Gering, Nebraska, and being associated with Lloyd Denslow as stockholder in said State Bank of Gering, and being desirous that you shall, from time to time, purchase notes, loans and commercial paper from said State Bank of Gering, and said Lloyd Denslow, such notes, loans and commercial paper to be indorsed or guaranteed by said Lloyd Denslow.

"Therefore, if you shall from time to time, and at any time after date hereof, purchase from said State Bank of Gering, or from said Lloyd Denslow, any notes, loans or commercial paper, and if such notes, or any of them, and such commercial paper, or any part thereof, shall not be paid at maturity, together with interest accrued thereon, in accordance with the terms thereof, the undersigned jointly and severally agree, and hereby bind themselves, to purchase such matured note and commercial paper, or any notes or any part of such commercial paper as you may elect, or demand, from you, paying therefore the amount due thereon, together with interest; and in case we should fail to purchase any of such notes or commercial paper from you in accordance with the provisions hereof, after demand made upon us, you are hereby especially authorized to recove from us the amount due upon any such notes, or any of them, and upon any such commercial paper, or any part thereof, in any court of competent jurisdiction: Provided, however, that this agreement shall be in full force and effect for the period of one (1) year from date hereof; and provided further that the amount of the notes and commercial paper to be purchased by said State Bank of Gering, for which the undersigned shall be responsible, shall at no time exceed the sum of one hundred thousand ($100,000) dollars, in the aggregate, but this guaranty shall at all times cover

any such paper or notes purchased by you up to and including the sum of one hundred thousand ($100,000) dollars.

"It is especially agreed that this agreement of guaranty shall apply to all notes or commercial paper purchased by you within one (1) year from this date, without regard to whether such notes or commercial paper shall mature within one (1) year from the date thereof.

"Witness our hands, this 1st day of October, 1921.

"Lloyd Denslow.
"C. W. Gardner.
"C. A. Henatsch."

The petition contains a copy of this instrument and a list of the unpaid notes alleged to have been purchased within a year by plaintiff from the State Bank of Gering and Denslow, showing in each instance the date, the name of the maker, the principal, the interest and the amount due. In addition plaintiff pleaded a demand, nonpayment, failure of defendants to comply with their guaranty and prayed for a judgment in the sum of $76,539.02.

Defendants in their answer admitted the execution of the instrument on which the action is based and that plaintiff purchased notes of the State Bank of Gering and Denslow prior to the date of the contract, October 1, 1921, but alleged, among other things, in addition to a general denial of unadmitted allegations, that the notes listed in the petition were renewals of notes purchased by plaintiff prior to that date.

Upon a trial of the issues the district court directed a verdict in favor of plaintiff for $57,300 and from a judgment therefor defendants appealed.

The controlling question presented by the appeal is whether the notes listed in the petition are notes which defendants obligated themselves to repurchase from plaintiff. The notes defendants agreed to purchase were those which plaintiff bought after the date of the contract, October 1, 1921. With few exceptions the notes in suit were renewals of notes purchased by plaintiff prior to that date. Were the renewals notes which defendant agreed to repurchase?

The original debts represented by the notes generally were incurred by the makers before the contract was executed. There is no evidence of an agreement between the makers and the holders of the notes that the renewals should pay or discharge the original indebtedness. The law is that the taking of a new note is a renewal of the old indebtedness and not a payment thereof, unless there is a specific agreement between the parties for the extinguishment of the original debt. *Exeter Nat. Bank v. Orchard,* 39 Neb. 485; *Davis v. Thomas,* 66 Neb. 26; *Auld v. Walker,* 107 Neb. 676; *Berwyn State Bank v. Swanson,* 111 Neb. 141; *Nebraska State Bank v. Walker,* 111 Neb. 203; *Farmers State Bank v. Dowler,* 112 Neb. 262; *Exchange Nat. Bank v. Schultz,* 113 Neb. 346.

The transactions relating to the transfer of notes were conducted between the two banks. For a considerable time before the contract under consideration was executed the State Bank of Gering had a checking account at plaintiff's bank in Lincoln. It was the custom of the former to send to plaintiff from time to time for rediscount notes held by the State Bank of Gering and Denslow, its officer. The proceeds were credited to its account. The rediscounted notes bore the personal indorsement of Denslow. When a note matured a copy was sent to him or his bank and paid or replaced by a renewal note or other paper. Gardner, a stockholder, never indorsed personally any of the notes, but just prior to October 1, 1921, he increased his interest in the State Bank of Gering by purchasing additional stock. Plaintiff then held rediscounted notes aggregating a large sum, and drew up and procured the instrument bearing the signature of Gardner, who joined Denslow and Henatsch as obligors. The contract on its face applies to transactions subsequent to its date. In absence of evidence of an evil design, and there is none, the instrument, with its references to future business, should not be regarded as a mere device to trick Gardner into guaranteeing payment of past obligations which Denslow and the bank managed by him had already assumed by indorsements. Notes already rediscounted were not contem-

plated. The indebtedness for which a rediscounted note was given was incurred by the maker before the contract under consideration was executed. The new note was a renewal of the original indebtedness and not a payment of it. If for any reason plaintiff should be unable to prove the liability of the maker on a rediscounted note, the remedy by proof of the original indebtedness, of ownership and of nonpayment would still remain. This is not a suit against the State Bank of Gering and Denslow on their indorsements, but an action on the contract to purchase and pay for rediscounted notes. It operates alike on the obligors. Gardner assumed no liability except the future obligations imposed by this contract and this does not include the repurchase and payment of unpaid notes in effect already rediscounted.

Plaintiff did not rely wholly on the contract and proof of the rediscounted notes listed in the petition, but adduced evidence for the purpose of showing how the parties understood their agreement and what was done under it. Plaintiff resorted to correspondence between Denslow and officers of plaintiff, implying knowledge of a liability of defendants for payment of notes in controversy; to oral testimony that plaintiff, after execution of the contract, would not have rediscounted the notes except for the guaranty of defendants; to verbal statements of a custom that the amount due on a note, when matured, was credited by plaintiff to the account of the State Bank of Gering and returned for payment and paid or replaced by other paper; and to other proof of a similar import. Proofs of this nature came largely from Denslow and officers of the plaintiff. Denslow was liable as indorser on all the paper in controversy. He was exposed to a temptation to divide his burdens with Gardner, who had never become an indorser. The officers of plaintiff were interested in an interpretation which would make Gardner liable for debts incurred before he bound himself by future transactions. Entries on the bank books of plaintiff did not change the import of the contract, unambiguous as it is in relation to future

transactions, or cast on Gardner and the other obligors a burden not within the terms of their written obligations. Considered a specific guaranty, as viewed by plaintiff, it has a prospective operation, since that is plainly indicated by its terms. Custom is not available for the purpose of changing the import of what is written in plain language. The contract, in imposing obligations, contemplates transactions in their true light and not retroactive fictions. The instrument was drawn by plaintiff. If it needed extrinsic explanation as to being retroactive, defendants are the favorites of the law.

A careful examination of the entire record fails to disclose anything substantial to show that Gardner waived or otherwise lost his right to stand on the terms of his agreement as written. The conclusion is, therefore, that plaintiff did not make a case against defendants for the repurchase of the renewal notes. It follows that the judgment below is reversed and the cause remanded for further proceedings.

REVERSED.

DAWSON COUNTY STATE BANK, APPELLANT, V. A. E. DURLAND, APPELLEE: M. C. DURLAND ET AL., APPELLANTS.

FILED MAY 25, 1926. No. 23967.

1. **Vendor and Purchaser:** ASSIGNMENTS: RECORD: VALIDITY. "The record of an unacknowledged deed of assignment is a nullity, furnishing no protection to the assignee as against the creditors of the assignor." *Heelan v. Hoagland*, 10 Neb. 511.
2. **Mortgages:** ASSIGNMENTS: PRIORITIES. "The law providing for the registration of instruments affecting land titles gives to the assignee of a junior incumbrance priority over a senior incumbrancer only in case his assignment is in registerable form and recorded before the senior incumbrance." *Rumery v. Loy*, 61 Neb. 755.
3. **Evidence:** WRITTEN CONTRACTS: PAROL EVIDENCE. The test of the completeness of a written contract is the writing itself, and parol evidence to show that it is incomplete is not competent.
4. "The terms and conditions of a written contract implied by law

are no more subject to variation by parol evidence than its express terms." *Grant v. King*, 117 Minn. 54.

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

W. A. Stewart and *Sinclair & McDermott*, for appellants.

Cook & Cook, contra.

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

DEAN, J.

Plaintiff is the owner and holder of two certain promissory notes in the sum of $8,000 and $7,200, respectively. The notes are each secured by separate mortgages on the separate quarter sections of a half section of land in Dawson county. The prayer of the petition is that plaintiff's mortgage liens be adjudged and decreed to be prior and superior to any right, title or interest that the defendant, A. E. Durland, and the intervening defendants, or any of them, may have or claim to have in the land in suit by virture of certain recitals in a release of a former $20,000 mortgage on the same land, or in any manner whatever, and that all defendants "be decreed to have no interest, right or title or lien in and to any of the lands owned by said Fannie B. Durland herein described," and for such other and further relief as equity may require in the premises. The release above referred to was executed by A. E. Durland and filed prior to the date of the filing of plaintiff's mortgages. This suit grows out of the A. E. Durland release, and certain recitals therein, as above noted, and is the instrument which defendants contend is superior to plaintiff's $15,200 mortgage lien on the half section of land in suit. The release follows:

"This agreement made and entered into this 13th day of February, 1922, by and between A. E. Durland, first party, and M. C. Durland and Fannie B. Durland, his wife, and O. B. Durland, second parties, of Lexington, Nebraska, witnesseth:

"That first party has this day released a certain mortgage executed and delivered to him, by M. C. Durland and wife, on the north half of section 31, township 10, range 20, in Dawson county, Nebraska, to secure a note of $20,000. Said mortgage is recorded in book 65, on page 497, of the deed records of Dawson county, Nebraska.

"Now, therefore, in consideration of said release, second parties agree to pay to first party in cash the sum of $100 in person on the first day of each and every month hereafter for and during the natural lifetime of the first party. For the payment of which, second parties bind their heirs, and their estates, and as an additional consideration for said release M. C. Durland and O. B. Durland, of the second parties, hereby acknowledge the receipt and satisfaction for all personal services rendered to the first party, and agree to give and extend to first party all other personal attention and services that they may be able to give first party in the settlement, disposition and carrying on of the personal affairs of the first party, without expense."

"Witness our hands, the day and date aforesaid.

"Witness:	M. C. Durland.
"W. A. Stewart.	Fannie B. Durland.
"H. L. Stuart.	O. B. Durland."

The following stipulation appears in the record:

"Mr. Stewart: It is stipulated and agreed by and between the parties * * * Fannie B. Durland, the wife of M. C. Durland, was the owner of the legal title to the north half of 31, 10, 20" (320 acres in Dawson county) on February 13, 1922, "and that * * * said Fannie B. Durland and her husband (November 16, 1922) made, executed and delivered to the plaintiff a mortgage," duly recorded, on the above half section of land, to secure the payment of two certain interest-bearing promissory notes, in the aggregate sum of $15,200.

"Mr. W. M. Cook: It is further stipulated that * * * the said A. E. Durland was the owner of said real estate (the half section) in fee simple from February 12, 1904, until

September 17, 1919; that on September 17, 1919, A. E. Durland conveyed said land to M. C. Durland by deed."

This deed and all subsequent instruments affecting title were duly recorded. M. C. Durland and wife excuted a mortgage thereon for the purchase price, namely, $20,000; that "on January 27, 1921, M. C. Durland conveyed said real estate to Fannie B. Durland by deed; * * * that on February 13, 1922, A. E. Durland executed * * * a release of said $20,000 mortgage."

When the taking of evidence was concluded, the court found generally in favor of defendant A. E. Durland, and against the plaintiff bank and the defendants M. C. Durland and wife and O. B. Durland, their son, and held that plaintiff's mortgage lien was junior and inferior to the lien of defendant A. E. Durland, except in respect of one of the quarter sections of land which the court found was the homestead of M. C. Durland and wife, and that A. E. Durland's claim was not a lien thereon from the fact that the so-called agreement was not acknowledged by M. C. Durland and wife. It seems that M. C. Durland and his wife and their son, O. B. Durland, or some of them, are the owners of an additional 240 acres of farm land and considerable real estate in Lexington. In view of this fact the court further found that the agreement is a valid and subsisting lien upon all of the real estate owned by M. C. Durland, Fannie B. Durland and O. B. Durland, except the homestead, to secure the performance of the terms of the agreement. The plaintiff bank and M. C. Durland, Fannie B. Durland, his wife, and O. B. Durland have appealed.

Counsel for plaintiff argues that defendant A. E. Durland's demand is inequitable and unconscionable. He argues: "What was the consideration for the bonus obligation? That the land mortgaged be freed of its lien. Now the appellee (A. E. Durland) seeks the aid of a court of equity to establish a lien by virtue of this bonus obligation, not only on that land, but upon all the property of the parties beyond that land as well." Continuing, counsel argues:

"Appellee undertakes to tell a court of equity that, no matter what they get, he is entitled to get a lien on all their property, although the obligation on which he claims his lien was executed for the purpose of relieving a lien on a portion of their property."

The question for determination here is whether the release, or contract, or agreement, call it what you may, creates a lien that is prior and superior to the lien of plaintiff's mortgages.

Referring to conveyances of real estate, section 5613, Comp. St. 1922 provides:

"They shall not be deemed lawfully recorded unless they have been previously acknowledged or proved in the manner herein prescribed."

There is no pretense that the instrument in question was "acknowledged or proved" in the manner prescribed by the recording acts. Does it then come within the meaning of the statute? Does the instrument operate as constructive notice merely from the fact that it was spread upon the record pertaining to conveyances in Dawson county? Under the authorities we think that both questions must be answered in the negative.

Pomeroy, in his work on Equity Jurisprudence, volume 2 (4th ed.) sec. 652, says:

"The record does not operate as a constructive notice, unless the instrument is duly executed, and properly acknowledged or proved, so as to entitle it to be recorded. The statutes generally require, as a condition to registration, that the instrument should be legally executed, and that it should be formally acknowledged or proved, and a certificate thereof annexed. If a writing should be placed upon the records with any of these preliminaries entirely omitted or defectively performed, such a record would be a mere voluntary act, and would have no effect upon the rights of subsequent purchasers or incumbrancers."

Story, in his work on Equity Jurisprudence, volume 1 (13th ed.) sec. 404, states this as being the rule:

"The doctrine as to the registration of deeds being con-

structive notice as to all subsequent purchasers is not to be understood of all deeds and conveyances which may be *de facto* registered, but of such only as are authorized and required by law to be registered, and are duly registered in compliance with law. If they are not authorized or required to be registered, or the registry itself is not in compliance with the law, the act of registration is treated as a mere nullity; and then the subsequent purchaser is affected only by such actual notice as would amount to a fraud."

The above excerpts from Pomeroy and Story are cited with approval by Mr. Justice White in *Lynch v. Murphy*, 161 U. S. 247. In *Benedict v. T. L. V. Land & Cattle Co.*, 66 Neb. 236, this court held to this rule:

"Constructive notice cannot be imputed from the recording of a document which the statute does not recognize as an instrument that should be recorded. Instruments, to impart constructive notice, must be recorded in their true character."

On principle, *Heelan v. Hoagland*, 10 Neb. 511, seems to be in point, wherein Judge Lake said: "The record of an unacknowledged deed of assignment is a nullity, furnishing no protection to the assignee as against the creditors of the assignor."

Rumery v. Loy, 61 Neb. 755, is in point: "The law providing for the registration of instruments affecting land titles gives to the assignee of a junior incumbrance priority over a senior incumbrancer only in case his assignment is in registerable form and recorded before the senior incumbrance."

In *Lewis v. Holdrege*, 56 Neb. 379, in an opinion by Sullivan, J., we said: "A plaintiff who does not stand in conscientious relations towards his adversary, with reference to the claim which is the subject of the action, is not entitled to the aid of a court of equity, and will be denied affirmative relief, although such claim does not arise out of an illegal transaction and is not tainted with actual fraud."

In *Keeling v. Hoyt*, 31 Neb. 453, in an opinion by Norval, J., we said: "A certificate of acknowledgment to a real

estate mortgage which does not show that the mortgagor voluntarily executed the instrument is invalid. The record of a real estate mortgage which is not legally acknowledged does not operate as constructive notice."

In *Langley v. Vaughan,* 57 Tenn, 553, the rule was emphasized: "An administrator took from a legatee, to whom he had made advances, an instrument in the following words: 'Received, Gallatin, March 16, 1867, of J. A. V., administrator of the estate of H. B. V., twenty-four hundred dollars and twenty-four cents, the same to be deducted out of my interest as legatee in the said estate. If the said amount is not realized out of the personal effects of the estate, the same shall be a lien on real estate or my interest in same.' Held, this instrument created no lien upon the land, because the description is wholly insufficient, and, besides, it neither conveys nor purports to convey or mortgage the land."

Some oral evidence was introduced tending to show the intention of the parties to the release, or agreement, in controversy in respect of what it meant and the like. Plaintiff argues that, if the agreement in suit fails to express the intention of the parties, reformation is the remedy, and not parol evidence of the intention. We think the authorities sustain counsel's contention.

"Reformation is that remedy in equity by means of which a written instrument is made or construed so as to express or conform to the real intention of the parties when some error or mistake has been committed." 34 Cyc. 904.

In *The Delaware,* 14 Wall. (U. S.) 579, 603, the court said: "Verbal agreements, however, between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract."

In *Grant v. King,* 117 Minn. 54, this is said: "The test of the completeness of a written contract is the writing itself, and parol evidence to show that it is incomplete is not com-

petent. The terms and conditions of a written contract implied by law are no more subject to variation by parol evidence than its express terms."

To substantially the same effect are the following: *Spiegal & Son v. Alpirn*, 107 Neb. 233; *Hamilton v. Thrall*, 7 Neb. 210. See, also, 13 C. J. 524, sec. 485.

In view of the record, we conclude that the judgment must be reversed and the cause remanded, with directions that plaintiff's mortgage liens be decreed and adjudged to be first liens upon the real estate in question.

REVERSED.

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

FILED MAY 25, 1926. No. 24376.

1. Highways: CONSTRUCTION: ESTIMATES: ADMISSIBILITY. Plaintiffs submitted to the state of Nebraska through the "department of public works" a bid for the construction of a highway in Sioux county, pursuant to federal aid project No. 102A. The contract provides: "The contractor, in all cases, will be paid for the actual amount of work performed as shown by the 'final estimates.'" The final estimates were to be, but were not, made by the state engineer. The "chief of the bureau of roads," whom the contract designates as "the authorized representative of the engineer in charge of all work in the state," prepared, pursuant to the contract, estimates and therein certified that $81,867.29 had been paid to plaintiffs and that $278.30 was the remainder due them. Plaintiffs, as the work progressed, accepted payments aggregating the former sum and made no claim at any time that measurements, used as a basis for estimates, were inaccurate. *Held*, that the estimates prepared by the chief of the bureau of roads were admissible in evidence on the issue as to the amount due the contractors.

2. ———: GRADING CONTRACT: DETERMINATION OF AMOUNT DUE. Where a grading contract provides the manner in which the amount of different materials which are removed shall be determined as a basis for calculating the price of the work, and provides that the final estimate shall be signed by the state engineer, and that officer fails, or refuses, to sign such estimate, the court, in an action to recover a remainder due the con-

tractor, will follow the method indicated by the contract in determining the amount due.

3. **Evidence:** HIGHWAYS: GRADING: SECONDARY EVIDENCE. The measurements and cross-sections made during the progress of road building construction work by the project engineer, in the absence of fraud, or gross mistake, are the best evidence of the quantity and character of the materials removed, and expert evidence, based on measurements taken after the work has been fully performed, which enable the witnesses merely to express an opinion in respect of the quantity and character of the removed materials, as shown by the estimates, is incorrect, secondary and incompetent.

4. **Interest:** CLAIMS AGAINST STATE. The legislature has not provided by statute for payment of interest upon claims against the state. It follows that, in the absence of statute, or of an agreement therefor, such claims cannot be allowed. See *United States v. North Carolina*, 136 U. S. 211.

Opinion on motion for rehearing of case reported in 113 Neb. 546. *Former judgment of affirmance vacated and judgment* of *district court reversed, with directions.*

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

DEAN, J.

Peterson, Shirley & Gunther, a firm of Omaha contractors, submittted a bid to the department of public works, of Nebraska, wherein it agreed to construct an earth and sand clay road, in Smiley Canyon in Sioux county, for $68,613.97, pursuant to federal aid project No. 102A.

This action was begun in Lancaster county to recover $47,428.72 which plaintiffs allege is the remainder due them, and unpaid, for the construction of the above-mentioned public highway. A jury was waived. Upon trial to the court plaintiffs recovered a judgment for $30,305.54, with interest thereon. From the judgment so rendered the state appealed, and, after argument, an opinion was written which, in all respects, sustained the trial court's judgment. See former opinion, *Peterson v. State*, 113 Neb. 546.

Afterward, on motion of the state, a rehearing was

granted. Thereupon the case was again submitted to this court for reexamination following able arguments by the respective counsel. Subsequently a second rehearing was allowed, on the state's application, and much new matter, material to the issues, was presented at the rehearing arguments to which our attention was not formerly directed.

In passing it may be recalled that the federal government is concerned in the construction of "post roads," and the contract therefore provides that the construction works shall be "subject to the inspection and approval of the secretary of agriculture." 39 U. S. St. at Large, ch. 241, p. 355, sec. 6.

In respect of the officers in charge of state highway construction, the contract indicates the following officers and designates their duties:

The engineer in charge of the project is the secretary of the department of public works. He is also designated "the state engineer."

The inspector: "An authorized representative of the engineer assigned to make detailed inspection of any or all portions of the work or material therefor."

The division engineer: "An authorized representative of the engineer in responsible charge of all work and of all project engineers in the division to which he is assigned."

The project engineer: "An authorized representative of the engineer whose duties shall be to see that the work is carried out in accordance with the contract and specifications and perform such duties as are here described as duties of the project engineer."

The "chief of bureau of roads" is the "authorized representative of the engineer in charge of all work in the state."

Subsequent to the submission of and pursuant to plaintiffs' bid, the contract in suit was entered into under date of May 5, 1921, wherein, among other things, it is provided:

"After the grading is completed and before final payment is made therefor, the project engineer will cross-section the road and make careful measurement to determine the units of various items of work performed, as the

basis for final settlement. The contractor, in all cases, will be paid for the actual amount of work performed as shown by the final estimates."

Final acceptance by the department of public works is stipulated to mean a written acceptance by the department of public works followed by final payment which is to be in accordance with the engineer's final estimate.

The contract requires prospective bidders "to examine the plans, specifications, and special provisions carefully and make sure that the requirements are fully understood. They must satisfy themselves by personal examination of the road as to the nature of the material to be excavated, the location and accessibility of material and other local conditions affecting the contract." This is so that bidders shall inform themselves in respect of the work to be performed in the project. And this cautionary warning appears in the contract: "Note—Bidders' attention is called to paragraph 62, section 1, standard specifications regarding payment of estimates." Paragraph 62, so far as material here, follows: "Final acceptance by the department of public works is stipulated to mean a written acceptance by the department of public works followed by final payment in accordance with the engineer's final estimate." Any minor work, not specifically mentioned in the contract, but obviously necessary for the proper completion of the work, shall be executed in proper manner by the contractor and he "shall not be entitled to any extra or additional compensation for the same." Grading shall be estimated and paid for by the cubic yard and measurement shall be made "by cross-sectioning before and after excavation and the volumes determined by the average and area method."

The contract also contains this: "Special provisions covering section A of project No. 102, Sioux county. It is specifically provided and understood in submitting this bid that all explosives which may be required to blast any solid rock or brule clay in solidified form will be furnished to the contractor by the department of public works at a price of fifteen (15) cents per pound. * * * The above-men-

tioned explosive is composed of T. N. T. made up in cartridges of ½ pound size. No caps or fuses will be furnished."

The chief of bureau of roads testified that about "24,000 pounds T. N. T. and a few hundred pounds of dynamite were used in the project," and that ordinarily it was assumed that a pound of explosive would remove a yard of rock, although in some instances it takes more explosives. This evidence seems to support the state's contention that plaintiffs removed approximately 24,000 yards of rock. Plaintiffs contend that much more explosives were used, but there is testimony which tends to prove that they were used to remove quantities of earth on the expressed ground that it effected a saving for the contractors. True, the contractors had the right to use explosives in moving plow land, for which they received 38 cents a cubic yard, if they counted that the most economical method of removal. But the mere fact that explosives were so used did not entitle them to $1.80 a cubic yard for earth so removed, that being the contract price for the removal of solid rock. Clearly, plaintiffs had no right to so increase the amount of their compensation.

Notwithstanding the following provision in the contract, there is no record of any claim by the plaintiff company for "extra compensation:"

"In any case, where the contractor deems that extra compensation is due him for work or material not clearly covered in this contract nor ordered in writing by the engineer as an extra, as defined above, the contractor shall notify the engineer of his intention to make claim for such extra compensation before he begins the work upon which he bases the claim. If such notification is not given, or the engineer is not afforded proper facilities by the contractor for keeping strict account of actual cost as defined for extra work, the contractor hereby agrees to waive the claim for such extra compensation. * * * The claim must be passed upon by the department of public works."

The contract expressly provides that any variations from the plans and specifications which may be required by the

exigencies of construction will in all cases be determined by the engineer, or chief of bureau of roads, and that no such changes by the contractor will be permitted without the division engineer's written approval, and if the meaning of the requirements of the specifications are in doubt, the contractor shall refer the question to the secretary of the department of public works, whose decisions shall be final and binding on both parties.

If any variations were made from the plans and specifications, above referred to, there is nothing in the record to show that such variations were determined by the engineer, nor that the written approval of the division engineer was obtained therefor, nor does it appear that plaintiffs referred any question in respect of the "meaning" of the requirements of the "specifications" to the secretary of the department of public works for determination. That plaintiffs were well advised of the project into which they were about to enter appears in their acceptance of the conditions of the contract, which follows:

"We have carefully examined the plans and specifications for the grading, paving, draining and incidental work on the road directed above, and we have made a personal examination of the site, and have inquired into the local conditions affecting the work."

When the work was finally completed, E. H. Morey, "chief of bureau of roads," prepared an estimate wherein, following a tabulated statement of the work, he certified that $82,145.59 was the total sum earned by plaintiffs under their contract, and that the previous payments made to plaintiffs amounted to $81,867.29, leaving a remainder due them of $278.30 which remained unpaid.

It may be observed generally that, under the federal and state authorities, it is competent for parties, in this class of general construction work, to designate in the contract some person or official to pass upon and decide all disputed questions that may arise in the course of construction, and that his decision shall be final. *United States v. Gleason,* 175 U. S. 588; *Martinsburg & P. R. Co. v. March,* 114 U.

S. 549; *Chicago, S. F. & C. R. Co. v. Price,* 138 U. S. 185; *Kihlberg v. United States,* 97 U. S. 398; *Chapman v. Kansas City, C. & S. R. Co.,* 114 Mo. 542; *Williams v. Chicago, S. F. & C. R. Co.,* 112 Mo. 463, 34 Am. St. Rep. 403; *Katz-Craig Contracting Co. v. City of Cozad,* 101 Neb. 189; *Elliott v. Missouri, K. & T. R. Co.,* 74 Fed. 707. Plaintiffs contend, however, that the estimate in question is invalid because it was not signed by the state engineer. But, in view of the facts, the majority of the court hold that it is not necessary to decide this question.

The contract provides that the duty of the project engineer shall be to see that the work is carried out in accordance with the contract and specifications and to perform such duties as are described; and further, as above noted:

"After the grading is completed and before final payment is made therefor, the project engineer will cross-section the road and make careful measurement to determine the units of various items of work performed, as the basis for final settlement. The contractor in all cases will be paid for the actual amount of work performed as shown by the final estimates."

It is claimed by the plaintiffs that the project engineer has no authority to classify the work, but by the provision just quoted he is required to cross-section the road and make careful measurement "to determine the units of various items of work performed, as the basis for final settlement." The units referred to consist of solid rock, loose rock and ordinary excavation, as defined by the contract. The cross-sectioning and measurements to be made by the project engineer necessarily required the exercise of his judgment as to the character of the materials involved. They must show the various materials composing each section of the work and the quantity thereof. If this is not classification, by what other word shall we describe it? True, the classification of the project engineer is not final. It is subject to the revision or approval of the state engineer. But the latter acts upon the reports of the project engineer as the basis for his decision in the absence of controlling evidence

of their inaccuracy. Furthermore, the parties accepted and acted upon such reports, received them as approximately correct, and plaintiffs received payment from time to time in accordance therewith.

Plaintiff contractors now contend that the state engineer, and none other, is competent to sign the final estimate. But the failure of the engineer to sign the final estimate does not throw open the question of the amount of compensation to the unrestricted arbitrament of the court, as upon *quantum meruit,* in a case where the method for determining such amount is provided in the contract. Such failure may require the court to fix the amount, but it must do so in accordance with the terms of the contract, which provides for measurements and cross-sections by the project engineer. If these are not shown to be inaccurate or fraudulent, they must form the basis of the court's judgment in the same way that it was the basis for the final certificate of the state engineer, because it is so provided in the contract.

Plaintiffs rely on the evidence of certain expert witnesses who are said to be learned in technical knowledge of the subject-matter as it pertains to modern highway construction projects. But these witnesses, none of them, ever saw the workings while in process of construction. Nevertheless, they testified at great length. Their examination and inspection was made on view, and after the work was all completed. Is it to be expected that witnesses so selected, even though learned in their calling, could as accurately describe, under the facts before us, the length, the depth, the height, the quantity, and the classification of the material that was removed, with the same degree of accuracy that such measurements could be given by eye-witnesses who were constantly present? To illustrate: Credible eye-witnesses testified that packed sand was moved by plows and grading machinery. As opposed to this, shall we accept the opinion of experts, not eye-witnesses, that such material could not be so removed? And these witnesses conceded that their evidence was merely an expression of their best judgment.

The plaintiffs contend that the sole controversy arises over the classification of material called "packed sand," their position being that all packed sand must be classified as solid rock. The field notes and estimates show that much of this material, especially where it was found between two ledges of rock, was classified by the project engineer as solid rock; in fact, we think it is a proper inference from the testimony for the defendant, and not disputed by the plaintiffs, that all packed sand was classified as solid rock except where the same was actually moved by grading machinery. When it was so moved, it was classified as ordinary excavation, and unquestionably could not be termed solid rock. If it was entitled to some higher classification, the proper unit is not defined by the contract, and it could not be classified thereunder, and was therefore subject to the provision awarding extra compensation. But in order to secure this it was necessary for the contractor to notify the engineer in charge that he would claim extra compensation before beginning the work and afford the engineer proper facilities for keeping strict account of the actual cost thereof, in which event such cost plus 15 per cent. would be allowed. No such notice was given, nor was the actual cost of the work kept, and therefore the contractor waived any claim for extra compensation. Assuming the nonexistence of a final estimate approved by the state engineer, as above pointed out, we have the field notes and cross-sections made by the engineers, as required by the contract, and these measurements were made upon actual view of the project day by day as the work progressed. And this was the best evidence obtainable.

To adopt plaintiffs' procedure in obtaining evidence in this class of work would not only be making a new contract for the parties, but it would open wide the door to fraud, speculation and unnecessary litigation. And, from any viewpoint, such evidence, under the contract, is incompetent and is therefore without probative value.

The court, in the absence of statutory authority or of a provision therefor in the contract, erroneously allowed

plaintiffs to recover interest. The law is otherwise and has long prevailed. *In re Gosman,* 17 Ch. Div. (Eng.), 771, the master of the rolls, speaking for the court of appeals, summed up the law of England in this terse expression: "There is no ground for charging the Crown with interest. Interest is only payable by statute or by contract." In *United States v. North Carolina,* 136 U. S. 211, the court said: "A state is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or by a lawful contract of its executive officers." To the same effect are the following cases: *State v. Board of Public Works,* 36 Ohio St. 409; *Flint & P. M. R. Co. v. Board of State Auditors,* 102 Mich. 500; *Western & Atlantic R. Co. v. State of Georgia* (special judicial commission), 14 L. R. A. 438. And the same principle prevails in Nebraska. *Central Bridge & Construction Co. v. Saunders County,* 106 Neb. 484. Our attention has not been drawn to a contrary holding of any court and we know of none.

Upon a reconsideration of the entire case, the former opinion (*Peterson v. State,* 113 Neb. 546) and judgment, in so far as they are at variance with the views herein expressed, are vacated. The judgment of the district court is reversed and the cause is remanded, with instructions to render judgment in the sum of $278.30 in favor of the plaintiff company.

REVERSED.

DAY, J., dissents.

DAVID CITY BUILDING & LOAN ASSOCIATION, APPELLEE, V. MARTIN R. FAST ET AL., APPELLANTS.

FILED MAY 25, 1926. No. 24000.

Mortgages: MORTGAGES ON HOMESTEAD: ALTERATION BY HUSBAND: EFFECT. Defendants, husband and wife, executed and delivered to plaintiff their bond for $1,200, and secured the same by a mortgage executed and acknowledged by them on their homestead in Butler county. Thereafter, at request of the husband,

acting without authority from the wife, an additional loan of $100 was made by plaintiff to him and the bond and mortgage respectively altered from $1,200 to $1,300. *Held*, that such alterations so made were each material and fraudulent; that the bond and the debt evidenced by it were thereby canceled as to the wife; further, that such mortgage was thereby discharged as to both husband and wife.

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

F. H. Mizera and *A. M. Walling*, for appellants.

Roper & Fuller, contra.

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

THOMPSON, J.

This is a suit brought by the plaintiff, appellee, hereinafter called the association, against the appellants, husband and wife, hereinafter called defendants, to have decree of foreclosure of a mortgage for $1,300 given to secure a bond in such association, which mortgage is claimed to have been executed by said defendants in usual form and delivered to the association on the north one-half of lot 3, block 5, Miles Second Addition to David City, Butler county, Nebraska. The petition is in ordinary form. Defendants, separately answering, meet such petition by a general denial, and further that, while the signatures of the makers are those of defendants, such instruments have each been fraudulently altered in a material part by the association since their execution and delivery, in this, that the bond has been changed from $1,200 to $1,300, as has the mortgage securing the same, and they are not the instruments executed or delivered by defendants respectively; to which a reply of general denial and plea of ratification is interposed. Trial was had to the court, and decree and order of sale entered in favor of the association, and against the defendants, as prayed. To reverse this decree, defendants separately appeal, and present as error, in substance, that

the findings and judgment of the trial court are not supported by the evidence, and are contrary to the law applicable to the facts proved. The association files a cross-appeal, and as a challenge to the judgment alleges, in substance, that in assessing the amount of fines collectable and unpaid the trial court erred wherein it found $53.30 to be due and payable as fines, when in fact it should have found $729.30.

The record reveals the following facts: The defendants Fast were at the dates covered by this transaction husband and wife, and the joint owners of the property above described, which was improved, and on which they resided as their home; that they, nor either of them, owned any other lands, town lots or houses in this state; that such half lot was and is, with the improvements thereon, their homestead, and does not exceed in value $2,000; that the plaintiff is a building and loan association duly incorporated under the laws of Nebraska for the purpose indicated by its name, and doing business in Butler county; that defendants desired to borrow of the association $1,200, and to secure the payment thereof by a mortgage to be executed by them running to such association; that on April 2, 1919, in furtherance of such wish, they went to the place of business of the association and informed its duly constituted officers in charge of such desire; that they were by them informed that in order to procure such loan they must purchase 12 shares of the stock of the association, which defendant M. R. Fast did; that the stock was issued as of that date to such M. R. Fast, the husband, and was then by him indorsed and delivered back to the association, at which time it issued in the name of M. R. Fast its pass-book representing such $1,200 loan, and showing therein credit for such amount; that these documents were left with the association, the latter requesting that defendants return the next day, April 3, 1919, when the papers necessary would be ready for them to execute; that defendants returned on April 3, 1919, and each signed the bond in question for the $1,200, and a mortgage for the same amount, and jointly acknowledged

the latter, which was also duly witnessed; that after the execution of such bond and mortgage, which were then delivered to the association, the pass-book upon which the $1,200 loan had been credited was turned over to the defendant husband and the loan of $1,200 thereafter applied in payment of the balance owing by the defendants jointly on the purchase price of, and in making improvements on, such half lot in accordance with the understanding of the parties; that for some unexplained reason the bond is dated April 3, 1919, as we have stated, but that the mortgage and the acknowledgement are each dated April 4, 1919; that on April 10, 1919, defendant M. R. Fast returned alone to the office of the association, and, in his own individual capacity, requested an additional loan of $100 of the officers in charge; that when this request was made one of the officers asked of the book-keeper if the mortgage had been filed, and, being informed that it had not, the book-keeper was directed by her superior officer to change the amount in the bond, mortgage and certificate, respectively, from $1,200 to $1,300, which she did; that the record shows that defendant Alice Fast was without knowledge of the transaction of April 10, 1919, until after the commencement of this suit; that the property had been purchased shortly before by defendants for $1,325.

The above facts as detailed are without contradiction in the evidence. The only evidence offered to show any knowledge on the part of the wife as to these alterations, or the additional loan of $100, was proof that she had individually paid to the association two monthly payments of dues, and had furnished the husband some money to aid in other payments. However, the evidence further shows that she never examined the pass-book for the purpose of seeing how many shares they were collecting on, or the amount of money that they were collecting on each share, or that she knew thereof, but simply paid what the association asked for. This would not be sufficient to put her upon guard, or to establish assent, waiver, or estoppel.

Taking up the appeal of the defendant M. R. Fast, it

will be seen that what the officers of the association were about to do was in furtherance of his request for an additional loan of $100; further, that he was present, and when the book-keeper was directed to make such alterations in such respective instruments, he lodged no objection thereto, but by his presence and lack of dissent approved the same, and thereafter with full knowledge of what had been done, he continued to recognize the bond as thus altered by receiving the $100, and by making monthly payments on the bond as altered. He thus led those dealing with him to believe that he was satisfied therewith, and consented thereto. Therefore, he is now estopped from asserting to the contrary as to such bond. The relation of the husband, defendant M. R. Fast, to the mortgage will be hereinafter considered.

Considering now the appeal of the defendant Alice Fast, such alterations in the bond and mortgage, respectively, were each material alterations, made by the association, payee in the bond and mortgagee in the mortgage, without authority and without the knowledge or consent of defendant Alice Fast, and were never by her approved, ratified or assented to in any manner. Hence, such alterations having been so made, intentionally by such association in utter disregard of her rights, she being one of the makers of the bond and mortgage so altered, such respective alterations are each inherently fraudulent whether so intended by the association at the time or not, and, in law, they thereby canceled such bond and the debt evidenced thereby as to defendant Alice Fast, and also discharged such mortgage as to her. This conclusion is in harmony with our uniform holdings. *Brown v. Straw*, 6 Neb. 536; *Townsend v. Star Wagon Co.*, 10 Neb. 615; *Walton Plow Co. v. Campbell*, 35 Neb. 173; *Foxworthy v. Colby*, 64 Neb. 216.

Our statute provides that, in order to be valid, an instrument such as the mortgage here in question must be executed and acknowledged by both husband and wife. We have held, when not so executed and acknowledged, such mortgage is void. *Kimmerly v. McMichael*, 83 Neb. 789.

Therefore, as the alterations here made canceled the debt and released the mortgage as to the wife, the mortgage no longer remained the joint mortgage of both husband and wife, and therefore it is void; and, being void, the cancelation and discharge thereof is effective as to both husband and wife.

This renders it unnecessary for us to consider the cross-appeal of the association.

The findings and judgment of the trial court are reversed and set aside, and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

ROSE and GOOD. JJ., dissent.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. AMERICAN EXCHANGE BANK OF BRISTOW: LUCIAN L. COOK, RECEIVER, APPELLEE: M. BAINBRIDGE ET AL., CLAIMANTS, INTERVENERS, APPELLANTS.

FILED MAY 25, 1926. NOS. 24065, 24066, 24067.

1. **Banks and Banking:** GUARANTY FUND: CLAIMS ALLOWABLE. Where interest at a greater rate than 5 per cent. has been paid by a state bank upon certificates of deposit, but such practice is abandoned while the bank is a going concern, certificates in renewal at 5 per cent., upon which a greater rate is not paid nor contemplated, may be proper charges against the bank guaranty fund.

2. ———: ———: ———. The fact that such renewals include accumulations of excess interest on prior ones will not prevent their allowance against the guaranty fund.

3. ———: ———: ———. An agreement by an officer of the bank or a third person to pay a bonus for the deposit, or a greater rate of interest than 5 per cent. out of his own pocket, will not prevent such allowance, although, without the knowledge or consent of the depositor, such excess is charged to the bank. The denunciation of the statute is against such contracts by the corporation.

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

Byron Clark, Jesse L. Root and *John A. Davies,* for appellants.

Fred S. Berry, W. T. Wills and *C. M. Skiles, contra.*

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

REDICK, District Judge.

These three cases were presented in this court together, are based upon substantially the same state of facts and present identical questions of law, and may, therefore, be disposed of by one opinion. They are all based upon certificates of deposit issued by the American Exchange Bank of Bristow which became insolvent and was taken over by the department of trade and commerce on January 2, 1923. The certificates in question were presented to the receiver for allowance against the state guaranty fund, and were disallowed on the ground that the bank had agreed to pay more than 5 per cent. interest thereon, were disallowed upon appeal to the district court, and the claimants have appealed to this court, and the state presents the same objection to their allowance against the guaranty fund.

The transactions resulting finally in the issuance of the certificates in question are very numerous and it will not be necessary to set them out in detail, though we find it proper for a better understanding of the questions of law involved to make a separate statement as to the claims of the three appellants. It is sufficient at this place to state that all of the certificates were drawn at six months and, on their face, draw 5 per cent. interest and are renewals, in series, of previous certificates reaching back a number of years, and each certificate includes as a part of its principal amount accumulation of interest paid on prior certificates in excess of 5 per cent. per annum. The following is a statement of the respective claims of the appellants:

M. Bainbridge, No. 1. Certificate No. 2605, dated September 1, 1922, for $1,792. 71. This was a renewal of a certificate for same amount dated March 1, 1922, which was

a renewal of a previous certificate with 5 per cent. interest for six months added. No excess interest was paid on these certificates, nor was any excess interest paid upon the next preceding certificate in the series, but there was included in the latter an excess of $14.70 constituting a payment of 8 per cent. upon the certificate of which it was a renewal. The original certificate, representing the first transaction of this series, dated March 1, 1920, for $1,000 drew 5 per cent. only.

M. Bainbridge, No. 2. Certificate No. 2629, dated October 12, 1922, for $3,055.78. This was a renewal of a certificate dated April 12, 1922, for the same amount, which in turn renewed a certificate of October 13, 1921, with 5 per cent. interest for six months, and which in turn renewed one of April 13, 1921, which included interest paid at 6 per cent. upon three previous certificates, an excess of $67.69. The original certificate of the series, dated March 4, 1919, for $2,000 carried only 5 per cent. interest. The difference in principal amount arises out of additional cash or payments.

Jennie Bainbridge, No. 1. Certificate No. 2628, dated October 12, 1922, for $1,529.85. This was a renewal of a certificate dated April 12, 1922, for $1,492.54, with six months interest added at 5 per cent., which in turn was a renewal of a certificate for a similar amount dated October 13, 1921, and which included an excess of $67 over 5 per cent. interest upon the next preceding certificate of the series. There is no evidence, however, in the books of the bank or the witnesses explaining this excess. Thirteen other certificates complete this series back to March 1, 1912, upon the first four, the sixth and tenth of which only 5 per cent. interest was paid; upon the fifth, $53.97, the seventh, $79.57, the eighth, $20, the ninth, $55.43, the eleventh, $55.88, and the twelfth, $6.27, in excess of the 5 per cent. on the face of the certificates respectively were included, but no evidence from the books of the bank or otherwise explains these items. The next in series, No. 2126, dated October 13, 1920, for $1,337.45 seems to in-

dicate payment of excess interest of $6.49, and certificate No. 2254, dated April 13, 1921, for $1,319.77 shows an unexplained excess of $20.06.

Jennie Bainbridge, No. 2. Certificate No. 2547, dated July 1, 1922, for $161.80. This and the two preceding certificates in this series carry only 5 per cent interest, but the second in the series included 10 per cent. interest on the original certificate dated December 21, 1920, for $92.05, charged in the bank books.

Jennie Bainbridge, No. 3. Certificate No. 2604 dated September 1, 1922, for $1,209.71. This certificate and three preceding certificates carry but 5 per cent. interest, but the first of these three included $16.20, and the next preceding $55, which latter was 6 per cent. on the original certificate, dated March 1, 1920, for $1,000.

Nellie Bainbridge Claim. Certificate No. 2624, dated September 28, 1922, for $2,393.11. This certificate and the four preceding it in the series carry but 5 per cent. interest, but the first of the four, dated September 25, 1920, for $1,811 included interest at the rate of 6 per cent. upon the original certificate of the series, dated March 26, 1920, for $1,700, to wit, $51 and small excesses on the two following certificates, but these items do not appear as charges in the books of the bank.

It thus appears that in the claims of M. Bainbridge, Nos. 1 and 2, the original certificates were issued in full compliance with the law, and that is true of the first four certificates involved in Jennie Bainbridge series, claim No. 1. In the other claims an excess over 5 per cent. interest was included in the first renewal certificate. It further appears that, so far as they can be identified as such, payments of excess interest began in March, 1920, and ceased, with one exception, in March or September, 1921. The exception has reference to certificate No. 2395, in Jennie Bainbridge claim No. 1, dated October 13, 1921, for $1,492.54, where an unexplained excess of $67 appears. In the latter part of September, 1921, the condition of the bank was unsatisfactory to the state banking department,

and the president of the bank, Mr. Frostrom, was removed, and Rollin B. Hewitt, his son-in-law, took charge of the bank at the request of the department and continued to operate it as manager and cashier until it was closed, January 2, 1923. He in no sense represented the banking department, but operated the bank for the corporation under the customary state supervision. After Hewitt took charge, each of the certificates involved in all the claims were renewed two or three times and no payment of excess interest was made except the item of $67 above referred to, which cannot be identified or explained by the books of the bank or other evidence.

J. L. Bainbridge, the son of M. Bainbridge and brother of the other two claimants, was called as a witness by the state for the purpose of showing the existence of an agreement by the bank to pay interest in excess of 5 per cent. He lived near the town of Bristow, while the claimants lived near Waverly, in Lancaster county. The witness acted as the agent of the claimants in procuring the certificates of deposit and attending to the renewals, the interest in nearly every case being added to the renewal certificate. He testified that he had a conversation with Frostrom, the president of the bank, in 1920, who agreed to pay a commission for keeping the money in his bank, and "he (Frostrom) said he figured it 8 per cent., although it was coming out of his own account. I understood it was not to affect the bank in any way." Now, this is practically the entire direct testimony on the subject. Frostrom was not called as a witness by either party. It is contended by the state that this testimony, together with the fact that in many instances the excess amounts of the renewal certificates equalled precisely 6 or 8 per cent. interest upon the certificates renewed, and the fact that the claimants received said certificates and demanded no explanation, are sufficient to establish the existence of an illegal agreement by the bank to pay more than 5 per cent. interest. The claimants M. and Jennie Bainbridge both testified that they did not and could not figure the interest,

but trusted the bank and accepted the renewals without question. The claimant Nellie had received an education, including two years in the high school, but testified she had no knowledge that excess interest had been included in the renewal of the certificate for $1,700, which is the only one in her series subject to criticism. She also testified that she relied upon the bank, and that if any interest in excess of 5 per cent. was included in the renewal it was done without her knowledge or consent. At the time of this renewal $60 additional money was deposited, so the amount of interest ($51) was not *prima facie* apparent. All three of the claimants testified that they had no acquaintance with Frostrom or any officer of the bank, that their dealings were all through their brother, and that they had no knowledge of any agreement with the bank for the payment of any interest in excess of 5 per cent. It is probable Nellie would be chargeable with knowledge of the fact that $51 included in the first renewal of her certificate was equal to 6 per cent. for six months, but she claims not to have noticed it.

We think the evidence insufficient to establish the existence of an illegal agreement, under all the circumstances shown. The evidence of J. L. Bainbridge, taken as a whole, points to a contract with the president of the bank to pay the commission or excess interest out of his own pocket. Such an agreement we have held not to be unlawful. *State v. Farmers State Bank,* 112 Neb. 474; *State v. American Exchange Bank,* 112 Neb. 834. The fact that the entries upon the bank books appear to show that in some instances the excess was paid by or charged to the bank does not bind the plaintiffs. It was not their duty to see that the president kept his promise, and, for all they knew, he did do so. "The misconduct of an officer of a bank in charging to it interest which he agreed to pay with his own money to a depositor is not imputable to the latter, if he had no knowledge of or part in the wrongdoing." *State v. Wayne County Bank,* 112 Neb. 792.

It seems however that, assuming the existence of an

illegal contract and payment of interest in excess of 5 per cent. on prior certificates, this will not necessarily taint renewals upon which no excess was paid nor agreed to be paid (*State v. Wayne County Bank*, 112 Neb. 792; *State v. Farmers State Bank*, 112 Neb. 474); that the law recognizes the existence of a *locus pœnitentiæ*, looks with favor upon a cessation of evil doing (*State v. Farmers State Bank*, 112 Neb. 788; *State v. American Exchange Bank*, 112 Neb. 834; *State v. Newcastle State Bank, ante*, p. 389); and refuses to apply the Semitic law by visiting the sins of the father upon the children. U. S. Const., art. I, sec. 9.

The certificates referred to in the evidence were issued for six months, and on three of the claims in suit on the last four, on two on the last three, and on one on the last two certificates no interest in excess of 5 per cent. per annum was paid or contemplated. It would seem therefore that, if any agreement for excess interest had at one time existed, it was completely abandoned by the parties in good faith for a period of from one to two years. The point is not made by the state, and may therefore be presumed to be of no force, that the abandonment took place only after Hewitt had been put in charge by the state banking department; but Hewitt was not acting for the department, but as manager and cashier of the corporation.

The state relies upon *Iams v. Farmers State Bank*, 101 Neb. 778, in which it was said: "The certificates in suit are renewals of certificates issued by the bank in its former name of Farmers & Merchants State Bank, and any infirmity that may have been imparted to the original certificates by an unlawful act, such as an agreement for an unlawful rate of interest, as the attorney general charges in the present case, would inhere in and vitiate the entire series of renewal certificates."

But in *State v. American Exchange Bank*, 112 Neb. 834, upon the precise point being urged, the *Iams* case was distinguished by Thompson, J., in this language: "In that case both parties intended to contravene the statute, and it was so held. The extra interest had been regularly paid

when due. The original transaction, with no attempt to purge it, continued up to the bank's insolvency and charge taken of it by the district court looking to its closing and dissolution, and suit brought on such certificate." But here the illegal payments had ceased for a period of more than a year prior to the closing of the bank.

The state further contends that, inasmuch as the certificates upon which claims are presented include accumulations of excess interest on prior certificates, the original vice inheres in them. We cannot accept this view. When the illegal payments were being made the transaction would be regarded as a loan, but when they were abandoned, and the interest paid, either in cash or by including it in the renewal, the certificate acquired the status of a deposit. It was perfectly competent to pay interest in excess of 5 per cent. on a loan. When that interest was paid, the bank was a going concern, and the certificates covering the indebtedness of the bank were issued at 5 per cent. and became deposits within the guaranty law. See *State v. American Exchange Bank,* 112 Neb. 834, 836.

It is therefore considered by the court that judgment of the lower court, in so far as the claims in question were disallowed, is erroneous, and that part is reversed and cause remanded for the purpose of requiring payment of the Bainbridge claims from the bank guaranty fund.

REVERSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. AMERICAN EXCHANGE BANK OF BRISTOW: LUCIAN L. COOK, RECEIVER, APPELLEE: NELS J. JACOBSON, EXECUTOR, INTERVENER, APPELLANT.

FILED MAY 25, 1926. NO. 24068.

Case ruled by and judgment reversed on the authority of *State v. American Exchange Bank, ante,* p. 626.

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

Byron Clark, Jessie L. Root, and *John A. Davies* for appellant.

Fred S. Berry, W. T. Wills and *C. M. Skiles, contra.*

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

REDICK, DISTRICT JUDGE.

This case involves claims against the bank guaranty fund and is based upon four certificates of deposit issued by the American Exchange Bank of Bristow, which was taken over by the state banking department January 2, 1923.

One of the certificates for $2,000 was allowed by the receiver as a charge against the guaranty fund, two for $1,000 each and one for $2,000 were allowed as general claims against the bank, but disallowed as against the fund. Upon appeal to the district court the action of the receiver was confirmed and the claimant prosecutes an appeal here. The receiver defends and protests against the allowance of claims against the guaranty fund on the ground that on previous certificates of which the ones in dispute are renewals a greater rate of interest than 5 per cent. was paid by the bank. The facts are not disputed. The certificates in question are renewals at six months each of certificates representing money placed in the bank by claimant's decedent over a period of several years. Upon the renewal certificates interest was paid at 5 per cent. per annum, but upon certificate No. 1970 for $1,000, dated February 24, 1920, of which No. 2582, dated August 24, 1922, was the final renewal, 6 per cent. interest was paid August 27, 1920; and upon certificate No. 1967, dated February 24, 1920, for $1,000, of which No. 2587, dated August 24, 1922, for $1,000, was the final renewal, 6 per cent. interest was paid August 24, 1920; and upon certificate No. 1993, for the sum of $2,000, dated March 4, 1920, of which No. 2591, dated August 24, 1922, was the final renewal, 6 per cent. interest was paid September 4, 1920. It will be noted that in the case of each certificate there were at least three renewals, subsequent to the payment of interest at

6 per cent., upon which only 5 per cent. was contracted for or paid. There is no evidence of any agreement by the bank to pay more than 5 per cent. interest except as one may be inferred from the fact that upon one certificate in each series 6 per cent. had been paid. It therefore appears that, assuming the existence of such an agreement in August, 1920, the practice was abandoned, and as to the certificates issued after that date, including the ones in question, no excess interest was paid and the evidence fails to establish any contract for such payment.

The case is therefore ruled by *State v. American Exchange Bank, ante,* p. 626. It seems proper, however, to notice one new proposition urged by counsel for the receiver and not discussed in that decision.

It is suggested that, if the certificate represented a loan by reason of the fact that more than 5 per cent. was agreed to be paid upon it, then a renewal of it would still be a loan, and *State v. Banking House of A. Castetter,* 110 Neb. 564, and *American State Bank v. Wilson,* 110 Kan. 520, are cited, in which the illustration was made that, if a bank paid its debt with certificates of deposit, there would be merely a change in the form of the obligation. The analogy is defective, in that, in these cases, the term deposit is defined from the standpoint of the provisions of the guaranty law. The definition adopted in the *Castetter* case was of a deposit, "within the meaning of the statute," and "under circumstances which do not transgress specific limitations of the bank guaranty law." But as between the bank and the customer, we have no doubt the certificate represents a deposit when money or its equivalent is left with the bank on a time certificate, regardless of the rate of interest it carries.

Having concluded that the judgment of the district court is erroneous for disallowing the claims in question as charges against the bank guaranty fund, that portion of the judgment is reversed and cause remanded for the purpose of such allowance.

REVERSED.

ANNIE W. MAGILL, APPELLEE, V. ALVA B. MAGILL ET AL., APPELLANTS.

FILED JUNE 8, 1926. No. 23708.

1. **Appeal:** TRIAL DE NOVO. When an action in equity is appealed, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it is the duty of this court to try the issues *de novo* and reach an independent conclusion without reference to the findings of the district court. Comp. St. 1922, sec. 9150. And when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying.
2. **Affirmance.** Upon examination of the entire record, and upon trial *de novo*, we find that the evidence supports the judgment.

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

Nye, Worlock & Nye for appellants.

N. P. McDonald, contra.

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

DEAN, J.

Mrs. Annie W. Magill, plaintiff, is the mother of Alva B. Magill, defendant. Lavia B. Magill, is Alva's wife. Alva and Lavia Magill are the sole defendants. This is a foreclosure suit commenced in the district court for Buffalo county by Mrs Annie W. Magill to recover on a certain 6 per cent. interest bearing promissory note, executed by Alva and Lavia Magill in the principal sum of $4,630, dated March 1, 1921, payable March 1, 1924, to plaintiff's order, and secured by a mortgage on a quarter section of land in Buffalo county, which is dated and acknowledged April 28, 1921, being about two months after the date of the note. The above mortgage is subject to a prior first mortgage on the same land in the principal sum of $9,000. The owners of the $9,000 mortgage, however, are not parties to this suit. The following instrument, dated April 28, 1921,

which is pleaded in paragraph 5 of defendants' second amended answer, is also in the record:

"Kearney, Nebraska, April 28, 1921.

"Received of A. B. Magill, a note made in his favor for fifty-eight hundred dollars ($5,800), secured by a mortgage on one-hundred sixty acres of land in Lincoln county, Nebraska, which I am holding as collateral to a note of A. B. Magill and wife for four-thousand six-hundred thirty dollars ($4,630), secured by a second mortgage on the northwest quarter (N. W. ¼) of section thirty-two (32) township nine (9) north, range fourteen (14) west, in Buffalo county, Nebraska, which is to be returned to A. B. Magill when his note is paid in full.

"Anna W. Magill."

In respect of the $5,800 note and mortgage, referred to by some of the witnesses as "the western mortgage," and also referred to in the last above-described instrument, the court held:

"That the instrument set forth in paragraph 5 of defendants' second amended answer, dated April 28, 1921, and purporting to have been signed by Anna W. Magill, and purporting to state that a certain note made in favor of the defendant Alva B. Magill, for $5,800, secured by a mortgage on 160 acres of land in Lincoln county, Nebraska, was held by plaintiff as collateral security to the note and mortgage set forth in plaintiff's petition, was not signed by the plaintiff with the knowledge and understanding that said instrument was a statement that said $5,800 note and mortgage was held by her as collateral security for the note and mortgage set forth in plaintiff's petition, and the court finds that said $5,800 note and mortgage on the land in Lincoln county, Nebraska, is the absolute property of the plaintiff and is not held by the plaintiff as collateral security to the note and mortgage set forth in plaintiff's petition."

When the evidence was finally submitted, the court rendered a judgment of foreclosure and found and decreed that $5,301.50 was due plaintiff on the $4,630 note and mort-

gage sued on, with interest at the rate of 8 per cent. per annum from the date of the judgment, subject only to the prior mortgage of $9,000. The court further found and decreed that plaintiff was the owner and the holder of the title to the $5,800 note, above described, and quieted and confirmed the title thereto in the plaintiff. Defendants appealed.

The main dispute in the present case is in respect of the $5,800 note and mortgage and certain interest which had accrued thereon. Alva Magill denied that he ever, at any time, delivered the $5,800 note and mortgage to his mother other than as security for the $4,630 loan which she made to him. Defendants alleged that the "note of $4,630 represented all of the indebtedness which was owing to the plaintiff," and that plaintiff agreed to return the $5,800 note to defendant as soon as his note for $4,630 was paid; that plaintiff represented to her son, Alva, that she was being taxed on the $4,630 note, and that in order to avoid such payment of taxes defendant complied with her request to execute the mortgage sued on, upon her agreement that the $5,800 note and mortgage should be returned when he paid the $4,630 note.

Mrs. Beulah Ross is a daughter of plaintiff. She was eleven in 1901 and lived at home from thence until 1910 when Alva married. It was during the period between 1901 and 1910 that Beulah's brother, Alva, claimed that he sent large sums of money to his parents which aggregated $5,000 or $6,000. She testified that Alva worked in a brickyard two years before he was married and paid $2 a week for his board and room; that her father never borrowed any money from him, but that at one time Alva sent $90 home for her father at a time when he could do no work on account of a broken arm after they moved to town in 1902. On the cross-examination the witness testified: "Q. Now, so you think Alva didn't contribute anything to your father and mother at all during those years? A. I do not. Q. And you are just telling from what you saw yourself; you don't know anything aside, from any evidence of any-

one that has told you anything? A. No; I am only telling what I know. * * * The Court: You never heard your mother say that Alva sent her fifty or one-hundred dollars? A. I did not. The Court: Do you think if he had advanced her during that time as much as five or six-thousand dollars, you would have known about it? A. I certainly would. The Court: You certainly would, you say? A. I certainly would. * * * The Court: And they (her parents) talked over their business matters in your presence and hearing? A. Yes, sir; they always did from the time we were little tots, you might say, talked over their business, you know, right openly, in the presence of us youngsters."

A Kearney banker testified that plaintiff and defendant came to the bank and there made a settlement of the accounts between them; that from their talk he understood that Alva Magill was indebted to his mother in a sum approximating $10,000, and that she wanted him, the witness, to deduct the value of the $5,800 note and mortgage from the $10,000 which Alva owed her, and make out a note for the remainder of his indebtedness to her, including accrued interest; that this brought the amount up to $4,630 which is the face of the note sued on. When asked if there was anything said by Alva or his mother to indicate that the $5,800 note was collateral to the $4,630 note, he answered: "I didn't understand it that way;" that Alva did not at that time or at any other time claim that his mother owed him anything. On the cross-examination this banker testified: "I couldn't say that Alva mentioned definitely about the $5,800 any more than he consented that the $4,630 was the difference between the value of the $5,800 and the $10,000;" that Mrs. Annie Magill complained about having to pay taxes on the $4,630 note, and that he, the witness, suggested "that the real estate mortgage with the proper clause in it" would obviate the objectionable taxation feature of which Alva's mother complained, and that this "led up to the making of the mortgage." He further testified that Alva, in speaking of the

$5,800 note and mortgage, said "it was being assigned to her (his mother), in payment of something that he owed her."

The following stipulation appears in the record:

"It is stipulated by and between the plaintiff and the defendants that the Central National Bank has collected for Anna W. Magill interest on the $5,800 note and mortgage referred to in the evidence for three successive years, 1921, 1922, and 1923, on or about March 1st each year, in the sum of $348 each time, and that said bank has credited the account of Anna W. Magill with these amounts in said bank and that she has received the benefit of the credit."

The record shows that Alva's mother is 65 years of age. That she was unacquainted with business usage and business custom is apparent from all of her evidence. But in the main her evidence was corroborated by that of her daughter, Beulah Ross, and of the Kearney banker, both of whom were called in her behalf, and by at least one other witness. Plaintiff testified that she never borrowed any money from her son, but she added that he sent $90 home when his father broke his arm, and that this sum was all paid back to him. From her evidence it appears that Alva borrowed $10,000 from her while the parents lived on a farm and that with this he did "some building and he got a threshing machine," an irrigating pump and some live stock. She produced a check for $4,000 and one for $6,000 payable to Alva, and his indorsement appears thereon. Defendant claimed, however, that the $4,000 check was not a loan from his mother, but was in payment of money he loaned her from time to time and for which he said she gave him three promissory notes in the aggregate sum of $6,000 or about that sum. He claimed to have made a final settlement with his mother in 1920, about a year before he executed the $4,630 note in her favor. The evidence conflicts on this as on every material point at issue. True, the case was tried as one in equity, and under the law it is our duty to try the issues here *de novo*. Comp. St. 1922, sec. 9150. The rule to which we are committed follows:

When an action in equity is appealed, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it is the duty of this court to try the issues *de novo* and reach an independent conclusion without reference to the findings of the district court. And when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner in testifying. *Greusel v. Payne*, 107 Neb. 84; *Johnson v. Erickson*, 110 Neb. 511. In view of the present state of the record, it seems that the discussion need not be further prolonged.

We conclude that the weight of the evidence is on the side of plaintiff. It follows that the judgment of the district court must be and it hereby is in all things

AFFIRMED.

MARY ULDRICH, APPELLEE, V. SANITARY DISTRICT NO. 1, LANCASTER COUNTY, APPELLANT.

FILED JUNE 8, 1926. NO. 24921.

Waters: DRAINS: ACTION FOR DAMAGES. Where as a part of a general drainage project of a sanitary district, which contemplates the deepening and straightening of a natural watercourse by constructing a large number of cut-offs of varying lengths, and during the progress of the work the first cut-off constructed caused the natural stream flowing through the plaintiff's land to be overflowed in times of flood water, *held*, that an action brought to recover damages to the land as a whole before the project is completed is premature, unless it appears that the project when completed will not relieve the situation complained of and that the district will not, in all probability, adopt some other method of relieving the conditions creating the damages.

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

Peterson & Devoe, for appellant.

C. J. Campbell and *Harry R. Ankeny*, *contra.*

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

DAY, J.

Plaintiff brought this action to recover damages claimed to have been sustained by her by reason of alleged negligent and wrongful acts committed by the defendent in the construction of a ditch, known as cut-off 47B, of defendant's drainage project, resulting, as she claims, in the creation of a nuisance permanently damaging her lands and destroying her crops therein.

The petition sets out three causes of action: The first relating to permanent injuries to the land, arising from flooded conditions which plaintiff claims reduced the market value of her land as a whole. The second and third causes of action were for damages alleged to have been sustained for loss of crops in the years 1923 and 1924. The trial resulted in a verdict and judgment in favor of the plaintiff for $7,000 on her first cause of action, $633.60 on her second cause of action, and $1,008 on the third cause of action, making a total of $8,641.60. From this judgment defendant has appealed.

Pending the appeal a stipulation was entered into between the parties permitting the defendant to satisfy the judgment in so far as it related to the second and third causes of action, without prejudice to the right of the defendant to have the court determine the issue presented in the first cause of action. The stipulation also contained a clause relating to the taxation of costs, contingent upon the determination of the issue in this court.

As the record now stands there is but one question presented for our determination, and that is the right of plaintiff to recover future or prospective damages to her land by reason of the construction of the ditch in question.

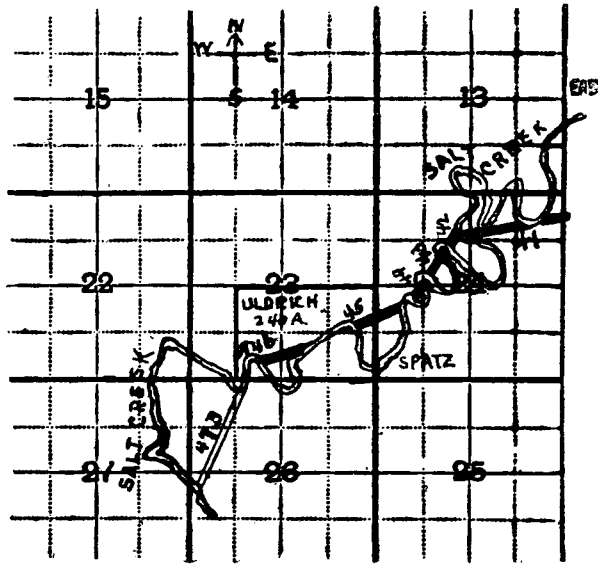
For many years the question of adequate and proper drainage of Salt creek valley in and adjacent to the city of Lincoln has been a matter of great public concern. To aid in solving this question the defendant was duly incorpo-

rated as a sanitary drainage district under the laws of this state, possessing, among other things, the power of eminent domain, the authority to construct and maintain ditches, drains and canals, and to provide an adequate sewage system for the entire district. The district included the city of Lincoln, several suburban towns, and thousands of acres of land drained by Salt creek, a natural water-course which carries large quantities of water, especially in the rainy seasons.

The land through which Salt creek flows is comparatively level, and the stream, containing many bends and curves and subject to frequent overflow, is very sluggish. To obviate this difficulty and afford better sanitation, the trustees of the district adopted a comprehensive scheme of drainage of the entire valley which in the main contemplated the straightening and deepening of several tributary streams to Salt creek and also the straightening and deepening of the channel of Salt creek for a distance of more than 13 miles. One of the cut-offs embraced within the scheme is known as cut-off 47B, which originates at a point in section 27 and extends in a northeasterly direction through a part of of section 26 where it connects with the original channel a short distance south of the plaintiff's land. This cut-off is 3,730 feet long. The plaintiff is the owner of the S. E. ¼ and the E. ½ of S. W. ¼ of section 23. The accompanying diagram shows the course of the stream through the plaintiff's land, the cut-offs and a few of the proposed cut-offs embraced within the project.

In furtherance of the general plan the district, in 1920, constructed cut-off 47B. It then commenced straightening the channel at the extreme eastern boundary of the district, known as cut-off 23, being approximately 8 miles from cut-off 47B. From the eastern boundary of the district the cut-offs have been constructed up-stream and at the time of the trial a number of such cut-offs had been completed.

It is claimed by the plaintiff that by diverting the waters through cut-off 47B the flow of water is so accelerated as to cause an overflow in flood times, in the main channel of



Salt creek at the point A shown in the diagram, causing many acres of plaintiff's land to be submerged and to deposit thereon large quantities of silt and debris, resulting in permanent injury to the land. It is the contention of the defendant that when the project is completed the flow of water in the natural stream through the plaintiff's land will be so accelerated as to relieve her land from overflow caused by water deposited in the main channel by the construction of cut-off 47B.

The rule established in this jurisdiction is that, where an injury is permanent, the plaintiff may recover in one action, future or prospective as well as past damages, but where the nuisance is of temporary, recurring or removable character, prospective or future damages are not recoverable. In *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, where this same principle was involved, this court said:

"We think the rule is stated correctly in 2 Wood, Nuisances (3d ed.) sec. 869, as follows: 'Where the damages are of a permanent character, and go to the entire value of the estate

affected by the nuisance, a recovery may be had of the entire damages in one action. Thus, in an action for overflowing the plaintiff's land by a mill-dam, the land being submerged thereby to such an extent and for such a period as to make it useless to the plaintiff for any purpose, the jury were instructed to find a verdict for the plaintiff for the full value of the land. So, too, when a railroad company by permanent erections imposed a continuous burden upon the plaintiff's estate, which deprived the plaintiff of any beneficial use of the portion of the estate so used by it, it was held that the whole damage might be recovered at once; but where the extent of a wrong may be apportioned from time to time, and does not go to the entire destruction of the estate, or its beneficial use, separate actions not only may but must be brought to recover the damages sustained.' "

In *Omaha & R. V. R. Co. v. Standen,* 22 Neb. 343, it was held:

"Where a nuisance is a continuing one, in consequence of which damages are sustained, a recovery is limited to damages which may have accrued before the action is brought, and one action is not a bar to a second action brought for damages thereafter sustained."

While it is true that there has been considerable delay in the completion of the project adopted by the board of trustees, we think it is clear that they have in good faith been proceeding to carry out the general plan of drainage adopted by the board. A large portion of the delay was caused by the necessity of using the funds for the construction of the disposal plant.

The construction of cut-off 47B is but a part of a general project. When completed it may, and some of the evidence tends to show that it will, entirely obviate the difficulty complained of by the plaintiff. The overflow of the plaintiff's land occasioned by the construction of the ditch does not at all times permanently destroy the use of the land. It would be entirely unjust to allow the plaintiff to recover $7,000 as a permanent injury to the land if it

should turn out when the project is completed that no permanent injury exists.

It would seem that the general rule, applicable to cases of permanent injury, would not arise upon a partial construction of an improvement producing an injury, unless it appears that the completion of a contemplated project will not relieve the situation complained of and that the district will not adopt some other method of relieving the conditions creating the damages.

Although an expert has expressed an opinion that the ditch as located with its present capacity will not prevent the injuries complained of, it is not to be assumed in advance that some other method may not be adopted by the district to obviate the difficulty, rather than submit to periodical suits or damages based upon the theory of maintaining a continual nuisance. The plaintiff has recovered damages for the loss of crops for the years 1923 and 1924 and the same remedy is open to her for recurring damages for subsequent years, if any there be.

In view of the entire record, we are quite convinced that the plaintiff is not entitled to recover for permanent injury to the land at this time. From what has been said, it follows that the judgment for permanent damages to the land upon the issue presented in the first cause of action is not sustained by the evidence and the judgment upon that issue should be reversed. In accordance with the stipulation, the plaintiff shall pay the cost of the bill of exceptions and the costs accrued in this court.

The judgment upon the first cause of action is

REVERSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. ATLAS BANK OF NELIGH: EMIL FOLDA, RECEIVER, APPELLEE: J. J. MELICK, CLAIMANT, APPELLANT.

FILED JUNE 8, 1926. No. 24231.

1. **Banks and Banking:** GUARANTY FUND: DEPOSITS. Whether a transaction constitutes a deposit, within the meaning of the

depositors' guaranty law, must depend upon the facts and circumstances surrounding the particular transaction.

2. ———: ———: ———. The law will look through all semblances and forms, to ascertain the actual fact whether or not there has been a *bona fide* deposit, and, if not, the depositors' guaranty fund will not protect the transaction, no matter how it may be evidenced.

3. ———: ———: ———. Ordinarily, where a stockholder of a state bank, with knowledge that the bank is insolvent or in an unsafe condition, at the instance and request of the bank officials obtains and places in or to the credit of the bank money, to enable the bank to meet a pressing obligation, and where the money is not placed in or at the command of the bank, for the use, safe-keeping or convenience of the stockholder, in the ordinary and usual course of business, such transaction does not constitute a good-faith deposit, within the meaning of the guaranty fund law, and is not protected by the depositors' guaranty fund.

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

Williams & Kryger and *Gaines, Van Orsdel & Gaines,* for appellant.

C. M. Skiles, Fred S. Berry, James E. Brittain and *Lyle E. Jackson, contra.*

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

GOOD, J.

In November, 1923, the Atlas State Bank of Neligh, Nebraska, failed, and a receiver was appointed to take charge of and wind up its affairs. A claim, based upon two certificates of deposit for $5,000 each, was filed against the receiver, praying that it be allowed as preferred and adjudged payable out of the depositors' guaranty fund. The trial court found and adjudged that claimant was entitled to have his demand allowed as a general claim, but was not entitled to a preference, and that his claim was not payable out of the depositors' guaranty fund.

The only question for determination is as to whether the transaction, which culminated in the issuance of the certificates of deposit, constitutes a good-faith deposit, or is, in effect, a loan, within the meaning of the depositors' guaranty law.

The Atlas State Bank was organized in 1901, and a few months thereafter J. J. Melick became a stockholder and director of the bank, and so continued until it failed. The bank was prosperous and paid good dividends until about 1919, when it began to have financial difficulties. The bank's financial distress continued and increased until it's failure. It was a continual struggle, for a period of three years, to keep the bank open and running. In 1921, the officers and stockholders procured L. K. Moore, to take charge of and attempt to place the affairs of the bank in a sound condition. In November or December of that year Moore informed Melick and other stockholders and directors that there was more than $200,000 of worthless paper in the bank, and that it was in a precarious condition. In order to procure ready money for the bank, to meet its demands, Melick and other stockholders had indorsed $60,000 of the bank's paper. This was done for the purpose of keeping the bank open. A little later Melick indorsed paper of the bank to the extent of more than $200,000. Melick and other officers then knew that the bank was insolvent, or at least in an unsafe condition. In January, 1922, a draft was drawn on the Atlas State Bank for $20,000, which it was required to meet. Its reserve was then depleted. It did not have the ready money to meet this and other obligations then pressing. Melick and two officers of the bank arranged to raise $30,000 for the purpose of assisting the bank in meeting its pressing demands. As his part of the $30,000, Melick raised $10,000 and placed it in the Stock Yards National Bank, of South Omaha, to the credit of the Atlas State Bank, and for this two certificates of deposit for $5,000 each were issued. These certificates were from time to time renewed. The last renewals are the certificates in controversy.

Section 8033, Comp. St. 1922, provides: "No claim to priority shall be allowed which is based upon any evidence of indebtedness in the hands of or originally issued to any stockholder, officer or employee of such bank, which represents money obtained by such stockholder, officer or employee, from himself or some other person, firm, corporation or bank in lieu of or for the purpose of effecting a loan of funds to such failed bank."

Whether the transaction constitutes a deposit, within the meaning of the depositors' guaranty law, must depend upon the facts and circumstances surrounding the particular transaction. The law will look through all semblances and forms to ascertain the actual fact whether or not there has been a *bona fide* deposit, and, if not, the depositors' guaranty fund will not protect the transaction, no matter how it may be evidenced. Where a stockholder or officer of a state bank, with full knowledge that the bank is insolvent, or in an unsafe condition, at the instance of the bank's officers procures and places therein or to its credit money to enable the bank to meet a pressing demand upon it, and where the money is not placed in the bank for the use and convenience of the depositor, although the form of the transaction may appear as a deposit, it does not, in fact, constitute a deposit, within the meaning of the depositors' guaranty law, and is not protected by the depositors' guaranty fund. *Kidder v. Hall*, 113 Tex. 49; *First Nat. Bank v. Hirning*, 48 S. Dak. 417.

Upon a state of facts similar to those presented by the record in this case, this court, in the recent case of *State v. Farmers State Bank*, 113 Neb. 348, held that, where a stockholder in a state bank borrowed money and placed it to the credit of the bank and for the purpose of keeping up the deposits of the bank, he was not a depositor, within the protection of the depositor's guaranty fund, although the certificate of deposit was issued for the amount and placed to the credit of the bank.

The facts in this case clearly disclose that Melick did not place the money to the credit of the bank as a matter of

convenience or safe-keeping, or for his own use, but that his purpose was to aid the bank in meeting a pressing demand upon it. It was not a deposit in the ordinary and usual course of business. It was done at the instance of the bank's officers and for the purpose of aiding the bank to meet its obligations. Although the transaction was in the form of a deposit, it is not a good-faith deposit, within the meaning of the guaranty law, and is not protected by the depositors' guaranty fund.

Claimant has cited and relies upon a number of cases that are not in point because the depositors were not officers or stockholders of the failed bank. Under the statute above quoted, a stockholder or officer of a state bank occupies a different position, with reference to the bank, than a stranger to it, and his transaction will be more closely scrutinized in determining whether the transaction constitutes a good-faith deposit, within the meaning of the guaranty fund law.

The judgment of the district court is clearly justified by the record and is

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. ATLAS BANK OF NELIGH: J. J. MELICK, CLAIMANT, APPELLANT: EMIL FOLDA, RECEIVER, APPELLEE.

FILED JUNE 8, 1926. No. 24282.

1. **Banks and Banking:** GUARANTY FUND: 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.

2. ———: PRINCIPAL AND AGENT. The delivery by an individual to a state bank of liberty bonds, with instructions to send the bonds to the United States treasurer, to be exchanged for a

later issue of liberty bonds, creates the relation of principal and agent.

3. ———: GUARANTY FUND: DEPOSITS. Where a stockholder of a state bank has deposited liberty bonds with the bank for a specific purpose, and the bank, in violation of its instructions, sells the bonds and converts the proceeds to its own use, and thereafter the bank becomes insolvent or in an unsafe condition, and the owner of such bonds, with full knowledge of the condition of the bank, accepts in settlement of his claim a certificate of deposit, such transaction does not constitute a deposit, within the meaning of the bank guaranty law.

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

Williams & Kryger and *Gaines, Van Orsdel & Gaines,* for appellant.

C. M. Skiles, Fred S. Berry, James E. Brittain and *Lyle E. Jackson, contra.*

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

GOOD, J.

This case was argued and submitted at the same time as *State v. Atlas Bank* (No. 24231), *ante,* p. 646. Since the claimant and the bank are identical in both cases, reference is made to No. 24231 for a statement of facts relative to the condition of the bank and the claimant's relation thereto.

Some time in 1920, claimant delivered to the bank liberty bonds of the face value of $4,000, with directions to send the bonds to the United States treasurer at Washington, D. C., to be exchanged for a later issue of liberty bonds. The bank, disregarding the instructions given, sold the bonds and converted the proceeds. Some time later Melick learned of the unauthorized acts of the bank and insisted that the bank procure other United States bonds to replace the ones he had delivered to the bank. The bank officers attempted to do so, and at one time had become possessed of such bonds to the extent of $3,800. The urgent need of

the bank for ready money prompted it to sell these bonds. For more than two years Mr. Melick tried in vain to obtain a settlement for his bonds which had been converted by the bank. In November, 1922, at a time when claimant had knowledge of the fact that the bank was insolvent, or at least in an unsafe condition, he accepted a certificate of deposit for $4,000, in satisfaction of his demands. This certificate was renewed from time to time, and the last renewal is the basis for the claim in this action. At all times, subsequent to November, 1922, the bank was insolvent, or at least in an unsafe condition.

The rule is established in this jurisdiction, that—"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. See, also, *State v. Kilgore State Bank,* 113 Neb. 772; *State v. Farmers State Bank,* 112 Neb. 380; *State v. Farmers State Bank,* 112 Neb. 474; *State v. Gross State Bank,* 113 Neb. 119. Decisions from other jurisdictions, holding to the same effect, are: *Tyler County State Bank v. Rhodes,* 256 S. W. (Tex. Civ. App.) 947; *Tyler County State Bank v. Johnson,* 257 S. W. (Tex. Civ. App.) 932; *Bloomheart v. Foster,* 114 Kan. 786.

The delivery of the bonds for a specific purpose by Melick to the bank created the relation of principal and agent. The bank became an agent of Melick, and the transaction did not create a deposit, within the meaning of the guaranty law. The condition and relation thus created continued until Melick consented to accept a certificate of deposit in satisfaction of his claim for bonds, delivered to the bank. At that time the bank was either insolvent, or at least in an unsafe condition verging on insolvency, which fact was well known to Melick. What he surrendered at that time was a claim against the bank founded upon tort. At the

time that he accepted the certificate of deposit, he did not place money or its equivalent in the bank or at its command, and the issuance of the certificate at that time did not create a deposit protected by the guaranty fund. Neither did any of the renewals thereof change the condition. It follows that at no time did Melick's transaction, with reference to the bonds deposited with the bank for a specific purpose, or with reference to the settlement of his claim for the bank's tortious act, ripen into a deposit protected by the guaranty fund.

The judgment of the district court in denying claimant a preference was in accordance with the law and is

AFFIRMED.

MORRISSEY, C. J., and DAY, J., dissent.

STATE, EX REL. THOMAS NELSON, APPELLANT, V. W. D. SMITH, SHERIFF, APPELLEE.

FILED JUNE 8, 1926. No. 24851.

1. **Criminal Law:** MISDEMEANORS: CORRECTION OF JUDGMENT DURING TERM. A court having jurisdiction in a misdemeanor case may, in the exercise of its judicial discretion and in furtherance of justice, at the same term, and before the original sentence has gone into operation or action had thereunder, correct its judgment so as to reflect the facts proved and the law applicable thereto.

2. ———: SENTENCE: BREAD AND WATER DIET: CONSTITUTIONALITY. Section 10169, Comp. St. 1922, considered, and *held*, that the part thereof which provides, "And when the imprisonment is to be without labor, the sentence may require the convict to be fed on bread and water only, the whole or any part of the term of imprisonment," does not violate section 9, art. I of our Constitution; *held*, further, that the word "convict," as used in such section, means one who has been proved guilty of a criminal offense in a court of competent jurisdiction.

3. **Constitutional Law:** CRIMINAL LAW: POWER OF LEGISLATURE. Our legislature is clothed with authority to define crimes and misdemeanors, and determine their punishment; where it exercises such discretion within constitutional limits, its action is

not subject to review by the court, and ulterior evidence will not be received to impeach such legislative enactment.

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

A. R. Oleson, for appellant.

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

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

THOMPSON, J.

In this case appellant, hereinafter called relator, was complained against in the county court of Burt county, for that on the 18th day of April, 1925, he unlawfully had and was possessed of intoxicating liquor in such county. To this charge, on April 20, 1925, relator pleaded guilty, and was sentenced to the county jail for 60 days, the first and last 20 days of which was to be upon an exclusive diet of bread and water, and to pay the costs taxed at $38.10. A warrant of commitment was issued to the sheriff, appellee herein, in furtherance of such judgment, and by virtue of such commitment such sheriff took the relator into his custody, and so held him. To obtain his release relator filed in the district court for Burt county a petition, which in apt language detailed the above facts, and challenged such judgment as being without authority of law, inhuman, and oppressive to the extent that the same contravened section 9, art. I of our state Constitution; also, that in addition to the foregoing such judgment included a fine of $100; and that the county court was without jurisdiction to hear and determine such case and enter judgment. To this petition appellee, hereinafter called respondent, answered setting forth the judgment of the court as it was actually entered, also such warrant of commitment, as a justification for such holding of relator, which was followed by a general denial of allegations not admitted. The case was tried to the court,

on which trial the county judge was sworn and examined, a certified transcript of the judgment and commitment respectively were introduced, and also proof that the judgment and commitment were as such judgment was entered and such commitment issued, and that neither thereof had been altered thereafter. The trial court found generally in favor of the respondent, and dismissed the action. To reverse this judgment relator appeals, and presents as challenges thereto the grounds hereinbefore instanced as his reasons for seeking the writ of habeas corpus.

As to the claimed alteration of the judgment: The record discloses that as the judgment was prepared by the clerk of the county court, it provided for a fine of $100, in addition to the 60 days' imprisonment. Through such part an ink line was drawn by the county judge, thus leaving the judgment one of imprisonment only when the record thereof was approved and signed. This erasure did not affect nor render void the judgment so entered. *Quinton v. State,* 112 Neb. 684; *Lee v. State,* 32 Ohio St. 113. The other claimed erasures are each immaterial, hence without effect on the judgment.

The judgment being one of imprisonment, and without a provision imposing a fine, section 3288, Comp. St. 1922, which provides for fine *or* imprisonment, is controlling, and not section 3239 thereof, as amended by chapter 106, Laws 1925, which provides for fine *and* imprisonment. Thus, the trial court was clothed with authority to hear and determine the offense set forth in the complaint, and to enter the judgment rendered, unless that part of such judgment providing for a bread and water diet nullified it.

This brings us to a consideration of section 10169, Comp. St. 1922, which provides:

"When any court or magistrate shall sentence any convict to imprisonment in the jail of the county as a punishment for the offense committed, the judgment and sentence shall require that the convict be imprisoned in the cell of the jail of the county, or that he be kept at hard labor in the jail; and when the imprisonment is to be without labor,

the sentence may require the convict to be fed on bread and water only, the whole or any part of the term of imprisonment."

As to who is a "convict," within the meaning of the above section, relator cites section 273 of the Criminal Code, Rev. St. 1866. Such section 273 appears only in the aforementioned revised statutes. This revision was superseded by the revision of 1873, designated, "General Statutes of Nebraska, 1873," at which time "an act to establish a Criminal Code" was passed and approved by our legislature. In this revision the chapter in which section 273 appeared in the 1866 statutes was largely reenacted, but such section omitted therefrom, and, as we find, was thereby repealed by implication. As a part of this Criminal Code of 1873, section 10169, Comp. St. 1922, now being considered, was first enacted. The word "convict" as used in such section means one who has been proved guilty of a criminal offense in a court of competent jurisdiction, and this was rightly applied to relator at the time the judgment was entered in the county court.

Does such section 10169 contravene section 9, art. I of our Constitution? This section, which is identical with article VIII of the federal Constitution, reads as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

In Bishop, Criminal Law (9th ed.) sec. 947, in considering this provision of the federal Constitution, and similar provisions in the different state Constitutions, it is stated:

"The 'cruel and unusual punishment' may be either excessive in degree, or not permissible at all. * * * Though of a permissable kind, it may violate the Constitution by being excessive. While no uniform rule can be laid down as to the amount of punishment permissible, it can be generally stated that if the punishment is within the statutory limits, no matter how harsh and severe it may appear to be, it will be upheld. 'Natural justice requires that the penalty shall bear some proportion to the nature and circumstances of

the offence. The legislature is clothed with the power of defining crimes and misdemeanors and fixing their punishment; and its discretion in this respect, exercised within constitutional limits, is not subject to review by the courts.' "

For an instructive discussion of the preceding paragraph, see *State v. Hogreiver,* 152 Ind. 652.

As was said by us in *McMahon v. State,* 70 Neb. 722: "A large discretion is vested in the legislature in the fixing of penalties designed to prevent the commission of certain prohibited acts; and a penalty imposed by statute will not be held unconstitutional as excessive, unless it is so excessive, as to shock the sense of mankind."

In *In re O'Shea,* 11 Cal. App. 568, it is held: "The courts can only inquire as to whether or not the legislature has violated the Constitution; but in passing upon that question much is left to the discretion and judgment of the legislature, and it will be presumed that such discretion has been wisely and justly exercised, and the law will not be held unconstitutional, unless it is clearly in violation of the fundamental law."

In *People v. Durston,* 7 N. Y. Supp. 813, it is held: "Where the validity of Laws N. Y. 1888, c. 489, providing that the death penalty shall be inflicted by means of electricity, is assailed on the ground that the constitutional prohibition of 'cruel and unusual punishments' has been violated, evidence *aliunde* the statute will not be received; but it will be conclusively presumed that the legislature has ascertained the facts necessary to determine that death by the mode prescribed was not a cruel punishment."

This holding was approved in the case of *In re Kemmler,* 136 U. S. 436, which was an original application for writ of habeas corpus by Kemmler. The case is instructive both as to the reasons impelling the adoption of this provision in the Constitution, as well as to what was intended to be inhibited thereby.

Such section 10169, as we have seen, has been in force without change and without interference on the part of the legislature since its enactment. While it is a part of the

law of many states, we find but scant decisions determining its constitutional validity. In passing upon the constitutionality of a similar act, in *Spencer v. State,* 132 Wis. 509, it was held:

"A statute authorizing punishment of a husband who should wilfully abandon his wife leaving her in a destitute condition, or should unreasonably refuse or neglect to support her, by imprisonment in the state prison or in the county jail, and providing that ten days of the imprisonment in the county jail might be upon a diet of bread and water only, does not provide for a cruel and unusual punishment within the meaning of sec. 6, art. I, Constitution."

When we consider that the county jail is a punitive institution, that the plea of guilty entered by relator in the county court was a confession that he had wilfully breached the laws of the state and defied its Constitution, that the inhibited act which such plea rendered him guilty of in many instances leads to the indiscriminate distribution of that which endangers the health, morals, and ofttimes the lives of our citizens, we cannot say, and do not hold, that the imposition of a bread and water diet, as imposed in this case, was cruel and unusual.

The imposition of a bread and water sentence is seldom inflicted, and justice requires that the penalty imposed in each case should fairly reflect in its application the facts and circumstances disclosed at the trial. While the penalty to be imposed rests largely in the discretion of the trial court, great care should be taken to moderate it so as to administer justice in a way not to shock its sense by the severity of the sentence, thus giving consideration to the word " may" as it appears in the statute, and remembering that "may," as thus used, does not mean "shall." This however, being an application for a writ of habeas corpus, such circumstances are not before us; hence, an opportunity is not afforded us to review the judgment of the county court for errors. Therefore, a reduction of the sentence as to this or any other part of the judgment is not within our powers.

It follows from what has been said that that part of section 10169, Comp. St. 1922, which provides for a bread and water diet, is not repugnant to section 9, art. I of our Constitution, on the ground that it is cruel and unusual.

The judgment of the trial court is

AFFIRMED

STATE, EX REL. HOWARD WHITACRE, APPELLANT, V. W. D. SMITH, SHERIFF, APPELLEE.

FILED JUNE 8, 1926. No. 24852.

Intoxicating Liquors: SENTENCE. The relator was charged in the county court with the unlawful sale of intoxicating liquor, and pleaded guilty and was sentenced to imprisonment in the county jail for 60 days, the first and last 20 days of which to be on bread and water, and to pay a fine of $100. *Held*, that such charge comes within section 3238, and the punishment within section 3288, Comp. St. 1922; *held*, further, that such court at such time was without jurisdiction to impose a sentence of both fine and imprisonment, hence the sentence is void.

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

A. R. Oleson, for appellant.

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

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

THOMPSON, J.

In this case relator seeks a writ of habeas corpus, and avers in his petition, in substance, that he is unlawfully restrained of his liberty by respondent, sheriff of Burt county, under a warrant of commitment issued by the county court, on a judgment rendered therein; that the complaint charged relator with the unlawful sale of one pint of intoxicating liquor in such county on April 18, 1925; that he was

arraigned on April 20, 1925, and pleaded guilty; and was sentenced to confinement in the county jail for 60 days, the first and last 20 days of which to be upon an exclusive diet of bread and water; and that he pay a fine of $100 and costs.

To this petition respondent demurred, which demurrer was sustained by the court and the action dismissed. Relator appeals, challenging the county court's jurisdiction to impose both fine and imprisonment; also, that the part of the judgment providing for a bread and water diet contravenes our Constitution, section 9, art. I, as being a cruel and unusual punishment inflicted.

The charge in the complaint is covered by section 3238, Comp. St. 1922, which provides, in part, as follows: "It shall be unlawful for any person to * * * sell, * * * any malt, spirituous, vinous and intoxicating liquors." The penalty for such crime is covered by section 3288, Comp. St. 1922, as follows: "Any person, who shall by himself or through his agent violate any of the provisions of this act, shall, except where another penalty is otherwise expressly provided, be deemed guilty of a misdemeanor, and upon conviction thereof shall, for the first offense, be fined the sum of one hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than sixty days."

As to the first contention of relator that the county court was without jurisdiction to impose both fine and imprisonment: At the time of this trial, the county judge was by section 9989, Comp. St. 1922, limited to the imposition of 90 days' imprisonment, or a fine of $100, in such cases. The act of 1925 (Laws 1925, ch. 57) which extended this jurisdiction had not yet become operative. Therefore, the court was without jurisdiction to impose the fine and imprisonment which it did under section 3239, Comp. St. 1922, as amended by Laws 1925, ch. 106.

Having thus determined that the sentence was null and void, it is unnecessary for us to consider other errors presented. The district court, therefore, erred in sustaining the demurrer interposed as to Whitacre.

It follows from what has been said that the judgment of the trial court should be reversed and the cause remanded, with instructions to enter discharge in accordance with the prayer of relator's petition.

REVERSED.

STATE, EX REL. ROY CARSON ET AL., APPELLANTS, V. W. D. SMITH, SHERIFF, APPELLEE.

FILED JUNE 8, 1926. No. 24853.

Intoxicating Liquors: SENTENCE. The relators, A. and B., were charged in the county court with the unlawful possession and transportation of intoxicating liquor, and each pleaded guilty thereto; A. was sentenced to 60 days imprisonment in the county jail, the first and last 20 days of which to be on bread and water, and B. to 60 days imprisonment, the first and last 20 days of which to be on bread and water, and to pay a fine of $100. *Held,* that such charge of possession comes within section 3247, as amended by chapter 94, Laws 1923, and such charge of transportation within section 3238, and the punishment as to each within section 3288, Comp. St. 1922; further, that the sentence as to A. is valid; that such court at the time was without jurisdiction to impose a sentence of both fine and imprisonment, hence the sentence as to B. is void; *held,* further, as to A., that the part of the sentence providing for a bread and water diet, as applied to the facts disclosed, does not violate section 9, art. I of our Constitution.

APPEAL from the district court for Burt county: JAMES M. FITZGERALD, JUDGE. *Affirmed as to Roy Carson, and reversed and remanded, with directions, as to Cecil Spielman.*

A. R. Oleson, for appellants.

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

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

THOMPSON, J.

In this case the petition for writ of habeas corpus avers,

in substance, that relators are unlawfully restrained of their liberty by respondent, sheriff of Burt county, under a warrant of commitment issued by the county court of such county, on a judgment rendered therein; that the complaint charged as to relators that they unlawfully did have and possess and transport intoxicating liquor within such county on April 18, 1925; that they were arraigned on April 20, 1925, and each pleaded guilty; that Roy Carson was ordered to confinement in the county jail for 60 days, the first and last 20 days of which to be upon an exclusive diet of bread and water, and that he pay a fine of $100 and costs; that such judgment as to Carson included the following: "It is further ordered by the court that said fine be and the same is hereby refunded to said defendant." That the same and identical judgment was entered as to Spielman, except that the fine was not refunded.

A demurrer was interposed by respondent, and the same was sustained by the court and the action dismissed. The relators appeal, and, as grounds for reversal, challenge the jurisdiction of the county court to impose both fine and imprisonment; also, that the part of the judgment providing for a bread and water diet contravenes section 9, art. I of our Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The charge in the complaint as to unlawful possession is covered by section 3247, Comp. St. 1922, which reads in part as follows: "It shall be unlawful for any person to have, possess or permit any intoxicating liquor to be in, upon or about any room, office, building or any other place except in such person's private dwelling house." The charge as to transportation is covered by section 3238, Comp. St. 1922, which provides in part: "It shall be unlawful for any person to * * * transport * * * any malt, spirituous, vinous or intoxicating liquor." The penalty for each crime charged is provided by section 3288, Comp.St. 1922, as follows: "Any person, who shall by himself or through his agent violate any of the provisions of this act,

shall, except where another penalty is otherwise expressly provided, be deemed guilty of a misdemeanor, and upon conviction thereof shall, for the first offense, be fined the sum of one hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than sixty days."

These two charges being contained in the same count, not being inconsistent and covered by the same penalty, form but a single offense. *Winkelmann v. State, ante* p. 1.

As to the judgment against Roy Carson: The imposition of a fine of $100, and the refunding thereof, are parts of the same judgment; the refunding was in fact as well as in law a remittitur or a cancelation of such fine, and therefore the judgment stands as one for imprisonment alone. As no fine was imposed, the case as to Carson comes under the sentencing provisions of section 3288, Comp. St. 1922, as hereinbefore indicated. Hence, error was not committed by the trial court in sustaining the demurrer interposed as to him.

We come now to consider the judgment against Cecil Spielman: He was sentenced under section 3239, Comp.St. 1922, as amended by chapter 106, Laws 1925. Attention is called to the fact that up and until February 13, 1925, magistrates, including the county judge, were clothed with jurisdiction in such cases to that of a sentence of imprisonment for 90 days, or a fine of $100, as provided by section 9989, Comp.St.1922. The legislature of 1925 enacted chapter 57, Laws 1925, which enlarged this jurisdiction, by repealing such section 9989 and substituting therefor the following: "Magistrates shall have jurisdiction concurrent with the district court and coextensive with their respective counties, in all criminal cases where the punishment cannot exceed three months imprisonment, and a fine of one hundred dollars, or both, except as otherwise provided by law." This act was passed without an emergency. Hence, it would not become operative until the following July, and was not in force at the time of the trial in the county court. Thus, such court was without jurisdiction to enter a judgment of both fine and imprisonment.

The constitutional question presented here as to Carson is controlled by the opinion rendered in the case of *State v. Smith, ante,* p. 653.

It is unnecessary to consider such question as to Spielman, for the reason that the sentence as to him is null and void for want of jurisdiction on the part of the county to enter such a judgment. The district court erred in sustaining the demurrer interposed, and in not entering judgment as prayed in favor of Spielman.

It follows from what has been said that the judgment of the trial court as to Roy Carson should be affirmed; as to Cecil Spielman, the judgment should be reversed and the cause remanded, with instructions to enter discharge as to him in accordance with the prayer of his petition.

AFFIRMED AS TO ROY CARSON, AND REVERSED AND REMANDED, WITH DIRECTIONS, AS TO CECIL SPIELMAN.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, APPELLEE, V. EXCHANGE BANK OF OGALLALA: HESTER WELPTON, INTERVENER, APPELLANT.

FILED JUNE 8, 1926. No. 23984.

1. **Banks and Banking:** STATE BANKS: SUPERVISION. The department of trade and commerce is vested with general supervision and control of state banks with authority to do all things reasonably necessary for the protection of depositors therein throughout the state. It also stands in the nature of a trustee for the state bank guaranty fund, and it is its duty as such to take such precautions as may be reasonably necessary to conserve and protect this fund.
2. ———: DEPOSITS: FINDING AS TO INTEREST. Evidence examined, and *held* that the finding of the district court that the Exchange Bank of Ogallala paid more than 5 per cent. interest per annum on deposits in suit is wholly unsupported by the evidence.
3. **Trusts:** TRUSTEE: ACTS AS FIDUCIARY. Where a trustee acts in good faith in discharge of the duties imposed upon his trust, and in a fiduciary capacity, he and the fund represented by him are not ordinarily subject to the limitations and disabilities which, under the facts in this case, would be imposed on and

attached to him when acting in his individual capacity only, because of the fact that he was a stockholder in and an officer of the bank.

4. **Banks and Banking**: GUARANTY FUND: DEPOSITS. Where, pursuant to an agreement made by the duly authorized officers of a state bank and the department of trade and commerce, and relied upon by all parties concerned, a trust fund is created by contributions, and the use of the property in part made and furnished by persons not stockholders, officers, or employees of the bank involved, which trust fund is placed in charge of a trustee (who is the president of and stockholder in such bank) and by said trustee, as such, pursuant to said agreement, such fund is deposited in said bank as a "general deposit," relying upon the express agreement that the same shall be within the protection of the state bank guaranty fund, and such trustee and *cestui que trust* concerned act in good faith without fraud or concealment of any material facts, after insolvency of the bank, in a procedure to determine the right of such fund so deposited to participate in the state bank guaranty fund, *held*, that the deposit thus made by such trustee must be deemed a "general deposit" within the protection of the state bank guaranty fund.

5. ———: ———: ALLOWANCE OF CLAIM. Evidence examined, and *held*, that, under the facts shown in the record, the claimant should be allowed the sum of $64,918.67, and interest as provided by law, as a valid claim against the state bank guaranty fund.

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

Halligan, Beatty & Halligan and *Carl E. Herring*, for appellant.

W. C. Dorsey, L. O. Pfeiffer and *C. M. Skiles, contra.*

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

EBERLY, J.

Hester Welpton, plaintiff and intervener, prosecutes this appeal from a final order of the district court for Keith county, denying a claim filed in the above-entitled cause, and adjudging "that the said sums ($66,525) were placed

in the said bank by the said intervener, Hester Welpton, under an arrangement whereby the said bank agreed to pay interest upon the said sums at a rate in excess of 5 per cent. per annum; that each and all of said sums constitute and was a loan to said bank and not a deposit, and that said Hester Welpton is not entitled to have said sums repaid to her out of the state bank guaranty fund of the state of Nebraska."

At the time of the inception of the transactions which form the basis of this controversy, the Exchange Bank of Ogallala was a state bank duly organized as such and a going concern. The intervener was its president, though not active, and was owner of 595 shares of the 750 shares of stock at $100 a share which formed the capital stock of this institution. Her daughter, Mabel, who was a director and stockholder, was owner of 30 shares of this capital stock, and the remaining 125 shares were owned by persons other than the parties herein named.

The Welpton Investment Company also forms a party to the transaction out of which the litigation before us in this case arises. This company was a corporation organized as such under the laws of Nebraska, having a paid up capital stock of 697 shares, each share with a face value of $100. Hester Welpton was the president of this company and the owner of 258 shares of its stock. Mabel Welpton was the owner of 405 shares of its stock of similar denomination, and 34 shares of stock were owned by persons who, so far as the record discloses, had no connection whatever with the Exchange Bank of Ogallala.

It would seem that the following provisions of our statute are applicable to some of the different phases which make up this transaction: Section 284, Rev. St. 1913, provides: "There is hereby created a state banking board which shall consist of the following state officers: The governor, who shall be *ex officio* chairman thereof; the auditor of public accounts and the attorney general, a majority of whom shall constitute a quorum for the transaction of business. Said board shall have general supervision and control of banks

and banking under the laws of this state." This act was amended in 1919 so that at the time of this transaction it read as follows: "The department of trade and commerce shall have general supervision and control of banks and banking under the laws of this state. * * * Said department of trade and commerce shall succeed to all the rights, powers, duties and responsibilities of the state banking board as now existing and as such shall be entitled to all the records, books, files and papers thereof, and shall exercise all the powers and discharge all the duties of such board under the laws of this state." Section 7982, Comp. St. 1922.

In construing that portion of the language found in section 284, Rev. St. 1913, which is identical with section 7982, Comp. St. 1922, both of which are quoted above, this court said: "We think the intention of the legislature was to vest the banking board with general control and with authority to do all things reasonably necessary for the protection of depositors throughout the state. The board also stands in the nature of a trustee for this guarantee fund, and it is its duty to take such precautions as may be necessary to protect its integrity. The terms 'general supervision and control' vest the banking board with duties of a very high order, and they are not to be perfunctorily discharged, but to be administered with the highest degree of intelligence and discretion." *State v. Morehead,* 99 Neb. 146. This language was approved in the opinion of Rose, J. (dissenting), in *State v. Morehead,* 100 Neb. 864.

Section 8029, Comp. St. 1922, provides that under conditions specified the department of trade and commerce shall communicate certain facts to the attorney general who shall thereupon cause an application to be made in the district court of the county where such corporation maintains its bank for the appointment of a receiver to take charge of the business and assets and property of the corporation and to wind up its affairs.

Section 8033, Comp. St. 1922, provides that the claims of depositors, for deposits, and claims of holders of exchange

shall have priority over all other claims, except federal, state, county and municipal taxes, and, subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation. There is the further provision that, in event the cash in the hands of the receiver, available for the purpose of paying such claims, be insufficient, the court, in which the receivership is pending, shall determine the amount required, which, in the manner therein specified, shall be paid upon the order of such court out of the state bank guaranty fund and applied on the claims of depositors and holders of such exchange.

Section 8035, Comp. St. 1922, provides for the subrogation of the department of trade and commerce for the use and benefit of such guaranty fund to all rights of creditors thus paid, and to participate in the assets of the bank.

The evidence in the record is undisputed as to the following facts: Prior to November 5, 1921, the Exchange Bank of Ogallala was in critical condition. The depositors had been making withdrawals to such an extent that the officers of the bank were unable to meet the same from current collections. Following an examination by the state banking department, attorney general Davis, representing the department of trade and commerce, went to Ogallala, together with another representative of that department, and called Hester Welpton and Mabel Welpton to the bank for a conference. The result of that conference was that, in reliance upon the unconditional statement of the then attorney general and the representative of the department of trade and commerce, then present, that the moneys to be raised and deposited as hereinafter set out would be and constitute a general deposit, and as such would be within the protection of the state bank guaranty law, in compliance with the recommendations and pursuant thereto, an agreement was entered into and arrangements were made by and between Hester Welpton, Mabel Welpton, and the Welpton Investment Company, a corporation, that the private property of Mabel Welpton, Hester Welpton, and the Welpton Investment Company should be pledged to secure

the loan of approximately $40,000, with provisions for its increase to an aggregate not to exceed $75,000, and that the proceeds thus secured should be placed in the possession and control of Hester Welpton and deposited as a general deposit in the Exchange Bank of Ogallala in a manner to bring it within the protection of the state bank guaranty fund, to be subject to use by her for certain restricted purposes only, which were deemed to be for the benefit, not only of Hester Welpton and Mabel Welpton, but of the Welpton Investment Company also. In pursuance of such arrangement to provide the necessary funds for the purpose contemplated, a trust agreement was drawn and executed by Hester Welpton, Mabel Welpton, and the Welpton Investment Company, and notes of the face value of $40,000, bearing interest at 10 per cent. per annum from maturity, were made and signed in the name of Hester Welpton, and which were secured by the provisions of the trust agreement and the conveyances to be made pursuant thereto by Hester Welpton conveying to the trustee named in the agreement 2,984 acres of land of a value not stated, and by the Welpton Investment Company conveying to the same trustee 2,930 acres of land of a value not stated, and by Hester Welpton pledging as additional security 258 shares of stock of the Welpton Investment Company, and by Mabel Welpton pledging 405 shares of stock of the Welpton Investment Company. These notes and this agreement were then delivered to and received by the Attorney General Davis. The record, as an entirety, supports but one inference which is the condition of delivery that Attorney General Davis was to and did proceed to Omaha and consummate the transaction, and that the net proceeds thereof were to be deposited in the Exchange Bank of Ogallala to the credit of Hester Welpton as contemplated by the trust agreement "as a general deposit" and "not a loan."

It was also contemplated that said deposit thus made would and could be used by Hester Welpton as trustee solely for the purpose of "financially assisting the Exchange Bank of Ogallala or the Welton Investment Company, both

or either, and for no other purpose." Such, indeed, were the terms of the trust deed after it had been finally corrected and executed by Hester Welpton and Mabel Welpton in their own behalf and by the Welpton Investment Company, and after the same had been formally accepted by the First Trust Company of Omaha, trustee, for the banks for whose benefit it was given. It is admitted by the record that there was actually turned over to the bank as net proceeds of this first transaction $35,149.14. One note executed to the First National Bank of Lincoln as part of the $40,000 was not accepted by the payee and therefore returned to the maker. In December, 1921, for the same purpose and pursuant to this agreement, and upon the same terms, there were $24,000 additional notes executed in the same manner and on which the bank realized $23,404.54. And in January there was $6,525 of additional notes executed in the same manner and for the same purpose on which was realized the sum of $6,364.99, making a total deposit of $64,918.67.

There can be no question under the record but what all the facts of the transaction, together with the terms of the trust agreement, both as originally and finally consummated, as well as the oral agreement between the Welptons and the Investment company, were at all times known to and approved by the attorney general, the department of trade and commerce, and the officers in actual charge of the Exchange Bank of Ogallala.

It also appears without question that there was no express understanding or agreement, nor was there any direction on the part of the Welptons or of the Welpton Investment Company, that any interest or discount should be paid by the bank on the loans thus made. The record plainly supports the inference that, in view of the general customs of banks and forms of the note made use of, the intent of all persons concerned was that it was only the net proceeds of the several notes discounted that was intended to be deposited in the bank, and that the credits and charges made upon the books and records of the bank covering the

difference between the face of the notes and the discount retained by the banks with whom the notes were negotiated were made wholly without knowledge, direction, or authority of the Welptons or the Welpton Investment Company, and that in truth, and in fact, no interest whatever was actually paid by the bank on any of these notes.

While it may be admitted that the book entries of the bank disclose a charge of a total of $1,593.01 discount, and $13.32 revenue to "Undivided Profits" account, these entries arise because of the failure of the bank officers to make a proper entry of the original transaction which should have been confined and limited under an agreement to entries showing a general deposit of the net amount received by the bank which would be determined by the face of the notes actually made use of less discount exacted and necessary revenue paid. False entries upon the books of the bank could not deprive the claimant in this case of her status as a depositor, nor could it relieve the bank guaranty fund of this state from its liability therefor. *State v. American State Bank,* 108 Neb. 129; *State v. Farmers State Bank,* 112 Neb. 474.

The entire transaction which resulted in the placing of the proceeds in the Exchange Bank was entered into, carried out, and consummated in strict reliance upon the representation and statement and the agreements hereinbefore referred to.

There is nothing in the record which in any manner or in the least degree tends to impeach the absolute good faith and honesty of the Welptons and of the Welpton Investment Company. And it cannot be gainsaid that, because of the aforesaid representations and approval and agreement, the bank actually secured $64,918.67 in actual money or actual money's worth. This conclusion is not denied by the state. Indeed, the situation is met only by the legal argument made by the state as representative of the state bank guaranty fund that the fact that intervener may have been erroneously advised or assured by her own agent, or by the attorney general, or by some representative

of the state banking department, that the money so obtained and placed in the bank would constitute a deposit protected by the guaranty fund, would not amount to a contract binding on the guaranty fund, since, under the facts and circumstances as they actually happened, the transactions in question were "for the purpose of effecting a loan of funds" to the Exchange Bank. With this contention we are not in accord.

It is to be remembered that the Welpton Investment Company was and is a corporation. It is in law an entity, separate and distinct and apart from its officers, stockholders, or employees. Its legal relations to the Exchange Bank were in no manner affected by the fact that some of its officers and stockholders were also officers and stockholders of the bank. In fact, the Welpton Investment Company could make a deposit at any time, notwithstanding it might have knowledge that the bank was "in need of money," and such deposit would be within the protection of the guaranty law. *Farrens v. Farmers State Bank*, 101 Neb. 285.

Because its officers determined that the proposed proceedings would result in and were for the "benefit of the company," assets of the Welpton Investment Company, together with certain assets of Hester and Mabel Welpton, were pledged and mortgaged, and the fund of $64,918.67 was created thereby. This fund was entrusted to Hester Welpton under the limitations which made her a "trustee," and as such to manage it in the manner contemplated by the trust agreement for the benefit of all parties, including the Welpton Investment Company.

It may be said in passing that, "A trust, in its simplest elements, is a confidence reposed in one person, who is termed trustee, for the benefit of another, who is called the *cestui que trust*, respecting property which is held by the trustee for the benefit of the *cestui que trust*. It has also been defined as an obligation on a person to whom the legal title to property has been transferred arising out of a confidence reposed in him to apply the property faithfully

and according to such confidence." 26 R. C. L. 1167, sec. 1.

"A trustee is a person holding the legal title to property, under an express or implied agreement to apply it, and the income arising from it, to the use and for the benefit of another person, who is called the *cestui que trust.* * * * The trustee and beneficiary must be distinct personalities, or otherwise there could be no trust, and the merger of interests in the same person would effect a legal estate in him, of the same duration as the beneficial interest designated. However, a trust is not rendered void by the appointment of one of several beneficiaries as trustee." 26 R. C. L. 1271, sec. 121.

We have, then, in this transaction, all the elements of a valid trust. The Exchange Bank so understood it and the record shows that the account of the transaction was carried on its books in the name of "Hester Welpton, Trustee." It follows that the entire sum must be deemed a "trust fund," a fact which was known and understood by all of the parties. And this in turn supports the conclusion that the fund could not be considered as the private property of Hester Welpton, or as being owned or controlled by her as an individual. The Welpton Investment Company, under the terms of the security agreement, is a *cestui que trust* and interested as to the application of every dollar of it, and was clothed with authority to compel the full and complete performance of the terms of the trust. The bank, with full knowledge, took and received the deposit from and under the trustee as a "deposit." "It is now a universal rule that all those who take under the trustee, except purchasers for a valuable consideration without notice, take subject to the trust, and they must either execute the trust themselves, or convey the property to new trustees appointed by the court." 1 Perry, Trusts (6th ed.) sec. 346.

The facts of the case bring it squarely within the doctrine announced by this court in the case of *Cady v. South Omaha Nat. Bank,* 46 Neb. 756, in which this court quoted ap-

provingly the following: "'It may be stated as a general principle that, if money deposited in a bank was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account.' And the same principle is recognized in the following cases: *Third Nat. Bank v. Stillwater Gas Co.*, 36 Minn. 75; *Peak v. Ellicott*, 30 Kan. 156; *Baker v. New York Nat. Exchange Bank*, 100 N. Y. 31; *Whitley v. Foy*, 6 Jones Eq. (N. Car.) 34; *National Bank v. Insurance Co.*, 104 U. S. 54; *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411.

"Analogous in principle, also, is the doctrine, abundantly supported by authority, that a partner cannot, without the consent of his co-partners, apply the firm property in satisfaction of his individual liabilities, and that upon one so receiving partnership property is cast the burden of proving either consent by the other partners, or facts which amount to an equitable estoppel as against them. *Kendal v. Wood*, 6 L. R. Ex. (Eng.) *243; *Heilbut v. Nevill*, 4 L. R. C. P. (Eng.) *354; *Rogers & Sons v. Batchelor*, 12 Pet. (U. S.) *221; *Davis v. Smith*, 27 Minn. 390; *Farwell v. St. Paul Trust Co.*, 45 Minn. 495; *Johnson v. McClary*, 131 Ind. 105. See, also, Parsons, Partnership (4th ed.) sec. 90, and note; 2 Bates, Partnership, sec. 1046; *Dob & Dob v. Halsey*, 16 Johns. (N. Y.) *34; *Mutual Nat. Bank v. Richardson*, 33 La. Ann. 1312."

It follows, therefore, that the failure of the bank to properly enter these deposits on its books to the credit of Hester Welpton, trustee, cannot militate against the rights of the trust fund. And it must be considered as a trust fund duly deposited to the extent of $64,918.67. It also follows that a trustee exercising the duties of his office in good faith cannot be considered, when acting in his official capacity as such trustee, as either an officer, stockholder, or employee of the bank with whom he deals; and so, too, neither can the trust fund which the bank received with full knowledge of the facts be considered, as between depositor and bank, as private funds of the trustee for any purpose whatsoever.

In other words, Mrs. Hester Welpton, as "trustee," made "good-faith deposits" of the sums in controversy in this case in the Exchange Bank of Ogallala, and she had no authority in that capacity to make a loan. Her authority was expressly limited by contract, of which the bank had due and actual notice, to the making of "general deposits." With knowledge of this, the bank with the approval of the department of trade and commerce accepted the moneys thus raised, constituting the trust fund, with the express agreement, at least evidencing the intention of all parties concerned, that the deposit should be a general deposit and within the protection of the state bank guaranty law. These deposits constitute, therefore, a general deposit, unless the fact that Mrs. Welpton was also, in addition to "trustee," an officer and stockholder of the bank.

It must be remembered, however, that her capacity as "trustee" was distinct from her individual capacity. Indeed, under the facts of this case, she must be deemed as possessing two distinct and separate identities—one as an individual, and one as trustee.

The conclusion would be, therefore, that the limitations and disabilities, which, under our banking act, attached to one, have no legitimate connection with the other.

It follows, therefore, that under the facts in this case the entire transaction does not disclose a claim in behalf of the plaintiff upon any evidence of indebtedness in the hands of, or originally issued to, any stockholder, officer or employee of such bank, which represents money obtained by such stockholder, officer, or employee from himself or some other person, firm, corporation, or bank, in lieu of or for the purpose of effecting a loan of funds to such failed bank. The money here deposited must therefore be deemed a general deposit, within the protection of the guaranty fund.

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

REVERSED.

BENJAMIN ALLEN V. STATE OF NEBRASKA.

FILED JUNE 8, 1926. No. 24529.

1. **Criminal Law:** EXAMINING MAGISTRATE. Where a search warrant is duly issued by a county judge upon a "complaint for search warrant," filed with him under section 3273, Comp. St. 1922, charging the defendant with the commission of a crime, the maximum punishment of which is in excess of the jurisdiction of the county court to impose, and the defendant is arrested thereunder, in making the examination provided for by the above section 3273, *supra*, the county judge exercises the powers of an examining magistrate only and in a proper case may hold the defendant for trial in the district court.

2. ———: INTOXICATING LIQUORS: JURISDICTION. A charge of the "unlawful manufacture of intoxicating liquors, to wit, whiskey," etc., under section 3252, Comp. St. 1922, may not be tried and determined by the county court.

3. ———: ———: ———. "Where the trial court is without jurisdiction of the subject-matter of an action, the appellate court will not acquire jurisdiction thereof by appeal." *Keeshan v. State*, 46 Neb. 155.

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

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

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

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

EBERLY, J.

This is an appeal by the defendant from a conviction and sentence for violation of certain provisions of chapter 33, Comp. St. 1922. The facts necessary for the proper determination of the issues presented here are as follows: "Complaint for search warrant" was filed in the county court of Otoe county by the county attorney thereof which, omitting the formal parts and parts essential to secure the

issuance of the search warrant where the premises to be searched were occupied as a home, was substantially in the following language: "The * * * county attorney * * * has good reason to believe and does believe that intoxicating liquors, to wit, whiskey, beer, and other intoxicating liquors, are unlawfully manufactured, owned, sold and kept for sale in violation of the laws of the state of Nebraska by Benjamin Allen in and about (description of premises) situated and located * * * in Otoe county, Nebraska." A search warrant was thereupon issued and duly served by the arrest of the defendant, and by the officer serving the same taking into his possession and retaining 15 barrels of intoxicating liquors discovered in the possession of the defendant. The record discloses that the defendant, over his objection, was tried in the county court of Otoe county on the "complaint for a search warrant" (as a proper complaint) and adjudged "guilty of unlawful possession of intoxicating liquors" only, for which punishment was assessed. From this conviction he prosecuted an appeal to the district court for Otoe county, where he was again, over his objection and no new information being filed, tried upon the same instrument (as a valid complaint) and by a jury's verdict found "guilty as charged in the complaint," and upon which verdict penalty was duly adjudged.

Objections to jurisdiction were seasonably presented by the defendant in both county and district court, which were overruled and the rulings of the court were assigned as error in the motion for a new trial.

There was also presented by the defendant a motion in arrest of judgment in the district court based upon the proposition "that no complaint or information has been filed against the defendant stating facts sufficient to constitute an offense."

The objections to jurisdiction were based upon the grounds: (1) That the complaint for search warrant did not charge any crime under the prohibition laws of the state of Nebraska; (2) that no complaint had been filed

against the defendant properly charging him with violation of the prohibition laws or any other laws of the state of Nebraska; (3) that the county court, as well as the district court on appeal, was wholly without jurisdiction over the person of the defendant to try him on any crime charged; (4) that the county court and district court, on appeal, are wholly without jurisdiction over the subject-matter.

The sufficiency of the complaint, as a complaint, on which to base the issuance of a search warrant does not appear to be seriously challenged by the defendant.

Section 3273, Comp. St. 1922, as setting forth the manner in which a search warrant shall be issued and served, provides: "If upon examination the magistrate hearing the same shall be satisfied that the person found in possession of the liquor in violation of this act had the same unlawfully in his possession or with the intent to unlawfully dispose of the same, the magistrate shall hold the person or persons so arrested for trial and the liquor so seized and any still, mash, preparation or equipment for the manufacture of same so seized shall be destroyed by direction of and in the presence of the trial judge before whom such offender is convicted, and the trial judge shall certify that the liquor has been destroyed as a part of the record in each case of conviction."

The state contends that it is the duty of the magistrate after the issuance and return of a search warrant to determine upon a trial before such magistrate that the party found in possession of liquor had the same unlawfully in his possession, etc., and also to try the defendant charged in the complaint for a search warrant and assess a penalty without any further or a new complaint being filed. As applying to the facts in the instant case, this contention cannot be sustained.

It may be said in passing that a comparison of sections 3864, 3865, and 3866, Rev. St. 1913, with section 3273, Comp. St. 1922, discloses that the latter is but a development of the former. Both cover the subject of issuance

and service of search warrants and regulate the proceeding thereon. The first act, in point of time, was limited to cases of unlawful keeping of intoxicating liquors with intention of disposing of the same without license. In the second act this subject is broadened so as to include all cases where intoxicating liquors are unlawfully owned or kept, or are intended or are being, by the persons named, manufactured, sold or kept for sale or disposition in violation of this act.

Under the former law, after service and return of a search warrant, "if upon examination the magistrate hearing the same shall be satisfied" that the accused had violated the law, he was required to "hold the person so arrested for trial at the next term of the district court and shall order the liquors so seized destroyed by the officer having them in charge." Rev. St. 1913, sec. 3865.

It is to be observed that as the maximum penalty for the offenses referred to in section 3864, Rev. St. 1913, exceeded the then jurisdiction of the county court or justices of the peace, the proceeding indicated in the section above referred to was in harmony with the laws of criminal procedure then in force. At the present time the maximum penalty for the unlawful acts referred to in section 3273, Comp. St. 1922, and charged in the complaint herein, is a maximum fine of not more than $5,000 and a maximum imprisonment of not to exceed one year in the county jail, as set forth in section 3252, Comp. St. 1922.

It is a cardinal rule of construction that, if possible, laws should be construed to make them valid and effective.

It would follow, therefore, that the only jurisdiction which this statute vests in the magistrate where the charge embraces the crime of the manufacture of whiskey, etc., would be that of an examining magistrate, and that as such he would have no power to find and adjudge the offender guilty, and no power as the trial judge "before whom such offender is convicted to direct the destruction of the liquors or certify to such fact as required by this statute."

Assuming, but not deciding, that the complaint, in form,

is sufficient to charge an offense under the statute, then the offense charged in this case is "that intoxicating liquors, to wit, whiskey, beer, and other intoxicating liquors, are unlawfully manufactured, owned, sold and kept for sale in violation of the laws of the state of Nebraska by Benjamin Allen in and about (description of premises) situated and located * * * in Otoe county, Nebraska."

The penalty provided for the unlawful manufacture of whiskey or intoxicating liquor in violation of chapter 33, Comp. St. 1922, is set forth in section 3252, Comp. St. 1922, in the following words: "Any person who shall manufacture intoxicating liquor in violation of this chapter * * * shall, upon conviction, be fined not less than $500 nor more than $5,000 and imprisoned not less than 30 days nor more than one year in jail for each offense."

Manifestly, the county court of Otoe county, assuming the offense to be correctly described in the complaint before it, would have no jurisdiction to try, determine the guilt, and assess the punishment for this offense. The only power that it could possibly exercise would be to bind over the offender to the district court, and this it did not do.

Unquestionably the county court has jurisdiction to try many offenses under the terms of chapter 33, Comp. St. 1922, but where such offenses are coupled with offenses covered and embraced in the language of section 3252, Comp. St. 1922, the penalty therein provided prevents the county court from exercising its jurisdiction as a trial court.

Under these circumstances, the rule announced by this court is controlling, that where the county court is without jurisdiction, upon appeal to the district court, the district court is also without jurisdiction. *Keeshan v. State*, 46 Neb. 155; *State v. Yates*, 36 Neb. 287; *Brondberg v. Babbott*, 14 Neb. 517.

It follows, therefore, that the judgment is reversed and the cause remanded to the district court for appropriate action therein.

REVERSED.

STATE BANK, APPELLEE, V. J. S. HOUSE, APPELLANT.

FILED JUNE 8, 1926. No. 23806.

1. **Bills and Notes:** BONA FIDE PURCHASER: BURDEN OF PROOF. By section 7898, Comp. St. 1922, it is declared unlawful to sell or dispose of a promissory note given for any part of the premium for an insurance policy prior to delivery of the policy; and by section 4670 the burden is placed upon a purchaser contrary to the statute to prove that he acquired the title as a holder in due course. *Held,* (1) that before plaintiff can recover in such case it must appear affirmatively that he acted in good faith; (2) it is sufficient to defeat the plaintiff if there is lack of evidence showing good faith.
2. **Evidence** examined, and *held* insufficient to show good faith in the purchase of the note in suit.

APPEAL from the district court for Antelope county: WILLIAM V. ALLEN, JUDGE. *Reversed and dismissed.*

Lyle E. Jackson, for appellant.

S. D. Thornton and *F. L. Putney, contra.*

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

REDICK, District Judge.

This is an action upon a promissory note given by the defendant for the first premium upon a policy of insurance. The note was dated October 9, 1919, due April 1, 1920, payable to one George Fowler, for $177.04, and was sold the same day to plaintiff for full value. Defendant admits the execution of the note, but alleges want of consideration and fraud, and denies that plaintiff purchased the same in good faith.

The facts are not in dispute. Fowler secured from defendant an application for life insurance, took the note in suit in payment of the first premium, and on the same day sold it to plaintiff; the application was never forwarded to the insurance company and the policy never issued; in fact, the whole transaction was a fraud on the part of Fowler. The note was purchased by plaintiff bank under

the following circumstances: Earlier in the day Fowler had procured at the bank a blank note, and late in the afternoon returned with it duly executed, and offered it for sale to the bank. The cashier of the bank asked what the note had been given for, and was told for life insurance premium. He then asked if the policy had been delivered, and was told that it had been. Without further inquiry or investigation he purchased the note for the bank, paying full value. The cashier had seen Fowler before, but had no acquaintance or conversation with him until the purchase of the note. The maker was a well-to-do farmer living five miles from town, had a telephone in his house, and the cashier had known him about 15 years.

Upon the evidence the trial judge directed a verdict for plaintiff, and from a judgment thereon defendant appeals.

The statutes provide that it shall be unlawful to sell or dispose of a promissory note given in payment of a premium on a policy of insurance prior to the delivery of the policy. Comp. St. 1922, sec. 7898. A holder in due course is defined as one who took the note in good faith, and for value, without notice of any defect in the title of the person negotiating it (section 4663); and when the title is shown to be defective the burden is upon the purchaser to prove that he acquired title as a holder in due course (section 4670).

Considering these provisions, did the learned district judge err in directing a verdict for plaintiff? The burden being upon the plaintiff to establish good faith, it was at least a question for the jury whether that burden had been sustained under the circumstances shown, if the evidence justifies an inference either of good or bad faith, and it is inaccurate to say that the intervention of a jury is required only when questions of facts are controverted, for different inferences may sometimes be drawn by reasonable minds from conceded facts. If however only one inference is proper, it is a question of law for the court.

In *Riverton State Bank v. Walker*, 113 Neb. 718, following *Norwood v. Bank*, 77 Neb. 205, we held: "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." Stated differently, and in view of the burden resting upon the plaintiff, it *is* sufficient if there is lack of evidence showing good faith. Or, again, before plaintiff may recover in such case, it must affirmatively appear that he acted in good faith.

The plaintiff knew that this note could not be lawfully transferred unless the policy had been delivered. If he had purchased without any effort to ascertain that fact, he would not be protected. Therefore, it was incumbent upon him to make a *bona fide* attempt to ascertain the truth.

The evidence of good faith offered by plaintiff is that he purchased for value, before maturity, and that, knowing the note was for an insurance premium, and that it could not be lawfully transferred before delivery of the policy, he asked the payee, a perfect stranger, if such delivery had taken place, and relied upon his affirmative answer without further inquiry.

Is this sufficient evidence of good faith to authorize a judgment which would allow the consummation of a fraud? We think not. It has been said: "Good faith in interpretation means that we conscientiously desire to arrive at the truth, that we honestly use all means to do so," quoted in *Hilleary v. Skookum Root Hair Grower Co.*, 4 Misc. (N. Y.) 127. Does one who is honestly seeking the truth apply to a person who, if the truth were known, would be defeated in the transaction? Would he be justified in relying upon information obtained from such a source? And, finally, may we honestly refrain from using the means at hand and known to him, viz., inquiry of the maker?

These propositions all demand negative answers. If such conduct is sufficient to warrant an inference of good faith, the requirement of the statute might as well be dispensed with. It rather justifies and requires the contrary. Not only is there a lack of evidence to show good faith, but such gross negligence appears as to permit an inference

of bad faith. The expectation that pure water may be obtained from a polluted source is doomed to disappointment and neglect of known sources of truth is no excuse for ignorance.

"Every one must conduct himself honestly in respect to the antecedent party when he takes negotiable paper, in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not wilfully shut his eyes to the means of knowledge which he knows are at hand. * * * for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith."

It follows that the court erred in directing a verdict for plaintiff, and the judgment must be reversed and case dismissed.

REVERSED AND DISMISSED.

ROSE, J., dissenting.

It seems clear to me that the opinion and the judgment of the majority are at variance with the law applicable to the undisputed facts. I think the decision enlarges the provisions of the statute that makes it unlawful for any company or its agent to sell a premium note before delivery of the insurance policy. I am unwilling, therefore, to allow the decision to go unchallenged, though I concede that the references in the opinion to the testimony, so far as they go, accurately reflect the record.

The note in controversy was dated October 9, 1919, and was payable April 1, 1920. It was a premium note for $177.04. It bore the genuine signature of defendant J. S. House, as maker. It was not payable to an insurance company. George Fowler was payee. He took the note to the State Bank, plaintiff, October 9, 1919, and offered it for sale. He indorsed it by writing his name on the back of it. Plaintiff bought it for value. It remains unpaid. Plaintiff, claiming to be a purchaser in good faith, brought the present action to collect the principal and interest. The theory of the defense was that plaintiff was not a purchaser in good faith, and that there could be no recovery

on the note because it had been given to Fowler for an insurance premium before delivery of the policy. There was a trial on these issues and the district court directed a verdict for plaintiff. Defendant appealed, and the majority reversed the judgment below and dismissed the action, holding that the evidence was insufficient to show good faith in the purchase of the note.

John Lemly, cashier of the State Bank of Tilden, plaintiff, stated positively on the witness-stand that the transactions resulting in the purchase of the note were conducted solely by himself and Fowler, the former acting for plaintiff. Fowler offered to sell the note to the bank. He said, in answer to a question, that it was given for life insurance. Lemly asked him if the policy had been delivered and he said it had. Lemly had no knowledge or information of any infirmity in or defense to the note. He first learned just before or shortly after it matured that defendant claimed to have a defense to it. This was after defendant explained the matter. Lemly had no connection with the insurance company represented by Fowler and did not know when defendant made his application for a policy. These facts were positively told by Lemly under oath and there is not a word of competent testimony to contradict them. Lemly had been a banker for twenty years and his veracity and integrity were not impeached. There was no reason to suspect that he committed perjury to prevent the bank of which he was merely cashier from losing a small amount of money. Under rules of evidence applied to similar commercial transactions for ages the undisputed facts of this record have been universally held sufficient to show good faith in the purchase of unmatured negotiable instruments.

Every day honest, capable men, by means of cash, checks and negotiable notes, pay for insurance on the very day on which the policies are delivered. Why should an honest banker be nonsuited for failure to prove good faith established by uncontradicted evidence merely because he discounted a premium note the day it was executed and de-

livered? Must a banker to whom a premium note is offered for discount by a payee to whom it had been entrusted by the maker suspect that the payee is a rascal? If the maker of a note for insurance may with impunity make it payable to his own fiduciary, not to the insurance company, and deliver it before the policy is delivered, must a person to whom it is offered for discount ascertain at his peril by telephone or other means that the policy has not been delivered, though told by the payee that it has been? Why should the maker of a note, without any responsibility for the consequences, be permitted to ignore the promptings of his own senses and, over his own signature, put into the hands of a knave the means of defrauding innocent persons in the ordinary course of their legitimate business? In reason these questions answer themselves.

Lemly had known defendant for fifteen years or more. He recognized on the note when presented at the bank for discount the genuine signature of defendant. Before him stood the payee who said the policy had been delivered. If defendant entrusted Fowler with the note, why could not plaintiff, knowing that fact, honestly and in good faith believe Fowler when he said the note had been delivered?

The statute making it unlawful to sell a premium note before the insurance policy is delivered does not make the note void, nor prevent its transfer to a purchaser in good faith, nor change the rules of evidence, nor set a new standard for testing the sufficiency of proof to show good faith, nor amend or repeal the negotiable instrument law on the subject of transferring negotiable paper for value before maturity.

What the statute relating to transfers makes unlawful is the selling of a premium note before delivery of the insurance policy. Comp. St. 1922, sec. 7898. No one but the insurer or its agent is penalized for violating the act. No person is punishable criminally except the insurer or its agent. Either or both may be subjected to a fine of $100 or to imprisonment for three months. Comp. St. 1922, sec. 7899. No penalty is imposed on a purchaser either in

good faith or in bad faith. Though plaintiff did not violate any statute, or commit any wrong, or knowingly participate in any unlawful transaction, or commit any fraud or deceive any person, its honest, lawful, business transaction is penalized by the decision of the majority in a civil action to the extent of $177.04, with interest from October 9, 1919, and costs of litigation, thus enlarging the statute and exercising legislative power.

The negotiable instrument act declares:

"A holder in due course is a holder who has taken the instrument under the following conditions:

"First. That it is complete and regular upon its face:

"Second. That he became the holder of it before it was over-due and without notice that it had been previously dishonored if such was the fact;

"Third. That he took it in good faith and for value;

"Fourth. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Comp. St. 1922, sec. 4663.

This ought to be the law still, notwithstanding the act making it unlawful, punishable by fine or imprisonment, for an insurer or its agent, to sell a premium note before the delivery of the insurance policy. The evidence adduced by plaintiff established without contradiction every necessary element of a purchase in good faith as defined by the negotiable instrument act—a restatement of commercial law based on the business rectitude of centuries.

In a recent opinion by Chief Justice Morrissey, there is a reiteration of the doctrine that a *bona fide* purchaser is not affected by fraud previously committed by a third person. *Farmers State Bank v. Lydick,* 112 Neb. 586.

In a still later opinion by Justice Thompson the following rule applicable to negotiable paper was sanctioned by this court:

"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." *Howells State Bank v. Hekrdle,* 113 Neb. 561.

On the issues now under consideration there is nothing beyond mere suspicion, even if there is that, to question positive and uncontradicted evidence of good faith.

In the present case the decision of the majority, as I understand the effect of it, not only extends the statute beyond its own terms, but it overturns a fundamental principle on which a former opinion of this court is based. *Citizens State Bank v. Nore,* 67 Neb. 69.

The peremptory instruction to the jury to render a verdict in favor of plaintiff was also proper under the rule of law that, where one of two innocent persons is defrauded by the wrongs of a third person, the loss should fall on the one who equipped the wrong-doer with the instruments of the fraud. As between the parties to this action, defendant alone was the mischief-maker. He signed and entrusted to a scoundrel the negotiable note in controversy.

I challenge the ruling that the nonsuit against plaintiff cannot be avoided without making ineffective the statute forbidding the transfer of a premium note before delivery of the policy. An affirmance of the judgment below would leave that legislation operative to the fullest extent. Violators of the act would still be subject to fine or imprisonment. One who knowingly bought a premium note before delivery of the insurance policy would be unable to enforce payment.

The only wrongs shown by the record were attributable to Fowler and defendant. The latter executed and put into the hands of the former the implement of fraud. The metaphor based on plaintiff as the source of pollution does the latter great injustice.

The importance of the decision and its harmful influence on legitimate banking and insurance, with the suspicion it will cast on all honest people in need of immediate credit for premiums, prompt this dissent.

GOOD, J., concurs in this dissent.

ECCE H. THRAPP, APPELLEE, V. ISAAC N. MEYERS, APPELLANT.

FILED JUNE 8, 1926. No. 24171.

1. **Negligence:** QUESTION FOR JURY. Under the circumstances of this case as shown by the evidence, plaintiff having testified that he looked in the direction of defendant before entering upon the intersection, whether or not his failure to see defendant constituted such negligence as would defeat plaintiff's recovery was a question of fact.
2. ———: ———. Upon approaching a highway intersection, it is the duty of the driver of an automobile to look to the right and left for approaching vehicles; whether or not he did his full duty in that regard may be a question of law, but is ordinarily one of fact for the jury upon consideration of all the evidence.
3. ———: DRIVERS OF AUTOMOBILES. A driver of an automobile should have his car under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof will exercise due care.
4. **Highways:** RIGHT OF WAY AT INTERSECTION. The driver of an automobile, upon reaching an intersection, has the right of way over a vehicle approaching on his left, and may ordinarily proceed to cross; but if the situation is such as to indicate to the mind of an ordinarily prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent accident, even to the extent of waiving his right.
5. **Damages.** When, at reasonable cost, a damaged automobile can be repaired and restored to substantially its original condition, such cost is a proper measure of damages in an action for negligence.

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

Peterson & Devoe, for appellant.

C. M. Skiles and *F. A. Peterson, contra.*

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

REDICK, District Judge.

This action grows out of a collision between an automo-

bile truck driven by the plaintiff and a Dodge touring car driven by the defendant, at an intersection of graded country roads. From a verdict and judgment for plaintiff defendant appeals.

For the purposes of the case the two roads may be considered of practically the same importance as highways. They were hard and dry, the day was clear and bright, and the collision took place about 9:30 in the morning. The intersection was about level and the two roads upon which the parties were traveling approached it on a slight decline, described by the witnesses as an incline down. The plaintiff testified that, as he approached the intersection from the west, he was traveling about 12 miles an hour, and at a point 8 or 10 rods west of the intersection he looked to the south along the intersecting road for a distance of about 30 or 40 rods across the corner and saw no automobile approaching, indicating that some trees to the west of the road may have prevented him from seeing defendant, and that he did not see defendant until just at the instant of the collision, which took place at a point about 10 or 12 feet east of the center of the intersection and a little south thereof; that defendant passed across in front of him like a streak; that the left front end of the truck caught the left rear wheel of defendant's car as it was passing, pulling and turning the truck to the northeast and upsetting it from left to right near the culvert at the northeast corner of the intersection, defendant's car continuing to the north, turning part way round and stopping in the ditch to the east of the road. Plaintiff further testified that he did not look again to the south, but while looking straight ahead could have seen defendant some distance from the intersection. Plaintiff and 7 or 8 disinterested witnesses testified that after the accident the defendant stated that when he first saw the plaintiff's truck defendant was going so fast that he could not stop and he thought he would shoot through. Plaintiff's truck was loaded with furniture about 12 feet high from the bed and represented a total weight of about 7 tons, and was provided with a cab containing glass and isinglass windows

through which plaintiff could observe the road to his right.

The defendant's version of the accident is as follows: That he was proceeding toward and entering the intersection from the south, going at about 15 to 16 miles an hour; that he first saw the truck when he was 50 or 60 yards south of the intersection, at which time the truck was 80 or 90 yards west thereof, going at about 15 to 18 miles an hour; that he proceeded north without slowing down and had just entered the intersection when he glanced up and saw the truck approaching at about 25 miles an hour, at which time he was going so fast he could not stop and swerved his car about 7 feet to the east, put on a little more speed and attempted to pass in front of the truck, but was caught substantially in the manner described by the plaintiff. Defendant, however, states that plaintiff was driving about a foot north of the center of the road and that the collision took place in the northeast corner of the intersection. Defendant further testified that he could see the truck all the way, but would not say that he watched it all the time. Defendant denied that he stated to the plaintiff's witnesses that he was going so fast toward the intersection that he could not stop, but insisted that if he said anything of that nature it was that after entering the intersection he was going so fast he could not stop. The parties were the only eye-witnesses of the occurrence, but a large number of persons congregated within a short time after the accident, and there is considerable testimony tending to support the various claims of the parties as to the relative positions of the cars upon the highway near the intersection, as evidenced by an examination of their tracks, some of defendant's witnesses placing the truck about a foot north and those of plaintiff south of the center of the road, while it is practically conceded that the defendant's car at a little distance south of the intersection was traveling to the left of the center, but entered the intersection about on the crown of the road.

Upon this record defendant strenuously insists that his motion for a directed verdict in his favor at the close of

the plaintiff's case, or a similar motion at the close of all the evidence, should have been sustained, and refusal of the district court to do so is assigned as error. The contention of defendant is that he had the right of way over the plaintiff, that it was the duty of the plaintiff to look in the direction of the defendant, that if he had done so at the proper time he would have seen the defendant in time to have slowed down and permitted the defendant to cross in front of plaintiff, and that plaintiff's failure to look or see defendant was more than slight negligence and therefore sufficient to prevent his recovery. Defendant requests the court to apply to automobiles approaching an intersection at right angles the same rule as applies to railway crossings, to wit, that it is the duty of a driver upon the highway approaching a railroad crossing to look and listen for trains at a point where he could see or hear a train approaching, and that his failure so to do is such negligence as prevents a recovery. *Haffke v. Missouri P. R. Corporation,* 110 Neb. 125. The situations are similar, but a moment's reflection will show that they are not identical for the obvious reasons that the engineer has no control over the route which he travels—the movement of the train is confined to the rails, while vehicles upon the highway have liberty of movement to a limited degree, but sufficient in many cases to spell the difference between safety and disaster; that in the open country railroad trains are propelled at a much higher rate of speed than are vehicles ordinarily; that the latter are more easily controlled, owing to lesser weight and momentum. Many other reasons might be mentioned. We have no doubt that cases may arise where it would be the duty of the court to rule, as a matter of law, that the failure of the driver of an automobile upon approaching an intersection to look in the direction from which other travelers upon the highway might be expected would amount to more than slight negligence and prevent a recovery, but we do not feel warranted in laying down a hard and fast rule governing all cases.

In the case at bar plaintiff testified that at a point 8 or

10 rods west of the intersection he looked north and south, and that he could see when looking straight ahead for some distance to the right and left and did not see the defendant. Whether plaintiff should have looked at some other point or should have continued to look to the right the entire distance to the intersection, and whether his failure to do so, when taken in connection with the peculiar manner of the happening of the collision and the other circumstances, amounted to more than slight negligence, presents a question upon which reasonable minds might differ, and therefore was for the jury.

But when the testimony of the defendant also is considered there is not the slightest doubt that the evidence is sufficient to sustain the verdict. It appears according to his own statement that he saw the plaintiff at a point 80 or 90 yards west of the intersection and that he was in plain sight all the time, that defendant proceeded without slackening speed into the intersection, and then found himself going so fast that he could not stop in time to avoid a collision. It may be conceded that defendant, being upon the right of plaintiff, and the same distance from or closer to the intersection, and finally having first entered the intersection, had the right of way; but that fact alone did not warrant driving into the intersection at such speed that he was unable to control his car and prevent a collision, especially in view of the fact that he had seen plaintiff who remained in plain sight for over 150 feet. One having the right of way may not on that account proceed serenely unconscious of the surrounding circumstances; and if they are such as to forecast in the mind of a reasonably prudent person the probability of a collision should he continue on his way, it would be his duty to waive his right if reasonably necessary to avoid that event. The position of a driver of an automobile having the right of way is akin to that of the farmer who, when his horse ran away, trusted in the Lord until the breeching broke; the former may rely upon his right of way until he becomes aware of conditions which call for action upon his part; it then becomes his

duty for his own safety, and that of others, to avoid accident if reasonably possible. The following rules of the road at highway intersections seem well established:

(1) The driver must look and listen for the approach of other vehicles, at such point as they may be seen or heard. (2) He must have his car under such reasonable control as to avoid accidents which might have been foreseen by the exercise of ordinary care. (3) He has the right of way over traffic approaching on his left, but is not thereby relieved from the duty of exercising ordinary care to avoid accidents; therefore, if a situation is presented which, to an ordinarily prudent person in the position of the driver, would probably result in a collision if he exercised his technical right of way, it would be his duty to subordinate such right to the public safety. Under these rules, and conceding that plaintiff was negligent and defendant had the right of way, nevertheless it was a question for the jury whether or not defendant was guilty of negligence in entering the intersection at such speed that he was unable to stop or turn out, and whether such negligence was gross as compared with slight negligence on the part of plaintiff. See *Francis v. Lincoln Traction Co.*, 106 Neb. 243; *Traphagen v. Lincoln Traction Co.*, 110 Neb. 855.

We think the evidence as a whole, viewed as favorably to the defendant as the record warrants, presented questions for the jury, whether or not the plaintiff or defendant was guilty of negligence, and, if both, the comparison between them was for the jury. It was also a question for the jury whether or not the failure of the plaintiff to see the defendant, or the negligence of the defendant in driving upon the intersection at a rate of speed so great that he could not stop his car in time to avoid a collision, was the proximate cause of the accident. If evidence by plaintiff's witnesses of admissions by defendant that he was going so fast that he could not stop was believed by the jury, they might well conclude that defendant's negligence was the proximate cause. We think a verdict for either party would have been sustained by the evidence, and the jury having

found for the plaintiff we are not justified in disturbing their verdict.

Objection is made that the only evidence as to the amount of damages was the reasonable cost of repairing the truck and putting it in the same condition it was before the accident, it being contended that the only correct measure was the difference in the value of the truck immediately before and after the accident. The rule contended for has been announced in this state (*Reed v. Chicago, B. & Q. R. Co.*, 98 Neb. 19), but the other rule has also been recognized in cases where the article may, by repairing it, be put into substantially its original condition (*Layton v. Sarpy County*, 83 Neb. 628). In such case the difference in value before it was injured and after it was injured would be the amount that it would cost to repair and restore it to its former condition. *Overpeck v. Rapid City*, 14 S. Dak. 507. See, also, *McClure v. City of Broken Bow*, 81 Neb. 384; *Carruthers v. Campbell*, 195 Ia. 390. If the damage consisted merely of a broken fender, the cost of a new one installed would clearly compensate plaintiff for the injury. So here, it being shown that the truck could be repaired for $400 or $500, the rule adopted was correct. Moreover, defendant presented the same kind of evidence as to the damage to his touring car. The jury gave the plaintiff only $275.

Finding no error in the record, the judgment is

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL V. ATLAS BANK OF NELIGH:
THOMAS C. SEXTON, CLAIMANT, APPELLANT: EMIL FOLDA, RECEIVER, APPELLEE.

FILED JUNE 8, 1926. No. 24368.

Case ruled by and judgment reversed on the authority of *State v. American Exchange Bank, ante*, p. 626.

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

Abbott, Rohn & Dunlap, for appellant.

Fred S. Berry, Lyle E. Jackson, Charles H. Kelsey and *C. M. Skiles, contra.*

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

REDICK, District Judge.

On November 21, 1923, the Atlas Bank of Neligh was taken over by the state banking department as insolvent, and intervener, Thomas C. Sexton, filed with the receiver claims on three certificates of deposit for allowance against the bank guaranty fund. Two of the certificates were so allowed, but the third one was allowed as a general claim but refused as a charge against the fund. Upon appeal to the district court the same disposition of claims was made, and intervener appeals to this court from the disallowance of one of the certificates against the fund. The facts with reference to this certificate may be summarized as follows: August 12, 1916, appellant deposited with the bank $8,000 in money and received a certificate of deposit therefor bearing 5 per cent. interest, due in one year. This was renewed each year until August 13, 1920, when the renewal was for six months, and on March 13, 1921, another renewal for six months. All of these certificates bore 5 per cent. annual interest and no more was paid thereon. January 27, 1921, Sexton wrote the bank that if they wanted to keep his money longer he would require a bonus of 3 per cent. in addition to the 5 per cent. on the certificate. This letter evidently had reference to another certificate for $5,000 and nothing seems to have come of it. But with reference to the certificate under consideration, on October 8, 1921, he wrote the bank saying he would probably have to call in the money when due, and on October 12, in response to a letter from R. S. Payne, vice-president of the bank, Sexton wrote Payne saying he "would not be satisfied with any arrangement under which there could be a question of irregularity." However, on October 13, 1921, the bank, at Sexton's request,

sent him a cash payment of $2,000 and a renewal certificate for $6,000 payable on demand. Thereupon Payne sent Ferguson, cashier of the State Bank of Clearwater, to Fremont, to see Sexton, which resulted in an arrangement whereby Sexton was to receive certificates of deposit bearing 5 per cent. annual interest and Payne would pay Sexton a bonus equal to 3 per cent. by his personal check. In pursuance of that arrangement on November 17, 1921, the demand certificate was returned and the bank issued, under date of October 13, 1921, a six months' certificate bearing 5 per cent. interest and transmitted it to Sexton, together with the personal check of R. S. Payne upon the State Bank of Clearwater for $90. This certificate was renewed for six months April 13, 1922, the Atlas Bank paying with its check interest at 5 per cent. and inclosing the personal check of Payne for $90 as before. These were the only excess payments of interest made and covered the period from October 13, 1921, to October 13, 1922.

In August, 1922, one Ray Swanson was placed in charge of the bank as manager upon the demand of the banking department. October 12, 1922, the certificate for $6,000 was renewed for six months, and was renewed April 25, 1923, and in October, 1923, for six months' periods at 5 per cent. interest, no excess interest or bonus being contracted for or received, it being understood between Swanson and Sexton in January, 1923, that no extra interest from any source would be paid.

The arrangement, as claimed by Sexton, whereby he was to receive a bonus of 3 per cent. by the personal check of Payne is confirmed by the testimony of both Swanson and Payne; but in fact Payne had no account at the Clearwater bank which paid his checks and remitted them to the Atlas bank, where they were intercepted by Payne and, instead of being charged to his individual account, were charged to the interest account of the bank. Of these matters Sexton had no knowledge or information. He had received the personal checks of Payne and deposited them with his bank at Fremont and received credit in the or-

dinary course of business and assumed that they were being paid by Payne personally.

From the above statement it will appear that the facts on this appeal are substantially like those in the case of *State v. American Exchange Bank, ante,* p. 626. The claim originated in a deposit of cash in the bank and retained that character, even under the restricted view of claims against the guaranty fund, until October, 1922. Then for two years excess interest of 3 per cent. was paid, but after that, and upon the three following certificates, no excess was contracted for or paid, and in fact there was an express understanding that only 5 per cent. interest would be paid. Under these circumstances we think the case is ruled by *State v. American Exchange Bank, ante,* p. 626.

We therefore conclude that the district court erred in refusing to allow the certificate in question for $6,000 and interest against the bank guaranty fund; and the judgment is therefore reversed and remanded for the purpose of making such allowance.

REVERSED.

CITY OF SUPERIOR, APPELLEE, V. ELLA M. W. SIMPSON, APPELLANT.

FILED JUNE 25, 1926. No. 24180.

1. **Municipal Corporations:** PAVING. The charter of cities of the second class having a population of less than 5,000 empowers the city council, by assent and vote of three-fourths of its members, to pave a street without a petition by the owners of the property subject to assessment. Comp. St. 1922, sec. 4283.

2. ———: ———: ASSESSMENTS: VALIDITY: BURDEN OF PROOF. Under the charter of cities of the second class having a population of less than 5,000, the burden is on a person assailing as void an assessment for paving to prove the invalidating facts. *Whitla v. Connor, ante,* p. 526.

3. ———: ———: ———. Under the charter of cities of the second class having a population of less than 5,000, the city council is not required to insert in the resolution containing

assessments for paving a finding that the benefits were equal and uniform.

4. ———: ———: ———: IRREGULARITIES. Where a city council, acting within its jurisdiction and exercising properly delegated power, assesses property for the benefits of paving, mere irregularities in the proceedings do not necessarily invalidate the assessments.

5. ———: ———: LETTING OF CONTRACT. Under a city charter requiring an engineer's estimate of the cost of a paving project and limiting the contract price thereto, the city council may reject a bid, because in excess of the estimate, advertise for new bids and subsequently let the paving contract to the original bidder under a new bid, if within a revised estimate made in good faith by the engineer and approved by the city council in the meantime.

6. ———: ———: ———. Before the legislature in 1925 inserted by amendment in the charter of cities of the second class having a population of less than 5,000 a provision requiring advertisements for bids and competitive bidding as conditions of letting contracts for paving, the members of the city council were not bound to pursue that course. Laws 1925, ch. 51, sec. 1; Comp. St. 1922, sec. 4180; *Murphy v. City of Plattsmouth*, 78 Neb. 163.

7. ———: ORDINANCES: PUBLICATION. A city ordinance regularly passed by the requisite majority of the council and signed by the mayor is not invalidated by mere inadvertence of the city clerk in publishing a purported copy without erasing therefrom the name of a former mayor and inserting in its place the name of the incumbent.

8. ———: ———: SIGNATURE: PROOF. The signing of a city ordinance by the mayor may be shown by the city clerk's record, in absence of the original ordinance.

APPEAL from the district court for Nuckolls county: RALPH D. BROWN, JUDGE. *Affirmed in part, and reversed in part.*

W. H. Hatteroth, for appellant.

Doane F. Kiechel, F. H. Stubbs and *J. W. Boyd, contra.*

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

ROSE, J.

This is a suit in equity to foreclose two certificates of sale issued by the county treasurer of Nuckolls county to plaintiff. One of the certificates evidenced the sale of lots 1 to 6, inclusive, in block 40, East Superior, for nonpayment of assessments of $312.58 for benefits accruing to the lots by the paving of a street. The other certificate evidenced the sale of lot 2, in block 11, Hunter's First Addition to the city of Superior for nonpayment of assessments of $154.10 for paving benefits also. Plaintiff is a city of the second class, having a population of less than 5,000. It made the paving improvements for which the lots were assessed and was holder of both certificates. Defendant was owner of the lots and resisted foreclosure on the theory that the assessments were invalid. Upon a trial of the issues the district court ordered a foreclosure of the certificate for the sale of lots 1 to 6, inclusive, in block 40, East Superior, and from that part of the decree defendant appealed. A foreclosure of the certificate for the sale of lot 2 , in block 11, was denied and from that part of the decree plaintiff took a cross-appeal.

It is first argued by defendant that the ordinance creating the paving district in which lots 1 to 6, inclusive, are situated is void, because the petition for the paving was not signed by three-fifths of the resident owners of property subject to assessment, as required by the city charter. Comp. St. 1922, sec. 4283. Assuming, but not deciding, the insufficiency of the petition, the ordinance was valid under legislation empowering the city council, by assent of three-fourths of its members, to make the improvement without a petition. Comp. St. 1922, sec. 4283; *Fitzgerald v. Sattler*, 102 Neb. 665; *Carr v. City of Lexington*, 103 Neb. 293. The record in the present case shows that the paving ordinance was passed by the requisite majority to make it effective without a petition. There was a valid exercise of legislative power and in this respect the case differs from *Rooney v. City of South Sioux City*, 111 Neb. 1, a suit in which the evidence showed that the paving ordinance, by its own terms, never went into effect.

It is next argued by defendant that the assessments of lots 1 to 6, inclusive, in block 40, East Superior, are void for failure of the city council to comply with the city charter which, among other things, provides:

"Such assessment shall be made by the council or board of trustees at a special meeting, by a resolution fixing the valuation of such lot assessed, taking into account the benefits derived or injuries sustained in consequence of such contemplated improvements, and the amount charged against the same." Comp. St. 1922, sec. 4286.

The assessments were made by an ordinance equivalent to a resolution. It gives the number of the paving district and identifies the lots. It also declares that, for the purpose of paying the cost of the improvements, the city council, sitting as a board of equalization, "finds, ascertains, determines, equalizes and fixes the benefits derived and injuries sustained," and that pursuant to such action it levies special assessments upon the lots, giving a list showing the amount of the assessment against each. The point urged by defendant seems to be that the ordinance contains no finding that each lot was benefited to the extent of the special assessment against it or that the benefits were equal and uniform. In view of the city charter, the two ordinances, the entire proceedings, the improvements actually made, and the presumptions in favor of the validity of legislative and official action, the ordinance containing the assessments is sufficient to show that the council considered each lot was benefited to the extent of the special assessment against it. In any event the special assessments for benefits are sufficient to cast on defendant the burden of proving invalidating facts, if any, a burden not assumed by her. *Whitla v. Connor, ante,* p. 526.

Plaintiff's charter does not require the council to insert in the resolution containing the assessment a finding that the benefits were equal and uniform. In *Chicago & N. W. R. Co. v. City of Albion,* 109 Neb. 739, this rule was announced:

"It is neither required nor necessary that the amount of

special benefits assessed against each lot in a paving district bear any proportionate relation to the actual value of the lot."

Mere irregularities do not necessarily invalidate assessments for special benefits. *Biggerstaff v. City of Broken Bow,* 112 Neb. 4. Error does not appear in that part of the judgment from which defendant appealed.

The cross-appeal presents for review that part of the judgment dismissing the plea for a foreclosure of the certificate evidencing the sale of lot 2, in block 11. Plaintiff insists there is nothing in the record to show the invalidity of the special assessment for the benefits accruing to that lot by reason of the paving. On the other hand, defendant argues that the council did not comply with the statute requiring in advance an engineer's estimate of the cost and limiting the contract price thereto. Comp. St. 1922, sec. 4180. This latter point does not seem to be well taken. In the first instance an estimate was regularly made and bids properly invited upon due notice. At a meeting of the council July 10, 1919, a bid by the Watts Construction Company was rejected on the ground that it exceeded the estimate of the engineer. The latter revised his estimate. The city clerk was directed to readvertise for bids to be opened the next day. There was a compliance with this direction by means of a newspaper publication. The council met again July 11, 1919, approved the revised estimate of the engineer and accepted another bid by, and let the contract to, the Watts Construction Company. The evidence does not show that the accepted bid exceeded the engineer's estimate. On the contrary, the resolution awarding the contract, as shown by the clerk's record, contains the statement that the bid of the Watts Construction Company conforms to, and in no particular exceeds, the estimate of the engineer. While there is no reason to approve the action of the council in limiting the time for new bidding to a single day, there is nothing to show that the haste indicated and the revising of the estimate were sufficient to invalidate the proceedings or the assessment. The original

notice and the time for making bids were ample. The evidence does not show fraud or concealment on the part of the council. It is not shown that the estimate of the engineer as revised or the cost of the paving or the assessment was excessive or unfair. There is a lack of proof that lower bids or better terms could have been obtained. Furthermore, the statute under which the city council acted did not then require advertisements for bids and competitive bidding. Comp. St. 1922, sec. 4180; *State v. Marsh,* 107 Neb. 637. Provisions of that kind, however, were inserted by an amendment in 1925, but are not applicable to the present controversy, the improvement having been made in 1919. Laws 1925, ch. 51, sec. 1.

Murphy v. City of Plattsmouth, 78 Neb. 163, cited by defendant, does not control the present decision. In that case the report fails to show that there was a new advertisement or that a new bid was submitted and accepted after the change in the estimate.

It is argued further that the resolution containing the assessment of lot 2, block 11, was not signed by the mayor. As published the resolution did not bear his name, that of a predecessor having been inadvertently used in the notices, but this did not prove that the original resolution adopted was not in fact signed by the mayor or that the notice was fatally defective. A copy of the resolution was introduced in evidence and the name of the mayor appears in the proper place for his signature. That he signed the ordinance was shown by the clerk's record. This proof was not overthrown by other evidence. A substantial ground for denying the foreclosure of plaintiff's lien on lot 2, block 11, has not been suggested or found.

The judgment in favor of plaintiff is affirmed. The dismissal in favor of defendant is reversed and the cause remanded for a decree foreclosing the lien on lot 2, block 11.

AFFIRMED IN PART, AND REVERSED IN PART.

Note—See Municipal Corporations, 28 Cyc. 360 n. 33, 398 n. 92, 959 n. 36, 1026 n. 53, 1031 n. 10, 1141 n. 9, 1167 n. 61.

IN RE GUARDIANSHIP OF ANNA MARGARET WESSEL. CLARA EHLERS ET AL., APPELLEES, V. ANNA MARGARET WESSEL, APPELLANT.

CLARA EHLERS ET AL., APPELLEES, V. CHARLES H. WESSEL, APPELLANT.

FILED JUNE 25, 1926. NOS. 23813, 23814.

1. **Deeds**: CANCELATION: MENTAL CAPACITY: BURDEN OF PROOF. "Where it is sought to cancel a deed for the want of mental capacity of the grantor to make the instrument, the burden of proof is on the one who alleges the mental incapacity." *Brugman v. Brugman*, 93 Neb. 408.
2. ———: EXECUTION: MENTAL CAPACITY. "In determining the mental capacity of the grantor to execute a deed, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of his property, and what he proposed to do with it, and to decide intelligently whether or not he desired to make the conveyance, it cannot be said that he was incompetent or incapable of executing the instrument." *Brugman v. Brugman*, 93 Neb. 408.
3. ———: CANCELATION: UNDUE INFLUENCE: BURDEN OF PROOF. Upon conveyance of real estate by a father to his son, when the facts and circumstances surrounding the transaction are such as to show that the deed was executed and delivered for a sufficient consideration, the burden of proof rests on the one who attacks the conveyance to establish the fact of undue influence. The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor.
4. ———: ———: ———: REVERSAL. The record examined, discussed in the opinion, and *held* that the judgment is not supported by the evidence and must therefore be, and it hereby is, reversed, with directions.

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

William R. Patrick and *Lee, Bremers & Bremers*, for appellants.

Jefferis & Tunison, contra.

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

DEAN, J.

Heinrich Wessel and Margaret Wessel, husband and wife, were born in Germany. They were married in Germany and their six children were born there. One died in infancy. Following are the names of the surviving children: Mrs. Elizabeth Koch, Mrs. Adelia Harder, Mrs. Clara Ehlers, Mrs. Emma Warnstedt, and Charles H. Wessel, defendant, who is 38 and unmarried. Plaintiffs' ages seem to range from 34 to 55 years. The four daughters have all joined as plaintiffs.

In 1892 the Wessel family came to the United States. Heinrich was a farmer and for about 15 years certain farm lands were rented on which the family lived. In 1907 he bought an 80-acre farm in Sarpy county, for $8,000, on which a first payment of $1,500 was made. From time to time, for a period of ten years, additional payments were made, from the sale of produce raised on the farm, until 1917, when the last instalment was paid and the farm mortgage was released. In the fall of 1920 one of Heinrich's feet was injured. An infection resulted which required his removal to an Omaha hospital, where it was found necessary to amputate one of his legs. From the infection, and the resulting operation, he died the first week in December, 1921, when he was 74 years of age.

Plaintiffs' contention is that defendant Charles H. Wessel, by the use of undue means, irregularly obtained a deed from his parents to the farm, and that, by like means, he obtained the personal property and money of Heinrich Wessel, all being of the value of $10,000 and upward, and that, under their alleged inheritance rights, plaintiffs are entitled to share equally with their brother Charles in a division of the estate. In behalf of Mrs. Wessel both defendants contend that she is now, and always has been, of sound mind and capable, both physically and mentally, of managing her business affairs. And in behalf of Charles Wessel both mother and son contend that, ever since the farm was bought in 1907, Charles worked continuously thereon, without pay, and that from the farm products the purchase price mortgage

of $6,500 was paid off and the personal property and the money in suit was accumulated, and that this was all accomplished "almost exclusively by the efforts of (Charles Wessel) the defendant," and that no part of such property or money was accumulated nor was it "contributed to in any way by any one of the plaintiffs herein." It is further contended by both defendants that the expressed intention of Heinrich and his wife was to give their real estate and personal property to Charles, and that the deed in suit was executed to preclude a miscarriage of their often expressed intention to give the farm and their personal property to their son on the ground that all of it had been earned by him.

The court found in favor of plaintiffs. Clara Ehlers was appointed guardian of Mrs. Wessel, and the deed of the 80 acres to Charles Wessel was canceled, and "the personal property on said farm at the time of the death of said Heinrich Wessel, the money in bank and the money loaned be, and the same hereby are, assigned and transferred to Clara Ehlers, administratrix with will annexed of the estate of Heinrich Wessel, deceased, to be administered according to law." Mrs. Wessel and her son Charles have brought the record here for review.

Dr. George E. Nehaus, of Omaha, is a specialist in mental and nervous diseases. In respect of Mrs. Wessel's mentality and physical condition he testified that, upon an examination, he found her to be a "remarkably well preserved woman. * * * She spoke in a perfectly coherent and comprehensive manner and she * * * was very much pleased to say that she had never spent a cent for doctors." In a memory test she correctly named the time when the world war began and when our country entered the war. He further testified: "Then I tested her a little bit on arithmetic, asking her * * * how much was 3 times 33, and she said 99; * * * that they sold their butter (for) 35 cents. * * * I said, 'Well, now, if you (sold) 13 pounds * * * for 35 cents a pound, how much would you get?' She said, just off hand, 'Four dollars and be-

tween 50 and 60 cents.' Four dollars and 55 cents is the correct figure." She correctly named the then president and the governor. She said there would be an election next month, the examination in question being in October, 1922. She told the doctor that her son had worked for them for 20 years, without pay, and her husband said the land and money and everything was all his because Charles, as her husband often said, and as she agreed, supported us and that they "couldn't have made a living" if he had left them. And in particular she said that "Charles had always been a good son; that he never drank or did anything wrong and always worked hard. * * * I think it would be very difficult for any one to put anything over on her, to get it away from her. She is shrewd. She understands the meaning of property and she wants it to go to her son because she is carrying out, not only what she thinks is right, but what her deceased husband wished should be done. * * * She was perfectly satisfied to stay there (on the home place) because there wasn't anything that interested her outside." The doctor testified that Mrs. Wessel recognized him when he appeared at the trial, and that her mental and physical condition was then just about the same as when he made his examination, and that he then found her heart, pulse beat, lungs, hearing, and eyesight all perfectly normal with no indication of hardening of the arteries. In her home she appeared much like a German peasant, and she told him she preferred the old home rather than the small new house which was built by her son. Her gown was patched, but clean, and her house was plain, but everything was neat and clean.

Mrs. Margaret Wessel, aged 74 years, testified by the aid of an interpreter. Her evidence seems to corroborate that of the doctor in respect of mentality. She testified that Charles worked for a neighbor from his fifteenth to his eighteenth year, and that his father collected all of the wages which Charles then earned and used it for farm purposes generally; that from his eighteenth year and "for 20 years he worked steady at home," without any wages for

his work; that his father often said that when he died all of the property should be given to Charles, "because he has worked for us, * * * because Charles has earned all that;" that she and her husband often talked "the same thing over with Charles;" that in 1920 her husband turned over to Charles $3,000 that he had in the bank, and about a year before he died, when in the Immanuel Hospital at Omaha, where he was treated, he executed and delivered a deed to the 80-acre tract to his son; that Charles gave the deed to his mother, as directed by his father, and she voluntarily signed and acknowledged it a month afterward, namely, March 3, 1921; and delivered the deed to Charles; that Charles was always a good son to her and to her husband; that he made her comfortable in her home where, as she expressed it, "I am boss myself;" that she cooked the meals and she and Charles ate together in the old home, where she preferred to live, and that she had no difficulty in performing her housework. It seems that Bernard Ehlers, a son-in-law of Mrs. Wessel, had reported that Charles obtained his mother's signature to the deed by compulsion. Mrs. Wessel and Charles both denied that any compulsion was used in obtaining the deed. It appears that the $3,000, above referred to, was loaned to a firm of Merchants in Gretna. Plaintiffs insist the loan is a bad investment, and they blamed Charles for making it. But both Charles and his mother testified that his father talked it over with them and advised that the loan be made. It also appears that, to build the three-room house, referred to by Dr. Nehaus, Charles executed a $1,000 farm mortgage to obtain the money to erect the building. Plaintiffs complain of this, evidently as a bit of extravagance, and also because Mrs. Wessel was not moved into the house when it was completed. But she testified that she "preferred to be in the old one" and that Charles slept in the new house. It also appears that Heinrich approved of the loan. On the cross-examination, in referring to a statement of her husband's in respect of the property, she testified: "Q. In other words, his understanding (her husband's) was that Charles wasn't to have

anything until both of you were dead; that is, the father and mother? A. He did not say that. * * * Q. Whose land is this now? A. Charles." And she further testified, on the cross-examination, that she did not want her daughters to have any of the estate "because they did not earn anything; because Charles has earned it all. Q. The girls have always been good to you, haven't they? A. Oh, yes. Q. They used to work, didn't they, years ago? A. After they came out of school they worked for other people and used the money they earned, and then afterwards they got married. Q. And they always came home and helped you didn't they, at times? A. Not much."

Charles Wessel, defendant, was called to the witness-stand by counsel for plaintiffs. On this examination his evidence was corroborative of substantially all of the material evidence of his mother. He testified that his father told him that the 80 acres of land, the personal property, and the money and funds in the bank and such money as was loaned, all of which was derived from the sale of farm produce, should be his because it was earned by him; that his father deeded the 80-acre tract to him, February 3, 1921, while he was at the Omaha hospital, and that he took the deed home and gave it to his mother, and that she voluntarily joined in its execution, as she testified; that the money in the bank and certain certificates of deposit were placed in his name at the bank at his father's direction after the deed was signed and almost a year before he died. On the cross-examination he testified that Ehlers, his brother-in-law, had sought a quarrel with him about the Wessel property, and that his father, with knowledge of this, said, in substance, that a deed might save family trouble, and that it was because of this that the deed was executed; that long before the land was bought, the money earned by him, as a farm laborer, was used by his father to buy a team, wagon and harness; that, as his mother testified, he never received any wages for his work; that within five years of his death his father helped in the hay field and herded the cows on the roadside, but he did little farm work; that farm

help was never hired, but that he, Charles, obtained such needed help, by his labor in changing work with the neighbors; that the $6,500 farm mortgage was paid off four years before his father died, and that all payments thereon, both interest and principal, and the money in the bank was derived from the sale of crops produced on the farm and that they had no other source of income; that his mother always conducted the household affairs.

Rev. Franz Snider was chaplain at the Immanuel Hospital. He testified that Mr. Wessel had a good deal of pain from the operation, but that he "never saw him anything but rational." Mr. Samuel Beveridge, a Burlington steel car maker, was a hospital patient and frequently talked with Mr. Wessel, and said that he told him about the 80-acre farm, and that "his son had always stayed with him — been with him all his life. Seemed to think the world of him." When he signed the deed he was in good spirits, and when he talked "he seemed to be very strong-minded, and when he said anything he seemed to mean it," and that, in his opinion, Mr. Wessel was capable of transacting ordinary business, and that he always seemed to be the same. Joseph Fabian, a storekeeper for the Union Pacific Railroad at Omaha, was a patient during the month of February, 1921. He testified that Mr. Wessel told him, and he heard him tell others, about his farm, and his personal property and that he had a dependable son who took care of his mother and did all of the work. After the amputation Mr. Wessel propelled himself on a wheel chair. From Fabian's contact with Mr. Wessel, his opinion was that he was mentally competent. To substantially the same effect is the evidence of Mr. Glenn Isaacson, a hospital patient, who had frequent talks with Mr. Wessel. At least two witnesses, in the Wessel neighborhood, acquaintances of many years, gave evidence tending to establish the fact of the mental competency of Heinrich Wessel. It clearly appears that the evidence of the witnesses who testified on the part of defendants on this feature of the case was based on facts, which were derived from personal observation, in

respect of each of the parties, and that, being so qualified, they were competent to testify.

Clara Wessel Ehlers and Adelia Wessel Harder were married several years before their father bought the farm and the first payment was made. Neither Mrs. Elizabeth Koch nor Mrs. Emma Warnstedt, nor their respective husbands, offered any evidence. Bernard Ehlers, Clara's husband, testified that his 160-acre farm joins the Wessel farm; that his wife worked out a year and a half before they were married. Elsewhere in the record it is disclosed that the girls, when so employed, earned 25 cents a week at first and afterward earned $2.50 a week. All of the girls were married several years before the farm was bought, and it is not made to appear that any of their earnings contributed toward the purchase of the farm, nor the payment of the mortgage. In fact, it was developed, on the cross-examination of Mrs. Wessel, that the girls "used the money they earned, and then afterwards they got married." Ehlers testified that the old folks lived closely at home and never associated with the neighbors, and that Mrs. Wessel had not been to town for 15 years; that he does not know whether Mrs. Wessel is "strong-minded," but he never saw her coerced into doing anything against her will.

Mrs. Clara Ehlers testified that all the daughters of the family married and left home several years before the farm was bought; that she had no record of money, if any, that they contributed towards its purchase; that her mother told her that it was her father's wish that Charles should have the land. She seems to complain that Charles did not go to the hospital, at Omaha, as often as she thought he should when his father was there. But it is clear that if Charles was so far away his mother would be left at home alone and, besides, without hired help, he had to do all the farm work and take care of the stock.

Mrs. Adelia Harder, on the part of plaintiffs, testified that her parents did not care for finery or high living, but were satisfied to live in a frugal manner, and that her mother's

mind had always been keen and bright, and that her mother always insisted in living in the old house, notwithstanding that Charles had built a new house. She admitted that she was married and away from home five or six years before the farm was bought, and that Charles did most of the work on the farm, and that he produced the crops from which the money was obtained to pay off the farm indebtedness.

Rev. Henry Schmidt called on Heinrich Wessel twice at the hospital. He testified, on the part of plaintiffs, that at the first call he was "perfectly normal," but when he made his second call Mr. Wessel "seemed to suffer great pain." But whether from the infection or the amputation of his leg does not appear. He testified: "Q. Well, just tell what you saw and what he said, if anything, and what you observed. A. Well, I tried to talk to him, but couldn't do much with him. He was kinda incoherent in his replies and seemed to suffer great pain, and he would stop in the middle of a sentence or something like that and wouldn't take any interest whatever in what I would do with him." He concluded that Mr. Wessel was not then able "to transact business affairs." On the cross-examination he said he "was keeping in touch with his (Mr. Wessel's) situation" through the "Ben Ehlers family." Mr. Schmidt was the only witness to testify on the part of plaintiffs, who was not financially interested in the outcome of this suit.

Upon examination of the record, we conclude that the judgment is not supported by the evidence. That Charles Wessel by 20 long years of toilsome and unrequited labor raised the crops that supported his parents and paid for the 80-acre farm is the outstanding fact that seems to be clearly established by the great weight of the evidence. And this fact was repeatedly asserted by his parents in the presence and hearing of many unprejudiced and disinterested witnesses, and was admitted by some of the plaintiffs. The evidence seems to leave no room for argument to the contrary. True, the evidence shows that Charles is unlettered and that he is endowed with a somewhat uncouth mode of expression. But his parents bore testimony repeatedly to

his unfailing devotion to their welfare. There is much meaning in these words of his mother, "for 20 years he worked steady at home," without wages, and of whom his father often said, "because he has worked for us, * * * because Charles has earned all that," all the property shall be his. And the evidence shows that his father made good his spoken word and that his wife assented thereto. So much on the merits as they relate to defendant Charles Wessel.

In respect of the mother of Charles Wessel there seems to be an entire absence of evidence which tends to show that she is "mentally incompetent" or that she is "insane," within the meaning of section 1589, Comp. St. 1922, nor, from her evidence, does it appear that she is a person of weak mentality. The evidence of Mrs. Wessel throughout, both in the direct and the cross-examination, discloses that, for a person of advanced years, she is endowed with a keen mind and memory, and that, in view of all the facts, she is in no need of a guardian and such guardian should be discharged.

In *Schley v. Horan*, 82 Neb. 704, it is shown that a son from his twelfth year to his majority, worked in iron mills and gave all of his earnings to his parents and for 20 years afterward faithfully worked on his parents' 120-acre farm without other compensation than his support. His mother survived her husband a year and, of her own volition, when over 80, deeded the farm, her entire estate, to her son, in consideration of $1 and love and affection. A married sister of the beneficiary, living with her husband, separate and apart from her parents, sought to set aside the deed on the ground of alleged want of mental capacity and certain "hallucinations" on the part of the grantor in the later years of her life. But the so-called "hallucinations" were shown to be mostly dreams. Under the facts we held that lack of mental capacity to execute the deed was not established, and we so hold here. *Brugman v. Brugman*, 93 Neb. 408, is in point.

The judgment must be, and it hereby is, reversed and vacated, with directions that the title to the land in suit be

quieted in Charles H. Wessel, and that a judgment be entered in conformity with this opinion.

REVERSED.

VAN E. PETERSON, RECEIVER OF FARMERS STATE BANK OF CULBERTSON, APPELLEE, V. MARY S. WINKELMANN, APPELLANT.

FILED JUNE 25, 1926. No. 25091.

1. Appeal: TRIAL DE NOVO. When an action in equity is appealed, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it is the duty of this court to try the issues *de novo* and reach an independent conclusion without reference to the findings of the district court. Section 9150, Comp. St. 1922. And when the evidence on material questions of fact is in irreconcilable conflict, this court will in determining the weight of the evidence consider the fact that the trial court observed the witnesses and their manner of testifying. *Magill v. Magill, ante*, p. 636.
2. ———: SUFFICIENCY OF EVIDENCE. Upon examination of the entire record, and upon trial *de novo*, we find that the evidence supports the judgment.

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

J. F. Ratcliff and *Scott & Scott*, for appellant.

Butler & James, contra.

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

DEAN, J.

The Farmers State Bank of Culbertson, Nebraska, hereinafter called the bank, became financially embarrassed and was taken over by Van E. Peterson, secretary of the guaranty fund commission. December 10, 1924, Peterson, as receiver of the bank, began an action in the district court, in and for Hitchcock county, to close up the bank's affairs.

November 8, 1923, Henry W. Winkelmann, cashier of the bank, admitted the shortage of $23,480.04 in his account as cashier. This is disclosed by the following instrument which is signed by Winkelmann:

"Whereas, an examination of the affairs of the Farmers State Bank of Culbertson, Nebraska, has disclosed a shortage of $23,480.04 in the assets of said bank; and

"Whereas, until the day of the date hereof the undersigned, H. W. Winkelmann, has been cashier of said bank; and

"Whereas, the said H. W. Winkelmann acknowledges said shortage and has promised and agreed to and with the said bank to pay and make good to said bank a portion thereof, amounting to the sum of $10,000; and

"Whereas, the said bank has agreed to accept the note of the said H. W. Winkelmann in the sum of $10,000 as evidence thereof, and certain assignments, conveyances and payments, herein specified, as security for the payment and in payment of said portion of such shortage, such assignments, conveyances and payments being described as follows:

"A warranty deed to lots 244, 245 and 246 in the town of Culbertson, Hitchcock county, Nebraska, for the consideration of $7,500. A certain Maxwell sedan for the consideration of $500. Cash in the sum of $1,500. An assignment of a certain insurance policy on the life of the said H. W. Winkelmann from the surrender value of which the sum of $500 is to be realized and paid, as hereinafter set forth, or, in lieu thereof, the sum of $500 in cash.

"Whereas, it is the desire of the said H. W. Winkelmann to make full payment of and restitution to the said bank for said portion of said shortage, and it is conceded by him that the property hereinbefore described may not realize the full amount of $10,000:

"Now, therefore, for and in consideration of the premises, and for and in consideration of the acceptance by the said bank, contingently, as herein set forth, of said assignments, conveyances and payments, it is understood and agreed that

the said H. W. Winkelman, in the event the property so as aforesaid assigned, conveyed and paid to the said bank by him shall not realize the full amount of the portion of said shortage agreed to be paid by the said H. W. Winkelmann, to wit, the said sum of $10,000, that the said H. W. Winkelmann has herein agreed to pay and make good, the said H. W. Winkelmann shall not be released from his obligation to pay any deficiency that may remain, but shall continue liable therefor until such deficiency shall be fully discharged by payment.

"The said H. W. Winkelmann agrees, so far as the payment to be made from the proceeds of the insurance policy hereinbefore mentioned, to do all things that may be necessary to realize thereon, and when such amount is received or collected by him, or when it is otherwise secured, to pay the same, forthwith, to the said bank."

"Dated this 8th day of November, 1923.

"(Signed) H. W. Winkelmann."

"Witness: John F. Cordeal."

Mary S. Winkelmann is the wife of Henry W. Winkelmann and, on and before November 8, 1923, she was the owner of the real estate in Culbertson which is described in the foregoing instrument. Pursuant to the obligation, Winkelmann joined with his wife in executing and delivering a warranty deed to the real estate above referred to. This deed was delivered to and accepted by the bank as security for that part of the bank shortage for which Winkelmann desired to make restitution, and which he agreed to make good to the bank. In this suit the warranty deed was treated as a mortgage and, plaintiff having prevailed, it was foreclosed and a judgment was rendered wherein the court found and decreed "that plaintiff has a good and valid lien by virtue of the deed set forth in his petition in the nature of a mortgage to secure payment of $7,500," with 7 per cent. interest per annum from the date of the decree. From the judgment and decree defendant Mary S. Winkelmann appealed.

Mrs. Winkelmann admitted the execution and delivery of

the warranty deed in suit, by herself as owner, in which she was joined by her husband. In respect of the merits Mrs. Winkelmann testified that she talked with D. R. McCallum, who was a stockholder and director of the bank since its organization, and that at her home on the evening of November 7, 1923, they, evidently meaning McCallum and her husband, who was also a director, asked her to sign the deed, and that she was promised that, in consideration of the signing and delivery of the deed, the bank would give her $7,500 of the notes. She testified that she relied on this promise and that, in reliance thereon, she executed and delivered the deed in suit. She testified that she never received any of the notes which were promised to her. From her evidence, unless she was mistaken, it would appear that the receiver, Peterson, and her husband, in her presence, had a conversation in which her husband said to Mr. Peterson "that we had done more than we ought to do and as what our share was; but we had done it to keep the bank going; and he (Peterson) said it would be all right, and he would see what he could do." On the cross-examination Mrs. Winkelmann admitted that she had no talk with the receiver, Peterson, before she delivered the deed to the bank. Mrs. Winkelmann's husband testified, in respect of the talk with McCallum, on the evening of November 7, 1923, that two other stockholders, namely, William Crews and J. M. Crews, were present for awhile, but that they did not stay long, and that after their departure McCallum said, if Mrs. Winkelmann would sign the deed and if it "would be acceptable to the bank, that in that way we might take up $10,000. * * * Q. And what was said to your wife about this arrangement? A. About all that was said to Mrs. Winkelmann was that I told her of the condition of the bank, and that it was necessary to make good this amount of money, which was not good to the bank, and in order to do so, Mr. McCallum had agreed, had partly agreed, to take up all remaining, provided we would take up $10,000" and that he, Winkelmann, said that, if she would sign the deed, they could take up the $10,000, but if

she refused to sign and deliver the deed, that they, the Winkelmanns, "would not be able to take up that much." Continuing Winkelmann testified: "Q. Was any consideration offered her for signing this deed? A. She asked what she would get, and I told her she would have to take of these assets. Q. Did you tell her how much? A. Seventy-five hundred dollars. Q. What did she say? A. Well, she finally consented. Q. Was Mr. McCallum present at the time this talk was had? A. Yes. Q. And heard the talk? A. Mr. McCallum asked her if she would sign the deed on these grounds, and I heard her tell him she would."

D. R. McCallum, above referred to, was called as a witness by defendants. He testified that no agreement was made by himself and H. W. Winkelmann, as officers and directors of the bank, or otherwise, that Mrs. Winkelmann should receive $7,500 of the bank's objectionable assets or notes and checks in consideration of her delivery of the deed in suit to the bank.

The evidence conflicts in some minor respects, but it is sufficient to support the judgment of the trial court. We have repeatedly held that, when an action in equity is appealed, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it is the duty of this court to try the issues *de novo* and reach an independent conclusion without reference to the findings of the district court. Section 9150, Comp. St. 1922. And when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying. *Magill v. Magill, ante,* p. 636.

The Winkelmanns, for obvious reasons, were desirous of making good for the shortage which the record discloses and, as above noted, they conveyed certain real estate to the bank, of the agreed value of $7,500. It seems naturally to follow that the cashier's wife must have been mistaken in her expressed belief that, in return for the conveyance of the real estate to the bank, she was to receive therefor,

from the bank, the "frozen assets," be their value much or little, which are referred to in the record as "objectionable assets."

In view of the recitals and admissions in the instrument signed by H. W. Winkelmann, former cashier, and in view of the oral evidence generally, we conclude that the judgment is amply supported by competent evidence and it is therefore in all things

AFFIRMED.

NEBRASKA NATIONAL BANK OF HASTINGS, APPELLANT, V. HUGH A. BRUNING, RECEIVER OF FARMERS STATE BANK OF BELVIDERE, APPELLEE.

FILED JUNE 25, 1926. No. 24048.

Banks and Banking: GUARANTY FUND: RIGHT TO PARTICIPATE. Where a bank with a checking account in a correspondent bank draws a draft on the latter and the drawee pays the draft in good faith in the regular course of business pursuant to a custom between the two banks, thereby creating an overdraft of the drawer bank, which is closed in the meantime owing to insolvency, the drawee, if without knowledge of such insolvency, and having reason to believe that funds or credits are in transit to fully cover the overdraft, may in equity be subrogated to the rights of the original holder of the exchange, and may participate to the extent of the overdraft in the bank guaranty fund.

APPEAL from the district court for Thayer county: RALPH D. BROWN, JUDGE. *Reversed, with directions.*

Harry S. Dungan, for appellant.

Heasty, Barnes & Rain, contra.

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

DAY, J.

On May 1, 1921, the Farmers State Bank of Belvidere, Nebraska, being insolvent, was taken over by the depart-

ment of trade and commerce, and on May 3, 1921, a receiver was duly appointed to wind up its affairs.

The Nebraska National Bank of Hastings filed its claim for $2,019.28 with the receiver of the Farmers State Bank, and prayed that the claim be allowed as a preferred claim and paid out of the guaranty fund of the state. At the conclusion of the trial the court allowed it as a general claim only, and refused to order it paid out of the guaranty fund. Plaintiff appeals.

It appears that for a number of years prior to the failure of the defendant bank the plaintiff had been its correspondent. During these years defendant carried a balance of varying amounts with plaintiff, against which defendant drew bills of exchange in the usual course of business. To illustrate, on March 16, 1921, there was a credit balance in the plaintiff bank of $12,211.27, on April 2, there was an overdraft of $1,039, on April 4, a small credit, on April 11, an overdraft of $4,455.75, and on April 13, a credit balance of $2,444.52. In the course of business the defendant bank frequently overdrew its account, but immediately sent remittance to cover its overdraft. On April 25, defendant had a credit balance of $109.16. Between April 25 and 30, plaintiff honored several drafts drawn upon it by the defendant, which at the time of the closing of the defendant bank, and after crediting the overdraft with the proceeds of some collateral held by the plaintiff in another transaction between the two banks, left an overdraft of $2,019.28, the amount of the plaintiff's claim.

The plaintiff had no knowledge or notice of the insolvency of the defendant bank at the time it honored the draft, but considered it solvent, and from the custom theretofore existing believed that sufficient funds or credits were in transit to cover the exchange drawn on it.

The only question presented under the facts of this record is whether the claim should be paid out of the guaranty fund. Section 8033, Comp. St. 1922, which was in force at that time, specially provides that "the claims of depositors, for deposits, and claims of holders of exchange, shall

have priority over all other claims," with certain exceptions not necessary to mention, and "they shall be paid immediately out of the available cash in the hands of the receiver." The statute further provides in substance that, if the receiver has not in his hands sufficient funds to pay preferred claims, the court shall order that the same be paid out of the guaranty fund.

In the case before us the drawee bank was under no obligations to honor the drafts drawn except to the extent of funds to the credit of the drawer. The original payee and subsequent holders of the bill of exchange were protected by the guaranty fund by the precise terms of the statute. When the bills of exchange were issued, the drawer received money or its equivalent for the same and requested that drawee honor them. Having honored the drafts, it would seem in justice and equity that the drawee should be subrogated to the rights of the original holders of the drafts. The drawer bank has had the benefit of the money paid for the drafts.

In Ackerman, Receiver of the American State Bank v. City Nat. Bank of Lincoln, No. 23712, under facts, in all essential respects, the same as the case before us, we affirmed, without a written opinion, the judgment of the district court allowing the claim as a preferred claim. The decision in that case was based on the same reasoning as in the case before us.

Under the facts of this record, we hold that the drawee bank became subrogated to the rights of the original holders of the bills of exchange, and that, as such, was entitled to have its claim allowed as a preferred claim, payable, if necessary, out of the guaranty fund.

From what has been said, it follows that the judgment of the district court must be reversed, with directions to enter judgment in accordance with the views herein expressed.

REVERSED AND REMANDED.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, V. AMERICAN STATE BANK OF OMAHA: K. C. KNUDSON, RECEIVER, APPELLEE: J. A. DOUGHERTY, RECEIVER OF CARROLL TRUST & SAVINGS BANK, APPELLANT.

FILED JUNE 25, 1926. No. 24214.

1. **Compromise and Settlement.** Where an officer of a bank wrongfully places money of the bank to his credit and the bank, with full knowledge of the fact, thereafter makes a settlement by taking the secured obligations of the officer for the same, it thereby ratifies the unauthorized appropriation and vests such officer with the legal title to the funds appropriated by him.
2. **Banks and Banking:** ACTS OF OFFICERS: RATIFICATION. Where an officer of a bank gives his individual note to another bank and places the proceeds thereof to the credit of the bank of which he is an officer, and which it accepts and uses, such bank may not complain that such officer subsequently pays and discharges his note out of the bank's funds. The transaction is equivalent to the bank borrowing the money and subsequently paying its own debts.

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

Crofoot, Fraser, Connolly & Stryker and *Salinger, Reynolds, Meyers & Cooney,* for appellant.

Jackson B. Chase, Brogan, Ellick & Raymond and *C. M. Skiles, contra.*

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

DAY, J.

On December 4, 1922, in a proper proceeding by the state, a receiver was appointed to take charge and wind up the affairs of the American State Bank of Omaha. For convenience, this bank will be referred to as the American Bank. On April 26, 1919, J. A. Dougherty was appointed receiver of the Carroll Trust & Savings Bank of Carroll, Iowa, and directed to wind up its affairs.

In May, 1923, Dougherty, as receiver, filed a petition for the allowance of a claim for $25,083.35 against the American Bank, praying that it be allowed as a preferred claim and paid out of the guaranty fund. The trial court disallowed it, both as a preferred and a general claim, and dismissed the petition. From this judgment Dougherty has appealed.

Dougherty's claim is based on the theory that certain funds of the Carroll Bank were improperly used by one John Roelfsema, its president, to pay his individual obligation to the American Bank, which fact was known to the bank at that time; that the payment of the money under the circumstances constituted a deposit by the Carroll Bank for which the guaranty fund became liable. A determination of the question thus presented involves an examination of the transaction between the two banks.

It appears that for some time prior to February, 1918, the Peoples Trust & Savings Bank of Carroll, Iowa, had kept a credit balance with the American Bank, against which, in the course of business, it drew drafts. John Roelfsema was an officer of this bank. About this time a movement was inaugurated which resulted in the consolidation of the Peoples Trust & Savings Bank with the Carroll Trust & Savings Bank under the name of the latter bank and John Roelfsema was elected president. In carrying out this plan, on February 4, 1918, Roelfsema sent his note for $25,000, secured by collateral notes, to the American Bank and requested that the amount be credited to the Peoples Trust & Savings Bank. On the same date this was done and the Peoples Trust & Savings Bank so notified. On February 8, 1918, by the direction of the Peoples Trust & Savings Bank, $30,000 of its deposit in the American Bank was transferred to the credit of the Carroll Bank.

In the course of business between the Carroll Bank and the American Bank, the credit balance of the Carroll Bank, in August, 1918, became reduced to $1,383.59. At this time the Roelfsema note for $25,000 became due and, after some interchange of correspondence, the American Bank charged

$25,025, the amount then due upon the Roelfsema note, to the account of the Carroll Bank. The cashier of the Carroll Bank made some protest against the American Bank so charging the note and suggested that Roelfsema would arrange to take care of his note.

On August 24, 1918, Roelfsema sent two drafts, drawn by the Carroll Bank in favor of the American Bank and signed by him as president, to take up the notes. One of the drafts, for $20,000, was drawn on the Continental & Commercial National Bank of Chicago, and the other, for $5,083.35, on the Iowa National Bank of Des Moines. These drafts covered the amount due upon the Roelfsema note, on that date. Thereupon the Roelfsema note, together with the collaterals thereto, was returned to the Carroll Bank and the amount also credited to the overdraft of that bank.

The record shows that, in purchasing the two drafts sent to the American Bank, Roelfsema drew his check for the amount on the Carroll Bank against a deposit which he had therein. His deposit was charged with the amount of the two checks, leaving a balance to his credit of about $4,000. In this respect the books of the Carroll Bank show the transaction to be perfectly straight. The record also shows that, prior to the drawing of the two checks, Roelfsema's personal account in the Carroll Bank was credited with $24,651.25. This credit was obtained by Roelfsema executing a note of the Carroll Bank for $25,000, in favor of the Continental & Commercial Bank of Chicago, which the latter bank discounted and credited $24,651.25 to the Carroll Bank. This amount was credited on the books of the Carroll Bank to the personal account of Roelfsema. On April 23, 1919, just prior to the appointment of the receiver of the Carroll Bank, an examination of the bank's books disclosed that Roelfsema had wrongfully taken credit to his personal account the amount realized in discounting the note of the Carroll Bank with the Chicago Bank. On making this discovery, the Carroll Bank made demand upon Roelfsema that he give security for the appropriation of the assets which should have been credited to the Carroll Bank, and

thereupon he gave his note, secured by a mortgage on a farm, for $25,000, and a few days later executed a deed to the farm, in favor of the bank, in payment thereof. While the record is not entirely clear, we think it is fairly shown that the execution of the mortgage and deed was given and accepted in settlement of the indebtedness from Roelfsema to the Carroll Bank, created by this transaction, and had the legal effect of giving him the title to the money he had wrongfully placed to his credit.

While the whole transaction is somewhat involved and in some of its aspects not as clear as one might wish, still, we think, it is established that on February 4, 1918, the Peoples Trust & Savings Bank was, at the request of Roelfsema, given credit for $25,000, the amount of the note. So far as the record shows Roelfsema received no other consideration for his note. The effect of this transaction, so far, was to increase the credit balance of the Peoples Trust & Savings Bank in the American Bank $25,000. A few days later, at the direction of the Peoples Trust & Savings Bank and in furtherance of the scheme to consolidate the two banks under the name of the Carroll Trust & Savings Bank, $30,000, the credit balance of the Peoples Trust & Savings Bank in the American Bank, was transferred to the Carroll Bank. By this book transaction the Carroll Bank received the full credit for the Roelfsema note and used it in the course of business. If it should be conceded that Roelfsema used the Carroll Bank's funds to take up his note, it would seem that he was only reimbursing himself for the money that he theretofore placed at the bank's disposal and which it had accepted and used. Having received the benefit it would be a matter of simple justice that it should discharge the Roelfsema obligation.

Assuming that the evidence is sufficient to show that Roelfsema received an individual benefit from his $25,000 note to the American Bank, and that he paid it out of the funds of the Carroll Bank, still, under the record, we think that Dougherty is in no position to assert a claim, because the evidence shows that the bank, while a going concern,

made a full settlement with Roelfsema of his indebtedness and ratified his action in appropriating the proceeds of the Carroll Bank note, discounted by the Continental & Commercial National Bank. In either event, it would appear that Dougherty had no valid claim against the American Bank either general or preferred.

In addition to this, we think that the directors of the bank were fully cognizant of what Roelfsema was doing. The testimony is clear that one director, besides himself, knew of the transaction. Two other officers of the bank also knew it, but it is not fully disclosed whether they were directors. The testimony shows that the Carroll Bank was what is often referred to as "a one man bank." Roelfsema owned a majority of the stock, controlled the board of directors, and dominated the policy and business methods of the bank. No claim was ever made by the Carroll Bank that the transaction was a deposit. Statements showing the status of American Bank account with the Carroll Bank had repeatedly been made, and not until five years had elapsed and a receiver appointed was it ever claimed by any one that the Carroll Bank had money to its account in the American Bank.

Upon the consideration of the entire record, we are quite convinced that Dougherty, as receiver, has no claim against the American Bank either general or preferred. The judgment of the district court is

AFFIRMED.

Note—See Compromise and Settlement, 12 C. J. 342 n. 32, Banks and Banking, 7 C. J. 538 n. 18.

IN RE ESTATE OF AUGUSTA BOYDEN.
LAVINIA P. ROBINETTE, APPELLANT, V. ERIC OLSEN, EXECUTOR, APPELLEE.

FILED JULY 7, 1926. No. 23426.

Executors and Administrators: ACTIONS ON CLAIMS: REVERSAL: PROCEDURE. Where a suit in equity in the district court and a proceeding at law in the county court for the same relief in

the form of a claim against the estate of a deceased person were irregularly prosecuted separately to an erroneous dismissal in each case, resulting in an injustice, and the records submitted together for review in the supreme court, where both judgments are reversed and a decree for the allowance of the claim directed in the suit in equity, the decree, when rendered, may be certified by the district court to the county court for allowance as a claim against the estate of decedent with a mandate showing the reversal of the judgment of the county court.

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

Will H. Thompson and *Oscar W. Johnson,* for appellant.

B. N. Robertson, contra.

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

ROSE, J.

To recover compensation for personal services plaintiff filed in the county court for Douglas county a claim against the estate of Augusta Boyden, deceased. The proceeding was dismissed and plaintiff appealed to the district court with the same result. Plaintiff subsequently presented the identical claim to the district court in a suit in equity. The actions were irregularly prosecuted separately to a disallowance of plaintiff's claim in each court. The records in both cases were submitted to the supreme court for review at the same time. In the supreme court the decision on the merits of the entire controversy was in favor of plaintiff in the suit in equity. *Robinette v. Olsen,* p. 728, *post.* For reasons stated in the opinion in that case the dismissal in this was erroneous. The judgment of the district court herein is therefore reversed and the cause remanded, with instructions to send the case back to the county court for a final determination in harmony with the decree directed in the suit in equity.

REVERSED.

LAVINIA P. ROBINETTE, APPELLANT, V. ERIC OLSEN, EXECUTOR, ET AL., APPELLEES.

FILED JULY 7, 1926. No. 23536.

1. **Wills:** ORAL CONTRACT FOR SERVICES: PAROL EVIDENCE. The making of an oral contract to transfer realty by deed or will in consideration for personal services may be shown by parol proof and the execution of a will conforming to the oral agreement, though the will was subsequently destroyed, where the personal services were fully performed and accepted.

2. ———: ———: PERFORMANCE: PROOF. Performance of personal services by a confidential attendant in consideration of an oral contract for the conveyance of realty by deed or will may be shown by evidence that the attendant was frequently observed at her duties, that they were performed and that they were acknowledged and accepted by the other party.

3. ———: ———: IMPLIED REQUEST. Requests for personal services of a confidential attendant pursuant to an oral contract to transfer realty in consideration for such services may be implied from evidence that they were rendered and accepted.

4. ———: ———: BREACH: PROOF. The breach of an oral contract to transfer realty by deed or will in consideration for personal services may be shown by proof of failure to pay for them and evidence that the transfer was never made and that the means of performance were destroyed.

5. ———: ———: RELIEF IN EQUITY. A court of equity may entertain a suit to recover damages for breach of an oral contract to transfer realty by deed or will in consideration for personal services, where equitable considerations essential to an adequate remedy are involved in addition to the main issue.

6. ———: ———: BREACH: MEASURE OF DAMAGES. The value of realty which the owner orally agreed to convey by deed or will in consideration for personal services, under the circumstances outlined in the opinion, *held* the measure of damages in a suit for breach of the oral contract.

7. ———: ———: ———: EQUITABLE RELIEF. In a suit in equity to recover damages for breach of an oral contract to transfer realty by deed or will in consideration for personal services, the available proceeds of a wrongful sale of the realty to an innocent purchaser may be subjected to the payment of plaintiff's claim.

8. Courts: CONCURRENT JURISDICTION: ESTATES: ALLOWANCE OF EQUITABLE CLAIM. The jurisdiction of the district court as a court of equity and the jurisdiction of the county court as a probate court, to allow a claim against the estate of a deceased person for damages for a breach of contract, may be concurrent, where equitable relief is essential to a complete remedy, specific performance and title to realty not being involved, and a judgment in favor of claimant, if rendered in the equity court, may be certified to the county court for allowance as a claim against the estate of decedent.

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

Will H. Thompson and *Oscar W. Johnson,* for appellant.

B. N. Robertson, contra.

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

ROSE, J.

This is a suit in equity to establish an oral contract to transfer by deed or will a house and lot in Omaha in consideration for personal services; to recover damages for breach of the contract; to impound proceeds of a wrongful sale of the property described, and to apply the impounded funds to the payment of the claim in controversy. The suit was defended on grounds, among others, that no such contract was ever made and that there was nothing due for compensable services performed. The district court upon a trial of the issues entered a nonsuit. This is an appeal from the dismissal.

Is the evidence sufficient to prove the making of the oral contract? The parties to it were Lavinia P. Robinette, the person who performed the personal services, and Augusta Boyden, the owner of the lot. The former is plaintiff. Eric Olsen, executor of the will of Augusta Boyden, deceased, and others interested in her estate are defendants. The personal services performed by plaintiff included combing hair, cooking meals, washing dishes, sweep-

ing rooms, attending furnace, gardening, running errands, purchasing groceries, going to bank, care during illness and performance of other duties of a confidential attendant. These services extended over a period of nearly nine years. There is proof that Augusta Boyden in 1912 orally agreed, in consideration for such services during her declining years, to pay for them upon receipt of a prospective inheritance from her parents; that in 1917 the same parties entered into a new oral contract obligating Augusta Boyden, in consideration for services previously performed and like services to be performed during her declining years, to transfer by deed or will the title to her home in Omaha to plaintiff. The making of this latter contract is shown by the testimony of disinterested witnesses and the execution of a will conforming to its terms. The will was executed in 1917 and devised to plaintiff the home or house and lot described in the oral contract. Referring to plaintiff by name the devise concludes: "I make this devise in lieu of any compensation for services rendered by her during my declining years." The record contains a positively identified carbon copy of the will. It was drawn by an attorney who had a responsible position with a trust company. He had been called to the home of testatrix by her and drew the will according to her directions. He was a witness to it. He was also a witness at the trial and his testimony shows the making of both the contract and the will. The testimony of another disinterested witness to the will disclosed the same facts. Each testified to seeing the will signed by testatrix. Others, also disinterested, testified to facts tending to show that testatrix entered into and recognized the existence of the oral contract in controversy and intended to perform it. There is little proof of a different import and nothing to overthrow the evidence adduced by plaintiff to establish the oral contract. In the long line of Nebraska decisions holding that an oral contract of this nature was legally established by parol, it is doubtful if there is one supported by more direct or convincing evidence on the affirmative of the issue than the

present case. The finding herein is that the oral contract was made as pleaded.

Did plaintiff render services amounting to performance on her part? Witnesses who frequently saw her at work testified to facts showing that she complied with the terms of her agreement, and that her services were acknowledged and accepted by Augusta Boyden. The services extended over a period from 1912 to 1921. The proofs, however, indicate that plaintiff was not on duty during the final two weeks, after Augusta Boyden had been taken to a hospital, the explanation of this being that plaintiff was unable to continue her services there during that time. Defendants argue, however, that plaintiff did not make a case because she failed to prove any request for services, though the petition contained the allegation that she agreed to render such services "as might be requested" by Augusta Boyden. The services were performed and accepted during a long period of time. Under the circumstances disclosed, the varying nature and frequency of plaintiff's duties at different times, when performed and accepted, necessarily implied requests therefor. On the issue of performance on her part, the finding on appeal is in her favor.

Did Augusta Boyden violate her oral contract while receiving the consideration for it? It is conclusively shown that sometime before her death she sold the lot to an innocent purchaser and thus destroyed her means of performance. The will devising the lot to plaintiff was destroyed and a former will ignoring her was probated. She never received payment for her services. A breach of the oral contract to transfer the lot to her by deed or will was therefore fully established.

Is plaintiff entitled to relief in equity? Defendants argue that she had an adequate remedy at law in the form of an action against the executor to recover compensation for services performed or damages for breach of contract, if she had any cause of action, and that therefore the suit in equity was not maintainable. Plaintiff, upon complete performance of her duties, was entitled to the lot. Assum-

ing that to be the measure of her compensation, she was entitled to the value of the lot upon breach of the contract. The purchase price was $2,250. The purchaser paid $500 in cash and gave a note for $1,750. The note and a number of partial payments thereon are in the hands of the executor. There is more to plaintiff's case than a mere breach of the oral contract and the recovery of a judgment for the reasonable value of the services actually rendered. The contracting parties agreed in advance that the lot was the measure of compensation. On that basis plaintiff was not obliged to keep an account of her services and the value thereof. Duties of a peculiar nature at odd times during a series of years were required. Sometimes she necessarily left her own work to attend Augusta Boyden. In an action at law technical proof of each item and of the reasonable value thereof, even at the time, would be burdensome. After the lapse of years, in absence of an account, it would be extremely difficult, if not impossible. Under such circumstances the agreed compensation, when not illegal or unreasonable or unconscionable, may sometimes be considered the basis of compensation, just as liquidated damages for breach of contract are sometimes upheld. In equity the proceeds of the sale belonged to plaintiff. The sale of the lot and the failure to transfer it by deed or will to plaintiff amounted to a fraud. The executor is a trustee and as such is accountable to those entitled to a distributive share of the estate. In his hands plaintiff is entitled to follow the proceeds of the wrongful sale and to impound the available trust funds for the payment of her claim. In an action to recover damages for breach of contract, a court of equity may entertain jurisdiction, where, in addition, equitable considerations, such as fraud or the distribution of trust funds, are essential to adequate relief. Damages for breach of contract, where the title to realty is not involved, may also be allowed in the county court as a claim against the estate of a deceased person. The jurisdiction of the district and the county courts is concurrent in such cases. The sources of dual power have been explained in former cases

and further elucidation seems unnecessary. *McGlave v. Fitzgerald,* 67 Neb. 417; *Lacey v. Zeigler,* 98 Neb. 380.

In the present instance plaintiff first filed in the county court a petition for her agreed compensation, the value of the lot, and prayed for an allowance therefor as a claim against the estate of Augusta Boyden, deceased. The petition stated that the lot had been sold to a purchaser in good faith. Issues relating to specific performance and title were therefore eliminated. It thus appeared that the claim was one within the jurisdiction of the county court in the settlement of the Boyden estate. The county court disallowed the claim and plaintiff appealed to the district court, where a demurrer to the petition was sustained and the proceeding at law dismissed. Afterward the equity suit now under consideration was instituted in the district court. The records in both cases, each disclosing a nonsuit, were presented to the supreme court at the same time for review. The technical objections to jursidiction in each case and the merits of the suit in equity are therefore before the supreme court at the same time. Anomalies of this kind should be avoided. Where a plaintiff may resort to one of two forums having concurrent jurisdiction, a definite theory should be deliberately adopted in advance. The remedy should generally be pursued in a consistent course in one action to the end of the litigation. Where the method of obtaining redress is doubtful, pleading in the double aspect of seeking relief by one remedy if another should fail is sometimes sanctioned to settle litigable controversies in a single action. Defendants should not be harrassed and the courts burdened unnecessarily by two proceedings to recover the amount due on a claim consisting of a single item. Defendants insist that the claim of plaintiff in the proceeding at law was disallowed and that consequently it cannot be relitigated in the court of equity. To so rule would defeat a just claim in both courts. There was no trial on the merits of the case in the county court nor on the appeal therefrom to the district court. The law case was dismissed on demurrer to the petition, but the dismissal

is reviewable on the appeal to the supreme court and did not terminate the litigation. For reasons already stated the county court had jurisdiction. With the jurisdiction of the county court thus determined the petition therein stated a cause of action which was erroneously dismissed by the county and district courts. With the records of both cases now under consideration, including the pleadings and the evidence in the equity suit, a final decision on the merits of the irregular proceedings is possible. The finding is that plaintiff in the equity suit is entitled to a judgment against the executor of the estate of Augusta Boyden, deceased, for $2,250 and that available funds in his hands as executor should be subjected to the payment thereof in preference to bequests in the will. The judgment of the district court, when rendered, should be certified to the county court as a claim against the estate according to the course pursued in *Lacey v. Zeigler*, 98 Neb. 380. For that purpose the judgment from which the appeal herein was taken is reversed and the cause remanded for further proceedings.

REVERSED.

Note—See Measure of Damages, 31 A. L. R. 129; 41 L. R. A. n. s. 246-Courts, 15 C. J. 1131 n. 31-Specific Performance, 36 Cyc. 736 n. 52-Wills, 40 Cyc. 1070 n. 19, 1071 n. 21, 1073 n. 38, 39, 52.

KING OF TRAILS BRIDGE COMPANY ET AL., APPELLANTS, V. PLATTSMOUTH AUTO & WAGON BRIDGE COMPANY, APPELLEE.

FILED JULY 7, 1926. No. 25141.

1. **Bridges: TOLLS.** When the district court of the proper county has prescribed the maximum toll bridge rate, under section 492, Comp. St. 1922, which a bridge company may demand, or receive, from a patron, it is not unlawful for such company to demand, or to receive, a less rate from such patron than the maximum toll bridge rate prescribed by the district court, such rate being uniform as to class of patrons.

2. **Statutes:** CONSTRUCTION. The legislative intent is the cardinal rule in the construction of statutes.
3. **Affirmance.** Under the record before us, the judgment of the district court is for affirmance.

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

Norris Brown, Brogan, Ellick & Raymond, W. A. Robertson, W. G. Kieck and *H. A. Collins,* for appellants.

Paul Jessen and *A. L. Tidd, contra.*

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

DEAN, J.

King of Trails Bridge Company, plaintiff, and Plattsmouth Auto & Wagon Bridge Company, defendants, are Nebraska corporations, with their respective principal places of business at Plattsmouth, in Cass county. Both corporations erected, maintain and operate separate toll bridges over the Platte river from Plattsmouth to points in Sarpy county. The bridges are about a quarter of a mile apart and are approached by the same highways in both counties. In respect of the rates of toll that may be charged by a Nebraska toll bridge company the statute provides:

"The company, previous to receiving any tolls upon said bridge, shall set up and keep in a conspicuous place a board on said bridge, on which shall be written, painted, or printed, in a plain and legible manner, the rates of toll, which rates of toll shall have been prescribed by the district court of the proper county; and if any company shall demand or receive any greater rates of toll than the rate prescribed by said court, they shall be subject to a fine of ten dollars for each offense." Comp. St. 1922, sec. 492.

The defendant company complied with the above statutory provision by the erection of a board, conspicuously placed, whereon the rates of toll were plainly inscribed which, under the act, were theretofore prescribed by the

district court for Cass county. It is proper to note that the court prescribed the same rates of toll for both plaintiff and defendant.

This suit arose out of substantially the following facts: King of Trails Bridge Company sought to enjoin the defendant bridge company from charging lower toll rates than the rates prescribed by the district court. Cass and Sarpy counties joined in a petition of intervention wherein the counties also prayed for an injunction against the defendant company on the same grounds and they prayed for the same relief.

For convenience the plaintiff and the interveners, their prayers for relief being substantially the same, will be hereinafter referred to as plaintiff.

Plaintiff pleaded that the defendant charged a lower schedule of rates on three different classes of toll bridge patrons, out of a total of 21 toll bridge classes, than that prescribed by the district court, and that defendant published such lowered schedule of rates in newspapers in Cass and Sarpy counties and elsewhere in Nebraska. The contention is that such lowered rates were adopted to "stifle competition" and that such lowered rates are without lawful authority. The plea is that the defendant company should be compelled to charge the higher rates as prescribed by the district court.

The defendant company demurred to plaintiff's petition and to the joint petition of the intervening counties. The demurrers were sustained. Both plaintiff and the intervening counties refused to plead further and, as the decree recites, the petitions "are hereby dismissed for want of equity, and a temporary injunction preventing the defendant from lowering the rates of toll * * * is hereby denied and the restraining order heretofore issued in this cause is vacated." King of Trails Bridge Company and the interveners appealed.

Plaintiff's counsel argue: "If the bridge company has the right to alter its rates of toll as prescribed by the district court, then the bridge company would have a right

to discriminate in the collection of its tolls, charging one person one rate and a different person another rate, which clearly would be unreasonable and unjust and necessitate the exercise of a sovereign prerogative. No such proposition is contemplated by the statute." The answer is that discrimination has not been charged in any of the pleadings before us. The question of discrimination in the collection of tolls, that is to say, "charging one person one rate and a different person another rate," as plaintiff argues, has no place in this suit. It is of course competent for the legislature to amend the act to meet the hypothetical proposition so advanced if so minded. The sole complaint of plaintiff is based on the reduction of the charges on the three classes of toll bridge patrons out of a total of 21 classes, as above noted.

Plaintiff's counsel pleaded that the close proximity of the respective toll bridges is such that, if defendant's lowered toll rates are not restored to the maximum rate, as prescribed by the court, the traffic will be diverted to defendant's bridge and the plaintiff bridge company "will not receive returns to offset a fair rate of interest figured upon its investment or to provide funds for keeping said bridge in repair; and, by reason thereof, the net cost will be increased to a figure which will prevent the state of Nebraska, and the counties of Cass and Sarpy, from taking over said bridge under the resolution and condition upon which said bridge was constructed." Counsel continues: "The question involved rests upon the construction of * * * sections 486 and 492 of the Compiled Statutes of Nebraska, 1922." Section 492, above cited, has been hereinbefore incorporated in this opinion.

Section 486, Comp. St. 1922, so far as applicable here, follows: "Whenever any number of persons, not less than five, associate themselves together for the purpose of constructing a bridge over any of the streams of water in this state, they shall (when incorporated) * * * be deemed a body corporate * * * and be subject to all restrictions hereafter provided."

It is to be borne in mind that section 492, Comp. St. 1922, above cited, places no restriction upon toll bridge companies, in respect of rates, other than that they shall keep their tolls within the maximum prescribed by the district court. And it is obvious that this provision was made, in the interest of the general public, to prevent oppression and extortion. That a minimum rate was not imposed in the act was doubtless a legislative recognition of the unwritten law of competition which, ordinarily, favors the public at large. Anyhow, in view of the facts and the law, we are, of course, powerless to read a minimum rate into the act. Clearly the legislature is satisfied with the law as it now is, because, as pointed out by plaintiff's counsel, the act has been on the books for 60 years and from the date of its adoption, in 1866, until the present hour it has stood unchanged and unamended. It may here be added, too, that this is the first time the question has been presented to this court.

Plaintiff's counsel argue that a grantee, in cases of this class, takes no right by implication, and that he is bound by all the conditions prescribed by the grant. Very true. And the statute is the grant. Is any condition expressly prescribed by the legislative grant before us, in respect of toll rates, other than that the defendant toll bridge company shall not demand, nor receive, any greater rate of toll than the rates prescribed by the district court under the act? Clearly no other condition is imposed and none other is pleaded by any of the parties to this suit. It has been said that a cause of action cannot be based upon the fact that a person solicited and obtained the business of a competitor where such solicitation is conducted in a lawful manner and for a lawful purpose. *Citizens Light, H. & P. Co. v. Montgomery Light & W. P. Co.*, 171 Fed. 553. It is common knowledge that in the marts of trade and commerce, and among public service corporations generally, an agreement to impose oppressive prices, or charges, will not be upheld by courts having jurisdiction to act in the premises. It is well known that such agreements are often, by statute, made illegal and the perpetrators are punishable by fine or

imprisonment. But the courts will not, ordinarily, disturb lawful competition in the field of legitimate business pursuits.

In *Patterson v. Wollman,* 5 N. Dak. 608, it is held that, where the state itself does not conduct its own toll bridge traffic, all questions having to do with the terms on which the state shall grant special privileges to others in respect of toll bridge rates "and all other questions connected with the subject are absolutely within the control of the legislature." *Adams v. City Council of Fort Gaines,* 80 Ga. 85; *Saunders v. Hathaway,* 25 N. Car. 402. "In some instances statutes authorizing toll bridges have specifically exempted from the payment of tolls persons engaged in certain employments or pursuits, or citizens of a certain county; and as the purpose of the law in fixing the rates of toll is to prevent extortion, it follows that, unless forbidden by charter or statute, the company may, by vote or contract, exempt certain parties from toll, or commute or compound the toll, or levy what they choose from each person, so long as they keep within the prescribed maximum." 9 C. J. 447, sec. 34. It has been said that the principle is well established that the legislature has almost absolute power with respect to the erection and regulation of toll bridges and that the authority of the legislature in this respect is justified on the ground that it promotes the public interest. 4 R. C. L. 204, sec. 12.

Had the legislature intended that the toll bridge rates prescribed by it under the act in question should be absolute and that there should be no downward departure therefrom by a toll bridge company, it is clear that it would have said so in apt language. But it did not indicate any intention other than that expressed by such plain and unambiguous language that it is not susceptible of strained construction. We think that, under the weight of authority, we are bound by the plain wording of the statute. It seems to us that it means just what it says. The statutory penalty being confined, as it is, to an unauthorized raise in the toll bridge rates, we do not think the matter complained of in the present case is subject to judicial interference. It seems

to us that if a change in the act is desired, which came into being while Nebraska was yet a territory, application to this end should be made to the legislature. We conclude that when the district court of the proper county has prescribed the maximum toll bridge rate, under section 492, Comp. St. 1922, which a bridge company may demand, or receive, from a patron, it is not unlawful for such company to demand, or to receive, a lower rate from such patron than the maximum toll bridge rate prescribed by the district court, such rate being uniform as to class of patrons.

The weight of authority seems to support defendant's argument. We think the intent of the legislature is clear, and to interpret its intent is the cardinal rule in the construction of statutes. Reversible error has not been pointed out.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. CLARENCE A. DAVIS, ATTORNEY GENERAL, V. AMERICAN STATE BANK:
LANCASTER COUNTY, CLAIMANT, APPELLEE: K. C. KNUDSON, RECEIVER, APPELLANT.

FILED JULY 7, 1926. No. 24248.

1. Taxation: ASSESSMENT: CORRECTION OF RETURN. Where an officer of a bank, pursuant to section 5887, Comp. St. 1922, makes a return to the assessor of the value of the capital stock of the bank and the assessed value of real estate, owned by such bank, which is deducted from the capital stock, and a tax is levied upon the assessment based upon the return, and where an action is brought for the enforcement of the tax, it is not competent to show, as a defense thereto, that the assessed value of the real estate owned by the bank was in excess of the amount returned by the officer of the bank. In such case, there is no relief for the mistake in the return, except in an application to the board of equalization, at a proper time.
2. Evidence examined, and *held* to sustain the judgment.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

C. M. Skiles, Claude S. Wilson and *Albert S. Johnston,* for appellant.

Charles E. Matson, Max G. Towle and *Farley Young, contra.*

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

DAY, J.

This is an appeal by the receiver of the American State Bank of Lincoln from a judgment allowing a claim in favor of the county of Lancaster against the bank for taxes, for the year 1921 and ordering the receiver to pay the same out of the assets of the bank in his possession, and, if the assets be insufficient for that purpose, that the deficiency be paid out of the guaranty fund. There is no dispute in the evidence.

On July 1, 1921, in a proper proceeding brought by the attorney general, a receiver was duly appointed to take charge and wind up the affairs of the American State Bank. On April 1, 1921, the American State Bank, through its proper officers, made a return of its property to the assessor of the county of Lancaster for assessment purposes. The return was made out on the form of schedule used by banks for this purpose and was properly verified. The schedule disclosed that the capital stock of the bank was $100,000; that there was a surplus of $10,000 and a deficiency of $10,338.22, leaving a net value of the stock, according to the schedule, of $99,661.78. The return also showed real estate assessed on a fair cash basis, $20,000, which deducted from $99,661.78 would leave a taxing value of $79,661.78.

The assessor in arriving at the value of the stock added to the capital stock the amount of the deficit, instead of the amount of the surplus, as shown by the return, and subtracted therefrom $20,000, claimed by the bank as the assessed value of the real estate, leaving a taxable value of $90,338.22. He should have added the $10,000 surplus to the capital stock and deducted from this amount the deficit

and the value of the real estate, leaving a taxable value of $79,661.78. The assessor's value of the stock returned to the board of equalization was $90,350. The effect of this error was to increase the amount of the assessment by approximately $10,000. The bank had no notice of this error and the consequent increase. Upon the valuation returned by the assessor the county board levied a tax amounting to $1,849.19.

In April, 1923, the county of Lancaster filed its claim in the receivership case for the taxes of 1921, alleging there was due the county $1,849.19 with interest, aggregating $2,108.05, and praying that it be allowed as a preferred claim and that it be paid, if necessary, out of the guaranty fund. The trial court found that on account of the error made by the assessor, as above stated, the amount assessed against the bank should have been $1,630.85, instead of $1,849.19 found by the board, and entered judgment in favor of the county for that amount with interest at 10 per cent. from December 1, 1921, aggregating $2,045.37, and ordered the receiver to pay the amount from the assets of the bank in his possession and, if the assets be insufficient for that purpose, that the deficiency be paid out of the guaranty fund.

It is first contended by the receiver that the assessment was invalid, because by an error in computation, on the part of the assessor, the value of the property, as returned by the bank for assessment purposes, was increased about $10,000 without notice to the bank. It appears, however, that the court in its judgment considered the error on the part of the assessor and reduced the amount of the claim so that the amount allowed was based on the return as made by the bank. With the correction of the error, the objection urged seems to be without merit.

It is next urged by the receiver that the assessment is invalid because the assessor failed to deduct from the returned value of the capital stock of the bank the assessed value of the real estate. Section 5887, Comp. St. 1922, which was in force at the time of the assessment, among

other things provides in substance that certain officers in banks shall, on April 1 of each year, make out and deliver to the assessor a return under oath, showing the number of shares comprising the capital stock of the bank, the name and residence of the stockholders, and the value of the shares on April 1, and where the bank has real estate, which is separately assessed, the value thereof shall be deducted from the capital stock.

It will be noted that in the return made by the officer of the bank the assessed value of the bank's real estate was listed at $20,000, which the assessor assumed to be correct and deducted that sum from the valuation of the capital stock. It now transpires that the assessed value of the real estate owned by the bank was $72,000. It is quite apparent, therefore, that if this latter sum had been deducted from the value of the capital stock the tax against the bank would have been materially reduced. How this discrepancy occurred is not explained. As before stated, with the exception of the error in computation to which reference has been made, the assessor assessed the value of the bank as returned by the bank. No complaint or objection was made by any one to the assessor or the board of equalization that the return as made by the bank was not correct, and the tax was levied upon the valuation returned by the assessor. It is argued by the receiver that it was the duty of the assessor to ascertain the assessed value of the bank's real estate and deduct that amount from the value of the capital stock. We are of the view, however, that the assessor had the right to rely upon the return made by the bank if he saw fit to do so, and that he was not obliged to examine the record to verify the statements in the return. It might frequently happen that real estate owned by the bank would be situated in another county or state from where the return was made, and it would be impracticable, if not impossible, for the assessor to examine the records. On this phase of the case, we conclude that it was not necessarily a part of the assessor's duty to examine the records to determine whether the return as made was correct.

As we understand this phase of the case, it is an attempt, in the defense of the collection of a tax legally levied, to correct the judgment of the board of equalization on a matter which was never called to its attention. We are unable to see how the receiver, who stands in the shoes of the bank in this matter, can avail himself of the error or mistake made by the bank. The board of equalization sits for the purpose of correcting errors and equalizing taxes, but no one appeared to object or complain of the assessment. It is too late now to successfully raise the point that the tax assessed is too high. It has repeatedly been held that where the board of equalization has jurisdiction its action cannot be reviewed in a collateral action. *Hahn System v. Stroud*, 109 Neb. 181, and cases cited; *Western Union Telegraph Co. v. Douglas County*, 76 Neb. 666.

It is next urged by the receiver that the tax assessed was, in fact, a tax against the individual stockholders and in no event could the guaranty fund be held liable for its payment. Section 5887, Comp. St. 1922, above referred to, also provides in substance that the bank shall pay the tax assessed upon its capital stock and shall have a lien on the stock for the same. It is within the province of the legislature to adopt such method for the collection of the tax. The mere fact that a receiver was appointed did not supersede the statute or in any way relieve the bank from the obligation to pay the tax. Did the court err in ordering the receiver to pay the tax out of the guaranty fund? It appears that at the time the receiver was appointed the bank had on hand ample funds to pay the taxes. This fund was turned over to the receiver and should have been used by him in payment of the taxes. Instead of using this fund to pay taxes, it was used in partial discharge of the liability of the bank to its depositors. Section 8033, Comp. St. 1922, in force at the time, provides in substance that "federal, state, county and municipal taxes" shall have priority over all other claims. The record is not clear whether the receiver, at the time of the judgment, had in his hands assets of the bank sufficient to pay the judgment, independent of

the amount received from the guaranty fund. Assuming, however, that the receiver used the assets of the bank which should have been applied to the payment of the taxes to pay the depositors, it would seem that there would be no inequity in requiring the taxes to be paid out of the guaranty fund upon the theory of subrogation.

Considering the whole record, we are quite convinced that the judgment of the district court is fully sustained and should be and is

AFFIRMED.

GENEVIEVE GRAVES, APPELLEE, V. ROYAL PECK, APPELLANT.

FILED JULY 7, 1926. No. 24211.

1. **Husband and Wife.** Since the passage of the "married women's act" in this state, a married woman may sue in her own name for injuries to her person.
2. **Evidence** examined, and *held* to be sufficient to support a verdict for plaintiff.
3. **Assault and Battery:** DAMAGES. In an action for damages for a lascivious attack upon a woman 29 years of age, of ordinary refinement, resulting in the indecent exposure of her person, and of such force as to cause paralysis of her right leg and render her a cripple, a verdict for $14,900 is not, of itself, so excessive as to indicate passion and prejudice on the part of the jury.

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

J. E. Dorshimer and *J. H. Grosvenor*, for appellant.

F. E. Edgerton, contra.

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

REDICK, District Judge.

Action to recover $50,000 for indecent assault. The plaintiff is a married woman, 29, not living with her husband, having a daughter 11 or 12 years old, and at the time in question occupied the position of housekeeper in the home of the defendant, a widower, 79 years old, having a son,

married daughter and granddaughter. The petition alleges that on September 15, 1923, while plaintiff was in bed recovering from an illness, the defendant came to her room and made an extremely indecent assault and battery upon her person, the details of which we prefer to leave to the imagination of a prurient mind, which alone can do the subject justice. Plaintiff further alleges that the acts of defendant were without her consent and against the most vigorous defense of which she was capable at the time; that during the struggle and in an endeavor to force plaintiff to lie upon the bed, defendant seized her right leg with such force as to bruise and twist it, and strained it in such manner as to cause paralysis thereof; that as a result of such assault she has been rendered unable to perform her usual household duties and has become a helpless cripple.

Defendant answered the petition, admitting the employment and age of the plaintiff, that she was sick in bed and had been so confined for over two weeks, and denies each and every other allegation of the petition. The case was tried to a jury, which returned a verdict for the plaintiff for $14,900, upon which judgment was rendered and motion for new trial overruled and defendant appeals.

Defendant's first contention is that the plaintiff, being a married woman, is not entitled to sue for her injuries, but the only case cited is *City of Central City v. Engle*, 65 Neb. 885, which merely announces the well-established rule that a married woman, not the owner of a separate estate nor engaged in any business or service except those pertaining to her husband's household, is not entitled to recover damages for loss of earnings or diminished capacity to earn money as the result of her injury; but since the adoption of the married women's act in this state we have not heretofore met the claim of disability of a woman on account of coverture to sue in her own name for personal injuries.

It is next contended that the evidence is insufficient to support the verdict. It therefore became necessary for us to examine the evidence. We have done so with critical care and have concluded that this assignment is not well taken.

The evidence for the plaintiff as to the principal facts comes exclusively from the plaintiff and her young daughter and, of course, in the nature of things, must be scrutinized with great care. The defendant insists that the case is within the reasoning which required the evidence of the prosecutrix in a rape case to be corroborated, but we are not willing to go that far. However, the daughter's testimony, if believed, would seem to be sufficient corroboration, and taken together with the fact as appears from the great preponderance of the testimony that prior to the assault in question plaintiff had full normal use of her right leg, and that since such occurrence, beginning with its very date, it has been paralyzed, surely a question was presented for the jury's determination, with which we do not feel warranted in interfering. The testimony of the doctors differs somewhat as to whether plaintiff is suffering from "hystero" or organic paralysis, but all agree that either may be caused by the application of such force as was made use of by defendant.

Numerous errors in the rejection and receipt of evidence upon the trial and in the instructions of the court are urged, and we have examined them carefully, but find none justifying a reversal. Among others, complaint is made of the rejection by the court of the report of the doctors who examined plaintiff on its order. If this was error, it was without prejudice, as two of the doctors were called by the plaintiff, and so far as the record shows the other was available. It is proper, however, to refer to objections made to two of the instructions. No. 8 was upon the measure of damages, wherein the court said that the jury should take into consideration "the extent and location of her injuries, if any, her health and condition before she received her injuries, if any, complained of, as compared with her present condition in consequence of her injuries, if any, and how far it is calculated to disable her;" it being claimed that by this language the jury were permitted to allow damages for the weak and disabled condition of plaintiff before the assault. But we think it will hardly bear this construction,

and by the closing paragraph of the instruction the jury were told that they could not allow plaintiff anything "for medical expense, for nurse hire and loss of time, either past, present or future, for the reason that the evidence is not sufficient under the law to entitle plaintiff to recover therefor." In the same instruction the jury were told that they could allow damages only for injuries received "as the direct consequence of the assault and battery."

Complaint is also made that by instruction No. 13 the jury were told in advance of their retiring that, if they were unable to reach an agreement in six hours, after the expiration of that time ten of them might render a verdict; the point being that the court should not have so instructed until after the jury had deliberated six hours so that a record might be made of that fact. It appears, however, that the jury retired at 12:50 p. m. April 3 and returned their verdict at 6:15 p. m. of April 4, 1924, and the presumption is in favor of the regularity of the proceeding of the district court, that the jury deliberated six hours before returning the verdict by ten jurors. *Lovelace v. Boatsman*, 113 Neb. 145.

The last assignment of error, and one with which we have had the greatest difficulty, is that the verdict is excessive and appears to have been given under passion and prejudice. In view of the fact that the evil intent of the defendant, if he can be said to have had one, failed utterly of culmination, this argument would be of persuasive force were it not for the serious physical injury to the plaintiff, but the shame and humiliation suffered by such indignities as were forced upon the plaintiff, who is shown by the evidence to be a woman of considerable cultivation, are difficult of measurement in dollars and cents. And when to these are added the disability of paralysis of the leg, although the extremely poor condition of her health was such as to justify the trial court in rejecting the Carlisle Table of Expectancy, we are not convinced that the jury acted under the influence of passion and prejudice or that the verdict is excessive. It is urged that there is no mathematical

demonstration by which the amount of the verdict can be deduced from the evidence, but we are of opinion that such exactitude is not to be expected in this class of cases.

It follows that the judgment must be, and it is,

AFFIRMED.

AMERICAN LIFE INSURANCE COMPANY, APPELLANT, V. BENNETT LIVE STOCK COMPANY ET AL., APPELLEES: HAMILTON NATIONAL BANK OF DENVER ET AL., APPELLANTS: BETSY JANE WOLCOTT, INTERVENER, APPELLEE.

FILED JULY 14, 1926. No. 24035.

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

Bardwell, Hecox, McComb & Strong, for American Life Ins. Co.

Brome & Ramsey and *Glenn N. Venrick,* for Hamilton Nat. Bank et al.

Stout, Rose, Wells & Martin, Roland V. Rodman, Gaines, Van Orsdel & Gaines and *B. E. Hendricks,* for Bennett Live Stock Co. et al.

Abbott, Rohn & Dunlap, for Betsy Jane Wolcott.

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

PER CURIAM.

This is an action in equity brought by the American Life Insurance Company to foreclose certain deeds of trust securing bonds of which it was the owner. Certain parties owning bonds secured by the same deeds of trust, by answers and cross-petition, and petitions in intervention, join with it in seeking similar relief. The defendant Peters Trust Company takes issue with the insurance company and the parties associated with it, and by cross-petition seeks the

foreclosure of certain mortgages securing notes owned by it, and the establishment of these mortgages as first liens on the premises. Certain defendants somewhat similarly situated join with the Peters Trust Company to establish a state of facts upon which the latter relies to sustain its cross-petition. On these issues judgment was entered in favor of the Peters Trust Company and against the contentions of the plaintiff. From this judgment the plaintiffs and others appeal.

The facts, fairly established by the evidence, out of which these controversies originate, are as follows: The Bennett Live Stock Company owned 6,000 acres of land in Kimball county, Nebraska. It had been by them mortgaged to the Hoffman brothers to secure a loan of $50,000 of which there still remains unpaid, at the time of the transaction out of which this litigation grew, more than $30,000. The Bennett Live Stock Company had also executed a deed of trust to Gurney and Knapp as trustees to secure an issue of $100,000 worth of bonds. Before the bonds in litigation in this proceeding were sold, Gurney and Knapp had resigned as trustees and a supplementary deed of trust had been executed by the Bennett Live Stock Company to the Fidelity Trust Company, by the terms of which the latter corporation was created sole trustee and vested with the powers formerly entrusted to Gurney and Knapp. In addition thereto, this supplementary deed of trust modified certain provisions of the original deed of trust. The evidence establishes the fact that both the deed of trust and supplementary deed of trust were recorded prior to the negotiations of the bonds which are in litigation herein. After these deeds of trust were recorded, the various parties to this litigation obtained bonds, taking the same with constructive notice, at least, of the provisions of the trust as set forth in the instruments above named, then of record in Kimball county, Nebraska.

Thereafter, the Bennett Live Stock Company conveyed their interest and title in the 6,000 acres of land, subject to certain mortgages, "to the Lodge Pole Land Company." The Lodge Pole Land Company negotiated a loan of $6,000

on said 6,000 acres of land from the Peters Trust Company. The proceeds of this loan were paid by the Peters Trust Company under authorization of the Lodge Pole Land Company to the Fidelity Trust Company, the sole trustee for the plaintiff bondholders, to effect a redemption or payment of all outstanding bonds.

It is claimed by the Peters Trust Company that paragraphs 19 and 20 of the original trust deed, as modified by the supplementary deed of trust, authorize such payment to be made in redemption of the lands from the lien of the deed of trust and supplementary deed of trust. There is no question but what the money was actually received by the Fidelity Trust Company which was sole trustee for the bondholders. Over $30,000 of the amount was properly applied by it in discharge of the amount due the Hoffman Brothers mortgage. The remaining amount received by the trust, amply sufficient to have complied with the terms of the trust instruments in effecting a redemption, was embezzled or misappropriated by the trustees. However, the Fidelity Trust Company duly executed a release of deeds of trust which was placed on record.

The plaintiffs and parties associated with them further their proceeding upon the theory that, notwithstanding the payment of the money to the trustee, the same was ineffective to accomplish a redemption from the lien of the trust instruments for two reasons: (1) The terms of the supplementary trust deed, which were ineffective to modify the original trust agreement and ineffective to vest the Fidelity Trust Company with the power of trustees. (2) If this contention be resolved against them, the Peters Trust Company failed to comply with certain technical requirements of article 19 of the trust deed providing for the giving of notice after payment of the amount of redemption to the trustee, and that section 20 has no application to the facts in this case. It is thought that the rule is well established that a deed of trust is not in force as to bonds secured by it until such bonds have been negotiated by or in behalf of the makers thereof, and that the makers

of bonds undelivered and not negotiated and the trustee are the sole parties in interest in the transaction until such negotiations, and as such are competent by agreement to modify the terms and conditions of the trust.

That as to bondholders who become such, after such modification has been made and fully recorded as provided by law, they are chargeable with notice of the facts disclosed by the proper public records, and that the modification is therefore binding upon them. The conclusion would therefore be adverse to the contention of the plaintiffs as to the validity of the appointment of the Fidelity Trust Company as sole trustee.

The district court for Kimball county in the trial of this case in effect held that the Peters Trust Company had substantially complied with the terms set forth in the trust instruments providing for redemption of bonds prior to maturity. We feel that this position is fairly sustained by the evidence. If this conclusion be granted, the determination of the further matters involved in this action by the lower court are correct.

In view of the nature of the facts in the record, and that the determination of the trial court is manifestly correct, the judgment of the district court is

AFFIRMED.

SAMUEL M. LITTLE ET AL., APPELLANTS, V. ANNA F. CURSON, APPELLEE.

FILED JULY 14, 1926. No. 23834.

1. **Deeds**: CANCELATION: MENTAL CAPACITY: BURDEN OF PROOF. "Where it is sought to cancel a deed for the want of mental capacity of the grantor to make the instrument, the burden of proof is on the one who alleges the mental incapacity." *Hitchcock v. Guilliams*, *ante*, p. 522.
2. ———: ———: UNDUE INFLUENCE. "The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor." *Clark v. Holmes*, 109 Neb. 213.
3. ———: ———: QUANTUM OF EVIDENCE. The evidence of the

attorney who prepared the deed, of the notary who took the acknowledgment, and of the witnesses to the execution of the deed, alleged to have been obtained by undue influence exerted by the grantee, that the deed was executed by the grantor understandingly and voluntarily, cannot ordinarily be overcome by evidence relating to different occasions.

4. ———: VOLUNTARY CONVEYANCE: PARENT AND CHILD: PRESUMPTION. The rule is well established in this jurisdiction, in a case of gift and voluntary conveyance from a parent to a child, no presumption of fraud or undue influence arises as between the parties thereto from the mere fact of the relation.

5. **Gifts**: VALIDITY: UNDUE INFLUENCE: PARENT AND CHILD. "The affection, confidence and gratitude of a parent to a child which inspires the gift is a natural and lawful influence, and will not render it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor." *Hacker v. Hoover*, 89 Neb. 317.

6. **Evidence** examined, and *held* that the findings and decree of the district court are supported by the evidence.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

Clement L. Shinn and *Burkett, Wilson, Brown & Wilson*, for appellants.

Hall, Cline & Williams, contra.

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

EBERLY, J.

This suit was originally brought in the district court for Lancaster county, Nebraska, to cancel conveyances of Lincoln real property made by Mary D. Little in her lifetime to the defendant, Anna F. Curson, her daughter, on the ground that these conveyances had been procured by fraud and undue influence, the amended petition alleging that the grantor, at the time of the execution of the instruments in suit, "was in poor health and in a weakened and debilitated condition of mind and body, and was wholly incompetent physically and mentally to transact business or to know and

understand her business affairs or the nature, amount and value of her property, or to know and comprehend the obligations and duties she owed to her offspring, and was unable to read and understand the terms of said pretended and purported deeds of conveyance, and unable to comprehend and understand the meaning and significance thereof." On issues joined in the lower court, there was a general finding for the defendant, judgment accordingly, and also a judgment quieting the title of the defendant to the interests in the Lincoln property conveyed to her by the deeds in controversy. Plaintiffs now appeal from this decree.

The following facts furnish the setting of this litigation: Samuel W. Little died testate in California on January 30, 1911, and his wife, Mary D. Little, departed this life in California on February 4, 1920. To them were born five children, one son Samuel M., and four daughters, Anna F., Lula M., Mary, and Emma. The daughters, Mary and Emma, died prior to the institution of this litigation. The sole heir of the latter died without issue prior to hearing of this case in the court below. The plaintiffs Mary L. Knapp, Ruby Harris, Victor Thompson, Jane R. Spencer, Ada F. Dolson, and Emma J. Held, are the children of the deceased daughter Mary and claim in her right. The daughter of Lula M. Scott is not a party to this litigation. The defendant, Anna F. Curson, was the eldest daughter of Samuel W. and Mary D. Little. She was married to Elijah Curson in Clarksburg, West Virginia, in 1867. Sometime after her marriage she, with her husband, removed from Clarksburg to Effingham, Illinois. To that place her father and mother and her brothers and sisters followed. In 1871 the Cursons moved to Lincoln, Nebraska, and in turn were followed again by the Little family. Ten years later the Cursons removed their family home to Los Angeles, California, and in 1884 were joined by Samuel W. and Mary D. Little. There these parents of Mrs. Curson continuously resided until the time of their deaths in 1911 and 1920, respectively. For 12 to 14 years prior to 1902 the Cursons lived in Los

Angeles in a home owned by Samuel W. Little. Mrs. Curson keeping the house, and her father and mother paying for their board. Later the Cursons moved to San Francisco, where Mr. Curson died in April, 1902. After his death his widow, Anna F. Curson, returned to Los Angeles and thereafter lived in the Little home. She had charge of the household in which her parents lived. After the death of Samuel W. Little on January 30, 1911, Anna F. Curson continued in charge of the home where her mother lived until the latter's death February 4, 1920. During this time she managed the household and had charge of the servants and had the care of her mother, who was born September 11, 1824. Samuel W. Little was, at the time of his death in 1911, the owner of property in California inventoried at $433,929.73, of which it appears $408,460 was distributed under the terms of the order settling final account and decree of distribution entered July 8, 1914, in the probate court of California having jurisdiction of his estate. He also owned what is known in the record as the Little building and the Cerf building, both situated in Lincoln, Nebraska, the value of which, as stipulated by and between the parties in this case, was $325,000.

Under the circumstances that developed and existed after the death of Samuel W. Little, the provisions of his will, together with the ultimate election on the part of Mary D. Little to receive her statutory interest in the Nebraska real estate in fee simple, and her "community property" rights in California, the results were as follows: Anna F. Curson received $8,365, the proceeds of a note received from her father in his lifetime; Lula M. Scott, daughter, and Delphina Little, daughter-in-law, each received a legacy of $500 per annum to continue for the period of 30 years; Mary D. Little, widow, received five-twelfths of all property belonging to the estate situated in California, except the sum of $24,544, one-third of Nebraska real estate in fee simple, and the sum of $6,000 annually out of trust estate; fourteen grandchildren named, each were to receive and are receiving $50 annually to continue for the period

of 30 years, unless sooner terminated under conditions of the will; $6,000 of the income of said estate was also equally divided between Samuel M. Little, son, and Mary M. Thompson, daughter, so long as Mary D. Little lived; seven-twelfths of the entire estate in California, plus $16,179.06, including an undivided two-thirds of the Lincoln properties, constitute the trust estate created under the will of Samuel W. Little and which, by its terms, the interest accruing thereon to be paid as above stated and the principal thereof to be distributed in three equal amounts payable in 10, 20, and 30 years after the death of Samuel W. Little, three-fourths thereof to Samuel M. Little and Mary M. Thompson, and one-fourth thereof to the charities named in the will.

The provisions of this will were unsatisfactory to all members of the family, and on June 25, 1912, Mary D. Little, Samuel M. Little, Mary M. Thompson, Lula M. Thompson (formerly known in the record as Lula M. Shaffner and later as Mrs. Scott), and Anna F. Curson instituted a contest based on the grounds that Samuel W. Little was incompetent at the time his will and codicils thereto purport to have been executed, and for the further reason that said will was not the will of Samuel W. Little, but was the result of undue influence exercised over him by William H. Avery. However, the contest was terminated in a compromise. The trust estate, composed of seven-twelfths of the California property and two-thirds of the Nebraska real estate, remained as provided for by the will. The six charities agreed to receive and were paid $49,500 in cash in lieu of all claims that they possessed under the terms of the will. The following sums were also paid pursuant to the compromise: Spencer & Thompson, attorneys' fees, $2,500; Lewis P. Ferguson, sole minor heir of Emma West, deceased daughter, $12,500; James A. Gibson, $10,000; Gage & Foley, attorneys' fees, $10,000 and costs. In accordance with the settlement it appears that these amounts, aggregating with costs the sum of $84,500, were wholly paid from Mary D. Little's share of the California

property, and that there remained of her share of the California property, after the payments had been made, approximately $20,000 to $25,000 in value in personal property, together with interests in certain real estate situated in California.

To recapitulate under the terms of the will as modified by Mary D. Little's election to receive her share of community property in California, and her widow's right in Nebraska, the following was the approximate distribution to be made prior to the acceptance of the compromise:

Anna F. Curson	$ 8,365	cash
Mary D. Little	160,000	California property
	108,000	Nebraska property
	6,000	cash per annum from income of trust estate
Trust estate	240,000	California property
	217,000	Nebraska property
Lula M. Scott	500	annuity per annum
Delphina Little	500	annuity per annum

Three-fourths of the trust estate to be divided equally between Samuel M. Little and Mary M. Thompson, provided, in event of death, their children should succeed to deceased parent's share; the remaining one-fourth to be distributed to six charities named; all annuities to be paid from income of trust estate.

Taking up the contention of the plaintiffs that Mary D. Little, at the time of the execution of the two deeds in controversy in this action, was wholly without the necessary mental capacity to understand and comprehend what she was then doing, it is to be observed that—

"Where it is sought to cancel a deed for the want of mental capacity of the grantor to make the instrument, the burden of proof is on the one who alleges the mental incapacity." *Brugman v. Brugman,* 93 Neb. 408; *Borgmann v. Borgmann,* 110 Neb. 318; *Hitchcock v. Guilliams, ante,* p. 522.

Judge Barnes, in writing the opinion in *Brugman v. Brugman, supra,* made use of the following language:

"It is not every weakness of mind arising from old age

or sickness, or other causes, that will avoid a deed. There must be a total want of reason or understanding. *Johnson v. Phifer,* 6 Neb. 401. Mere mental weakness will not authorize a court of equity to set aside an executed contract. *Mulloy v. Ingalls,* 4 Neb. 115; *Schley v. Horan,* 82 Neb. 704; *Mann v. Keene Guaranty Savings Bank,* 86 Fed. 51. In order to vacate a deed on the ground of mental incapacity of the grantor, it is necessary to show such a degree of mental weakness as renders the maker of the deed incapable of understanding and protecting his own interest."

See, also, *Johnson v. Millard,* 110 Neb. 830; *Sawyer v. White,* 122 Fed. 223; *Ludwig v. Bressler,* 253 Fed. 8. The evidence in the record, in the light of the foregoing authorities, does not sustain the contention of the plaintiffs on this branch of their case.

The contention, however, upon which plaintiffs chiefly rely is that the Nebraska deeds are the fruits of fraud and undue influence. We fail, however, to find in the record any support for the statement that positive misrepresentations of facts or concealments were made by or in behalf of the defendant herein. Even the cause of the exclusion by Samuel W. Little of the defendant from the beneficial provisions of his will was known to his wife, as appears from the positive testimony of at least two witnesses called by the plaintiffs themselves. With this knowledge in her possession, Mary D. Little in the fall of 1914 journeyed from California to Pennsylvania for the purpose of paying a visit. On her return home she stopped off at Lincoln, Nebraska, and on September 28, 1914, alone with a nephew, who was then in charge of her business affairs in Nebraska, she discussed the situation and advised him, not only of her disapproval of the terms of the will of her husband, but that she intended to transfer her interest in the Lincoln real estate to her daughter, Anna F. Curson. Her nephew, at her request, then arranged for a meeting with Frank M. Hall, a reputable attorney of Lincoln, Nebraska, an old friend of the Little family, and who was then engaged as attorney for the Little estate and who had formerly been

employed by Samuel W. Little during his residence in Lincoln. On the morrow Mary D. Little, accompanied by Anna F. Curson and her nephew, proceeded to the office of Mr. Hall, where the deed, dated September 29, 1914, was drawn under his direction, read, and carefully explained to Mrs. Little. She, evincing full and complete knowledge of its terms, executed and acknowledged it in the presence of disinterested witnesses in a manner provided by law. Of these facts all witnesses present were fully convinced and so testify. This deed contains the following recital:

"Whereas, the party of the second part is the daughter of said party of the first part and of Samuel W. Little, deceased, and said Samuel W. Little has provided fully for all of the children of said party of the first part and said Samuel W. Little, by certain trusts in his last will and testament, excepting the said Anna F. Curson, for whom he provided only by a small legacy; and whereas, the said party of the second part has been a loving daughter and has for many years comfortably and tenderly cared for said party of the first part, and has resided with her and said party of the second part still resides with and comfortably and tenderly cares for said party of the first part as a loving daughter, and [illegible] party of the second part has agreed to reside with an[illegible] said party of the first part for the remainder of her [illegible] as long as desired by said party of the first part, or as long as said party of the second part shall live, in case said first party shall survive said second party."

Consideration of what was said and done at this time, in the light of the surrounding circumstances, leads us to the conclusion that no one could seriously question the mental capacity or physical powers of Mary D. Little on the 29th day of September, 1914; that she was fully advised and understood the nature of the instrument she was signing, and that it was her free and voluntary act, and at the time she executed it she fully intended its legal effect; and that she was subject to no undue influence at the time and place of the execution of this deed, and that the recitals contained

in the deed executed stated the facts and were approved by her.

In this connection we have not overlooked the fact that a form of deed which had been prepared in the office of Mr. Foley in Los Angeles had been transmitted to Mr. Hall and was made use of in dictating the deed actually filed, and that Mrs. Curson was with her mother and her mother's nephew at the time this was done, and we have given due consideration to the evidence as to the previous relations of the parties in California. This conclusion, it is thought, is at least in part supported by the fact that, though the deed in question was duly recorded in the office of the register of deeds in Lancaster county, Nebraska, on September 30, 1914, and though the plaintiffs herein had actual knowledge thereof at least three years prior to their ancestor's death in 1920, none of them ever questioned its validity until after that event.

It is also true that there is an entire absence of any evidence in the record indicating in any manner that Mary D. Little at any time regretted this conveyance. But, on the contrary, the subsequent deed executed by her, dated April 24, 1917, conveying to Anna F. Curson all rights reserved in favor of the grantor by the terms of the deed, now under consideration, tends to sustain the contrary conclusion. Then, too, the fact that this gift in 1914 was made in conformity with the expressed intention of Mary D. Little made years before is strongly evidenciary of a disposition free from undue influence or incompetency. *Sawyer v. White, supra.*

It would also seem that the evidence of the attorney who prepared the deed, of the notary who took the acknowledgment, and of the witnesses to the execution of the deed, alleged, to have been obtained by undue influence exerted by the grantee, that the deed was executed by the grantor understandingly and voluntarily, cannot ordinarily be overcome by evidence relating to different occasions. *Massey v. Huntington,* 118 Ill. 80; *Turner v. Gambert,* 19 Idaho, 339; *Will of Ball,* 153 Wis. 27; *Boardman v. Lorentzen,* 155 Wis.

566; *Kelly v. Perrault*, 5 Idaho, 221; *Curtis v. Kirkpatrick*, 9 Idaho, 629.

So, too, the rule is well established in this jurisdiction in the case of gift or voluntary conveyance from parent to child, no presumption of fraud or undue influence arises, as between the parties thereto, from the mere fact of the relation. *Gibson v. Hammang*, 63 Neb. 349.

And it is also true that—"The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. The affection, confidence and gratitude of a parent to a child which inspires the gift is a natural and lawful influence, and will not render it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor." *Hacker v. Hoover*, 89 Neb. 317.

But if it be contended that we have unduly narrowed the scope of the controlling evidence, still it is thought we are attaining the same conclusion if we broaden the scope of our investigations and include the life story of all the actors in this transaction as revealed in the record before us, giving full force and effect to the relations which it is claimed have existed between this grantor and grantee for many years, and due consideration to the possibilities that the "undue influence" Anna F. Curson had acquired over her mother was a continuing one, asserted by her mere presence, effective though silent, forceful though unspoken. Does this situation call for the application of the doctrine announced in *Gibson v. Hammang, supra*, as follows: "But where a conveyance from a parent to one of several children by way of gift, *prima facie*, is not a just or reasonable disposition of the parent's property, and the age and physical conditions of the parent, the proportion of the property conveyed to the whole estate, and the circumstances surrounding the gift suggest fraud and undue influence, the transaction should be closely scrutinized, and the burden is upon the donee to overcome the presumption of fact arising from such circumstances." As we view the evidence the facts are not such as call for the application of this rule.

We do not find that the disposition of the property made by Mary D. Little by way of gifts, of which these deeds evidence one, is *prima facie* unjust or unreasonable. Nor does her age and physical condition, "the proportion of the property conveyed to the whole estate," and the circumstances surrounding the gift, suggest fraud or undue influence in the execution of these deeds.

It is to be remembered that a simple problem was not presented to Mrs. Mary D. Little in dividing the property owned and controlled by her in an equitable manner between her children, but she used and divided her property so as to correct the evils and injustice, incident to an unjust disposition of property made by the late husband in his last will and testament. Whatever the controlling factors which influenced each of the members of the Little family were, the record before us contains indisputable proof that all the members of the family, including plaintiffs herein, regarded the provisions of the will in question as unjust and all joined in endeavoring to overthrow its validity.

We fully realize that the estimates and appraisals contained in the record may not be absolute, but they afford approximations sufficiently accurate for the purpose at hand. There can be no question that Mary D. Little deemed that her daughters, Anna F. Curson and Lula M. Scott, had been unjustly dealt with by their father. Actuated by a desire to right the wrong, Mary D. Little transferred her home residence in California of the value of $8,500 to Anna F. Curson; also, out of her individual share of $268,000 she paid $84,500 the entire amount required to be paid by the terms of the compromise, of this sum $49,500 in cash is paid to the "charities," in satisfaction of all rights possessed by the terms of the will, which were to participate in the division of the trust estate to the extent of $112,000 of the corpus besides certain income provisions.

It seems fairly certain that Anna F. Curson received no special benefits from the arrangement made with the charities. Mary D. Little, also out of said sum of $84,500, satisfied the claim of a grandson who bases his rights upon

the right of her deceased daughter, Emma, and also satisfield all attorneys' fees and costs involved in the litigation.

Thereafter, in addition to the two deeds which were contested in this action, and which, together, convey a fee simple title to an undivided one-third interest in Lincoln, Nebraska, real estate, of the value of $108,000, to Anna F. Curson, Mary D. Little executed two conveyances to Lula M. Scott of property in California of the approximate valuation of $65,000.

Mary D. Little died in 1920. After her death, instead of the distributions intended by her husband, the distribution of the "Little fortune" had been, through her efforts, readjusted as follows: Heir of daughter, Emma, $10,000; Anna F. Curson, $124,000; Lula M. Scott, $65,000, $500 annuity for life; Delphina Little, $500 annuity for life; plaintiffs, three-fourths of $457,000, to be received in three equal payments, 1921, 1931, 1941, and also, excepting the amount of annuities mentioned, all profits accruing from trust estate payable to them annually; also benefits from the $114,000 paid them by Mary D. Little, which inures to the trust estate through the settlement made by Mary D. Little.

In view of the entire history of the "Little fortune," we do not find that *prima facie* the conveyances questioned in this litigation are either unjust or unreasonable, nor are the proportions of the property conveyed to the whole estate, nor the circumstances that surround the gift, suggestive of fraud or undue influence. The defendant devoted 23 years of her life to the service of her mother. There may be some disagreement in the opinions of witnesses as to the character, or rather the quality, of the services rendered, but there can be no question but that these services were preeminently satisfactory to the mother. Her last years were spent wholly relieved from cares which otherwise would have been extremely burdensome.

Therefore, giving due consideration to all evidence, and determining the matter *de novo,* we arrive at the conclusion in agreement with the determination of the trial court.

The judgment of the district court is

AFFIRMED.

OLIVE B. HAYS, APPELLEE, V. CARRIE S. CHRISTIANSEN ET AL., APPELLANTS.

FILED JULY 14, 1926. No. 24708.

1. **Appeal:** APPEAL FROM ORDER OF CONFIRMATION. Where a final decree is rendered foreclosing a mortgage, stay taken, sale had and confirmed, and appeal taken from the order of confirmation, this court has no power to set aside the decree.

2. ———: ———: MANDATE: VALIDITY. In such case, where the order of the court was merely to set aside the order of confirmation and order an accounting, a mandate issued thereon reversing the decree is void *pro tanto.*

3. **Pleading:** FILING AMENDED PETITION AFTER DECREE. The filing of an amended petition after entry of final decree not appealed from will not be considered an abandonment of the decree upon an order of the appellate court remanding the case simply for an accounting.

4. **Mortgages:** MORTGAGEE IN POSSESSION: ACCOUNTING. A mortgagee in possession is chargeable with the reasonable rental value of the premises plus any amounts actually received in excess of such value, and should be credited with the reasonable cost of necessary repairs and improvements, and with amounts paid for insurance and taxes.

5. **Appeal:** LAW OF THE CASE. Where, upon a second hearing, additional evidence is produced upon a question of fact involved in an appeal, the holding of the appellate court as to such fact does not become the law of the case.

6. **Estoppel:** RENTAL VALUE. The refusal by mortgagee in possession of offers, upon certain conditions, of $300 a month for the premises did not, under the circumstances of this case, estop her from claiming that the reasonable rental value was less than that sum.

7. **Evidence** examined, and reasonable rental value of the premises fixed at $150 a month.

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

C. C. Flansburg, for appellants.

Stout, Rose, Wells & Martin and *Fred C. Foster, contra.*

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

REDICK, District Judge.

Action to foreclose mortgage. One McLaughlin, April 1, 1915, executed nineteen promissory notes for $1,000 each, due every six months thereafter, including April 1, 1924; also one note for $16,000, due April 1, 1925, all bearing 6 per cent. interest payable semi-annually. On the same date, to secure said notes, he executed a mortgage on certain lots with a four-story brick building thereon in the city of Lincoln. The notes provided that they should draw interest at 10 per cent. after maturity and the mortgage contained a similar provision, and also that upon failure to pay any interest or principal when due the whole indebtedness secured by said mortgage, at the option of the mortgagee and without notice to mortgagor, became immediately due and collectible. It was further provided that, upon failure of mortgagor to keep the premises insured or to pay the taxes upon the premises when due, payment might likewise be accelerated, and that mortgagee might insure the premises and pay the taxes, charge the same to mortgagor with 10 per cent. interest, and add the same to the mortgage debt. Shortly after the execution of the mortgage the defendant Carrie S. Christiansen purchased the property, and her husband Nels is joined as defendant.

The first note, due October 1, 1915, together with interest on the entire debt was paid. Default was made on the note due April 1, 1916, and no further payments were made thereafter upon the notes nor for insurance and taxes. August 16, 1916, the mortgagee exercised his option to declare the entire amount due and brought this action to foreclose the mortgage. The defendant filed no answer and on September 24, 1917, a decree was rendered finding the amount due upon the mortgage to be $39,806.81 with in-

terest at 10 per cent. per annum from that date. By this decree no allowance or credit was given for rents and profits received by the mortgagee while in possession of the premises. The defendant filed a request for stay of nine months, at the expiration of which time an order of sale was issued and property sold to plaintiff for $40,000. Motion for confirmation of the sale being filed, on July 30, 1918, the defendant Carrie S. Christiansen, in opposition thereto, filed what she terms an amended and supplemental cross-petition alleging that upon threats by plaintiff of the appointment of a receiver, with the consent of defendants in August, 1916, the mortgagee took possession of the premises and has retained the same together with the rents and profits thereof ever since; that the decree was grossly excessive; that the premises were reasonably worth $1,000 a month; that $28,000 should be applied upon the decree; that plaintiff had contracted to sell the premises to Rocke, on December 1, for $60,000, and placed him in possession; and that defendant is entitled to an accounting for the reasonable rental value of said premises; and defendant prayed that an accounting be taken and confirmation delayed until the results were ascertained, and that the difference between the amount so found due plaintiff and the amount bid at the sale or the amount of the sale to Rocke be paid to the defendant. A hearing was had and the amount found due at that date, after crediting the net rentals received by the mortgagee, $738.54, in the sum of $44,593.24, and sale confirmed. Defendant appealed to this court, where the judgment was affirmed in every respect, except an order appointing a receiver, which was reversed. See opinion of Cain, C., 105 Neb. 586. That opinion established, as the law of the case, that the mortgagee was chargeable, not only for the rents and profits he actually received, but for such as he, with diligence, could have received; also, that he should be credited with the reasonable cost of improvements made by him in good faith, and which were absolutely necessary for the preservation and management of the property.

A rehearing was granted upon questions growing out of

the accounting, with the result that the "former judgment of this court be vacated, and that the judgment of the district court confirming the sale and approving the account of the plaintiff and in appointing a receiver be reversed and the cause remanded, with instructions that there be another accounting of the rents and profits of the building from August 28, 1916, to the time when the account shall be taken in the district court; that, in accordance with this opinion, the defendants have the right to redeem, and that the order of the district court appointing a receiver be vacated, and that no fees or costs be allowed on account of such receivership." This, Cain, C., second opinion was not published, but in due time a mandate was transmitted to the lower court which in terms reversed the decree as well as the order confirming the sale and directed further proceedings in accordance with the opinion.

Plaintiff then filed in district court what she termed an amended petition, March 29, 1922, which was in the identical language of the original petition, with the additional allegation of the payment on November 9, 1916, of delinquent taxes of the sum of $808.75, which with interest she prayed might be included, and prayed for a foreclosure of the mortgage, alleging the amount due at $35,825.23, together with said taxes and 10 per cent. interest. Defendant Christiansen answered said amended petition, admitting the execution of the mortgage and purchase of the property by defendant, denying any default, and alleging that the rental value of the premises as found in the opinion of the supreme court (Cain second opinion) was sufficient to pay all stated instalments of principal and interest and leave a balance to be credited upon the principal, that the amount due on said mortgage was less than $19,000, and that since the Rockes went into possession they had collected rents in the sum of $20,000, that said mortgage had been fully paid, and prayed that the same might be canceled and title quieted in defendant Carrie S. Christiansen. Thereupon another trial was had in the district court ending January 29, 1924, at which the evidence taken upon the former accounting and

additional evidence was received, resulting in a decree April 3, 1925, confirming the sale and dismissing the cross-petition of the defendants, and defendants have again appealed.

The points made by defendants for reversal of decree are as follows: (1) That by the mandate of this court following the opinion in 105 Neb. 586, the original decree was reversed and set aside; (2) that by the filing of the amended petition by plaintiff the original decree was abandoned; (3) that by the second opinion of Cain, C., it was established as the law of the case that the reasonable rental value of the premises was $300 a month; (4) that plaintiff by her agent is estopped from claiming that the reasonable rental value of the premises was less than $300 a month; (5) that the court erred in allowing plaintiff amounts paid by her for insurance and taxes; (6) that the court erred in confirming the sale, there being no decree upon which to base it; (7) that the court erred in fixing the amount necessary to redeem.

A reargument was ordered before the court presenting the matters now to be disposed of.

We will now take up in order the points made by defendants Christiansen:

1. That the original decree was reversed and set aside. This is not well taken for three reasons: First. The second opinion of Cain, C., did not assume to set aside the decree, but only the order confirming the sale, and the allowance of credit to the defendant. Second. While the mandate by certain language might be construed as setting aside the decree, properly construed as a whole and with reference to the opinion it did not do so. Third. This court was without power to set aside that decree, after stay and no appeal taken. If the mandate issued by the clerk required the construction claimed for it, it would be simply void to the extent that it reversed the original decree.

2. That by the filing of the amended petition plaintiff abandoned the original decree. The discussion upon this

point revolved about the question whether or not the pleading called an amended petition was of that character or a supplemental petition, and cases are cited illustrating the nice distinctions between the two classes of pleadings; but, hard as we have tried, we have been unable to discover any force in the distinction as applied to the present situation. As a matter of fact the pleading was not supplemental, because the only new matter introduced was a charge for taxes paid November 9,1916, which was before the entry of decree September 24, 1917. We are cited to no authority sustaining the proposition that the filing of an amended petition constituted an abandonment of the original decree from which no appeal had been taken and upon which a sale had been had and confirmed. The only cases cited are in pending suits where it is held the filing of an amended petition is an abandonment of the original petition. They have no application here.

3. That the second opinion by Cain, C., established the rental value of the premises at $300 a month, and is therefore the law of the case. We think this point is not well taken. In the first opinion it was held that the conditions attached to the Rocke offer, that the building be put in repair and he be given a five-year lease, were sufficient to justify a rejection of the offer.

It is proper here to note that there is no evidence that Barkley rejected the "Rocke offer." The only statement that he ever heard of it is in answer to the last question before the evidence closed. Witness Nels Christiansen was being interrogated as to the repairs required by Rocke, and he is asked by his counsel: "Q. On your former examination I believe you testified that you took that up with Mr. Barkley? A. Yes; I did." But nowhere else in the record did he so testify, no details of any conversation on that subject are given, and he had already testified that he never had any other talk with Barkley about the possession of the building except the one relative to the offer of Poore, when his brother was present. Moreover Rocke testified that Christiansen himself refused his offer—"would not

listen—told me he could do better, and that settled it. We did not go into details, not at all." This does not seem to have been denied by Christiansen. In his second opinion the commissioner said, "On reconsideration we are not altogether satisfied with this view of the Rocke offer," for the reason that Barkley did not put his objection upon that ground, but said, "I can get you more money out of it." The commissioner then continued: "The fact, too, that Mr. Rocke, who had himself operated the building for several years and knew its earning capacity, offered to pay $300 a month for the building, is some evidence that such a rental was then obtainable. This evidence is persuasive that the plaintiff mortgagee with diligence could have secured more rent than she actually received, and our previous conclusion on the evidence in this respect was erroneous, and that plaintiff's account should not have been approved." And further: "The plaintiff's account, therefore, was erroneous in respect to the receipts shown thereby, and * * * should be charged with the amount of rent she could have received, and the defendants still have the right to redeem. The items of expenditure set forth in plaintiff's account, we think, were correct, but it is certain that the items of receipt should be largely increased. The offer of Mr. Poore of $310 a month, and the offer of Mr. Rocke of $300 a month, and Mr. Barkley's statement that neither of these amounts was enough, is, we think, sufficient evidence to show that plaintiff could with diligence have obtained part of that sum. Plaintiff is still in possession of the building as mortgagee and must account for rents and profits to date." We think this is far from holding that the value of the premises was the definite sum of $300 a month. If it had been the intention to so hold, the order for a new accounting would have directed the rentals to be credited at that figure, but this was not done. Furthermore, additional evidence as to the rental value of the premises was received on the second accounting making a material and substantial change in the testimony. In such case the rule of law of the case has no application. *Phelps County Farmers Mut. Ins. Co. v. Johnston,* 66 Neb. 590.

4. That plaintiff is estopped from claiming the rental value less than $300. The Rocke offer above mentioned need not be considered further, and the claim of estoppel is based upon evidence of Christiansen and his brother, Nels, that they went to Barkley and told him of the Poore offer of $310 a month, and that Barkley said: "That is not enough. If you will give me possession of this building, I will take this building, I can get you more money out of it, and I will apply it on the debt, and when it is turned down in shape, I will turn this building back to you and it will be all right, and if you don't do this I will go ahead with my suit and get a decree and have a receiver appointed. Now, it is up to you, what do you want to do? We weren't in there over ten minutes, my brother and I." Barkley denied saying that he could get them more money, but the commissioner found that the Christiansens were entitled to greater credit, so we may assume that the conversation was as claimed by the defendants. The question then is whether the statements of Barkley are to be considered merely as evidence upon the question of the rental value of the premises, or whether the plaintiff is bound absolutely by his expression of opinion on such value. The defendants base their contention upon the proposition that, where a party has based his conduct upon certain reasons stated by him, he will not be permitted, *after litigation* has commenced, to assert other reasons for his conduct; that he cannot "mend his hold." There is probably no proposition better established than this in our jurisdiction in cases in which it is applicable. Defendants cite six cases from this court beginning with *Ballou v. Sherwood*, 32 Neb. 666, and ending with *Mitchell v. Brotherhood of L. F. & E.*, 103 Neb. 791, in all of which the position of defendant, from which it was claimed he was not permitted to depart, was taken before litigation commenced. In the *Ballou* case defendant refused to go on with a contract of exchange solely because of the pendency of a suit involving the title, and after suit brought tried to justify his refusal on different grounds. In another, *Frenzer v. Dufrene*, 58

Neb. 432, defendant refused to sign the mortgage because it contained a gold clause, and after suit attempted to assign other reasons. In *State v. County Commissioner of Cass County*, 60 Neb. 566, the defendants refused to draw a warrant in favor of the plaintiff because one had already been drawn and paid to a party claimed to be plaintiff's agent, and upon a second trial attempted to deny plaintiff's contract and that any claim had ever been allowed. In *First State Bank v. Stephens Bros.*, 74 Neb. 616, the bank refused to pay a check because the drawer instructed them not to, and after suit brought attempted to defend on the ground of no funds. In *Mitchell v. Brotherhood of L. F. & E.*, 103 Neb. 791, defendant insurance company refused payment only because no proof of death had been furnished, and then sought to defend upon the ground of misrepresentation in the application. The rule of estoppel is salutary, although in many cases its application results in preventing the actual truth being shown. It is quite remarkable, in view of the amount of oral and printed argument upon this question, that it is not referred to in the pleadings. Not a reference to the Poore or Rocke offer is to be found in either the cross-petition or answer of defendants. In the cross-petition filed December 30, 1918, we find this allegation regarding the turning of the possession to the mortgagee: "That this answering defendant at first objected to turning of the same over and advised said plaintiff * * * that she could rent the two upper stories for $360 a month," that said plaintiff refused to allow her to make said arrangement, alleging as a reason that that was insufficient rent for the premises; that if turned over "a larger rent could and would be collected." If this has reference to the Poore offer it suffered a terrible shrink by the time the evidence was taken by which Poore's offer was said to be $310 for the whole building except part of the first floor. But in the answer to the amended petition, filed February 14, 1923, all this was abandoned, the only allegations upon the subject of rental being that this court had found the reasonable rental value to be $300.

There is not even an allegation as to what the rental value is. There is no estoppel pleaded, but if there were the evidence does not establish it. Barkley's statement was no more than the expression of an opinion, as if he had said, "I think it is worth more money." This might be a mistake in judgment, but the limit of its effect would merely be to charge him with the actual rental value. To erect upon such foundation a contract of guaranty that such a sum would be secured would result in a structure the reverse of a pyramid.

5. That the court erred in allowing expenditures by plaintiff for taxes and insurance. The fact that these payments were made is not in dispute, but it is contended that, because no pleading was filed by plaintiff setting up these items, the court had no power to allow them. The situation was this: The decree foreclosing the mortgage was affirmed by this court, but the order confirming the sale was reversed and the case remanded for the purpose merely of an accounting between the parties. It would then have been perfectly proper for pleadings appropriate to the accounting to be filed but it was not necessary; and the evidence was received without objection. We think it is now too late for this objection. The plaintiff continued in the possession of the property and, as we have held, is chargeable with the reasonable rental value, and certainly was entitled to be credited with payments made in good faith for the protection of the premises. The present position of defendants is that they desire to redeem the property. The contention that they should pay merely the amount due upon the mortgage and not reimburse plaintiff for nearly $11,000 paid for taxes and insurance does not appeal very strongly to our sense of honesty and justice.

6. That the court erred in confirming the sale. This point is based upon the proposition that the original decree was reversed, and falls with that proposition.

7. That the court erred in fixing the amount necessary to redeem. Having disposed of the question of the propriety of the allowance for insurance and taxes paid by plaintiff,

the defendants not contesting the allowance for repairs in the sum of $4,361.74, the only question remaining is how much plaintiff should be charged for the reasonable rental value of the premises. The building was built some 35 years ago and when plaintiff took possession it was badly in need of repairs, witness Rocke estimating that it would cost from $6,000 to $10,000 to put the property in condition where it would be worth $300 a month. The building was not modern in any sense. There were no private baths and only six general bath-rooms. It had been wired for electric lighting, but there were no fixtures, only drop cords. The flooring was six inch and badly warped. The doors and windows needed refitting. In fact, the entire premises were in a state of dilapidation. In its then condition one witness put its rental value at from $50 to $100 a month, another at $150. These witnesses had examined the premises at the time and were well qualified. Defendants called one witness who testified to a rental value of from $250 to $350 a month, but he had not made an examination of the building and admitted he did not know "a whole lot about it." Other evidence consists of the offer of Poore of $310 for a three to five-year lease and the offer of Rocke of $300 for a similar lease, provided extensive repairs were made. A further fact for consideration is that the net receipts of plaintiff for the first 13 months of her possession were $1,253.64 without any allowance for rent; also, the net receipts from November 25, 1918, to November 1, 1923, while the Rockes were in possession, were $12,522.83, without any allowance for rent, repairs or management, but including board and lodging of three persons. The Rockes were experienced lodging-house keepers and the results of their management furnish persuasive evidence of what the premises were capable of producing in their then condition after plaintiff had expended over $3,000 for repairs, and serve to indicate what rent could be paid for the use of the building for the purposes to which it was adapted. The average monthly net receipts under the Rocke management were $212.25. To this must be added $40 for their lodging

and $20 for lodging their niece who assisted them, also the board of the three persons at $1.25 a day each; adding these together the net receipts from the premises would be $384.75. If we allow the niece $25 and the Rockes $100 a month for services, in addition to their board and lodging, it would leave $259.75 out of which to pay rent and repairs. The lower court found that the Rockes were entitled to $2,000 a year for management, and their assistant $80 a month. There was no evidence other than the two offers above referred to, with their accompanying conditions, that any such sum as $300 could have been procured. It should also be considered that the situation made it practically impossible to grant a long-term lease which would enable the tenant to amortize expenditures for repairs, and the building therefore had to be leased as it stood.

From this evidence we have concluded that $150 a month was the outside figure which could have been procured by the exercise of reasonable diligence on the part of the plaintiff, and that she should be charged with that amount. The claim of defendants that the premises were worth $300 a month seems to be the legitimate offspring of the extravagant allegations of the answer that they were worth $1,000 a month, that the mortgage had been fully paid and should be canceled, and title quieted in defendants. Upon the whole record we conclude that the calculation of the amount due plaintiff should start with the decree of September 24, 1917, that she should be credited with the amount of repairs made and taxes and insurance paid, and charged with $150 a month rent from September 1, 1916, payable monthly, and we have brought the account down to July 1, 1926, as follows:

		Dr.
Sept. 24, 1917,	decree ..... $	39,806.81
July 1, 1926,	Interest at 10% to date.....	34,897.36
July 1, 1926,	taxes paid ($8,300.60) with interest at 10% from the several dates of payment.....	13,039.45
July 1, 1926,	insurance ($2,672.60) with in-	

		terest at 10% from the several dates of payment	4,994.16
July	1, 1926,	repairs ($4,361.75) with interest at 7% from their several dates	6,456.03
			Cr.
July	1, 1926,	to rent 118 months at $150 $ 17,700.00	
July	1, 1926,	10% interest thereon with monthly rents, 7,021 months at $1.25 a month 8,776.25	
July	1, 1926,	balance due 72,717.56	
		$99,193.81	$99,193.81

We have allowed only 7 per cent. upon the amount expended for repairs because they were not provided for in the mortgage. We have not allowed plaintiff anything for management, deeming the penalty of 10 per cent. interest an equitable offset. These figures charge plaintiff with about $6,500 more than her actual net receipts from the building. We conclude that the defendants are entitled to redeem by paying the amount due as above stated and that they should be allowed thirty days for that purpose.

It is therefore ordered that the decree of the district court be reversed and the court instructed to enter a decree in conformity with this opinion, and if redemption be not made within the time limited, to enter an order confirming the sale.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1926

CLARA M. REED, APPELLEE, V. JAMES W. GOOD ET AL., APPELLANTS.

FILED SEPTEMBER 24, 1926. No. 24203.

1. Process: SUMMONS: SERVICE ON NONRESIDENT. Before service by publication can be made on a nonresident defendant, an affidavit must be filed pursuant to section 8584, Comp. St. 1922.
2. 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 Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

Allen G. Fisher and *Samuel L. O'Brien*, for appellants.

Lee Card, contra.

Lester R. Slonecker, amicus curiæ.

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

DEAN, J.

This suit was begun in the district court for Dawes county to foreclose a real estate mortgage given as security for a certain promissory note in the principal sum of $3,000 and accrued interest. Plaintiff prevailed. Defendants appealed.

James W. Good was the former owner of the land. The mortgage was executed by Mr. Good and his wife. The record discloses that, some time before this suit was brought, the mortgagors joined in a conveyance of the title to the mortgaged land to their daughter, Naomi Good Potter. Mrs. Potter and her husband, James L. Potter, had been and were residents of Woodbury county, Iowa, before and at the time the petition was filed, and were, of course, named as necessary parties defendant. In the answer defendants pleaded that "the title owner, as shown by the said petition and hereinbefore admitted, has not been made party to this action nor brought within the jurisdiction of this court, nor has she or he waived the issuance and service of summons or other process upon her or him, and thereby the said real estate has not been brought within the jurisdiction of this action, nor have such proceedings been had that this has become an action *in rem* against the real estate described in petition." Counsel prayed that the action be dismissed and for costs.

Counsel for defendants contend that the Potters, as nonresident defendants, were not regularly served with the summons which is required by section 8587, Comp. St. 1922. The statute follows:

"In all cases where service may be made by publication, and in all other cases where the defendants are nonresidents, and the cause of action arose in the state, suit may be brought in the county where the cause of action arose, and personal service of the summons may be made out of the state by the sheriff or some person appointed by him for that purpose. In all cases where service of a summons is made on a person without the state, proof of such service must be made by affidavit, stating the time and manner of service, and such service shall be made in the same manner as summonses are served on parties residing within this state."

In respect of the service and the return thereon, which is herein complained of, the record shows that the sheriff of Dawes county, by indorsement on the original summons,

which was issued under section 8587, Comp. St. 1922, and under the hand of the sheriff of Dawes county, appointed and deputized the "sheriff or any deputy sheriff of Woodbury county, state of Iowa, my agent to serve this writ. (Signed) Vet Canfield, Sheriff." C. O. Krummans, a deputy sheriff of Woodbury county, Iowa, in his return, which was verified by his oath, averred that he was "the identical person who was appointed agent by the sheriff of Dawes county, state of Nebraska, to serve the within summons," and that he served the writ on the within named Naomi Potter and her husband, James L. Potter, June 29, 1923, by delivering to each of them in Woodbury county, Iowa, a true and certified copy thereof with all the indorsements thereon.

This feature of the case is argued at great length by the respective parties. Defendants' contention is that "a definitely named individual to make service," in Woodbury county, Iowa, should have been appointed. Plaintiff's contention is to the contrary. We think that, under the statute, defendants' objection in respect of the appointment, is without merit. The name of the sheriff of Woodbury county was doubtless unknown to the sheriff of Dawes county, and likewise that of his deputies, any one of whom were presumably by virtue of their office duly qualified to serve the writ. And it might well be that the Nebraska sheriff did not know the name of any person in the Iowa county who would be a proper person for appointment to perform the required service. It follows that unless an appointing sheriff is permitted, as in the present case, to appoint the "sheriff, or any deputy sheriff," of a designated county, without naming such appointee, much delay and unnecessary inconvenience might thereby be occasioned. And, besides, a sheriff and his deputies are by training and experience, of course, well equipped in every essential respect for this vitally important class of legal service. It seems clear to us that the appointment as made by the sheriff of Dawes county, and the return indorsed thereon, both comply with the material requirements of the statute.

Defendants also contend that plaintiff did not comply with sections 8583 and 8584, Comp. St. 1922, pertaining to service upon nonresident defendants, in that he did not file an affidavit with the clerk of the district court showing that the defendants to be served are nonresidents of this state. Section 8583 designates certain classes of cases in which service by publication may be made upon nonresident defendants. And the defendants Potter, in the present case, come within this class. So far as applicable here, section 8583, Comp. St. 1922, follows: Subdivision 4 reads:

"In actions which relate to, or the subject of which is, real or personal property in this state, where any defendant has or claims a lien or interest actual or contingent therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a nonresident of the state or a foreign corporation."

In respect of the required affidavit, section 8584, Comp. St. 1922, specifically provides:

"Before service can be made by publication an affidavit must be filed that the case is one of those mentioned in the preceding section, and that the defendant to be served is a nonresident of this state or a foreign corporation or being a resident of this state has departed therefrom or from the county of his residence with intent to delay or defraud his creditors or to avoid the service of a summons or keep himself concealed therein with like intent, or that such defendant's whereabouts, if in this state, and residence are unknown to plaintiff or person in whose behalf such affidavit is made."

Before service by publication can be made on a nonresident defendant, an affidavit must be filed pursuant to section 8584, Comp. St. 1922.

Plaintiff very properly pleaded, but entirely omitted to prove, under section 9212, Comp. St. 1922, that no "action at law or inequity has ever been brought on said note and mortgage for the recovery of any part of the principal or of the interest due thereon."

Defendants denied the allegations of the petition throughout. In *Beebe v. Bahr*, 84 Neb. 191, we held that 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 recovery of the debt. And we there held that such formal allegation, although negative in its nature, unless admitted, must be proved in order to entitle plaintiff to a decree of foreclosure. The *Beebe* case was cited with approval and followed in *Great Western Commission Co. v. Schmeeckle*, 99 Neb. 672.

Defendants further contend that the decree is excessive in a sum approximating $50, but, in the present state of the record, we are unable to determine the fact in respect of this assignment of alleged error with any degree of accuracy. Our attention has been directed to other like assignments which, in view of the fact that this suit is to be retried, we do not find it necessary to discuss and do not decide.

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

REVERSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. ATLAS BANK OF NELIGH: EMIL FOLDA, RECEIVER, APPELLEE: ELIZABETH CASTEK, CLAIMANT, APPELLANT.

FILED SEPTEMBER 30, 1926. No. 24267.

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

George W. Wertz, for appellant.

C. M. Skiles, Fred S. Berry and *Lyle E. Jackson, contra.*

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

PER CURIAM.

November 21, 1923, the state banking department took control of the Atlas Bank of Neligh, an insolvent banking corporation. In due season appellant filed with the receiver a claim against the institution based upon a certificate of deposit for $3,100, dated August 16, 1923, and bearing interest at the rate of 5 per cent. per annum, and asked that the same be allowed as a preferred claim against the institution and be made a charge against the depositors' guaranty fund. The receiver, by answer, disclaimed any personal knowledge of the transaction, and asked that claimant be required to make strict proof of her cause of action.

After a hearing the court found that the certificate sued upon was based upon a former certificate of deposit issued February 16, 1921, for a deposit of $3,000 which was made by claimant in defendant bank, that when the certificate issued February 16, 1921, matured, claimant being about to withdraw her deposit, the assistant cashier of defendant bank called upon claimant and informed her "that the bank could not pay a greater rate of interest than 5 per cent. for said money, but that he would give his personal check for an extra 1 per cent. interest thereon;" that following this agreement a new certificate was issued bearing 5 per cent. interest, which interest was paid directly by the bank. Additional interest was paid by the personal check of the assistant cashier, in the sum of $30, being interest at the rate of 1 per cent. per annum on the $3,000 deposit; that on the maturity of this certificate, on August 16, 1922, it was again renewed and the rate of interest was fixed at 5 per cent. which interest was paid directly by the bank, and the assistant cashier again gave plaintiff his personal check in the sum of $30; that on August 16, 1923, the certificate in suit was issued in renewal of the certificate immediately heretofore mentioned, but the amount was increased $100, the increase representing that much of the interest earned, and the remainder of the interest, to wit, $50, was paid by the bank to claimant. No interest in any

amount has ever been paid on the certificate in suit. The court held that the certificate constituted a general claim only against the insolvent bank and denied a recovery against the depositors' guaranty fund. Claimant has appealed.

The proof shows that claimant never received from the bank interest in excess of 5 per cent. per annum. It may be conceded that the bank officers, in place of charging the checks of the assistant cashier against his personal account, charged them to the bank's interest account. As said in the body of the opinion in *State v. American Exchange Bank, ante,* p. 626: "The fact that the entries upon the bank books appear to show that in some instances the excess was paid by or charged to the bank does not bind the plaintiffs. It was not their duty to see that the president kept his promise." The instant case is ruled by the case of *State v. American Exchange Bank, supra.*

Since this cause of action arose the statute has been amended by the enactment of chapter 28, Laws 1925, and the rule herein applied has no application to the new statute.

It follows that the district court erred in refusing to allow the certificate in question as a claim against the depositors' guaranty fund. The judgment is, therefore, reversed and the cause remanded, with directions to make such allowance.

REVERSED.

GEORGE HEYEN, V. STATE OF NEBRASKA.

FILED SEPTEMBER 30, 1926. No. 25161.

1. **Criminal Law:** ACCESSORY AFTER THE FACT. Under the Nebraska statute "An accessory after the fact is a person who, after full knowledge that a felony has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime." Comp. St. 1922, sec. 9542.
2. ———: ACCESSORY AFTER THE FACT: PROOF OF PRINCIPAL

CRIME. In a prosecution for being an accessory after the fact, the commission of the principal crime and the guilt of one who committed it may be shown by his conviction, sentence and confinement in the penitentiary, though two other persons not yet convicted were equally guilty of the same criminal offense.

3. ———: ———: ADMISSIBILITY OF RECORD. A mere error in imposing upon a convict an indeterminate sentence instead of one for a definite period does not make the record inadmissible for the purpose of showing his guilt in a prosecution against an accessory after the fact.

4. ———: ———: ———. A clerk's judicial record showing a conviction for a felony, though not yet signed by the presiding judge, is admissible to prove the principal offense in a subsequent prosecution against an accessory after the fact.

5. ———: ———: INSTRUCTIONS: HARMLESS ERROR. In a criminal prosecution, inconsistency in the instructions is not necessarily a ground for the reversal of a conviction, where the record does not show prejudice to defendant.

6. ———: ———. A person knowingly harboring and protecting criminals immediately after they have robbed a bank cannot escape trial, conviction and punishment as an accessory after the fact merely because they had not been formally charged in court and found guilty of the robbery at the time they were harbored and protected, the expression "charged with or found guilty," as used in the accessory statute, not being thus limited as to time. Comp. St. 1922, sec. 9542.

7. ———: ———: SUFFICIENCY OF EVIDENCE. In a prosecution against an accessory after the fact for harboring and protecting bank robbers, "full knowledge" that they were guilty of the robbery is essential to a conviction, and the evidence outlined in the opinion *held* sufficient in that respect.

8. ———. Where the evidence on a material issue in a criminal prosecution is conflicting but sufficient to sustain a conviction beyond a reasonable doubt, the question is one for the jury.

9. **Robbery**: APPEAL: RULINGS ON EVIDENCE. Under an information charging defendant as an accessory after the fact for harboring and protecting robbers, a ruling which prevented him from telling the jury in answer to a question why he did not run to a police officer and tell all about it, *held* not erroneous or prejudicial.

10. **Witnesses.** The admission of offered evidence to contradict a witness is largely in the discretion of the trial court.

11. ———. Evidence which directly tends to disprove the facts to which a witness has testified is admissible in contradiction.
12. **Evidence.** A newspaper, properly addressed and mailed, is presumed, as a matter of evidence, to have reached the addressee in the usual course of the mails.
13. **Criminal Law:** ADMISSION OF EVIDENCE. In a criminal prosecution, the admission of evidence not prejudicial to defendant is not ground for setting aside a conviction.
14. ———: ———. In a prosecution against an accessory after the fact for harboring and protecting robbers, testimony by and records of the circulation manager of a daily newspaper tending to prove that defendant received a copy of the newspaper during the time of such harboring and protecting, *held* admissible to rebut testimony by him to the contrary.
15. **Sentence.** A sentence of nine months in the county jail and a fine of $300 for harboring and protecting robbers *held* not excessive.

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

Hazlett, Jack & Laughlin, for plaintiff in error.

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

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

ROSE, J.

In a prosecution by the state in the district court for Gage county, George Heyen, hereinafter called "defendant," was convicted of violating the statute which provides:

"An accessory after the fact is a person who, after full knowledge that a felony has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime. Any person found guilty of being an accessory after the fact shall be imprisoned in the jail of the county for any term not exceeding two years, and fined in a sum not exceeding five-hundred dollars, to be regulated by the circumstances of the case and the enormity of the crime." Comp. St. 1922, sec. 9542.

April 6, 1925, Carl Erickson, Dewaine Brennan and Johnnie Brown entered the Farmers State Bank of Cortland in Gage county with arms and threats, put the cashier and the assistant cashier in bodily fear with the intention of committing robbery and feloniously took and carried away $1,845 belonging to the bank. They violated the following provisions of statute:

"That whoever enters any building occupied as a bank, depository or trust company and by violence or by putting in fear any person or persons in charge of or connected with said bank, depository or trust company with intent to take, steal or carry away any of the money, goods, chattels or other property belonging to or in the care, custody or control of said bank, depository or trust company shall be deemed guilty of a felony and on conviction thereof shall be confined in the state penitentiary not less than ten nor more than twenty-five years." Laws 1921, ch. 301, sec. 1; Comp. St. 1922, sec. 9622.

"Whoever forcibly, and by violence, or by putting in fear, takes from the person of another any money or personal property, of any value whatever, with the intent to rob or steal, shall be deemed guilty of robbery, and upon conviction thereof, shall be imprisoned in the penitentiary not more than fifteen nor less than three years." Comp. St. 1922, sec. 9557.

During the afternoon of April 6, 1925, following the robbery, the felonious trio appeared in a stolen automobile at the home of defendant, a farm in Gage county, put the car under cover in a shed and concealed themselves in the barn and house or elsewhere on the premises. Brennan was there at intervals until April 10, 1925, and Erickson and Brown made it their hiding place most of the time until April 11, 1925. They were not apprehended there. In a prosecution by the state in the district court for Gage county, Erickson pleaded guilty to the charge that he had feloniously entered the Farmers State Bank of Cortland April 6, 1925, and for that offense he was sentenced to serve in the penitentiary a term of 10 to 25 years.

In the present case defendant was tried and convicted in the district court for Gage county under the charge that he had been an accessory after the fact to the felonious entry of the bank April 6, 1925, having harbored and protected Erickson with full knowledge of his guilt, contrary to the accessory statute quoted. As an accessory after the fact defendant was sentenced November 18, 1925, to serve in the jail of Gage county a term of nine months and to pay a fine of $300. As plaintiff in error he presents for review the record of his conviction.

It is first argued that the trial and conviction were premature and void because defendant was accused and sentenced as an accessory after the fact before the principal malefactors were convicted of feloniously entering the bank to rob it. In this connection it is contended that Erickson was never legally convicted within the meaning of the accessory statute. As defendant views the record Erickson committed acts of violence for which he was not punishable under the indeterminate sentence of 10 to 25 years imposed by the district court, the deduction being that a valid conviction prior to the sentencing of the accessory was not disclosed, though essential to the state's case. The point does not seem to be well taken. The evidence adduced on behalf of each party to the present prosecution against defendant shows conclusively that the principal felony was committed as charged in the information against Erickson. The latter was answerable for his crime, though Brown and Brennan had not yet been brought to justice. In the district court for Gage county Erickson was duly charged with entering the bank feloniously with intent to rob it. He pleaded guilty and was sentenced and committed to the penitentiary. If an indeterminate sentence was erroneously imposed upon him instead of one for an act of violence, the proceeding in that respect was merely erroneous, not void. The error, if any, might have been reviewed by Erickson, but it was not available to defendant in the subsequent prosecution against the latter as an accessory after the fact—a different offense. The correct rules of law seem to be that, "To

prove the previous conviction of the principal, so as to authorize the trial and conviction of the accessory, the record of the principal's conviction is admissible," and "The fact that there are in the record errors which would have been available to the principal is immaterial." 16 C. J. 143, sec. 154.

It is true, however, as pointed out by defendant, that there is nothing in the evidence to show that two of the robbers, Brown and Brennan, were convicted of the principal offense before the accessory was sentenced, but in that particular the previous conviction of Erickson alone was sufficient, and that fact was properly shown by authentic copies of the judicial record itself. The record of the conviction was admissible, though open to the objection that it was not signed by the presiding judge, the entries made by the clerk of the district court showing that Erickson was legally charged, that he pleaded guilty and that he was sentenced and imprisoned. Independently of the court record, however, the guilt of Erickson as a principal was definitely established by oral evidence not disputed or questioned. The felony committed by the principal was shown to have been complete. If defendant harbored or protected Erickson within the meaning of the accessory statute, the former was no less culpable, or amenable to law, merely because at the same time he also harbored and protected two other criminals equally guilty.

In connection with this feature of the review, there is further complaint that the presiding judge, after ruling that it was necessary only to try defendant as accessory to the principal Erickson, submitted to the jury the issue as to defendant having been accessory to all three of the robbers. In the information accusing defendant as accessory after the fact there were two counts. The first charged that the three principals feloniously entered the bank with intent to rob it and that defendant with full knowledge thereof, harbored and protected them. The second count charged the robbery itself and the harboring of the robbers. Before trial there was an election by the prosecution to

stand on the first count. One form of verdict submitted to the jury permitted them to find defendant guilty as charged in the information. The first instruction to the jury contained the substance of the first count and the statement that the issues were formed by the charge in the information and the plea of not guilty. The jury found defendant guilty as charged in the information. Defendant challenges the instructions and the verdict on the ground that the court erred in permitting the jury to find defendant guilty as accessory to all three of the principals, though two of them had not been charged with or convicted of the principal offense. In these particulars the record does not affirmatively disclose error prejudicial to defendant. Considering the argument from defendant's standpoint, the trial court required, and the jury found, more than was necessary to a conviction. If the instructions as a whole required, and the jury found, that defendant was accessory to all three principals, Erickson, who had been accused and convicted, was included. Defendant himself proved beyond doubt or question facts showing conclusively that the felonious trio were each and all guilty of both unlawfully entering and robbing the bank and that defendant had harbored all of them, the substance of his defense being that he had no knowledge of those facts during the time the three principal offenders were on his premises. If the jury, under the instructions, in addition to the facts necessary to a conviction, found what defendant himself proved without doubt or question, the criticism based on prejudice does not, under the circumstances, seem to be well founded. It does not appear, however, that the instructions permitted the jury to find as a fact that defendant harbored and protected Brennan and Brown. Some of the instructions, referring directly to the first count of the information, make it clear that the issue as to harboring and protecting was confined to Erickson as principal. The assignments of error on this branch of the case are overruled.

The conviction is also assailed as invalid because Erickson, while at the home of defendant, had not then been

"charged with or found guilty of the crime," within the meaning of the accessory act. Comp. St. 1922, sec. 9542. The statutory definition is: "An accessory after the fact is a person who, after full knowledge that a felony has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime." Defendant was accused under the latter clause. It is contended that the words "charged with or found guilty" apply to the time of the harboring and protecting of the principal offender and that consequently defendant did not violate the law, since there was then no formal charge pending against Erickson and no finding that he was guilty. This seems to be the view taken by the supreme court of California in construing a similar statute. *People v. Garnett*, 129 Cal. 364. That construction, however, appears to be at variance with the obvious intention and purpose of the legislature. It might permit an accessory to conceal the identity of the principal, delay the making of a formal charge against him and avoid accountability for the misdeeds of the accessory on the plea that the principal had not been brought to justice. The legislature did not intend to make the committing of the crime its own vindication. When the intention of the legislature and the purpose of the statute, as disclosed by the language used, are considered, the words "charged with or found guilty of the crime" may mean legal proceedings subsequent to the harboring and protecting of the criminal. Law-abiding citizens generally revolt at high-handed crimes and the screening of criminals from justice. The necessity of protecting society from criminal violence and from harbored criminals resulted in common and statutory law condemning accessories. The legislature meant to enact an effective remedy and used language to that end. The statute recalls a passage from Emerson:

"The beautiful laws and substances of the world prosecute and whip the traitor. He finds that things are arranged for truth and benefit, but there is no den in the world to hide a rogue. Commit a crime, and the world

is made of glass. Commit a crime, and it seems as if a coat of snow fell on the ground, such as reveals in the woods the track of every partridge and fox and squirrel and mole. You cannot recall the spoken word, you cannot wipe out the foot-track, you cannot draw up the ladder, so as to leave no inlet or clew. Some damning circumstance always transpires. The laws and substances of nature—water, snow, wind, gravitation—become penalties to the thief."

The robbers went from the Cortland bank to the home of defendant, where they remained several days, temporarily escaping capture. If defendant harbored and protected them, knowing they had been guilty of robbery, he committed an offense against which the statute was directed and the wording of the entire act conveys that meaning. The supreme court of Arkansas, construing the words, "charged with or found guilty of the crime," as they were used in a similar statute, held that a pending indictment at the time of the harboring and protecting of the principal offender was not a prerequisite to the conviction of the accessory after the fact, citing, but declining to follow, the contrary ruling of the supreme court of California. *State v. Jones,* 91 Ark. 5. The decision of the Arkansas court seems to be based on the better grounds.

Other assignments of error challenge the sufficiency of the evidence to sustain a finding that defendant, while the robbers were at his home, had "full knowledge" that Erickson robbed the bank at Cortland. "Full knowledge" was of course essential to a conviction of the accessory, because the statute makes it so. Comp. St. 1922, sec. 9542. If there was evidence sufficient to show beyond a reasonable doubt that defendant had full knowledge, the issue was a question for the jury. He testified that he knew nothing of the robbery until long after the robbers left his place. In this he was corroborated by his wife and Brown. His testimony showed in addition, however, that Brown, before the robbery, obtained from him permission to return with his two companions, where they would not be exposed to

the observation of others, while engaged in transporting booze to Wymore. If the jury, in considering all the evidence, should, upon sufficient evidence, disbelieve the story that such permission was given only in the belief that it was for the purpose of harboring and protecting booze-runners instead of robbers, many of the circumstances showing the harboring and protecting would apply to knowledge of the robbery. Guilty knowledge may be proved by circumstances. *Bashinski v. State,* 123 Ga. 508. There is a reasonable view of the case in which circumstances disclosed tend to prove the guilt of the accessory.

There is proof in addition to circumstances. A police officer stated in substance, on the witness-stand, that defendant, sometime after the robbery, admitted or confessed that the robbers were permitted to remain at his home after he had been told by one of them that "they," referring to the three, had robbed the Cortland bank. The testimony of another police officer was of the same import. This testimony, if believed, was sufficient, when considered with corroborating facts and circumstances, to prove the knowledge essential to a conviction. There was a direct conflict between interested witnesses on opposite sides. The issue was submitted to the jury and their verdict is supported by sufficient evidence.

Was there prejudicial error in the sustaining of an objection to the questioning of defendant in this manner? "Just tell the jury why you didn't run here to the sheriff of this county or to Sheriff Condit at Lincoln or the chief of police and tell all about it." The offer of proof indicated a purpose to show that defendant and his wife were excited and didn't know what to do and in their ignorance decided to remain silent and see what would happen. Excitement and ignorance were not of themselves defenses. As the record stands, the question and offer of proof do not seem to be in a proper form to elicit evidence of an issuable fact. Though the statute made concealment from "the magistrate" unlawful, there was no accusation or trial under that provision. The officers mentioned in the question

were not "magistrates" within the meaning of the act. As explained by the proof, the inquiry did not call for testimony that defendant was influenced by danger, fear, threats, violence or any other form of duress. The contrary was shown by the record. Knowing that the trio were seeking seclusion, defendant invited them to remain, having had a previous acquaintance with two of them. He so testified. There was also proof in defendant's behalf to the effect that the guests were unwilling to accept offered hospitality without any consideration and that the wife of defendant received $40 as compensation. In the form the question was asked it does not seem, therefore, that the ruling of the trial court violated any law of evidence or otherwise prejudiced defendant.

Another question is presented by the assignment that the trial court erred in admitting evidence tending to show that defendant received April 9, 1925, before the robbers left his premises, a copy of the Lincoln Star, a daily newspaper. The question arose in the following manner: Defendant, among other things, testified in effect in his own behalf that he did not receive a copy of the Daily Star between April 2, 1925, and April 11, 1925, while the robbers were his guests. In rebuttal the state called as witness the circulation manager of the Daily Star, who was permitted to identify as evidence original records of circulation, which, in connection with oral testimony, tended to show that in the regular course of circulation a copy of the issue of April 8, 1925, was mailed the same day and delivered to defendant in due course of mails April 9, 1925. One of the objections to this evidence is that it was hearsay as to defendant. There is a well-recognized rule of evidence that a newspaper account is merely hearsay evidence of facts stated therein, and is not generally admissible in evidence to prove such facts. 22 C. J. 929, sec. 1137. A newspaper, however, may be admissible to impute to a person who reads it knowledge of a published fact, but neither of these purposes or rules is the test of admissibility in this particular instance. Evidence that defendant received a copy

of the Daily Star April 9, 1925, would tend to rebut or contradict his testimony to the contrary. The admission of offered evidence to contradict a witness is largely in the discretion of the trial court. 40 Cyc. 2782. "Evidence which directly tends to disprove the facts to which a witness has testified is admissible in contradiction." 40 Cyc. 2777. The objection as to the testimony described was properly overruled under the following principle of law: A newspaper, properly addressed and mailed, is presumed, as a matter of evidence, to have reached the addressee in the usual course of the mails, common experience indicating the regularity and certainty with which mail is carried and delivered in the exercise of governmental functions. *City of Omaha v. Yancey,* 91 Neb. 261; 16 C. J. 542, sec. 1032; 22 C. J. 96, sec. 36. The objections, however, go further. Defendant testified also that he was not a subscriber to the Daily Star between April 2, 1925, and April 11, 1925. The records and testimony of the circulation manager tended to show in addition to the delivery of a copy to defendant April 9, 1925, that, through the Daily Star's agent at Filley, a subscription accompanied by $3.60 in payment was received April 6, 1925, and that in consequence the name of defendant was entered on the subscription list. It is argued that this evidence was hearsay as to defendant because the publisher's agent was not called as a witness to connect defendant with those transactions. This evidence does not appear to be prejudicial to defendant in view of properly admitted testimony that, without regard to questions of subscription and payment, he received the newspaper in due course of mail.

It is finally contended that imprisonment nine months in the county jail and a fine of $300 are too severe. The maximum penalties are two years in the county jail and a fine of $500. Comp. St. 1922, sec. 9542. The jury recommended clemency, but in view of the verdict of guilty and the merciful sentence imposed there does not seem to be a sufficient reason for interference with the discretion of the trial court.

Error prejudicial to defendant has not been found in the record.

AFFIRMED.

Note—See Criminal Law, 16 C. J. pp. 137, 145, 542, 931; 17 C. J. pp. 317, 333, 343.

STATE, EX REL. DARLENE JOHNSON ET AL., RELATORS, V. JOHN M. MATZEN, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, RESPONDENT.

FILED SEPTEMBER 30, 1926. No. 25556.

Schools and School Districts: TEACHERS' CERTIFICATES. Where an applicant for a teacher's certificate has successfully passed the examination for such certificate under chapter 182, Laws 1925, the state superintendent is without authority, in the absence of statute, to refuse to issue the certificate provided for therein on the sole ground that the applicant is under the age of 18 years.

Original proceeding in mandamus to compel respondent to issue to relator, Darlene Johnson, a teacher's certificate. *Writ allowed.*

Hugh J. Boyle, for relators.

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

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

DEAN, J.

By appropriate proceedings commenced in this court, on relation of Darlene Johnson, aged 17, by Gustof H. Johnson, her father and next friend, and Gustof H. Johnson, as relators, against the Honorable John M. Matzen, state superintendent of public instruction, as respondent, the relators sought to have a writ of mandamus issued by this court compelling the respondent to issue to Darlene Johnson a

third grade elementary school certificate upon an application theretofore presented by her to the respondent, the required fee having been tendered by relators therefor. The facts are undisputed. The case was submitted on the pleadings and oral argument. Whereupon the court, being fully advised in the premises, found in favor of the relators and caused a peremptory writ of mandamus to issue requiring the immediate issuance of the certificate in question, it being conceded that the relator Darlene Johnson successfully passed the required examination. It may here be observed that the respondent frankly concedes that the legislature has not enacted a statute which imposes the rule for which he contends as a preliminary condition to the issuance of such certificate.

The respondent, in his answer, pleaded that such refusal was based on the ground that "the relator Darlene Johnson * * * is but 17 years of age and he has adopted a rule that no certificate to teach school will be granted by him to any applicant unless such applicant is at least 18 years of age."

Counsel for relators, in substance, contends that the respondent has no statutory right to adopt the foregoing rule. The relators' contention as above noted, must be upheld. The legislature has not delegated to any official the duty of fixing the age which a qualified applicant must have attained before the certificate in question shall be issued. And our decision is based solely on this ground. We hold that unless, and until, the legislature shall see fit to invoke the rule contended for by the respondent, the applicant who complies with the requirements of the act shall be entitled to receive the certificate. Under the act there is no legal obligation resting on the successful applicant that he shall engage in school work. The law fixes no age requirement.

The local boards of education, as in the present case, select and employ the teachers for their schools. And such boards are selected from the body of the citizens in the same locality where the school is situated and they are, of course, vitally interested in seeing to it that the teachers

employed by them are persons of character and in all respects qualified to teach in the grades for which they hold certificates. And in so doing it is competent for them to pass upon the fact as to whether an applicant under the age of 18 years has the required qualifications. It is a universally recognized fact that some persons under the age of 18 are endowed with mental equipment and have acquired scholastic attainments that are superior to others who are over that age, though they may have enjoyed the same educational advantages, but, for obvious reasons, they may not be so richly endowed with that other and rarer quality which makes them apt to teach. Doubtless the lawmakers were so minded. Anyhow, this seems to be a part of the duty devolving upon the school boards.

We have no right, neither are we disposed, to interfere with the apparent legislative intent to leave the question of the age of the applicant to the local boards of education. To do so, in the absence of statute, would of course be judicial legislation. If the law, in the respect noted herein, is inimical to the public good, application should be made to the legislature to amend the act, and not to the courts. We conclude that the legislature did not intend that the relator, otherwise qualified, must have reached the age of 18 years before she is entitled to the certificate in question.

WRIT ALLOWED.

GOOD, J., dissents.

STATE OF NEBRASKA, APPELLEE, V. LEAH HEUPEL ET AL., APPELLANTS.

FILED SEPTEMBER 30, 1926. No. 25292.

1. **Statutes:** CONSTRUCTION. "Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning; a mere reading will suffice." *Stoppert v. Nierle*, 45 Neb. 105.
2. **Insane Persons:** COST OF MAINTENANCE. Where a patient is maintained in the state hospital for the insane, who possesses an estate or income sufficient to meet the expense of his care

and maintenance in said hospital without depriving of necessary support those, if any, dependent upon such patient, then the guardian of such patient may, by appropriate action, be required to pay to proper authorities an amount equal to the reasonable cost of his maintenance at such hospital, as provided by section 6928, Comp. St. 1922.

3. *Baldwin v. Douglas County*, 37 Neb. 283, overruled.

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

C. A. Sorensen, for appellants.

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

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

EBERLY, J.

This is an action originally brought by the state of Nebraska in the county court of Lancaster county against Leah Heupel, incompetent, and Ira Birt, her guardian, to recover for the support and maintenance of said Leah Heupel in the state hospital for the insane at Lincoln, Nebraska, by virtue of section 6928, Comp. St. 1922, which reads as follows:

"If any patient be possessed of an estate or income sufficient to meet the expense of his care and maintenance in said hospital without depriving of necessary support those, if any, dependent upon such patient, then the guardian of such patient shall be required to pay to the superintendent of the hospital, quarterly during the stay of such patient therein, a sum to be fixed by the board of commissioners of state institutions in an amount as nearly as may be equal to the *per capita* cost of maintaining such hospital, and said sums shall constitute a claim against the estate of such patient and be collectible therefrom."

The facts concerning which there is no dispute are these: Leah Heupel was adjudicated insane and committed to the state hospital at Lincoln, Nebraska, in February, 1918, and is still confined there. Her mother was confined in the

same institution for many years, but was recently released at the age of 50 years. She does not appear as dependent upon her daughter for support. The father of Leah Heupel died in April, 1921, and left his daughter, Leah, an estate of $4,100, the approximate gross income from which is $190 per annum. Out of this must be paid state and county taxes, fees for guardian, and upkeep of property. The state in this suit seeks to collect a fixed fee of $16.10 per month or $193.20 per annum for the maintenance of Leah Heupel.

It is not questioned but that the charges made are reasonable and just and are not simply an arbitrary exaction. Consequently the net income from the estate is not sufficient to pay this claim against it and a portion of the indebtedness will have to be paid out of the principal.

It was contended by defendant in the county court and also in the district court that, properly construed, the word "or" in the statute quoted should be construed as "and," which would limit the recovery of this state to the amount of the net income; also, that section 6928, Comp. St. 1922, is unconstitutional and void, for the reason that the amendatory act upon which the state relies contained more than one subject, which is in violation of the Constitution of the state of Nebraska; and that the amendatory act itself purported to amend an unconstitutional law, declared so by this court in *Baldwin v. Douglas County*, 37 Neb. 283.

From a determination on appeal of this cause to the district court favorable to the state, and the entry of a judgment against the defendant in the sum of $568.81 and costs, an appeal is prosecuted to this court, where the issues above outlined are again presented.

As to the defendant's contention that the words of the statute, "If any patient be possessed of an estate *or* income sufficient to meet the expense of his care, * * * then the guardian of such patient shall be required to pay," shall be construed as though reading, "If any patient be possessed of an estate *and* income sufficient to meet the expense of his care," it is to be observed that the language of this statute is plain and unambiguous. Its meaning is

not at all uncertain. It conflicts with no other act. While we have no quarrel with the principle of construction for which the defendant contends, the question here is whether the facts in the instant case are such as require its application. It would seem not.

It is to be remembered that in the construction of a statute the language employed in it should generally be given its plain, obvious import. *Simmerman v. State*, 14 Neb. 568. This rule has been stated in other words: "Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning; a mere reading will suffice." *Stoppert* v. *Nierle*, 45 Neb. 105. It would seem that the principle announced in the case last cited is controlling in the present case, and that the statutory provision in question, if otherwise valid, sustains the plaintiff's recovery.

So far as the amendatory act containing more than one subject is concerned, defendant's argument is fully answered in *State v. Badberg*, 108 Neb. 816.

The remaining contentions of the defendant herein are almost wholly based upon the doctrines announced by this court in *Baldwin v. Douglas County, supra*, and are due to a situation supposed to have been created by that opinion. It may be observed that this case is admittedly a pioneer case. It has never been accepted in any jurisdiction other than our own, and even this court has substantially repudiated its doctrines.

In *Kearney County v. Elsam*, 81 Neb. 490, the following language is employed by Good, C.: "In *Baldwin v. Douglas County*, 37 Neb. 283, this section of the statute was held to be unconstitutional, at least to the extent that it seeks to hold the relatives of insane persons liable for the support, care and maintenance of the insane persons while in the asylum. That action, however, was begun in 1889, and was tried and judgment rendered in the district court for Douglas county prior to the enactment of this section in its present form, though the opinion in the supreme court was written long after the passage of the act. This fact seems

to have been overlooked by the writer of the opinion in that case. That action was brought to recover for the support, maintenance and care of an inmate of the asylum. It will be observed that the section itself exempts the estate of the insane person and the relatives from the costs of board, care and treatment, which shall be born by the state. It does not appear to the writer of this opinion that it was necessary to determine or consider the constitutionality of this section of the statute in that case. It appears that the section itself denied the very right to recover for the items sought to be recovered in that action, so that it was wholly unnecessary to declare this section unconstitutional in order to defeat a recovery. In addition, we may say that the reasoning which led to holding this section unconstitutional does not appeal to us as sound. Under the circumstances, we regard the opinion in the *Baldwin* case as of doubtful authority as a precedent to be followed. We have, therefore, disregarded the *Baldwin* opinion, and will proceed upon the assumption that the section is not unconstitutional in so far as it seeks to make the estates of insane persons liable for any sum paid by the county in their behalf."

The basic reasoning upon which the decision above referred to proceeds is that because the state may pay the expenses involved in the care and maintenance of an insane person, requiring the county to reimburse it, and the county, in turn, being permitted to look to the estate of an insane person for indemnity for the payment made, the taxation is triple, and wholly ignores the patent fact that the payments by the county and state are, in effect, but loans and advancements and do not constitute a real burden upon the estate under state and county taxes. In the final event the estate of the insane as taxpayer bears no larger burden than it would if it paid direct upon demand to the state. In other words, in the instant case, no greater sum is required to be paid by the insane estate than the amount of the judgment against it, whether this be paid direct or to the county itself for advances made. The conclusion therefore

is that the doctrine of the *Baldwin* case is logically unsound and forms an unjust impairment of legislative powers. This conclusion is at least implied in the result announced in the case of *State v. Stanton County,* 100 Neb. 747, where a recovery by state from county was directed.

"It being the policy of the state that the estates of lunatics shall be appropriated to their proper maintenance before they can be supported at public expense, the legislatures may, and often do, permit the public authorities to recover expenses incurred in support of an indigent insane person from him or his estate." 32 C. J. 687, sec. 374.

It may be noted that the only authorities cited to sustain the doctrine of *Baldwin v. Douglas County, supra,* are *Richardson County v. Frederick,* 24 Neb. 596, and *Richardson County v. Smith,* 25 Neb. 767, and *County of Delaware v. McDonald,* 46 Ia. 170. An examination of these authorities discloses that the Nebraska doctrine is based upon the supposition that "section 48" referred to in *Baldwin v. Douglas County, supra,* is identical in substance with section 1433 of the Iowa Code. The fact that section 1433 of the Iowa Code had been amended at the time of the Iowa decisions were rendered, and that later such amendment had been repealed, is entirely overlooked. Thus the opinion in the case of *County of Delaware v. McDonald, supra,* is in part as follows:

"Under the Code, sec. 1433, the defendant was clearly liable. It is there expressly provided that 'the auditors of the several counties * * * are authorized and empowered to collect from * * * any person legally bound for their support (the support of insane patients) any sums paid by the county in their behalf.' The husband is legally bound for the support of his wife, and under the provision he was liable for the expenses paid by the county in her treatment as an insane patient. But said section has been amended. By an act of the Fifteenth General Assembly, ch. 26, the words 'from any person legally bound for their support' were stricken out."

It, therefore, follows that the effect of the opinion in

County of Delaware v. McDonald, supra, is only that, in the absence of legislation, the estate of the insane is under no implied obligation to pay for the maintenance of the insane party in the state hospital. And this case therefore in no manner sustains the doctrine of *Baldwin v. Douglas County, supra.* On the contrary, the case of *Wapello County v. Eikelberg,* 140 Ia. 736, which was decided after the amendment referred to in the case of *County of Delaware v. McDonald, supra,* had been repealed, and where the question at issue was whether a husband was liable to this state for the support of his wife at an insane asylum (the identical case presented in *Baldwin v. Douglas County, supra*), the supreme court of Iowa reached the opposite conclusion and held the husband liable. In the opinion by Ladd, C. J., the following language appears:

"Such an obligation is not to be implied (*County of Delaware v. McDonald,* 46 Ia. 170), and exists, if at all, by virtue of section 2297 of the Code, which reads: 'The provisions herein made for the support of the insane at public charge shall not be construed to release the estates of such persons nor their relatives from liability for their support; and the auditors of the several counties, subject to the direction of the supervisors, are authorized and empowered to collect from the property of such patients, or from any person legally bound for their support, any sums paid by the county in their behalf, as herein provided; and the certificate from the superintendent, and the notice from the auditor of state, stating the sums charged in such cases, shall be presumptive evidence of the correctness of the sums so stated. If the board of supervisors in the case of any insane patient who has been supported at the expense of the county shall deem it a hardship to compel the relatives of such patient to bear the burden of his support, or charge the estate therewith, they may relieve such relatives or estate from any part or all of such burden as may seem to them reasonable and just.' * * * That the husband is thus bound to support his wife is too well settled to require the citation of authority, but see *County of Delaware v. Mc-*

Donald, supra; Heacock v. Heacock, 108 Ia. 540; *Descelles v. Kadmus,* 8 Ia. 51; *Porter & Moir v. Briggs,* 38 Ia. 166; *Goodale v. Lawrence,* 88 N. Y. 513, 42 Am. Rep. 259."

It follows, therefore, that the conclusion reached by this court in *Baldwin v. Douglas County, supra,* is wholly unsupported by authority, based on reasoning which is unsatisfactory and constitutes an undue restriction upon the legislative powers vested in a coordinate branch of our government, and has practically been abandoned by this court. The doctrines announced in that case should be and are hereby rescinded and the case itself expressly overruled.

We have not overlooked the other questions presented by counsel for defendant in his brief. However, the foregoing substantially disposes of all contentions made by him.

The judgment of the district court is

AFFIRMED.

CELSUS C. YOUNG ET AL., APPELLEES, V. ROBERT B. THOMPSON ET AL., APPELLANTS.

FILED OCTOBER 15, 1926. No. 24291.

Mortgages: FORECLOSURE: PLEADING AND PROOF. In a suit in equity to foreclose a mortgage on real estate, plaintiff is required by statute to allege that no proceeding at law to recover the debt has been instituted, and it is necessary to prove that fact, if denied by defendant in his answer.

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

James C. Quigley, for appellants.

A. B. Green and *Ruby & Tucker, contra.*

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

ROSE, J.

This is a suit in equity commenced by Celsus C. Young, plaintiff, to foreclose a mortgage executed by Robert B.

Thompson and Belle M. Thompson, mortgagors, defendants, on real estate in Cherry county to secure the payment of two promissory notes aggregating $19,447.77. Francis E. Cronin was also sued as a defendant, the petition alleging that he claimed some interest in the mortgaged property, and he afterward filed an answer and a cross-petition praying for the foreclosure of a mortgage, executed by the other defendants, on the same property to secure to him the payment of two promissory notes aggregating $2,437. The facts stated in the petitions were put in issue by general denials of the mortgagors. The trial resulted in a decree for the foreclosure of both mortgages. Mortgagors appealed.

Failure to prove material allegations of the petitions is the ground of appeal. Each petition contained the plea that there had been no proceeding at law for the recovery of the debt secured by the mortgage. This allegation was denied in the answers of mortgagors. Mortgagees failed to prove the fact thus put in issue. The decree of foreclosure was therefore erroneous. The statute requires an allegation that no proceeding at law to recover the debt has been instituted, and proof of that fact is necessary, if denied in the answer. This technicality was created by legislative enactment and neither the parties nor the courts are at liberty to disregard it. Comp. St. 1922, sec. 9212; *Beebe v. Bahr*, 84 Neb. 191, and cases cited therein; *Great Western Commission Co. v. Schmeeckle*, 99 Neb. 672. There was also a failure to prove other material allegations of Cronin's petition. For the reasons stated, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

STATE OF NEBRASKA, APPELLANT, V. DELAWARE-HICKMAN DITCH COMPANY, APPELLEE.

FILED OCTOBER 15, 1926. No. 24377.

1. **Appeal in Equity:** TRIAL DE NOVO. When an action in equity is appealed, it is the duty of this court to try the issues *de novo* and to reach an independent conclusion without reference to the findings of the district court. Comp. St. 1922, sec. 9150. But in a case wherein the court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. *Greusel v. Payne*, 107 Neb. 84.
2. **Affirmance.** Upon examination of the record, we find that the judgment is amply supported by the evidence.

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

O. S. Spillman, Attorney General, Lee Basye, and *Sullivan, Wright & Thummel,* for appellant.

Scott & Scott and *McDonald & Irwin, contra.*

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

DEAN, J.

The Delaware-Hickman Ditch Company, of Dundy county, hereinafter called the company, and its officers were cited under section 8428, Comp. St. 1922, to appear at Bridgeport, before the department of public works, there to show cause why its appropriation for a certain quantity of water for irrigation purposes from the Republican river, in Dundy county, Nebraska, should not be canceled and forfeited, on the alleged ground of nonuser.

Defendants own and occupy 1,280 acres of land under the ditch, and in their joint answer it is alleged, in sub-

stance, that for many years they used the water pursuant to the appropriation, in fact, ever since 1895, when the grant was obtained, and that, shortly thereafter, they constructed the headgate, main ditch and laterals, and the irrigation works generally, and appropriated such water as was needed to irrigate the above mentioned lands. And they alleged that practically every year large sums of money were expended by them for the construction, upkeep and maintenance of the ditch and to keep it and the works generally in repair. It is also alleged that the soil through which the ditch runs is a light, sandy, porous loam and is therefore "subject to seepage," and much of the land under the ditch has received great benefit by reason of subirrigation, so that it did not at all times require the application of surface irrigation, unless the rainfall was deficient, and that at such times, when irrigation was deemed expedient and appeared to be necessary, the land was regularly irrigated through and by means of the ditch and the works generally. It is alleged, too, that, during all of the time since the appropriation of water involved herein, the headgate, main ditch, laterals, drops, spillway, and the works generally, have been kept in a reasonably efficient and operative condition and capable of furnishing the water for which the project was constructed. And defendants insist that they have in no way, either by word or act, abandoned the right to use the full appropriation, and have never entertained any intention to abandon any right acquired through the appropriation.

In support of defendants' material allegations there is evidence tending to prove that, during a part of the time involved in this inquiry, there was no water available in the Republican river, so that, of course, irrigation from that source temporarily ceased; but, when needed, it was regularly turned into the ditch. A ditch foreman was employed each year, the evidence shows, and from $250 to $300 was expended yearly for ditch repairs exclusive of labor costs. It is also disclosed by defendants' witnesses that it was the expressed policy and the uniform practice

of the company to extend the ditch to all points where the water might be beneficially used.

George E. Johnson, then secretary of the department of public works, caused to be attached to the record certain instruments purporting to be verified copies of original reports made by the water commissioner which were adverse to the contention of defendants. Mr. Bailey, the commissioner, testified that he acted in that capacity while he was engaged with other work which was entirely aside from his duties as water commissioner. Other witnesses called by the department of public works gave evidence which, in some particulars, flatly contradicted that of the defendants. And in respect of the evidence, plaintiff frankly makes this concession in his brief: "Many apparent conflicts appear and much indefiniteness in the use of terms occurs."

Some of the evidence was taken in the form of depositions and some oral evidence was submitted in the presence of the court. And, besides, the court's findings disclose that the trial judge, accompanied by counsel for the opposing parties, made a personal examination of the irrigation works in suit throughout all its course; so that the court not only saw and heard many of the material witnesses who testified, but a personal examination of the physical facts was made as well.

So much of the court's findings as are immediately pertinent to the facts follow:

"Proceeding to consideration of the case upon its merits, the court finds from the evidence and the observations made at the examination of the works and grounds, pursuant to the stipulation of counsel, that the contestee, Delaware-Hickman Ditch Company, has constructed and is maintaining the irrigation works in question, and that the structures and appliances used in connection therewith are of a feasible and practical nature, and adapted to the purposes for which constructed; that the water of the Republican river has been put to the beneficial and useful purpose of irrigating lands for which the appropriation was made; the works and structures are probably as sub-

stantial as the size of the ditch would justify, particularly when consideration is given to the irregularity of the supply of water and demand for water; that at times there is no available water in the river at the point of diversion, and at times irrigation not necessary; that there has never been an abandonment of such irrigation project, and there has not been a failure to use said works, nor to apply the water appropriated thereby for irrigation purposes for a period of three consecutive years. The court finds generally in favor of the contestee and against the contestant."

The rule is that, when an action in equity is appealed, it is the duty of this court to try the issues *de novo* and to reach an independent conclusion without reference to the findings of the district court. Comp. St. 1922, sec. 9150. But in a case wherein the court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. *Greusel v. Payne,* 107 Neb. 84.

Reversible error has not been pointed out. It follows that the judgment must be, and it hereby is,

AFFIRMED.

CITIZENS STATE BANK OF RALSTON, APPELLEE, V. MAX PETERSEN ET AL.:
FARMERS & MERCHANTS BANK ET AL., APPELLANTS:
C. F. CONNOLLY, TRUSTEE, APPELLEE.

FILED OCTOBER 15, 1926. No. 24277.

1. Mortgages: MERGER. "Ordinarily, when one having a mortgage on real estate becomes the owner of the fee the former estate is merged in the latter." *Wyatt-Bullard Lumber Co. v. Bourke,* 55 Neb. 9.
2. ———: ———. "But the mortgagee may in such case keep his mortgage alive when it is essential to his security against

an intervening title. If there was no expression of his intention in relation to the matter at the time he acquired the equity of redemption, it will be presumed, in the absence of circumstances indicating a contrary purpose, that he intended to do that which would prove most advantageous to himself." *Wyatt-Bullard Lumber Co. v. Bourke*, 55 Neb. 9.

3. **Evidence** examined, and *held* that the taking of a deed to the mortgaged premises by C. F. Connolly, trustee, for the benefit of the plaintiff did not operate to cancel the plaintiff's mortgage.

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

William R. Patrick, for appellants.

Crofoot, Fraser, Connolly & Stryker, contra.

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

DAY, J.

This action is brought by the Citizens State Bank of Ralston to foreclose two mortgages for $5,000 and $4,000, respectively, executed by Max and Martha Petersen, covering 100 acres of specifically described land in Sarpy county, Nebraska. These two mortgages were subject to prior mortgage in favor of Adolph H. Voss. The Voss mortgage is not involved in this action.

The Farmers & Merchants Bank filed a cross-petition praying that its judgment against Max Petersen for $1,015.15, with interest thereon, be established as a lien upon the premises paramount to the plaintiff's mortgages. H. L. Gearhart also filed a cross-petition in which he prayed his materialman's lien be decreed a prior lien to the mortgage of the plaintiff.

The court found that the Voss mortgage for $7,500, dated February 13, 1918, was a first lien upon the land in question. The court also found that the plaintiff's mortgage for $5,000, dated April 5, 1919, and recorded November 17, 1919, upon which there was due $6,239.64, was a second

lien upon the premises, and that the judgment of the Farmers & Merchants Bank for $1,015.15, recovered October 8, 1921, in the district court for Sarpy county against Max Petersen, with interest and costs amounting to $1,284.58, was a third lien; that the plaintiff's mortgage for $4,000, dated December 10, 1921, and recorded December 24, 1921, with interest aggregating $4,964.46, was a fourth lien, and that the lien of H. L. Gearhart for $482.37, recorded May 5, 1922, with interest totaling $565.17, was a fifth lien.

Upon these findings the court foreclosed the plaintiff's mortgages and established liens of the respective parties for the amounts and in the priorities as above stated. The court also made an order of accounting of the proceeds of the sale of the premises based upon the possession of the plaintiff of the mortgaged premises. From this judgment the Farmers & Merchants Bank and Gearhart have appealed.

It appears that Max and Martha Petersen conveyed the land in question to C. F. Connolly, trustee, on February 27, 1923, in consideration of the payment to them of $1,000 and the release of certain personal property from the lien of a chattel mortgage held by the plaintiff, and thereupon the Petersens surrendered possession of the premises to Connolly, trustee. The record shows that in taking the deed Connolly was trustee for the plaintiff. The main point urged by the appellant is that the deed to Connolly, trustee, was in effect a deed to the plaintiff of the land in question; that, by thus obtaining the legal title, the plantiff's equitable title created by its mortgages became merged in the legal title and canceled the mortgage liens, thus giving the appellants a prior lien over the plaintiff's mortgages.

Assuming, but not deciding, that the deed to Connolly, trustee, was equivalent to a deed direct to the plaintiff, it does not necessarily follow that the merger of the two titles was thereby created. It is a general rule of law that, whenever a greater estate and a lesser unite in the same person, without any intermediate estate, the lesser is merged in the greater. In equity, however, the legal rule of merger is not always followed, and the question whether

the legal rule will be applied depends upon the facts and circumstances of each particular case. In some jurisdictions it is held that the intention of the party in whom the estates unite is the controlling factor. In *Wyatt-Bullard Lumber Co. v. Bourke,* 55 Neb. 9, the rule is stated as follows:

"Ordinarily, when one having a mortgage on real estate becomes the owner of the fee the former estate is merged in the latter.

"But the mortgagee may in such case keep his mortgage alive when it is essential to his security against an intervening title. If there was no expression of his intention in relation to the matter at the time he acquired the equity of redemption, it will be presumed, in the absence of circumstances indicating a contrary purpose, that he intended to do that which would prove most advantageous to himself."

In discussing the doctrine of merger in *Peterborough Savings Bank v. Pierce,* 54 Neb. 712, this court said: "Whether the two estates will be held to have coalesced will depend upon the facts and circumstances in the particular case, the intention of the party acquiring the two estates and the equities of the parties to be affected."

For general discussion see *Downing v. Hartshorn,* 69 Neb. 364; *Mathews v. Jones,* 47 Neb. 616; 21 C. J. 1033, sec. 233, and 1034, sec. 234, and cases cited. In viewing the evidence and circumstances in the light of the authorities above cited, we are well satisfied that the deed to Connolly, trustee, did not cancel and annul the plaintiff's mortgage and that the trial court was correct in so holding.

The appellants also complain of that portion of the decree wherein the court ordered an accounting upon final distribution of the proceeds of the sale of the premises. The decree provides: "That upon final distribution of the proceeds of the sale of said mortgaged premises an accounting will be had on account of the plaintiff and C. F. Connolly, trustee, being in possession of said mortgaged premises from January 27, 1923, to the date of said accounting; that in said accounting plaintiff herein will be entitled to credit

for the amount paid by it as a consideration for said deed, and for any other amounts paid by it as interest upon the first mortgage upon said premises, and for any other improvements made upon the mortgaged premises or for the value of any crops planted upon the same by plaintiff, and the plaintiff will be charged with the reasonable rental value of said mortgaged premises during the time it has been in possession of same." The decree also provided that the amount due from the plaintiff on the accounting should be used to reduce the plaintiff's $5,000 mortgage.

It is difficult to understand upon what theory the appellants complain of this part of the decree. Petersens had the right to sell their equity of redemption, and Connolly, trustee, or the plaintiff had the right to purchase it, and to retain possession of the premises till taken away in a proper proceeding.

While it is true the appellants had a lien on the land, this fact alone gave them no lien on the rents and profits of the land or the equity of redemption of the Petersens. If the appellants desired to impound the rents and profits pending the action, the law afforded them an appropriate remedy. We see no basis for appellants' complaint. While we are of the view that this order should not have been made against the plaintiff, it has taken no appeal.

Other errors have been assigned in the briefs, but are not discussed except in a general way. We have considered them, but do not regard them as controlling.

On the whole record, we are of the opinion that the judgment of the trial court is correct and it is therefore

AFFIRMED.

SHERIDAN COUNTY, APPELLANT, V. JOSEPH HAND, APPELLEE.

FILED OCTOBER 15, 1926. No. 24630.

1. **Statutes:** CIVIL ADMINISTRATIVE CODE: SUFFICIENCY OF TITLE. The title of the Civil Administrative Code (Laws 1919, ch. 190), in connection with sections 1, 2, 3, and 4, title 7, art. II, thereof, being sections 8333-8336, Comp. St. 1922, considered,

and *held*, that such title was sufficiently comprehensive to include such sections.

2. ———: ADOPTION BY REFERENCE. By reference in section 8335, Comp. St. 1922, relating to relocation, alteration and widening of state highways, to sections 1017-1021 to provide method of appropriating land for such highways, the latter sections were thereby adopted; and further, by reference in such section 8335 to sections 1017-1021, the former did not become amendatory of the latter.

3. Constitutional Law: EMINENT DOMAIN: NOTICE. Sections 1017-1021, Comp. St. 1922, considered, and *held*, that the word "nonresident," as used in section 1021, means one not domiciled within the state; *held*, further, that, as neither of these sections provide for notice to be given to resident landowners of the time and place of the appraisers' meeting to inspect the land and assess the damages, such owners are denied due process of law; thus, such sections contravene section 3, art. I, of the Constitution.

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

O. S. Spillman, Attorney General, George W. Ayres and *J. H. Edmunds*, for appellant.

E. D. Crites, F. A. Crites and *J. E. Porter, contra.*

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

THOMPSON, J.

This case was decided by us and the opinion reported in 209 N. W. 741 (advance sheets). A motion for rehearing was filed, upon consideration of which, such opinion was withdrawn.

This is an action, as reflected by the record and as presented at oral argument, as tried and determined in the district court for Sheridan county, wherein the appellee seeks to have the appellant enjoined from establishing a public road over and across his land in such county. Judgment was rendered in his favor, as prayed, against the county and the department of public works, each of which

latter respectively appeals.

The record shows that the county, acting through its proper officers, and at the instance of the department of public works, had proceeded to locate a state highway over and across 160 acres of land in Sheridan county, owned by Hand, a resident of Dawes county, under and by virtue of sections 1, 2, 3, and 4, title 7, art. II, ch. 190, Laws 1919, being a part of our Civil Administrative Code, and especially sections 2 and 3 thereof, which latter sections are, and will be herein referred to as, sections 8334 and 8335, Comp. St. 1922, and in the manner as provided in sections 1092-1096, Rev. St. 1913, which latter are sections 1017-1021, Comp. St. 1922, and are referred to in such section 8335. Hand challenged such procedure of the county for the reason that such sections 8334 and 8335 are unconstitutional and void, in that:

(1) As such sections are without a mode of procedure save and except as they refer to sections 1017-1021, Comp. St. 1922, they are amendatory thereof, and as such amendatory provision is not covered by the title, the sections here in question contravene section 14, art. III of the Constitution, which reads in part as follows: "No law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed."

(2) The act of which such sections 8334 and 8335 are a part, by their inclusion, contains more than one subject, and such subject is not clearly expressed in the title, therefore the act contravenes the further prohibition of section 14, art. III of the Constitution, wherein it is provided: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."

(3) That such sections 8334 and 8335, even if they include sections 1017-1021 by reference, in no wise provide for notice to be given the landowner, when as in this case he is a resident of the state, to wit, that of an adjoining county, so that he may have his day in court, hence, they contravene that part of section 3, art. I of the Constitution,

wherein it is provided: "No person shall be deprived of * * * property, without due process of law."

The trial court sustained each of such contentions, and entered judgment as hereinbefore stated. Appellant for reversal challenges such respective holdings.

Considering these claimed errors as lodged, solely in connection with the sections here involved, the holding of the trial court that, by reason of section 8335 adopting as the mode of procedure sections 1017-1021, the former is amendatory of the latter, is erroneous. In *State v. Ure*, 91 Neb. 31, we held:

"The mere fact that an act of the legislature adopts the provisions of prior acts by reference thereto does not render the new act amendatory of the acts to which reference is made if in other respects it is a complete act in itself."

The title of the act in question, so far as is necessary for our consideration, reads as follows: "An act to adopt and establish a code of laws for the state of Nebraska relating to the civil government of the state and to provide for their administration and enforcement to be known as the Civil Administrative Code," etc. Laws 1919, ch. 190.

While the scope and intent of the act is broad, yet it covers but a single thought, to wit, the efficient administration of the civil government of the state, and sections 8334 and 8335 are but relative parts of the objective. In this, it is similar to our Civil and Criminal Codes and other comprehensive enactments, which must necessarily cover many provisions pertinent to its purpose, which purpose must be gleaned from a consideration of the entire act, and not from segregated portions thereof.

Thus considered, the act in question is a complete and independent act, and is not amendatory of other statutes. Hence, we conclude that such act, as to the sections under consideration, covers but one subject; thus it does not contravene section 14, art. III of the Constitution, wherein it is provided: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."

And, as it is not an amendatory act, it does not run coun-

ter to that provision of section 14, art. III of the Constitution, providing: "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."

In this conclusion we are sustained by the following authorities: In *Affholder v. State,* 51 Neb. 91, we held: "Section 11, art III of the Constitution (now section 14, art. III) should be so liberally construed as to admit of the insertion in a legislative act of all provisions which, though not specifically expressed in the title, are comprehended within the objects and purposes of the act as expressed in its title, and to admit all provisions which are germane, and not foreign, to the provisions of the act as expressed in its title." *Nebraska Loan & Building Ass'n v. Perkins,* 61 Neb. 254; *DeFrance v. Harmer,* 66 Neb. 14; *Eaton v. Eaton,* 66 Neb. 676; *State v. Loer,* 82 Neb. 602; *Wilkinson v. Lord,* 85 Neb. 136; *State v. Junkin,* 87 Neb. 801; *State v. Ure,* 91 Neb. 31.

As to the challenge of Hand to the constitutionality of the sections under consideration, we have carefully considered section 1019, in connection with the other sections cited, and find a failure to provide for notice to be given the landowner, if a resident of the state, of the application to be made to the county court, or of the court's determination thereof, or of the time and place of the appraisers' meeting to inspect the land and assess the damages. Hence, we conclude that such section denies to such resident landowner due process of law, and therefore contravenes section 3, art. I of the Constitution. This conclusion is in harmony with our holding in *Albin v. Consolidated School District,* 106 Neb. 719, wherein it is *held*:

"Chapter 244, Laws 1919, is unconstitutional for failure to provide for notice to the property owner of the time and place at which the appraisers would meet for the purpose of making their assessment.

"The proceedings being without jurisdiction, the owner did not waive his objection thereto by appealing from the award.

"Actual knowledge of the owner of the appointment of the appraisers under an unconstitutional act cannot operate as a substitute for notice required by due process of law."

Our attention is also called to section 1021. This section, however, provides for notice to a nonresident landowner only. Where the word "nonresident" appears in a statute without qualifications or limitations, it means one not domiciled within the state, the sovereignty. As well said by us in construing a similar section of our statute in *Pacific R. Co. v. Perkins*, 36 Neb. 456: "The word 'nonresident,' in section 100, ch. 16, Comp. St. * * * means a nonresident of the state, and not of the land affected, or of the county where it is situate." Hence, as Hand was a resident of an adjoining county, this section is without application.

The respective contentions of the appellant are sustained as to all points hereinbefore considered, save as to jurisdiction. However, as we have determined that the failure of the statute to provide for notice contravened section 3, art. I of the Constitution, we conclude that the entire proceedings were without jurisdiction. The judgment of the district court dismissing the proceedings for lack of jurisdiction and sustaining the injunction is affirmed. All costs, including those of this court, to be taxed to the county of Sheridan.

AFFIRMED.

Note—See Equity, 21 C. J., pp. 1033-1035. Mortgages, 41 C. J., pp. 775-780.

LEON A. CLARK V. STATE OF NEBRASKA.

FILED NOVEMBER 19, 1926. No. 25118.

Criminal Law: DYING DECLARATIONS. Dying declarations are admissible only in cases of homicide, and then only where the death of declarant is the subject of the charge.

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

Stewart, Perry, Stewart & Van Pelt and *Kiplinger & Hanson,* for plaintiff in error.

O. S. Spillman, Attorney General, B. F. Butler and *Frank M. Colfer, contra.*

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

MORRISSEY, C. J.

Defendant was convicted in the district court for Red Willow county upon an information which charged him with having committed the crime of sodomy, on May 1, 1924, upon the person of a young man named Ted Pate.

At the time the offense is alleged to have been committed, defendant was engaged in the mercantile business in the city of McCook. His home was in an apartment house, and this apartment was frequented by several boys and young men of the city.

It is shown by witnesses for the state that defendant and Ted Pate had long been intimate friends; that Pate was an employee of defendant and frequently slept in defendant's apartment. In the early summer of 1924, defendant, Pate, and another young man made an extended automobile trip together. For some time prior Pate had been in failing health. While making the excursion his condition became such that they turned back, and, upon reaching McCook, Pate submitted himself to the care of a physician. The physician found his patient suffering from syphilis in an advanced and virulent form. From this disease Pate soon thereafter died.

The mother of Pate was called as a witness for the state and, over objection by defendant, was permitted to testify that, shortly before the death of her son, he told her that his syphiletic condition was due to unnatural intercourse which defendant had had with him.

Upon the facts thus briefly summarized, the case was submitted to a jury, which returned a verdict of guilty and

defendant was sentenced to serve a term in the state penitentiary.

The first assignment of error deals with the admission of the testimony of Pate's mother in which she told of the statement made to her by her son shortly before he died. It is claimed that this testimony does not fall within the exceptions to the hearsay rule and was, therefore, not admissible.

At the early common law, dying declarations were admissible in all cases, civil or criminal. Later a distinction was evolved and such declarations were received only in homicide cases. This has been the general rule in this country for more than a hundred years. It has been so long recognized as a rule of evidence that a court may well pause before overthrowing it. There is an extensive discussion and a masterful criticism of this rule in 3 Wigmore, Evidence (2d ed.) sec. 1436. The learned author indicts it as a heresy, but concludes the discussion by saying that it should be wholly abolished by legislation. The rule has been so generally accepted and its overthrow might lead to such confusion that we are constrained to adhere to it, and leave the law-making body to determine whether or not it shall be revoked.

Dying declarations are admissible only in cases of homicide, and then only where the death of declarant is the subject of the charge. 1 Greenleaf, Evidence (16th ed.) sec. 156a; *People v. Stison,* 140 Mich. 216; 22 C. J. 258, sec. 259.

It was error for the court to permit the testimony to be submitted to the jury. The judgment of the trial court is set aside and the cause remanded.

REVERSED.

ROSE, J., dissenting.

I dissent from the ruling that dying declarations are inadmissible in evidence except in prosecutions for felonious homicides. Evidence of this character consists of statements by a person conscious of certain and immediate death. The common law once sanctioned proof of dying declara-

tions in both civil and criminal cases. The solemnity of approaching dissolution and the natural inclination to refrain from false accusations in the presence of impending death performed the office of an oath for the purpose of ascertaining the truth from a person having knowledge of material facts. In time, criticism based on the inadmissibility of hearsay evidence, on the lack of opportunity for cross-examination, and on other technical objections to the general applicability of the common-law rule resulted in restricting dying declarations to prosecutions for homicide in many jurisdictions. Some courts, however, admitted dying declarations in other criminal cases. An able textwriter and teacher condemned the restrictions as heresies of the last century, saying:

"The sanction of a dying declaration is equally efficacious whether it speaks of a murder or a robbery or a fraudulent will; and, the necessity being the same, the admissibility should be the same. The spurious principle is recognized as unworkable in logical strictness, and, when fairly carried out, comes into conflict with convenience and good sense. Its limitations are heresies of the last century, which have not even the sanction of antiquity." 3 Wigmore, Evidence (2d ed.) sec. 1436.

Some eminent courts have taken the same view, though the current of modern precedent is to the contrary. A reason for admitting dying declarations in one class of cases and excluding them in others has been recently stated as follows:

"Dying declarations are admissible in cases of felonious homicide, on the ground of public policy and necessity, since that crime is usually committed in secret, and it cannot be allowed to such an offender to commit the crime, and by the same act still forever the tongue of the only person in the world who could affirm his guilt." 1 R. C. L. 529, sec. 70.

The reasons for admitting such evidence in trials for homicidal felonies and rejecting it in prosecutions for criminal acts of sexual perverts are not based on logical

or justifiable distinctions. In cases of felonious homicide, dying declarations as proofs of guilt are generally sanctioned by the courts of the country. The reasons for applying the rule in one class of cases sanction the same kind of evidence in prosecutions for other classes of crimes. If necessity is the test, the protection of innocent children, both male and female, from the sexual depravity of moral perverts is as essential as the protection of human life from the homicidal tendency of assassins. If secrecy is the standard of admissibility, sexual crimes are generally committed in secret and the victims are sometimes children too young and innocent to testify as witnesses. I condemn the distinction as unfounded in reason and experience. I challenge the propriety or necessity of waiting for the legislature to change or make rules of evidence for the purpose of proving the guilt of malefactors who are already too numerous for the sanctity of innocence and the privilege of life.

DEAN, J., joins in this dissent.

CLEO ANN FREELAND ET AL., APPELLANTS, V. ELSIE ANDERSEN ET AL., APPELLEES.

FILED NOVEMBER 19, 1926. No. 24091.

1. **Partition:** TESTAMENTARY RESTRICITON. A will devising a life estate in land to the wife of testator and the remainder to his heirs may contain a testamentary restriction on compulsory or involuntary partition during the life of his widow.
2. ———: ———. A will devising a life estate to the wife of testator and the remainder to his heirs at her death may operate as a restriction on compulsory or involuntary partition during her life.
3. ———: ———. A life tenant and remaindermen cannot compel other remaindermen to submit to compulsory or involuntary partition in violation of testamentary devises creating both the life estate and the remainder.

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

J. Harvey Sherwood and *Edward J. Lambe,* for appellants.

S. A. Dravo, contra.

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

ROSE, J.

This is a suit to partition a quarter section of land and three lots in Phelps county. The lots are in the village of Atlanta and there is a dwelling on them. While William D. Freeland was owner he made his will June 20, 1918, and died January 23, 1920. The will was filed in the county court January 29, 1920, and probated February 26, 1920. It first directed payment of testator's debts and funeral expenses. The second and third bequests and devises were as follows:

"Second. I give, devise and bequeath to my beloved wife Cleo Ann Freeland all the rest, residue and remainder of my estate both real and personal to have and to hold so long as she may live.

"Third. All the rest and residue of my estate, both real, personal and mixed, I give, devise and bequeath to my heirs at the death of my beloved wife Cleo Ann Freeland and to them and their heirs and assigns forever, share and share alike, as tenants in common."

Cleo Ann Freeland, widow of testator, was appointed executrix and as such she paid the debts and the funeral expenses and accepted the terms of the will. Pursuant to decree of the county court, she took possession of the real estate in controversy and has since enjoyed the rents and profits thereof as tenant for life. The petition and the probate records to which it refers show that testator, for the purposes of his will, temporarily divided his real property into two estates — the life estate and the remainder. He willed the life estate to his wife and the remainder to his heirs without naming them, but the county court in a decree relating to heirship identified them by name and from that

adjudication there was no appeal. The widow to whom the life estate was willed was the second wife of testator and was not the mother of any of the other devisees. The interest of each plaintiff and each defendant was derived from the will. The plaintiffs, petitioners for partition, are Cleo Ann Freeland, the widow, owner of the life estate, and the following named heirs, who, as remaindermen, join in the prayer for partition: Elmer E. Freeland, the only surviving child of testator; Alfred J. Freeland, grandson, child of a deceased son; and Cecil C. Salisbury, grandson, child of a deceased daughter. The defendants include the other heirs of testator, grandchildren and great-grandson, who, as remaindermen, resist partition. The wives and the husbands of the married heirs sued are also defendants. The theory of the widow, as disclosed by the petition, is that she has a right to relinquish her life estate and to demand the value thereof in purchase money arising from a partition sale. The other plaintiffs petition for the same relief and also for the distribution of the remaining proceeds according to the respective interests of the heirs. The suit was defended on the ground that a cause of action for an involuntary or compulsory partition will not accrue prior to the extinguishment of the life estate by the death of the life tenant. Upon a trial of the case the district court dismissed the action and plaintiffs appealed.

The principal question argued by plaintiffs in support of their demand for relief may be stated thus: During the existence of the life estate, may the life tenant waive it in a suit for partition and recover the value thereof in purchase money arising from a partition sale, where some of the remaindermen join in the petition for such relief and pray for a distribution of the remaining proceeds according to respective shares, though other remaindermen resist partition as premature? It is earnestly insisted by plaintiffs that the right to the relief sought by them is, on undisputed evidence showing the value of the life estate, created by the statutes relating to partition and to the settlement of the estates of deceased persons, citing: Comp. St.

1922, secs. 1438-1442, 9238, 9258, 9261; *Weddingfeld v. Weddingfeld,* 109 Neb. 729; *Nitz v. Widman,* 106 Neb. 736. Admitting for the moment the general proposition stated, but not deciding the question raised, this suit was properly dismissed on the ground that testator expressed in his will an intention to prevent involuntary or compulsory partition until after the death of his widow to whom he gave the life estate. The restriction was a valid exercise of testamentary power. It does not violate public policy nor conflict with any Nebraska statute. *Peterson v. Damoude,* 98 Neb. 370.

Testator, after devising the life estate to his wife, disposed of the remainder as follows:

"All the rest and residue of my estate, both real, personal and mixed, I give, devise and bequeath to my heirs at the death of my beloved wife."

The term, "at the death of my beloved wife," in the connection used, is a testamentary restriction on compulsory or involuntary partition during the life of the widow. Notwithstanding an Illinois statute providing, contrary to the general rule in absence of legislation, that joint owners of a vested remainder may compel partition among themselves without disturbing the life estate, the supreme court of that state held:

"Where a will devises real estate to the widow for life or during widowhood, and there is a subsequent general direction that after the death of the wife the property shall be equally divided among the testator's children, the children are not entitled to partition until the particular estate of the wife is extinguished by her death or remarriage." *Dee v. Dee,* 212 Ill. 338; *Heininger v. Meissmer,* 261 Ill. 105.

The rule stated is based on sound principles. The will involved in the present suit was duly probated and the valid devises therein are binding on devisees who assert rights thus created. Partition of land, if resisted by tenants in common, should not be awarded at the suit of a devisee in violation of a valid restriction in the testamentary devise under which he claims. Plaintiffs, therefore, cannot com-

pel defendants to submit to a partition to which they object. It follows that the judgment of dismissal in the district court was free from error.

AFFIRMED.

Note—See Partition, 30 Cyc. 185 n. 54; 14 A. L. R. 1240; 20 R. C. L. 718.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELEE, V. FARMERS STATE BANK OF BUSHNELL: LINCOLN LIBERTY LIFE INSURANCE COMPANY, INTERVENER, APPELLANT.

FILED NOVEMBER 19, 1926. No. 25121.

1. **Banks and Banking:** RECEIVERS. Ordinarily a receiver takes charge of banking affairs where the bank left them, and cannot generally, in absence of fraud, mistake, or violation of law, open closed transactions which would conclude the bank, if solvent.
2. ———: DEPOSITS: EVIDENCE. A plea that a time certificate of deposit, valid on its face as a claim against the bank guaranty fund, was tainted by an unlawful collateral agreement, *held* not established by the evidence.

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

C. J. Campbell, for appellant.

O. S. Spillman, Attorney General, C. M. Skiles, Homer L. Kyle and *McIntosh & Martin, contra.*

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

ROSE, J.

This is a controversy between the receiver of the Farmers State Bank of Bushnell, an insolvent state banking corporation, and the Lincoln Liberty Life Insurance Company, claimant, over a demand for the payment of five certificates of deposit, aggregating $4,000, out of the bank guaranty fund.

The bank went into the hands of a receiver in July, 1923. In the proceedings to wind up its affairs claimant intervened and presented for allowance five certificates of deposit, all dated April 28, 1923, each bearing interest at the rate of 5 per cent. per annum, the dates of maturity and the amounts being as follows: July 15, 1923, $500; August 15, 1923, $500; September 15, 1923, $1,000; October 15, 1923, $1,000; November 15, 1923, $1,000. These five certificates, all unpaid, amounting to $4,000, were, to that extent, renewals of a 5,000-dollar certificate evidencing an original deposit by claimant October 28, 1922, payable April 28, 1923. Two other renewal certificates dated October 28, 1922, based on the same original deposit, each for $500, were also issued by the bank to claimant, but they were subsequently paid. The amount in controversy is the $4,000 evidenced by the five unpaid renewal certificates of deposit aggregating that sum.

The demand for payment out of the bank guaranty fund was challenged by the receiver in his answer on the ground that the unpaid certificates dated April 28, 1923, were issued pursuant to a collateral agreement obligating claimant, in violation of a statute which went into effect April 7, 1923, to make bank deposits in sums proportioned to the amount of life insurance procured by officers of the bank for claimant. Laws 1923, ch. 191, sec. 39. The facts pleaded as a defense were treated as if denied in a reply to the answer. Upon a trial of the issues the district court allowed the claim as a general indebtedness of the bank, but disallowed it as a charge against the bank guaranty fund. Claimant appealed from the disallowance.

Was a resort to the bank guaranty fund defeated by a collateral agreement forbidden by statute? Laws 1923, ch. 191, sec. 39. The original certificate and the renewals evidence deposits conforming to the bank guaranty law. Each is regular on its face. The bank in fact received from claimant $5,000 October 28, 1922, and paid back $1,000 only, retaining the rest until the state closed its doors. In the meantime the creditors of the bank, the bank itself, and the

guaranty fund had whatever protection the deposits afforded. Power to examine the bank and to disburse the bank guaranty fund had been committed to the state department of trade and commerce and not to claimant. The receiver took charge of the banking affairs in July, 1923, where the bank had left them, and cannot, in absence of fraud, mistake or violation of law, open closed transactions which would conclude the bank, if solvent. *State v. South Fork State Bank,* 112 Neb. 623; *State v. American Exchange Bank,* 112 Neb. 834; *State v. Farmers State Bank,* 112 Neb. 788.

Claimant made a *prima facie* case. Afterward the burden was on the receiver to prove the collateral agreement pleaded by him as a defense. He was required to overturn written evidence of legitimate banking transactions — the issuance of the certificates of deposit while the bank was in operation as a commercial enterprise. In this situation the receiver argues that claimant's money, pursuant to a mutual understanding, was entrusted to the bank in part consideration for the procuring of insurance at the ratio of $100 in deposits to $1,000 in insurance, a collateral agreement forbidden by the statute cited. The receiver, to maintain his position, relies on correspondence between claimant and officers of the bank, on circumstances surrounding the transactions and on inferences from oral testimony, from the procuring of insurance and from the making of the deposits. In the correspondence officers of the bank and claimant exchanged views on the advisability of a permanent agreement like that pleaded as a defense, but there is nothing to show the consummation of such an arrangement. The letters themselves tend to negative a permanent understanding. There is no evidence of a single or temporary collateral agreement applicable to the original deposit of $5,000 or to the renewals. There is, however, positive testimony by an officer of claimant that there was no illegal consideration or collateral agreement for the original deposit or for the renewals thereof. In view of both written and oral proofs of legal transactions, the circum-

stances are insufficient to prove a violation of law. The evidence has been examined from every standpoint without finding anything substantial to prevent claimant from participating in the bank guaranty fund. That part of the judgment from which the appeal is taken is therefore reversed and the cause remanded to the district court for the purpose of granting the prayer of claimant's petition.

REVERSED.

FRANK L. HORR, APPELLEE, V. THOMAS J. EASTON ET AL., APPELLANTS.

FILED NOVEMBER 19, 1926. No. 24331.

Continuance. Where a defendant alleges a valid and lawful defense in a suit brought against him and before the time set for the trial he becomes ill and is unable to attend court at the time fixed therefor, and such fact is established by his own affidavit and that of his counsel and his attending physician, ordinarily it is error for the trial court to proceed to trial in the absence of such defendant.

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

William J. Ballard, for appellants.

Roland V. Rodman, contra.

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

DEAN, J.

This is a suit for the foreclosure of a real estate mortgage in the district court in and for Kimball county wherein the plaintiff alleges that there is due and owing to him $1,400 pursuant to a note and a five-year mortgage executed by defendants and delivered to plaintiff on or about September 3, 1920. The petition is in the usual form and was filed January 4, 1924. February 29, 1924, an answer was filed wherein the defendants admit the making, execution

and delivery of the note and mortgage in suit, but a counterclaim is pleaded which is based on an alleged failure of consideration for a considerable portion of the amount for which the instruments in suit were given, and it was also pleaded that the execution of the instruments sued on was induced by fraudulent representations of plaintiff. On May 5, 1924, a motion for continuance was filed wherein it is set forth generally that a party therein named was a material witness for defendants and, if present, would testify to facts which were material to the defense on defendant's part, and it was further averred that defendant knew of no other witness by whom to establish such facts, and that such witness would be present at the following September, 1924, term of the court, or failing to have him present, his deposition would be procured. We deem it sufficient to say that the allegations set forth in the foregoing affidavit, which need not be reproduced here, if established, would tend to constitute a defense. There is also an affidavit filed by defendant's counsel wherein it appears that his client was ill and was unable to appear at the date set for the trial, and this averment was supported by an affidavit of a physician who attended defendant in his illness, and he avers that defendant was, at the time, suffering from an ailment, namely, "epistaxis, or hemorrhage from nasal canal," and that at the date of the trial he was not in a fit physical condition to safely leave his home. The court overruled the motion for a continuance, and defendants, alleging error, after perfecting the required bond, prosecuted an appeal. No counter affidavits were filed by plaintiff. *Hoover v. Hoover,* 5 Neb. (Unof.) 167; *In re Townsend's Estate,* 122 Ia. 246. In speaking of the absence of the litigant the Iowa court, speaking by Judge Deemer, said: "Her counsel were entitled to her presence, counsel and advice during the entire trial. The evidence discloses that she knew more about the real issues than any one else, and, while she may have been incompetent as a witness to testify to many of these matters, there was the more need for her advice and counsel during the trial." In *Mathews*

v. Willoughby, 85 Ga. 289, the court said: "A continuance should have been granted on motion properly showing, on the call of the case, that the defendant was sick with pneumonia and would be unable to attend court for five or six days, in connection with his counsel's statement that he could not go to trial without the presence of his client; the only counter-showing being to the effect that the defendant was seen two days before, going from his home."

We think, in view of the entire record, that the court erred in overruling defendant's motion for a continuance and in this view of the case the judgment of the district court must be reversed and the cause remanded for a new trial.

REVERSED.

WILLIAM MCKELVIE V. STATE OF NEBRASKA.

FILED NOVEMBER 19, 1926. No. 25181.

1. **Intoxicating Liquors: STILLS: UNLAWFUL POSSESSION: PROOF.** "In order to constitute the possession of a still unlawful under section 3252, Comp. St. 1922, it must be established that the still was intended to be used for the manufacture of intoxicating liquor, without permission being given as required by the statute." *Blevins v. State*, 109 Neb. 183.
2. **Case Followed.** Upon examination, we hold that the present case is governed by the rule announced in *Blevins v. State*, 109 Neb. 183.

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

Hazlett, Jack & Laughlin, for plaintiff in error.

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

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

DEAN, J.

William McKelvie, defendant, was informed against in the district court in and for Gage county for an alleged

violation of the liquor law of Nebraska. Sections 3252 and 3273, Comp. St. 1922. The information contains three counts wherein the defendant is separately charged with (a) the unlawful manufacture of intoxicating liquor, (b) the unlawful possession of intoxicating liquor, and (c) the unlawful possession of a still. The jury acquitted the defendant of unlawful manufacture of intoxicating liquor and of unlawful possession, but found him guilty of unlawful possession of a still. Thereupon defendant was sentenced to 60 days' imprisonment in the county jail and a fine of $1,000 was imposed, and it was adjudged that he pay the cost of the prosecution, taxed at $89.05, and be committed to the county jail until the fine and costs were paid. A motion for a new trial was overruled and defendant, pursuant to the judgment, furnished a supersedeas bond in the sum of $2,000. Alleging error, counsel has brought the record here for review.

The defendant was 71 years of age when the case was tried. He is now and for many years has been a resident of Barneston, in Gage county. He is a shoe cobbler, unmarried, and lives alone in a 12 by 16, two-room cement house that was once used as a smoke house and was referred to by the sheriff as a "ramshackle" structure. Defendant testified that he came from Canada to Nebraska in the year that "the city of Chicago was having its big fire" and he "came to Barneston in the fall or winter following Dewey's great victory at Manila Bay." The record discloses, and it is uncontradicted, that for many years defendant was sorely afflicted with rheumatism and bronchial pneumonia and a troublesome heart affection, and that on account of these physical ailments he obtained and used certain liquors in suit, to rub on his hips and legs "on account of poor circulation." And on account of his weakened heart he said that, because of a choking sensation, he could not lie down to sleep and had long been compelled to sleep in a sitting posture in a rocking chair, and that, at times, and solely as a heart stimulant, he used the wine in suit, which was made from grape or cherry juices. Counsel

also offered evidence to prove that defendant had formerly employed not less than four reputable Gage county physicians to treat him for the rheumatic and heart and bronchial ailments of which he complained, and that both whiskey and wine were prescribed by the physicians, but evidence of these facts was withheld from the jury by the court's ruling.

The jury found, as above noted, that defendant, though not guilty of unlawful manufacture, nor of unlawful possession, of intoxicating liquor, was nevertheless guilty of the "unlawful possession of a still." But there is no evidence to show that the still was intended to be used for the manufacture of intoxicating liquor. *Blevins v. State,* 109 Neb. 183. The record shows that defendant had never before been under arrest, and there is undisputed evidence that he is a man of good repute in his home community. The evidence, taken in its entirety, clearly negatives any "presumptive evidence" that the defendant was unlawfully in possession of a still.

This is not a case of first impression. Substantially the same question before us now is discussed in *Blevins v. State,* 109 Neb. 183, above cited, wherein Letton J., made this timely observation: "If it be held that the word 'still' in the statute is not qualified by the words 'for the manufacture of alcohol or whiskey' in the succeeding clause of the sentence, then the conviction on the charge of the possession of a still in the first count must stand. * * * We will not so interpret the statute, and must hold that the statute should be construed as if it read, 'or have possession of any still or equipment for the manufacture of alcohol or whiskey.' " We adhere to the interpretation which we placed on the act in the *Blevins* case, so far as the still was there involved.

We conclude that the evidence does not support the verdict of guilt imputed to McKelvie by the jury. Exceptions are taken by the defendant to certain instructions and the admission of certain of the evidence; but, in view of our disposition of the case, we do not find it necessary to dis-

cuss the record further. The judgment of the district court is reversed and remanded, pursuant to the rule announced in the *Blevins* case, with directions that the action be dismissed.

REVERSED.

FAYETTE F. ROGERS ET AL., APPELLANTS, V. WILLIAM BUETTGENBACK ET AL., APPELLEES.

FILED NOVEMBER 19, 1926. No. 25301.

1. Judgment: COSTS. Construing sections 8616 and 8618, Comp. St. 1922, together, *held*, that a defendant in an action is not required to plead any counterclaim or set-off he may have against the plaintiff. The penalty of his omission to do so, in an action where the counterclaim or set-off might have been pleaded, being that, in a subsequent action against the plaintiff, he cannot recover costs.
2. ———: 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." *State v. Farmers State Bank*, 113 Neb. 497.

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

J. L. McPheely, for appellants.

J. H. Robb and *C. P. Anderbery, contra.*

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

DAY, J.

On July 31, 1925, the plaintiffs brought this suit in equity to enjoin the defendants, William Buettgenback and Renus Kargo, sheriff of Kearney county, from ordering an execution to be issued on a certain judgment obtained by Buettgenback against the plaintiffs and from levying an execution upon the plaintiffs' property, or any part thereof. As

Kargo has no interest in the suit except in his official capacity, we will, for convenience, refer to Buettgenback as defendant.

The plaintiffs set out the pleadings upon which the judgment against them in favor of the defendant was based, and also alleged that they had paid the amount due upon the judgment except the sum of $700; that they held the defendant's note, dated August 13, 1921, due in one year from date, no part of which had been paid; that they tendered the note to defendant in payment of the judgment, but he refused to accept the same; and that the defendant was insolvent. The plaintiffs prayed that the amount of the note with interest be credited upon the judgment; that the judgment be canceled; that the defendant be enjoined from proceeding to collect the judgment, and for "such other relief as justice and equity may require." The answer tendered an issue which will sufficiently appear in the further discussion of the case. The trial resulted in a judgment denying the plaintiffs the relief prayed and dismissing their cause of action. From this judgment the plaintiffs have appealed.

The record shows that on November 30, 1921, Buettgenback, as plaintiff, brought an action in the district court for Kearney county against the plaintiffs in this action, as defendants, in which he recovered a judgment for $857.65. In that action the plaintiff, among other things, alleged in substance that on August 13, 1921, he purchased from defendants a threshing machine engine under a warranty by them that the engine was in good mechanical condition; that it would operate the plaintiff's separator and would perform the service for which it was sold; that, relying upon the representation made by the defendants, he paid them $500 in cash and executed his note in favor of the defendants for $700, dated August 13, 1921, and due in one year, secured by a chattel mortgage on the engine; that the engine proved defective and would not propel the separator; that within one month from the date of the purchase the plaintiff returned the engine to the defend-

ants, stating that he rescinded the contract and demanded that the purchase price be returned to him, which was refused by the defendants. The plaintiff also alleged that he suffered special damages in an attempt to make the engine work; that during a period of five days he paid for wages, coal and labor the sum of $175 in an effort to make the engine work, and was also deprived of the profits in the sum of $325. The plaintiff sued to recover $1,200, the purchase price of the engine, and $500 as special damages.

The amended answer of the defendants admitted that they sold the engine to plaintiff for $1,200; that $500 was paid in cash and a note of $700 taken for the balance; denied that any warranties or representations were made by them; and alleged that, when the plaintiff returned the engine to the defendants, it was agreed between the parties that the same should be sold at private sale, and if the engine brought more than was necessary to pay the note that the surplus should be paid to plaintiff. As a cause of action against the plaintiff, the defendants alleged that they sold and delivered to plaintiff, at his order and request, oil for the use of said engine, upon which there was a balance due and unpaid of $92.35. They prayed that plaintiff's action be dismissed and that they have judgment against plaintiff for $92.35.

The reply denied the allegations of the amended answer which were inconsistent with the allegations of the petition.

Upon the issues thus presented, a trial was had to a jury, who, upon very conflicting testimony on the disputed issues, returned a verdict as follows:

"We, the jury, duly impaneled and sworn in the above cause, do find for the plaintiff for the sum of $250 and the note of $700. Plaintiff pay the oil bill of $92.35 and defendants keep the engine."

The court refused to accept this verdict as not being responsive to the issues and instructions of the court and directed the jury to retire for further deliberation. Thereafter the jury returned a verdict as follows:

"We, the jury, duly impaneled and sworn in the above entitled cause, do find for the plaintiff for the sum of $857.65."

Judgment was entered on this verdict. From this judgment, defendants appealed to this court and the judgment was sustained. The plaintiff in the action, being apparently satisfied with the judgment, took no appeal.

The record shows that, during the trial of the first case, the $700 note was received in evidence and exhibited to the jury, over the objection of the plaintiff. This probably confused the jury. The plaintiff took no appeal from the judgment and it is now too late to consider the basis of the jury's verdict. A reference to the pleadings clearly shows that the defendants did not plead the $700 note as a set-off or counterclaim to the plaintiff's cause of action and it was not an issue in that case. After the mandate from this court had been spread upon the record of the district court for Kearney county, the plaintiffs in this action paid into court all of the judgment in excess of $700, and tendered to the plaintiff in that action his note for $700 and demanded that he accept the same as a balance due upon the judgment and in satisfaction thereof, which the plaintiff refused. Thereupon the present plaintiffs brought this action in equity to offset the amount due on the note against the amount due on the judgment, alleging that the defendant herein was insolvent.

The precise question presented by the records is whether the plaintiffs in equity are entitled to have the amount due on the note offset against the judgment. We think the record fairly shows that defendant Buettgenback was at the time insolvent. It will be noted that the plaintiff in the first action sought to recover the full purchase price of the engine. In so doing, he regarded that his note of $700 was equivalent to the payment of that amount in cash. It is difficult to determine upon what theory the jury arrived at the amount of its verdict. It would seem, however, based upon the verdict which was not received, that they allowed the plaintiff $250 damages, $700 for his note, and deducted

from this sum the defendants' bill of $92.35, leaving a balance of $857.65, the amount of the last verdict. It is quite evident that the verdict was a compromise, which not infrequently occurs in jury trials. The situation is presented where the plaintiff has a judgment against the defendants and the defendants have an unpaid note of the plaintiff in an amount equal to or greater than the amount due upon the judgment.

It is the contention of the defendant in the present case that, the plaintiffs having had the opportunity to set up the note as a counterclaim in the original action and failing to do so, they are now precluded from offsetting the note against the judgment. The argument is made that the judgment is conclusive as to every matter of defense, counterclaim or set-off which was or might have been litigated in the first action. We think the contention of the defendant states the rule too broadly. Section 8616, Comp. St. 1922, provides that the defendant "may set forth in his answer as many grounds of defense, counterclaim and set-off as he may have." Section 8618, Comp. St. 1922, provides: "If the defendant omit to set up the counterclaim or set-off, he cannot recover costs against the plaintiff in any subsequent action thereon." Construing these provisions of the statute together, as we must, it seems quite clear that it was not the intention of the legislature that a defendant should be required to plead any counterclaim or set-off which he may have had against the plaintiff in the action. Whether the defendant did so or not was optional with him; but, if he failed to plead in an action where the counterclaim or set-off might have been pleaded, he could not recover his costs in a subsequent action thereon against the plaintiff. It being shown that defendant Buettgenback was insolvent, we see no valid reason why a court of equity may not set off his note against the judgment, or at least restrain the collection of the judgment for a reasonable time to permit the holder of the note to reduce it to judgment and then set off one judgment against the other. In *Richardson v. Doty*, 44 Neb. 73, it was held: "The pro-

visions of the Code of Civil Procedure in regard to set-off are not exclusive. The insolvency of a party against whom the set-off is claimed is a sufficient ground for a court of chancery to allow it in cases not provided for by statute." In *State v. Farmers State Bank,* 113 Neb. 497, it was 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." The same principle was announced in *Wells v. Cochran,* 88 Neb. 367, and *Clark Implement Co. v. Wallace,* 103 Neb. 26.

In view of the fact that there may be defenses to the note which defendant would have the right to have determined by a jury and in view of the equities presented, we think the judgment of the district court should be reversed and the cause remanded, with directions to enter a judgment enjoining the defendant from collecting the judgment for such time as to permit the plaintiffs, in the exercise of reasonable diligence, to litigate their claims upon the note, and, if they succeed, that the court should then set off the judgments so far as one may equal the other.

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

REVERSED.

Note—See Judgment, 34 C. J. p. 469 n. 38; p. 864 n. 15.

HERMAN KRUGER, APPELLEE, V. SAMUEL I. BLOCK ET AL., APPELLANTS.

FILED NOVEMBER 19, 1926. No. 23991.

1. **Equity.** The maxim, "He who seeks equity must do equity," is applicable in an action to set aside a deed obtained by fraud or imposition practiced upon a person of weak mentality.

2. **Deeds:** SETTING ASIDE. Before a court of equity will set aside a deed obtained by fraud or imposition practiced upon a person

of weak mentality, it will require, so far as possible, a return of the purchase money paid and will make such other order as will place the purchaser in substantially the same condition as he was at the time the deed was made.

3. ———: ———: IMPROVEMENTS. In an action to set aside a deed obtained by fraud practiced upon a person of weak mentality, where it appears that the grantee, while in possession, has made improvements upon the real estate, a court of equity, as a condition to setting aside the deed, will require reimbursement for the improvements to the extent only that they have enhanced the value of the real estate.

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

Courtright, Sidner, Lee & Gunderson, for appellants.

Dolezal, Spear, Mapes & Stevens and *E. H. Mahlin, contra.*

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

GOOD, J.

Herman Kruger, incompetent, by his guardian, prosecutes this action to cancel and set aside a deed, executed by him prior to the time he was placed under guardianship, and whereby he conveyed to defendant Samuel I. Block a lot, with a three-story brick business building thereon, situate in the city of Fremont, Nebraska. Plaintiff also prays for an accounting for the rents and profits from the building during the time that Block has been in possession under the deed.

Plaintiff's cause of action is grounded on his alleged mental incompetency, and fraud practiced by Block in obtaining the conveyance. There were two transactions between the parties. In the first Kruger conveyed to Block the lot and business building above mentioned, subject to a mortgage of $16,500, and Block, as a consideration therefor, conveyed to Kruger 160 acres of land in Dodge county, Nebraska, subject to a mortgage of $12,000. In the second transaction, for a consideration of $5,500 and assumption

of the $12,000 mortgage, Kruger reconveyed the farm to Block.

In their answer defendants Block and wife deny fraud and the incompetency of plaintiff, but offer to rescind the second transaction and reconvey the farm to Kruger upon a return of the $5,500, with interest, and some rentals collected from the farm by Kruger. They further aver that after taking possession of the building and lot in Fremont they placed improvements thereon, consisting of painting, plumbing, carpenter work, decorating, electric fixtures, repairing furnace, and other items, aggregating $1,139.41. They also allege that they had paid and discharged the $16,500 mortgage and accrued interest thereon. The affirmative matter in the answer is denied in a reply.

Trial resulted in a finding that plaintiff was incompetent; that the deed to the Fremont property had been obtained by fraud; that plaintiff was entitled to have his deed canceled and his property restored to him, and entitled to have an accounting for the rents and profits. The court further found that the rents for the period amounted to $7,974, but that defendants were entitled to deduct therefrom expenses for improvements, taxes, interest, insurance, and other items, aggregating $4,649.68, and charged defendants with net rentals, amounting to $3,324.32. The court further found that Kruger had collected rents from the farm, amounting to $84; that this sum, together with the $5,500 and interest, should be restored to defendants, and that defendants were entitled to be reimbursed for the interest paid upon the $16,500 mortgage, and were entitled to have such mortgage reinstated in favor of defendants, upon the same terms and conditions as the mortgage which had been paid and discharged. The net amount found to be due from plaintiff to defendants was $2,839.75, which should be paid within 20 days, and it was further adjudged that the decree should operate as a mortgage of $16,500 from plaintiff to defendants, bearing interest at the same rate and payable at the same time as the mortgage upon the property which

defendant Block had paid. Defendants appealed, and plaintiff has filed a cross-appeal.

Heretofore the case was submitted in this court, and the judgment of the district court was affirmed without an opinion. The matter is now before us upon a motion for a rehearing, filed by plaintiff, in which he strenuously contends that, since Block obtained the plaintiff's property by actual fraud, plaintiff should not be required to place defendants *in statu quo* as a condition to the relief demanded. Plaintiff urges that, since Block voluntarily paid and discharged the liens on the property before they were due, and voluntarily put the improvements upon the property for which he demands recompense, he is not entitled to be reimbursed for those items. Plaintiff, however, seems to concede that defendants are entitled to the return of the $5,500 purchase money received from defendant Block in the second transaction, and that plaintiff should also account for $84 of rent received from the farm while in possession thereof.

Plaintiff relies upon the case of *Goble v. O'Connor*, 43 Neb. 49, as sustaining his position. In that case it was held: "A bidder at a judicial sale of real estate induced another bidder thereat to cease bidding, by the promise to pay him a sum of money for so doing, and by this means procured the real estate to be sold to him for a less sum than would otherwise have been realized from its sale. Held, that the sale was fraudulent and invalid and the purchaser obtained no title thereby or by the deed executed and delivered to him in pursuance thereof as against parties whose interests were defrauded; and the property may be recovered in an action for such purpose, by the parties entitled thereto, and they will not be required to repay to him such portions of the purchase price paid by him as were expended to discharge mortgage or other liens and incumbrances from the property existing thereon at the time of the sale, including the lien under which such sale was made, or other moneys expended by him on the property or its title."

We do not think, however, that the case just cited sustains plaintiff's contention. In that case, it was not the deed of the plaintiff's which was sought to be canceled, but a void sheriff's deed, executed pursuant to a judicial sale. In the instant case, plaintiff comes into a court of equity seeking to be relieved from his own act and to have his own deed canceled and set aside. It is a general rule that the deed of an incompetent, or one obtained from grantor by fraud, is not void, but voidable. In this case it was necessary for the plaintiff to come into a court of equity, seeking its aid to be relieved from his own act. It may be further remarked that the fraud disclosed by the record in this case does not consist in any false statements or representations made by Block, but in his taking advantage of a mental incompetent, to obtain his property for much less than its actual value.

Under the facts as they exist in this case, the rule applicable is that plaintiff must restore whatever he has received and, so far as possible, place the defendants *in statu quo* as a condition to obtaining the relief demanded. The rule was properly stated in *Overton v. Sack*, 99 Neb. 64, as follows: "Before a court of equity will set aside a deed obtained by fraud, or imposition, practiced upon a person of weak mentality, it will require a return of the purchase money paid, or, if that cannot be done, will make such other order as will place the purchaser in substantially the same condition as he was in at the time the deed was made."

In *Blondel v. Bolander*, 80 Neb. 531, it was held: "Where, in a suit to enforce a contract by a plaintiff who has obtained the same by means of sharp, unconscionable and fraudulent practices, the defendants claim as affirmative relief an accounting for rents received by the plaintiff, the maxim, 'He who seeks equity must do equity,' may be applied, and there may be deducted from the amount otherwise due the defendants for such rents the amount of money expended by the plaintiff in their behalf and the reasonable value of his services performed for their benefit."

However, an examination of the record in the instant case

discloses that the trial court found that defendants should account for rents from the property in Fremont to the amount of $7,974, and permitted defendants to deduct therefrom items of expense, taxes, interest, insurance, and improvements, amounting to $4,649.68. We are unable to determine from the record what specific items disclosed by the evidence went to make up this latter amount. The total of the items of expense and for improvements, claimed by defendants, was $4,980.46. Since the court allowed $4,649.68, it is apparent that it allowed all items claimed by the defendant, except in the sum of $330.78. Since the total items of the improvements claimed amounted to $1,139.41, it is apparent that the court must have allowed at least $808.63 for improvements placed upon the property by Block. While these improvements may have cost Block that amount, yet the plaintiff is not chargeable with such items, except to the extent that they have enhanced the value of the property. In this respect, the record is barren of proof that the property was enhanced in value, by reason of the improvements, to the extent of a single penny. Under the circumstances, we think that defendants should not be allowed anything for the item of improvements. It necessarily follows that, as a condition to the cancelation of the deed, plaintiff should be required to pay to defendants $2,031.12, instead of $2,839.75.

The former judgment of affirmance is vacated, and the judgment of the district court, accordingly, will be and is hereby modified so as to require the plaintiff to pay to the defendants, within 60 days, the sum of $2,031.12, together with interest thereon at the rate of 7 per cent. per annum from the 20th day of November, 1923, the date of the original decree, and, as thus modified, the judgment of the court is affirmed.

AFFIRMED AS MODIFIED.

ALBERT EDHOLM, APPELLANT, V. MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA, APPELLEE.

FILED NOVEMBER 19, 1926. No. 24253.

1. **Railroads.** Under the provisions of section 4, art. X of the Constitution of Nebraska, railroads in this state are public highways.
2. **Adverse Possession:** RAILROAD RIGHT OF WAY. "The general public has the same interest in the preservation and maintenance of railroads as it has in the maintenance of other highways, and the title to a part of a railroad's right of way, while such road is being operated as a common carrier, cannot be divested by adverse possession." *McLucas v. St. Joseph & G. I. R. Co.*, 67 Neb. 603.
3. ———: ———. Lands acquired for right of way purposes by a railway corporation under condemnation proceedings, in the exercise of the power of eminent domain, and over which the company constructs and operates a railroad, are dedicated to a public use, and title thereto may not be divested by adverse possession, so long as the railroad is operated over the right of way.

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

Carl E. Herring and *Edward F. Leary*, for appellant.

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

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

GOOD, J.

Plaintiff sued to quiet title to certain particularly described tracts of land in the city of Omaha, basing his claim of title on continuous, hostile, adverse possession thereof, under claim of right by him and his predecessors in title for a period of more than ten years antedating the commencement of this action. The defendant answered and set up that it was a railway corporation; that the tracts of land in controversy formed a part of its right of way for railway purposes and had been obtained by condemnation pro-

ceedings in the exercise of the right of eminent domain, and denied that plaintiff's possession was adverse to the rights of the defendant. A trial of the issues resulted in a finding and judgment for the defendant. The trial court based its decision upon the proposition that the title to the tracts in question, having been acquired by condemnation for right of way purposes for a railway, is subject neither to voluntary alienation nor to adverse possession as to any part of such right of way, while said right of way is used for railway purposes. The plaintiff appeals.

That the tracts of land in controversy were within and constituted a part of defendant's right of way, that such right of way was obtained by condemnation proceedings in the exercise of the power of eminent domain, and that defendant, or its predecessors, had constructed a line of railway over such right of way and at all times since has operated thereon a line of railway, running trains daily, are facts either admitted or conclusively established. That plaintiff and his predecessors in title had been in the open, continuous possession of that part of the right of way in dispute and asserting title and right in themselves for a period of more than ten years antedating the commencement of this action is also conclusively established.

If a right of way for the construction of a railway acquired by condemnation proceedings is not subject to be alienated by adverse possession so long as a railroad is operated thereon, the judgment should be affirmed.

The rule is well established by the decisions of the United States supreme court that title by adverse possession cannot be acquired to any part of a railroad right of way that is granted by act of congress over public lands. *Northern P. R. Co. v. Townsend,* 190 U. S. 267; *Union P. R. Co. v. Laramie Stock Yards Co.,* 231 U. S. 190. This rule has been adopted and followed in this court in the following cases: *McLucas v. St. Joseph & G. I. R. Co.,* 67 Neb. 603, 612; *State v. Grimes,* 96 Neb. 719; *Union P. R. Co. v. Wooster,* 104 Neb. 421; *Etheredge v. Chicago, B. & Q. R. Co.,* 105 Neb. 778.

Whether title by adverse possession may be acquired to lands forming a part of the right of way of a railroad corporation, acquired in the exercise of the power of eminent domain, is an open question in this state. It is true that in *McLucas v. St. Joseph & G. I. R. Co.*, 67 Neb. 603, the rule was laid down that such title could not be acquired, and upon a rehearing a like holding was made, but based upon the ground that the right of way had been acquired by grant from the congress of the United States, and following the rule laid down in *Northern P. R. Co. v. Townsend, supra.* In the later opinion it was announced that the applicability of the limitation of law to actions brought by a railroad company to recover lands, acquired for right of way purposes by condemnation or purchase, was an open question, and the court declined to either affirm or repudiate the doctrine announced in the first opinion.

It may be conceded that the rule announced in most state jurisdictions is that title to a part of a railroad right of way, obtained by condemnation proceedings, may be divested by adverse possession. From the reported decisions, however, it is not apparent whether the states so holding have the same constitutional and statutory provisions as exist in this state. By section 4, art. X of our Constitution, railroads are made public highways, free to all persons for the transportation of persons and property thereon, under such regulation as may be prescribed by law, and section 6, art. X of the Constitution, provides: "The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking by the legislature of the property and franchises of incorporated companies already organized, or hereafter to be organized, and subjecting them to the public necessity the same as of individuals." Under the laws of this state a railway company may, by condemnation proceedings, in the exercise of the power of eminent domain, acquire a right of possession and easement over real estate for the purpose of constructing and operating a railway. It may acquire such right only for a public use. It is not within the power

of a railway company to take, by condemnation proceedings, the right of possession of a private owner of lands for any other purpose than for a public use, and it holds the right of possession only for such purpose. It is also apparent that under our constitutional provisions the public itself, at any time that public necessity requires, may take possession and use the property of a railway corporation, including its right of way, for the public good. A railway company may not, by its voluntary act, alienate its right of way to private individuals, to be used for private purposes inconsistent with that for which the right of way was acquired. If it could do so, then it would be possible to condemn and take private property, ostensibly for a public purpose, and immediately convert it for a private purpose. It would be permitting, by indirection, the condemnation of private property for a private purpose, which our law does not sanction. If a railway company cannot voluntarily alienate any part of its right of way so long as it is using the same for railway purposes, it is difficult to perceive how, by its inaction, it can permit title to be acquired, and it is also difficult to perceive how one can acquire a greater right against a railway company by adverse possession than he can acquire by a conveyance from it. If the railroad right of way, or a part thereof, may be divested by an adverse occupancy, the public might be seriously and injuriously affected, in the exercise of its constitutional rights to take possession when public necessity demands.

By the constitutional provisions above referred to, railways are made public highways, and this court has held in *Lydick v. State,* 61 Neb. 309, and in *Krueger v. Jenkins,* 59 Neb. 641, that title to a part of a county road cannot be acquired by adverse possession. The reason for the holding is that the county had only an easement in the road for a public use; that the county was, in effect, a part of the state sovereignty, and that the statute of limitations was not applicable in such case.

It is true that a different holding has been made by this court with reference to streets and alleys of cities and vil-

lages. The cities and villages held absolute title to the streets and had authority to sell and dispose of them. However, after the decisions of this court, holding that title to city streets might be obtained by adverse possession, the legislature, in 1899, amended the statute so that thereafter title, by adverse possession, to streets, alleys or public grounds belonging to a city or village could not be acquired. Comp. St. 1922, sec. 8507 (Laws 1899, ch. 79).

After a careful consideration of the first opinion in *McLucas v. St. Joseph & G. I. R. Co., supra,* we are satisfied that the principles therein announced are based upon sound reason, and we adopt and adhere to the rule therein stated, basing our decision largely upon our constitutional provisions. We do not wish to be understood as holding that a railroad right of way, obtained by condemnation proceedings, may not be divested by adverse possession when there has been full abandonment of the right of way, such as where the railroad company removes its tracks from the right of way and places them in an entirely different location.

The conclusion herein reached renders it unnecessary to consider other questions raised and discussed in the briefs.

The judgment of the district court is right and is

AFFIRMED.

Note—See Adverse Possession, 2 C. J. p. 217 n, 63; p. 225 n. 50; 2 R. C. L. n. s. 272; 22 R. C. L. 850.

IN RE ESTATE OF WILBUR O. AYER.
FIRST TRUST COMPANY OF LINCOLN, APPELLANT, V. MARSHALL W. AYER ET AL., APPELLEES.

FILED NOVEMBER 19, 1926. No. 24885.

1. Wills: VALIDITY: COMPETENCY. In a proceeding to probate a will, where the only question relates to the competency of the testator, and where it appears that he is not generally insane, but suffers from insane delusions with respect to a particular subject, the question for determination is whether he was the

subject of such a delusion as controlled or influenced his action in making the will.

2. ———: ———: ———. A testator, who is not generally insane, but who suffers from insane delusions, is competent to make a valid will, provided the insane delusions from which he is suffering do not control or influence his action in making the will.

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

Hall, Cline & Williams and *F. H. Stubbs,* for appellant.

Good, Richardson & Good and *T. W. Cole, contra.*

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

GOOD, J.

This is an action to determine whether a written instrument, purporting to be the will of Wilbur O. Ayer, deceased, late of Nuckolls county, Nebraska, is, in fact, the will of the deceased and entitled to be admitted to probate. The instrument was executed on the 11th of September, 1923, and Mr. Ayer departed this life on the 7th of January, 1924. The proponent, the First Trust Company, of Lincoln, was named in the instrument as executor. Mr. Ayer left surviving him as his next of kin an only child, Marshall W. Ayer, the contestant herein. The trust company proposed the will for probate. Contestant filed an answer in which he alleged that his father was suffering from paranoia and insane delusions respecting his son; that these insane delusions controlled and influenced the father in the making of the instrument, and that it was not a valid will.

A trial in the county court resulted in a judgment that the instrument was the will of the deceased and ordering it to be probated. Contestant appealed to the district court, and, on a trial of the issues in that court, a verdict and judgment thereon were rendered against the validity of the will. The district court directed that the costs be taxed to

the estate of the deceased. Proponent appeals, and contestant prosecutes a cross-appeal upon the question of the taxation of costs.

Proponent has assigned many errors, but relies, apparently, upon three: (1) That the verdict is contrary to and not supported by the evidence; (2) error in the admission of evidence; (3) error in the instructions.

We have examined the evidence sufficiently to satisfy ourselves that there was sufficient evidence tending to prove that Mr. Ayer, at the time of making the will and for some time prior thereto, was laboring under delusions respecting his son and the relations between them which may have controlled or influenced the making of the will, and that the question as to whether or not he was competent to make a will was a question for the jury, under proper instructions.

We have examined the ruling on the admission of evidence of which proponent complains and find no error.

A more serious question is presented as to an instruction given to the jury. It is as follows:

"You are instructed that, if you should find from a consideration of all the evidence that the deceased Wilbur O. Ayer suffered from delusions concerning his only son Marshall W. Ayer, which rendered him insensible to the ties of blood and kindred between him and his son Marshall W. Ayer, you will find for the contestant."

The rule is that where a testator is not generally insane, but suffers from insane delusions with respect to a particular subject, the question for determination is whether he was the subject of such a delusion as controlled or influenced his action in making the will. *McClary v. Stull*, 44 Neb. 175; *In Re Estate of Ayers*, 84 Neb. 16. In the course of the opinion in the latter case it is said (p. 24):

"This court has laid down the rule that, where the insanity is not general, the question to be determined is whether the subject was the victim of such delusions as controlled his actions and rendered him insensible to the ties of blood and kindred."

The instruction under consideration directs the jury to find for the contestant if testator has suffered from delusions as therein described, regardless of the fact that such delusion may not have existed at the time of the making of the will, and regardless of whether or not it controlled or influenced the testator's action in making the will. A testator may suffer from insane delusions and yet make a valid will, provided the insane delusions from which he is suffering do not control or influence his action in making the will.

It may be urged that in another instruction the court informed the jury that evidence relating to the mental condition of the testator at any time prior to September 11, 1923 (the date of the will), would not establish such condition at the date of the making of the will, but was admitted for the purpose of throwing light on his condition on said date, and should be considered for that purpose only. However, in the instruction given, of which criticism is made, the question of whether the testator was sane or insane at any time was not mentioned. By the instruction, the mere fact that testator may have, at some time, suffered from delusions, such as described in the instruction, would be sufficient to set aside the will. Such is not the law as we understand it. The giving of the instruction was prejudicial to the proponent.

Respecting the cross-appeal, which involves the question of whether costs should be taxed to the estate, we think it unnecessary to consider or determine that question at this time. Since the judgment must be reversed and remanded because of the erroneous instruction given, the question of costs should be left until the final determination of the case.

Because of the error in the instruction given, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

DAY, J., dissenting.

The decision in this case, as I understand it, turns upon

an error in an instruction given by the trial court which is set out in the opinion.

I agree that the instruction is subject to the criticism stated in the opinion. In view of the entire record, it does not seem to me that the jury were mislead by the instruction, and therefore the error was without prejudice.

I respectfully dissent from the conclusion of the majority of the court.

MORRISSEY, C. J., and DEAN, J., concur in this dissent.

HARRY BARR V. STATE OF NEBRASKA.

FILED NOVEMBER 19, 1926. No. 25186.

1. **Criminal Law:** APPOINTMENT OF ASSISTANT COUNSEL. Whether, in a prosecution for a felony, the court should, on the application of the county attorney, appoint counsel to assist in the prosecution, presents a question addressed to the sound discretion of the court. And where, pursuant to such application, the court appoints an attorney to assist in the prosecution, error cannot be predicated thereon, in the absence of a showing that there was an abuse of the court's discretion.

2. ———: MISCONDUCT OF COUNCIL IN ARGUMENT. An assignment of error, to the effect that counsel, in the prosecution of a criminal action, has made inflammatory and unwarranted statements of fact in his argument to the jury, is unavailing, in the absence of a showing in the record that the statements complained of were actually made to the jury.

3. ———: EVIDENCE: COMPETENCY. In the trial of the defendant in a criminal action, a letter, written by a third person, in which he states that the writer, and not defendant, committed the offense, is not competent as evidence in behalf of the defendant.

4. **Larceny:** POSSESSION OF STOLEN PROPERTY. "The unexplained possession of stolen property, shortly after the theft of it, is a fact which may justify the jury in inferring that the person so in possession is the thief." *Palmer v. State*, 70 Neb. 136.

ERROR to the district court for Knox county: ANSON A. WELCH, JUDGE. *Affirmed.*

H. F. Barnhart, Hugh J. Boyle and *Donald Gallagher,* for plaintiff in error.

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

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

GOOD, J.

In the district court Harry Barr, hereinafter referred to as defendant, was convicted of the larceny of 21 young hogs, the property of one Frank Kain, and was sentenced to a term of three years in the state penitentiary. He prosecutes error to this court to review the record of his conviction.

The errors assigned and relied on are: Error of the court in permitting M. F. Harrington, an attorney, to assist the county attorney in the prosecution of the defendant; error in refusing the defendant's request that said Harrington be not permitted to make the closing argument to the jury; error in permitting the said Harrington to give his opinion as to the guilt of the defendant in his argument to the jury and in making inflammatory and prejudicial statements to the jury in the course of his argument; error in the exclusion of certain proffered evidence; and, finally, that the verdict is not sustained by sufficient evidence.

It is argued that Mr. Harrington was a private prosecutor employed by or at the instance of Mr. Kain, whose hogs had been stolen, and that he was not a fair and impartial person and was, therefore, not a proper person to assist the county attorney in the prosecution of the case. An examination of the evidence upon this point fails to show that Mr. Harrington was ever in the employ of Mr. Kain, or had ever acted as his attorney. It does show that Mr. Kain approached the county attorney, asking to have some one assist him in the prosecution, and that the county attorney evinced his willingness to have such assistance; that Mr. Kain, with the purpose of employing him, called

on Mr. Harrington, but the latter informed Mr. Kain that he could not accept a retainer from him; nor could he act as a prosecutor or assistant prosecutor except that he be appointed by the court and employed and paid by the county. Thereafter, 30 or 40 citizens called upon the county board and petitioned for the appointment of Mr. Harrington to assist in the prosecution of the case. The county board passed a resolution to employ Mr. Harrington and fixed the compensation that the county should pay therefor. Mr. Harrington appeared in the county court, pursuant to this resolution, and assisted at the preliminary hearing. In the district court objections were made to his appointment, and the facts above related developed. Thereupon, the court, on its own motion, called Mr. Harrington to the witness-stand and fully and thoroughly interrogated him as to his relations to the prosecuting witness and to the defendant, from which it appears that there was no occasion for any feeling of hostility on the part of Mr. Harrington toward the defendant, and that there was no reason why he could not, and would not, be fair and impartial in the prosecution of the case as an assistant to the county attorney. Thereupon, the court made the appointment upon the application of the county attorney.

Section 4916, Comp. St. 1922, provides that the county attorney of any county may, under the direction of the district court, procure such assistance in the trial of any person, charged with a felony, as may be necessary for the trial thereof, and such assistant, or assistants, shall be allowed such compensation for his services as the county board shall determine. The application of the county attorney for the appointment of Mr. Harrington to assist in the prosecution presented a question addressed to the sound discretion of the trial court.

In *Baker v. State,* 112 Neb. 654, it is held: "Where a county attorney requests and the court appoints counsel to assist in the prosecution of a felony case, a verdict will not be vacated for that reason in the absence of a showing

which discloses that the defendant has been thereby prejudiced in his substantial rights."

And in *Gragg v. State,* 112 Neb. 732, it is held: "When, under section 4916, Comp. St. 1922, a county attorney, under the court's direction, procures counsel to assist in the prosecution of a person charged with a felony, it is not error for the court to overrule defendant's objection to such appointment, unless it is shown that the appointment was made under a mistake of fact or under such circumstances as would reasonably tend to preclude the accused from having a fair and impartial trial and thereby prejudicially affect his substantial rights."

In the instant case it is not made to appear that the appointment was made under a mistake of fact or under such circumstances as would preclude the accused from having a fair and impartial trial. No abuse of discretion on the part of the court in making the appointment is shown. The assignment of error is not well taken.

With respect to the assignment that the court erred in permitting Mr. Harrington to make the closing argument to the jury, it may be observed that the record fails to show that Mr. Harrington made any argument to the jury. Error will not be presumed, but, to be available, it must be made to appear from the record.

As to the assignment that Mr. Harrington, in his argument to the jury, made inflammatory statements and stated his opinion of defendant's guilt, it is sufficient to say that the record fails to disclose that any such inflammatory statements were made, or that the opinion of Mr. Harrington was ever stated to the jury. The assignment is without merit.

The evidence, exclusion of which defendant assigns as error, is a letter written by defendant's son and addressed to Mr. Kain, the prosecuting witness, in which the writer of the letter stated that he was responsible for the hogs being in his father's barn, and that the father had nothing to do with the transaction, and offering to reimburse Mr.

Kain for any damages he had sustained. In the information both defendant and the writer of the letter were charged with the larceny of the hogs. At the time of the trial the son was a fugitive from justice, and his evidence was not taken. It is clear that the letter was merely hearsay and wholly incompetent, and was properly excluded. An admission by a third person was that he, and not the defendant, committed the crime charged is not competent evidence. Wharton, Criminal Evidence (10th ed.) sec. 225; *Greenfield v. People,* 85 N. Y. 75.

As to the last assignment, that the verdict is not sustained by sufficient evidence, the record discloses that about the 29th of June, 1925, 21 hogs disappeared from the farm of Mr. Kain. On the 5th of July following, the hogs were found in a barn on a farm operated by defendant. The defendant admitted that the hogs were in the barn on his premises, and that he had fed and watered them. When Mr. Kain, the owner of the hogs, came to his place and demanded the hogs, defendant inquired: "What hogs?" Mr. Kain's answer was: "My hogs. You have got them shut up here in this barn." To which defendant replied: "Take your hogs. I don't know who they belong to." Defendant did not attempt to account for the possession of the hogs, and gave no good reason why he was feeding and watering them in his barn. He testified that he did not know the hogs were in his barn or on his premises until the 5th day of July. The defendant did not live upon the farm where the hogs were found, but some distance therefrom. He kept his horses in the barn on the farm and drove back and forth from his residence to the farm. There was evidence tending to show that on the 30th of June defendant was on the farm, using his horses in cultivating corn, and that it would have been impossible for him to enter the barn for his horses, or take them therefrom, without seeing the hogs. Under all the circumstances, we think the evidence was sufficient to justify the jury in finding defendant guilty.

In *Palmer v. State,* 70 Neb. 136, it is said: "The unexplained possession of stolen property, shortly after the theft of it, is a fact which may justify the jury in inferring that the person so in possession is the thief." To the same effect are *Williams v. State,* 60 Neb. 526, and *Dobson v. State,* 46 Neb. 250.

The record is free from prejudicial error, and the judgment is

AFFIRMED.

Note—See (4) 17 R. C. L. 71 et seq.; 3 R. C. L. Supp. 637; 4 R. C. L. Supp. 1109.

FRANCIS H. BROKAW, APPELLANT, V. L. M. COTTRELL ET AL., APPELLEES.

FILED NOVEMBER 19, 1926. No. 24249.

1. **Taxation:** TAX SALES: STATUTORY REQUIREMENTS. When the statute, under which land is sold for taxes, directs an act to be done, or prescribes the form, time and manner of doing any act, such act must be done, and in the form, time and manner prescribed, or the title is invalid; and in this respect the statute must be strictly, if not literally, complied with.
2. ———: ———: NOTICE: PROOF OF SERVICE. A statute which directs that a tax sale certificate holder shall have published a certain notice, and that proof of such publication shall be evidenced by the affidavit of the "publisher, manager or foreman" of the newspaper, is not met by an affidavit designating the affiant as "editor" of such newspaper.
3. ———: OCCUPYING CLAIMANT: IMPROVEMENTS. Whether or not the breaking of unimproved land by an occupying claimant is in fact a lasting and valuable improvement is a question of fact to be determined in the trial court as any other fact. If found to be such, the breaking being an integral part of the freehold, the measure of recovery therefor is to be determined by ascertaining the enhanced value of the land, if any, by reason of such improvement, regardless of its cost.
4. ———: TAX DEEDS: VALIDITY. A tax deed void for want of proper affidavit of proof of service having been filed with the county treasurer is not validated by the filing of a subsequent affidavit showing compliance with statutory requirements.

5. ———: ———: ———. Where the issuance of such deed is without authority on the part of the county treasurer, it is void, and the owner of the land is entitled to redeem.

APPEAL from the district court for Chase county: CHARLES E. ELDRED, JUDGE. *Reversed, with directions.*

C. G. Miles, for appellant.

Scott & Scott, contra.

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

THOMPSON, J.

Appellant Brokaw, hereinafter called the plaintiff, brought this suit in the district court for Chase county to redeem from a public tax sale made by the county treasurer of such county on the 6th day of November, 1916, of the southeast quarter of section 21, township 8, north, range 41, in such county, and to have set aside and held for naught a tax deed issued by such county treasurer on April 24, 1920, to appellee L. M. Cottrell, one of the defendants herein, who after the issuance of such deed had gone into possession and taken there with him his codefendants. After issues were duly joined and trial had, the court dismissed the plaintiff's suit, and entered a decree quieting title in defendant Cottrell. Plaintiff appeals.

The record reflects the following facts: The plaintiff became the unqualified owner of the land in dispute through a patent issued to him by the government of the United States on May 9, 1891; that after securing such title actual possession thereof was not had by him, and he became a nonresident of the state and has remained such ever since; that the taxes for which the certificate was issued in this case were legally levied, which, after becoming delinquent, were paid by defendant L. M. Cottrell and a certificate of sale and purchase in the form provided by statute was issued to him by the county treasurer, and that such cer-

tificate holder has since continued to pay the taxes thereon; that defendant, desiring to obtain a deed, procured the notice hereinafter referred to to be published, and the affidavit hereinafter quoted to be executed, signed and filed in such county treasurer's office, in furtherance of such desire; that on such record, on the 24th day of April, 1920, such county treasurer issued to defendant the tax deed in question, and thereafter said Cottrell went into possession of the land, taking with him other defendants herein as tenants; that the land at the time of such sale and tax deed was uncultivated and without improvements; that defendant procured 120 acres thereof to be broken and has since cropped the same; that prior to the bringing of this suit the plaintiff tendered to the county treasurer the sum of $315, which was amply sufficient to redeem such lands from such tax sale; that the treasurer refused and still refuses to permit plaintiff to redeem or he to receive such money, alleging as the sole reason the execution and delivery of the tax deed herein challenged; that plaintiff also before the bringing of this suit offered to defendant L. M. Cottrell the sum of $500 as redemption money, which defendant refused and has continued to refuse; that the redemption money tendered to the county treasurer did not include the cost of the breaking of the 120 acres.

The plaintiff, for reversal, presents many claimed errors of the trial court, the most important of which, not considering the challenged defects in the notice, are the following: That the affidavit, hereinafter set out, was not sufficient compliance with the statute, hereinafter quoted, as to authorize the county treasurer to issue the deed; that, as it was not, such deed is void, and, being void, it was not validated by the affidavit filed during the trial by permission of the trial court, even if such affidavit conformed to the statute.

The notice is as follows:

"Notice of the Expiration of the Time of Redemption.

"To Francis H. Brokaw: You are hereby notified that

on the 6th day of November, 1916, L. M. Cottrell purchased at public tax sale, for the taxes for the year 1915, the following described real estate, to wit: The southeast quarter (S. E. ¼) of section twenty-one (21) in township eight (8) north, of range forty-one (41) west of the 6th principal meridian. Said real estate was taxed in the name of F. H. Brokaw. The time for the redemption of said real estate from said tax sale will expire in three months from the date of the service of this notice, after which the undersigned will apply to the county treasurer of Chase county, Nebraska, for a tax deed for said real estate. Dated this 18th day of October, 1919. L. M. Cottrell, owner and holder of the certificate of said tax sale.

"Filed in the office of the county treasurer this 29th day of November, 1919. A. B. Grant, county treasurer."

The affidavit challenged is as follows:

"Publisher's Affidavit.

"State of Nebraska, Chase county—ss.

"John W. Hann, being duly sworn, on oath says he is editor of the Wauneta Breeze, published weekly at Wauneta, Chase county, Nebraska, and of general circulation in said county; that a true copy of the attached notice was correctly published in the regular and entire issue of said paper, and not in a supplement, on Thursday, Dec. 4, 1919, Thursday, Dec. 11, 1919, Thursday, Dec. 18, 1919. John W. Hann."

"Subscribed and sworn to before me this 20th day of December, 1919. D. R. McCallum, Notary Public. Fees $2.00. (Seal) Commission expires Jan. 20, 1925."

The controlling statutes are sections 6542 and 6543, Rev. St. 1913.

Section 6542: "No purchaser at any sale for taxes, or his assignee, shall be entitled to a deed for the land or lot so purchased, unless such purchaser or assignee, at least three months before applying for such deed, shall serve or cause to be served on every person in actual possession or occupancy of such land or lot and also upon the person

in whose name the title to said land appears of record in the office of the register of deeds of the county, if upon diligent inquiry he can be found in the county, a notice stating when such purchaser purchased the land or lot, the description thereof, in whose name assessed, for what year taxed or specially assessed, and that after the expiration of three months from the date of the service of such notice the deed will be applied for. The service of said notice shall be proved by affidavit and the notice of affidavit shall be filed and preserved in the office of the county treasurer. For each service of such notice a fee of one dollar shall be allowed. The amount of such fees shall be noted by the treasurer in the sales book opposite the tract of land described in the notice and shall be collected by the treasurer in case of redemption for the benefit of the holder of the certificate."

Section 6543. "If no person is in actual possession or occupancy of such land or lot, and the person in whose name the title to the land appears of record in the office of the register of deeds in the county cannot, upon diligent inquiry, be found in the county, then such purchaser or his assignee shall publish the notice in some newspaper published in the county and having a general circulation therein. If no newspaper is printed in the county, then in a newspaper published in this state nearest to the county in which the lands or lot is situated. Such notice shall be inserted three consecutive weeks, the first time not more than five months and the last time not less than three months before the time of redemption shall expire. Proof of such application shall be made by filing in the county treasurer's office the affidavit of the publisher, manager or foreman of such newspaper, that to his personal knowledge, said notice was published for the time and in the manner provided herein, setting out a copy of the notice and the dates upon which the same was published. Such affidavit shall be preserved as a part of the files of said office. Any publisher, manager or foreman of a newspaper knowingly or negligently making a false affidavit regarding any such

matters shall be guilty of perjury, and shall be punished accordingly."

It will be seen that the notice is not in strict conformity with section 6542 of the statute. However, as heretofore indicated, our determination of the sufficiency of the affidavit in a large measure covers the challenge to the judgment.

Section 6542, *supra,* applies to cases where the applicant can make personal service of his intention to apply for a deed, and section 6543 applies where it is necessary to publish a notice in a designated newspaper of such intention. In construing these sections, however, it is necessary that we consider them together; in fact, they should be considered and interpreted as if they were one and the same. Thus interpreting such sections, we find that it is provided that no purchaser at any sale for taxes, or his assignee, shall be entitled to a deed for the land or lot so purchased, unless the things specifically required to have been previously done by him have been done, and proof thereof as required by the statute has been made a part of the records in the county treasurer's office. That is, that such record is a necessary condition precedent to the issuance of such tax deed by such county treasurer.

The law applicable to the instant case is fairly stated in an early Vermont case, to wit, *Chandler v. Spear,* 22 Vt. 388, as follows: "When the statute, under which land is sold for taxes, directs an act to be done, or prescribes the form, time and manner of doing any act, such act must be done, and in the form, time and manner prescribed, or the title is invalid; and in this respect the statute must be strictly, if not literally, complied with." While this Vermont case has not been referred to by us in our previous opinions, we have adopted the rule therein announced, and consistently followed the same when such question has been presented to this court.

In *State v. Gayhart,* 34 Neb. 192, 195, we held: "The production of the tax certificate to the treasurer, together with proof that proper notice of the expiration of the time

to redeem has been legally given, are conditions precedent to the right of the treasurer to execute a tax deed."

The notice to redeem, to be of any validity, must be served upon the very party designated by the statute, and contain the precise information required thereby. Such statements are jurisdictional. *Thomsen v. Dickey,* 42 Neb. 314. Without the affidavit required by the statute being filed, the county treasurer is without jurisdiction, and the tax deed is void. *Peck v. Garfield County,* 88 Neb. 635. There must be a strict compliance by the tax sale purchaser with each condition imposed by the statute, or the deed is void. *Henze v. Mitchell,* 93 Neb. 278, 289. "When it is sought to divest the owner of his land by a tax deed, it has always been held by this court that the provisions of the statute must be strictly complied with, for such provisions are mandatory." *Howell v. Jordan,* 94 Neb. 264. Where the deed is void the owner may redeem. *Lanigan v. Gilroy,* 97 Neb. 754.

Thus, it being the unquestioned rule in this state that a strict compliance with the terms of the statute must be had, a comparison of the affidavit with the requirements of the statute becomes essential. It will be seen that the statute, among other things, requires the record to show that notice has been given as in the act provided, the giving of which notice must be proved by an affidavit made by the "publisher, manager or foreman of such newspaper" and duly filed in the office of such county treasurer. It will be noticed that the affidavit in question, instead of following the above requirement, simply stated as descriptive of the one who made the affidavit, as follows: "John W. Hann, being duly sworn, on oath says he is editor of the Wauneta Breeze." The meaning of the respective words "editor," "publisher," "manager" and "foreman" is of such common significance as not to demand explanation or interpretation. Each means, and must have been by the legislature intended to mean: "Editor (as applicable to a newspaper): One who directs or supervises the policies and contributions of a newspaper, magazine, work of reference, or the like."

"Publisher: One who publishes; especially one who issues, or causes to be issued, from the press and offers for sale or circulation matter printed, engraved, or the like." "Manager: One who manages; a conductor or director." "Foreman: The chief of a set of workmen who superintends the rest; an overseer." Webster's New International Dictionary.

That it was not intended that such statute should or did include an "editor" is stressed by the further provision in such section: "Any publisher, manager or foreman of a newspaper knowingly or negligently making a false affidavit regarding any such matters shall be guilty of perjury, and shall be punished accordingly." Then, the affidavit must be made by one who knows. It is not necessarily an editor's duty to know the business done by such paper. His duty relates, as we have seen, to directing or supervising the policies and contributions of the newspaper. It is true, as contended by appellee, that one person might be editor, publisher, manager, and foreman, but where the affidavit uses only the word "editor," more cannot be presumed. The statute is without ambiguity as to who shall make the affidavit, and as to what must be shown by the record, and how it must be shown, in order that the county treasurer may be authorized to make such a deed. Thus, as is indicated by the foregoing, the word "editor" is not a synonym of, and does not comprehend or include in its meaning or significance, "publisher," "manager," or "foreman," as used in such statute, and the use of the word "editor" does not answer the statutory requirements. Thus, the county treasurer was without authority to issue such tax deed, and such deed is void. This being true, the subsequent filing of an affidavit within the statutory provisions could not, and did not, validate such deed.

The cases cited by the appellee, to wit, *Britton v. Larson*, 23 Neb. 806, *Bresee v. Seberger*, 88 Neb. 632, and others of a similar nature, as being adverse to the position herein taken, are cases wherein it was held that the service of the notice was jurisdictional, and not the proof of such

service. In the instant case, and those cited in support of our conclusion herein, the contrary holding is applied, to wit, that a strict compliance with the statute, not only as to the service of the notice, but also as to the proof of such service, must be reflected by the record before the county treasurer is clothed with authority to issue such tax deed.

The tender by plaintiff of the $315 to the county treasurer was sufficient to lay a foundation for the institution of this action. *Herman v. Barth,* 85 Neb. 722; *Howell v. Jordan,* 94 Neb. 264.

Hence, as we held in *Humphrey v. Hays,* 85 Neb. 239: "In such a case the plaintiff should be allowed to redeem upon the payment of the tax lien, the taxes subsequently paid on the premises, together with the interest thereon, and the (reasonable) value of the permanent improvements, if any, made upon such premises by the purchaser or those claiming under him." Further, it is held that the tax deed should be canceled and title forever quieted in the plaintiff, as against each and all of the defendants.

However, as to whether or not the breaking of the land was a lasting and valuable improvement is one of the questions of fact to be determined in the trial court at the hearing, and, if found to be such, the breaking being an integral part of the freehold, the measure of recovery therefor is to be determined by ascertaining the enhanced value of the land, if any, by reason of such improvements, regardless of its cost. *Gombert v. Lyon,* 72 Neb. 319; *Dougherty v. White,* 112 Neb. 675.

The judgment of the trial court is reversed and the cause remanded, with directions for an accounting, and an entry of judgment in favor of the plaintiff in harmony with this opinion.

REVERSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. CITIZENS STATE BANK OF ROYAL: ROLLIE W. LEY, RECEIVER, APPELLEE: SADIE SHAFER, CLAIMANT, APPELLANT.

FILED NOVEMBER 19, 1926. No. 24294.

Banks and Banking: GUARANTY FUND: LIABILITY. When money is deposited in a state bank and certificate of deposit issued therefor drawing interest in excess of the maximum statutory rate, and afterwards, by agreement, while the bank is a going concern, in ordinary course of business, without fraud, mistake, ulterior motives, or violation of law entering therein, such certificate is surrendered and a new one issued in lieu thereof drawing a rate of interest not in excess of such maximum, such a deposit becomes a proper charge against the bank guaranty fund. In such case, including in such renewal certificate accumulations of excess interest accruing on others to which it is sequent does not prevent such allowance.

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

Williams & Kryger, for appellant.

C. M. Skiles, Fred S. Berry and *James E. Brittain, contra.*

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

THOMPSON, J.

The Citizens State Bank, as we find from the record, was organized in 1913 for the purpose of conducting a general banking business as is usual under the banking laws of this state, and continued to transact such business until November 21, 1923, when it became, and was found to be insolvent. A receiver was duly and legally appointed by the district court for Antelope county, who proceeded to wind up its affairs. Shortly after the bank's organization, to wit, November 19, 1913, Sadie Shafer, claimant and appellant herein, became a time depositor thereof in the sum of $300. As evidence of such deposit, a certificate was

issued and delivered to her therefor, due and payable six months from date, drawing 5 per cent. interest. On the maturity of such certificate the president of the bank told claimant that, on account of the bank just starting, such bank would allow her a premium on her deposit of one-half of 1 per cent. per annum, and thereupon interest at 5½ per cent. was added to the amount of such certificate and included in the renewal of the one issued to claimant on November 19, 1913. Thereafter additional sums were deposited in such bank from time to time, and every six months renewal certificates were issued which included the amounts thus deposited, the amount of the certificate renewed, and interest at 5½ per cent. thereon. Thus the business between the bank and this claimant continued as to such certificates up to and including certificate No. 1860, issued November 19, 1922, for $2,297, which certificate was renewed May 19, 1923, by certificate No. 1891, here in question, which latter represented the following items: Face of certificate renewed $2,297, interest thereon at 5 per cent. for six months or $57.45, deposit made May 19, 1923, $350, total $2,704.45.

Certificate No. 1911 was the outgrowth of a deposit of $600 made February 27, 1917, for a period of six months, drawing 5 per cent. interest as appearing on its face, but in fact by agreement drawing 5½ per cent.; and thereafter at intervals of six months certificates of deposit were regularly issued in renewal of such deposit, which renewal certificates included interest at 5½ per cent. on the certificate renewed, and additional deposits, up to and including certificate No. 1875, issued February 28, 1923, which certificate was renewed August 28, 1923, by certificate No. 1911, here in controversy, which latter represented the following items: Face of certificate renewed $1,027.75, interest at 5 per cent. for six months or $25.70, total $1,053.45.

On the failure of such bank, claims were lodged in due form by such Shafer with the receiver of such bank praying that each be allowed and ordered paid out of the bank

guaranty deposit fund of the state. On the receiver denying the prayer of such petitioner as to each of such claims, issues were duly joined in the district court for such county. The claimant's petition was in the usual form, and objections to the allowance thereof were interposed by the receiver, for the following reasons: (1) That such alleged certificates did not represent and were not based upon money or its equivalent placed in such bank; (2) that such certificates of deposit were issued without adequate consideration, and that the same represented and were a mere loan of funds to such bank, and not a deposit; (3) that, just before and at the time and as a part of the agreement of and for such respective deposits, it was agreed between the bank and such claimant that the claimant should receive thereon interest exceeding 5 per cent. per annum, to wit, 5½ per cent. per annum, payable semi-annually, and that each and all of such respective deposits going to make up the amount as appearing on the face of each of such respective certificates are and were in fact agreed to be not deposits of money in the usual form, but loans of money from the claimant to the bank at the agreed rate of interest of 5½ per cent. To this claim of the receiver a general denial was interposed, the case tried to the court, and judgment rendered allowing each of such certificates, together with 5 per cent. interest from the date thereof as a general claim against the bank; and the court further ordered that of the amount found due on certificate No. 1911 one certain deposit made May 19, 1923, of $350, being a part of such certificate, was not covered by such 5½ per cent. interest agreement; that it was an ordinary deposit, and that claimant was entitled to judgment for such deposit, with interest at 5 per cent. thereon from May 19, 1923, to wit, in the amount of $358.75 to be allowed as a preferred claim payable if necessary from the depositors' guaranty fund, and that the balance of the two respective claims, to wit, $3,479.05, be allowed as a nonpreferred or general claim only.

From this judgment the claimant appeals, and presents errors in substance as follows: (1) That the decision of the court is contrary to law; (2) that it is not sustained by the evidence and is contrary thereto.

The claimant testified: "On account of numerous failures of banks and getting to understand the law better, I felt that it wasn't safe and wasn't possibly protected under the guaranty law, so I asked them (the officers in charge of the bank) to reduce the interest to 5 per cent., which they did." That she did and they did just what she swears was done is without opposing proof, and is strengthened by the acts of the bank as shown by its records when the certificates in question were issued. The interest on the respective certificates thus renewed was computed at 5 per cent., and not at 5½ per cent., and the renewals drew, and were understood to draw, but 5 per cent. Her contention is further supported by the books of the bank, in this: At all previous renewals the respective computed interest at 5½ per cent. was shown on the books of the bank as interest charges, save the last few, which were computed as above indicated, and such interest payment entered in the expense account. As to the renewals in question, the bank book entry showed but a 5 per cent. interest charge for the six months preceding the issuance of each of these respective certificates. Hence, at a time when the bank was a going concern and perfectly solvent, at the request of the depositor, and upon a sufficient consideration, to wit, the reduction of interest, and by and with the consent of the bank, without any fraud, mistake, ulterior motives, or violation of law entering into the transaction, these loans drawing 5½ per cent. interest (or as we have said deposits not within the provisions of the depositors' guaranty law) were converted into deposits drawing 5 per cent. interest, within the protection of such law. Thus these matters stood at the time this institution was placed in the hands of the receiver, and thus they must remain. *State v. American Exchange Bank*, 112 Neb. 834; *State v. American Exchange Bank, ante*, p. 626.

The cause is therefore remanded to the district court, with directions to modify its judgment so as to include the entire amount of certificates No. 1891 and No. 1911, and direct that they be paid out of the bank guaranty fund.

REMANDED, WITH DIRECTIONS.

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3. Refusal of a continuance *held* error. *Horr v. Easton* 829

Contracts.

1. A written contract may be waived in whole or in part, directly or inferentially, and the waiver may be proved by express declarations, or by so neglecting to act as to induce belief of intention to waive. *Advance-Rumely Thresher Co. v. Bartzat* 35
2. One seeking to rescind a contract for fraud must offer to return the property or consideration received, if of any value, within a reasonable time. Advance-Rumely *Thresher Co. v. Bartzat* 35
3. Reformation of an instrument has the effect of making it express the real intent of the parties. *Beckius v. Hahn* 371
4. Reformation of an instrument generally relates back to, and takes effect from, the time of its original execution, especially as between parties thereto, creditors at large, and purchasers with notice. *Beckius v. Hahn* 371
5. The equity of reformation of an instrument is not affected by the subsequent rendition of judgment in favor of a general creditor. *Beckius v. Hahn* 371
6. Parties to a contract may reform it voluntarily. *Beckius v. Hahn* 371
7. Contracts whose tendency is to tempt interference with courts will not be enforced. *State v. First Bank of Nickerson* 423
8. A special contract to pay nonexpert witnesses residing within the jurisdiction of the court more than the regular witness fee is contrary to public policy and void. *State v. First Bank of Nickerson* 423
9. The validity of a contract is determined by its general tendency at the time it is made, and if this is opposed to public policy it is invalid, even if the intent of the parties was good and no injury to the public would result. *State v. First Bank of Nickerson* 423
10. A contract of sale providing that partial payments of the purchase price during a stipulated period of years may be retained as liquidated damages for the purchaser's breach of contract is not necessarily void. *Tarry v. Johnston* 496
11. A physician who purchases the good-will and property of a sanitarium may bind himself by agreement not to practice within a fixed radius if the restriction is necessary to protect the seller's contractual rights and is not in restraint of trade. *Tarry v. Johnston* 496
12. A contract not specifying the time limit of restraint on a physician's right to practice in a restricted area is not thereby void, a reasonable time being implied. *Tarry v. Johnston* 496

13. Trade custom or usage may be excluded from a contract by express statements therein or by implication reasonably drawn from the terms used. *O'Gara Coal Co. v. Chicago, M. & St. P. R. Co.* 584
14. Where terms of a contract are clear and unambiguous they cannot be varied by evidence of trade custom or usage. *O'Gara Coal Co. v. Chicago, M. & St. P. R. Co.* 584

Corporations.

1. Where a party purchased stock on the promise of the seller to repurchase upon demand, the time elapsing between the date of purchase and demand is not controlling. *Grotte v. Rachman* 284
2. The provisions of sec. 9295, Comp. St. 1922, relative to the appointment of trustees, are applicable to both domestic and foreign corporations. *State v. Brictson Mfg. Co.* 341
3. The district court, on entering judgment of ouster against a foreign corporation, may appoint trustees for creditors and stockholders. *State v. Brictson Mfg. Co.* 341
4. Any surplus remaining after administering the affairs of an ousted foreign corporation shoud be returned to its proper officers or representatives. *State v. Brictson Mfg. Co.* 341
5. A corporation which has received the benefits of an *ultra vires* contract is not estopped to set up that defense when sued on the contract, but generally a recovery may be had against the corporation on *quantum meruit*. *Simmons v. Farmers Union Cooperative Ass'n* 463

Courts.

1. An action for personal injuries is transitory and may be maintained on a cause of action accruing in a sister state, unless contrary to public policy, abstract justice, good morals, or calculated to injure the state or its citizens. *Herrmann v. Franklin Ice Cream Co.* 468
2. The courts of this state have no discretion to refuse to entertain jurisdiction of a cause of action brought by a nonresident because of nonresidence when the policy of the state accords the right to its own citizens to maintain such action. *Herrmann v. Franklin Ice Cream Co.* 468
3. Jurisdiction of the district court and the county court, to allow a claim against an estate for damages for breach of contract, may be concurrent, where equitable relief is essential, and the decree of the district court may be certified to the county court. *Robinette v. Olsen* 728

Criminal Law. SEE BURGLARY. EMBEZZLEMENT. FORGERY. HOMICIDE. INDICTMENT AND INFORMATION. INTOXICATING LIQUORS. KIDNAPPING. LARCENY. RAPE.

1. The statute regulating appeals from an inferior court in misdemeanor cases is mandatory. *Killian v. State* 4
2. On appeal to the district court in a misdemeanor case, accused must enter into a recognizance that complies with requirements of statute. *Killian v. State* 4
3. A recognizance requiring accused in a misdemeanor case to appear in district court on the first day of the next term *held* not to confer jurisdiction on the district court. *Killian v. State* 4
4. Ordinarily, side remarks of the sheriff or county attorney in the hearing of the jury are not ground for reversal, where the trial court admonishes the jury not to consider them. *Pointer v. State* 13
5. A conviction will not be reversed for nonprejudicial error at the trial. *Welter v. State* 28
6. Receiving evidence of an immaterial fact is not ground for reversal, unless prejudicial. *Aller v. State* 59
7. Objection to introduction in evidence of prosecutrix' clothing that no sufficient foundation was laid *held* insufficient to raise the question as to whether the clothing was in the same condition as immediately following the assault. *Aller v. State* 59
8. By a plea of not guilty to an information, accused waives all defects which may be excepted to by motion to quash or plea in abatement. *Olsen v. State* 112
9. Although grant of change of venue is largely discretionary, yet when such hostility is shown that a fair and impartial trial is improbable, it is error to deny the application. *Olsen v. State* 112
10. Refusal of change of venue *held* an abuse of discretion. *Zediker v. State* 292
11. A change of venue is discretionary. *Ringer v. State* 404
12. The granting or refusing of a continuance rests in the sound discretion of the court. *Ringer v. State* 404
13. Where accused is convicted of separate offenses on separate counts of an information, the better practice requires imposition of separate sentences. *Williams v. State* 132
14. Admissions of accused while under arrest must ordinarily be shown to be voluntary, to be admissible. *Thompson v. State* 147
15. Information against automobilist for speeding *held* insufficient. *Wagner v. State* 171

16. The district court has no jurisdiction of an offense triable only in the district court, unless an information has been filed or an indictment by a grand jury has been returned. *Langford v. State* 207
17. The habitual criminal act *held* not *ex post facto* as to convictions prior to its passage. *Taylor v. State* 257
18. Where the state seeks punishment of accused as an habitual criminal it is proper to allege and prove a previous conviction. *Taylor v. State* 257
19. In a prosecution for forgery, evidence of similar acts at about the same time is admissible to show guilty knowledge or intent. *Taylor v. State* 257
20. The trial court should instruct the jury as to the purpose of evidence of similar acts by accused. *Taylor v. State* 257
21. Statute requiring double restitution and a fine *held* to inflict a single punishment. *State v. Swedland* 280
22. A supersedeas bond is not satisfied by the surrender of accused before issuance of execution and return thereof unsatisfied. *State v. Swedland* 280
23. Objection to evidence on the ground of incompetency *held* sufficient. *Zediker v. State* 292
24. If objection to evidence is once made and overruled, objection to further testimony of the same nature by the same witness is not necessary. *Zediker v. State* 292
25. Writings or words of a party in furtherance of the common design are admissible against the party and his coconspirators, whether present or not, but not writings or words of a party which are an admission merely of his own guilt. *Zediker v. State* 292
26. When it appears that there is substantial and well-founded reason to believe that acccused cannot obtain a fair trial in the county, the venue must be changed. *Zediker v. State* 292
27. Statutory power of a county court in a civil proceeding to punish an executor for contempt does not deprive criminal courts of jurisdiction to punish him for embezzlement as executor. *Kronberg v. State* 393
28. Admission of accused freely and voluntarily made may be received in evidence. *Ringer v. State* 404
29. Accused voluntarily pleading guilty waives his right to a preliminary examination. *Ringer v. State* 404
30. When evidence of another crime admissible, stated. *Smith v. State* 445
31. Whether proof of unlawful conversion of goods, for which accused was not informed against, tended to prove the

unlawful conversion for which he was being tried, *held* a question of fact for the jury. *Smith v. State* 445
32. A court in a misdemeanor case may correct its judgment during the term. *State v. Smith* 653
33. Statute providing that the diet of a "convict" may be restricted to bread and water only *held* constitutional. *State v. Smith* 653
34. The term "convict" defined. *State v. Smith* 653
35. The legislature has authority to define crimes and misdemeanors and determine their punishment; and where it acts within constitutional limits its action is not reviewable by the court, and ulterior evidence will not be received to impeach such legislative enactment. *State v. Smith* 653
36. Where a county judge issues a search warrant in a criminal case beyond the jurisdiction of the county court he can exercise the powers of an examining magistrate only. *Allen v. State* 676
37. The crime of unlawful manufacture of intoxicating liquors is not within the jurisdiction of the county court. *Allen v. State* 676
38. Where the trial court is without jurisdiction of the subject-matter of an action, the appellate court will not acquire jurisdiction thereof by appeal. *Allen v. State* 676
39. An accessory after the fact defined. *Heyen v. State* 783
40. In a prosecution for being an accessory after the fact, the commission of the principal crime and the guilt of one who committed it may be shown by his conviction, sentence, and confinement, though other persons not yet convicted were equally guilty. *Heyen v. State* 783
41. Error in imposing an indeterminate sentence instead of one for a definite period does not make the record inadmissible to show guilt, in a prosecution of an accessory after the fact. *Heyen v. State* 783
42. In a prosecution of an accessory after the fact for harboring robbers, testimony by and records of the circulation manager of a daily newspaper that accused received copies of the newspaper during such time was admissible in rebuttal. *Heyen v. State* 783
43. A judicial record showing a conviction for felony, though not signed by the presiding judge, is admissible to prove the principal offense, in a subsequent prosecution of an accessory after the fact. *Heyen v. State* 783
44. One knowingly harboring criminals immediately after a robbery cannot escape conviction as an accessory after the fact because the principals had not been found guilty of

the robbery at the time they were harbored. *Heyen v. State* 783
45. In a prosecution of an accessory after the fact for harboring bank robbers, full knowledge of their guilt is essential to conviction. *Heyen v. State* 783
46. Where conflicting evidence on a material issue is sufficient to sustain conviction beyond a reasonable doubt, the question is one for the jury. *Heyen v. State* 783
47. Admission of evidence not prejudicial to accused is not ground for setting aside a conviction. *Heyen v. State* 783
48. Dying declarations are admissible only in cases of homicide, and where death of declarent is subject of charge. *Clark v. State* 818
49. Appointment of assistant counsel *held* not error, in absence of a showing of abuse of discretion. *Barr v. State* 853
50. Assignment of error in inflammatory statements to the jury is unavailing, in absence of a showing in the record that the statements were made. *Barr v. State* 853
51. A letter written by a third person stating that he, and not the accused, committed the offense is not competent evidence. *Barr v. State* 853
52. Ordinarily, error cannot be predicated on an instruction given, which is a duplicate of one asked by the complaining party. *Bell v. State* 17
53. Refusal to give an instruction which is without competent evidence to support it is not error. *Bell v. State* 17
54. A misleading instruction will not work a reversal, if the instructions as a whole are correct *Aller v. State* 59
55. An instruction from which the jury may fairly infer that facts and circumstances necessary to corroborate the testimony of prosecutrix need not be proved by other witnesses *held* erroneous. *Daggett v. State* 238
56. The court should direct the jury to disregard an admitted confession if, on consideration of all evidence, they find it was not voluntarily made. *Ringer v. State* 404
57. Inconsistency in the instructions is not necessarily ground for reversal, in absence of showing of prejudice. *Heyen v. State* ..... 783.

Damages.
1. Basis of damages in an action for tort. *Sohl v. Sohl* 353
2. Evidence must contain sufficient data to enable the jury with reasonable certainty to estimate the actual damages for loss of good-will. *Tarry v. Johnston* 496
3. Reasonable cost of repairs of automobile is a proper measure of damages in an action for negligence. *Thrapp v. Meyers* 689

Deeds.

1. A deed to grantee "and unto her children" *held* not to limit the estate to grantee for life. *Aynes v. Bantz* 226
2. In a suit to cancel a deed for mental incapacity of grantor, the burden of proof is on the one who alleges the mental incapacity. *Hitchcock v. Guilliams* 522
   Little v. Curson 752
3. Undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. *Hitchcock v. Guilliams* 522
   In re Guardianship of Wessel 704
   Little v. Curson 752
4. Evidence *held* to sustain decree canceling deed for lack of consideration, undue influence, and incompetency of grantor. *Domann v. Domann* 563
5. The burden of proof is on one alleging mental incapacity. *In re Guardianship of Wessel* 704
6. What constitutes mental capacity to execute a deed, stated. *In re Guardianship of Wessel* 704
7. Where a deed from father to son was executed and delivered for a sufficient consideration, the burden of establishing undue influence rests on the one who attacks it. *In re Guardianship of Wessel* 704
8. Evidence of the attorney who prepared the deed, of the notary, and the witnesses, that it was executed by the grantor understandingly and voluntarily, cannot ordinarily be overcome by evidence relating to different occasions. *Little v. Curson* 752
9. In case of gift and voluntary conveyance from parent to child, no presumption of fraud or undue influence arises from the mere fact of relationship. *Little v. Curson* 752
10. Before setting aside a deed for fraud, equity will require, so far as possible, a return of the purchase money. *Kruger v. Block* 839
11. In setting aside a deed for fraud, equity will require reimbursement of purchaser for improvements to extent of enhanced value of land. *Kruger v. Block* 839
12. One suing to set aside a deed for fraud must do equity. *Kruger v. Block* 839

Descent and Distribution.

The state may properly intervene, in a proceeding to determine heirship, to assert its right of escheat. *In re Estate of O'Connor* 266

Divorce.

Evidence *held* sufficient to sustain a decree of divorce. *Christman v. Christman* 456

Drains.

1. Damming of drainage channel to detriment of drainage district may be enjoined. *Flader v. Central Realty & Investment Co.* 161
2. A landowner cannot recover damages for negligent installation of construction and diversion works installed by a drainage district where and as he directed. *Idlewild Farm Co. v. Elkhorn River Drainage District* 134
3. Notice must be given to mortgagees of the proposed organization of a drainage district before special assessments levied against the lands become liens superior to the mortgage liens. *Board of Commissioners v. Northwestern Mut. Life Ins. Co.* 596
4. When notice of the organization of a drainage district is not given mortgagees, special assessments against the lands will be held subject to the mortgage liens. *Board of Commissioners v. Northwestern Mut. Life Ins. Co.* 596

Embezzlement.

1. An executor is amenable to the embezzlement statute applicable to "any individual or company or association." *Kronberg v. State* 393
2. Evidence *held* to sustain conviction of conversion as bailee. *Smith v. State* 445

Eminent Domain.

1. Before opening a road across land to which a government patent has been issued, just compensation must be made or provided for. *Soulek v. Stiefvater* 204
2. Where appraisers in assessing damages for opening a public road fail to perform their duty, and the county clerk fails to give notice to claimants and they are thereby deprived of opportunity to appeal, equity will grant relief. *Horner v. Eells* 210

Estoppel.

1. It is essential to estoppel that one party was influenced by and relied on the conduct of the other and changed his position in reliance thereon to his injury. *Rea v. Pierson* 173
2. Equitable estoppel defined. *Peters Trust Co. v. Cranmore* 491
3. Refusal by mortgagee in possession of offers, on certain conditions, of $300 a month for the premises *held* not to estop her from claiming that the reasonable rental value was less. *Hays v. Christiansen* 764

Evidence. SEE WILLS.

1. A judicial record of another state, duly authenticated, is admissible as proof of foreign judgment. *Chamberlain v. Vanderhoof* 47
2. Parol evidence to vary terms of a written agreement is not admissible, but evidence to show that there is no agreement is admissible. *Hanneman v. Olson* 88
3. Parol evidence is admissible to show that a written instrument delivered to the obligee was not intended to take effect until another event should take place. *Hanneman v. Olson* 88
4. Defense that note in suit was given for accommodation and without consideration may be established by parol evidence. *Bennington State Bank v. Petersen* 420
5. Where a shipper of delayed freight telephones the yardmaster of a carrier, and one who says he is yardmaster answers indicating that the delay was caused by negligence, the shipper, as a witness, may testify to the conversation, if otherwise competent, though he did not recognize the voice of the person talking. *Connolly v. Davis* 556
6. Evidence of trade custom or usage is admissible to aid in the interpretation of a contract, but not to change its intrinsic character. *O'Gara Coal Co. v. Chicago, M. & St. P. R. Co.* 584
7. Extrinsic proof of a custom is not available to change obligations expressed in plain language in a written instrument. *City Nat. Bank v. Denslow* 600
8. Parol evidence is not admissible to show that a written contract is incomplete. *Dawson County State Bank v. Durland* 605
9. The terms and conditions of a written contract implied by law are not subject to variation by parol evidence. *Dawson County State Bank v. Durland* 605
10. Measurements and cross-sections made during progress of road construction by the project engineer are the best evidence of quantity and character of materials removed, and expert evidence, based on measurements after completion of work, is incompetent. *Peterson v. State* 612
11. A newspaper, properly addressed and mailed, is presumed to have reached the addressee in the usual course of mails. *Heyen v. State* 783

Executors and Administrators.

1. Right of executor to apply legacy to debt of legatee to the estate *held* not to depend on insolvency of legatee. *First Trust Co. v. Cornell* 126
2. Legatee retaining fund out of which his legacy should be

paid *held* not entitled to receive his legacy from the executor without deducting therefrom the amount in his hands as debtor of the estate, and his assignee takes the legacy subject to equities in favor of the estate. *First Trust Co. v. Cornell* 126

3. Assignee of legatee *held* to take subject to existing equities, notwithstanding he took without notice. *First Trust Co. v. Cornell* 126
4. Right of executor to retain legacy and apply it *pro tanto* on debt of legatee *held* to exist independently of statute. *First Trust Co. v. Cornell* 126
5. A declaration or promise by an executor is not binding on the estate until approved by the proper court. *First Trust Co. v. Cornell* 126
6. A trust company, as executor, *held* not estopped to sue for benefit of estate because of acts of its officers. *First Trust Co. v. Cornell* 126
7. Evidence of fraud in issuance of certificate of deposit *held* insufficient to sustain judgment. *In re Estate of Kamrath* 230
8. On reversal of judgments of dismissal in the county and district courts of a claim against an estate, the decree of the supreme court may be certified by the district court to the county court for allowance of the claim, with a mandate showing reversal of the judgment of the county court. *In re Estate of Boyden* 726

Franchises.

A franchise is a special privilege conferred by government on individuals which does not belong to citizens generally. *Omaha & C. B. Street R. Co. v. City of Omaha* 483

Fraud.

1. Values placed on properties of respective parties to determine difference to be paid in exchange, *held* not binding on either party in an action for fraud. *Theisen v. Peterson* 154
2. The measure of damages for fraud in exchange of properties is the difference between the actual value of the property transferred and its value if it had been as represented. *Theisen v. Peterson* 154
3. Evidence *held* to establish fraud in procuring exchange of properties. *Theisen v. Peterson* 154

Forgery.

1. In a prosecution for forgery, the state must prove that the indorsement was made without authority of the per-

son whose name was used, and such proof can be made by direct or circumstantial evidence. *Taylor v. State* 257
2. Evidence *held* insufficient to sustain a conviction for forgery or uttering a forged instrument. *Taylor v. State* 257
3. Evidence *held* sufficient to warrant submission of case to the jury. *Taylor v. State* 263

Gifts.
1. Evidence *held* insufficient to establish a gift, but sufficient to prove a trust *Ward v. Geary* 50
2. The affection of a parent for a child which inspires a gift will not render it voidable, unless influence has been so used as to confuse the judgment and control the will of the donor. *Little v. Curson* 752

Guaranty.
1. The guarantor is a favorite of the law in the interpretation of ambiguous provisions of a guaranty drawn by the obligee. *City Nat. Bank v. Denslow* 600
2. Ordinarily, a guaranty is not applicable to past transactions. *City Nat. Bank v. Denslow* 600

Highways.
1. County *held* liable for injuries from want of repair of a public highway. *King v. Douglas County* 477
2. A well-traveled track in a public highway, where there are no barriers or warning signs, justifies the assumption that the highway is reasonably safe for travel. *King v. Douglas County* 477
3. Where the traveled portion of a public highway is within two feet of the perpendicular banks of a ditch, ordinary care requires maintenance of barriers. *King v. Douglas County* 477
4. Where a traveler on a public highway is injured by a county's negligence combined with another cause the county is liable. *King v. Douglas County* 477
5. The right to use public highways by the usual means of transportation extends to carriers for hire, subject to the power of the state to impose reasonable regulations, which power may be delegated to municipal bodies. *Omaha & C. B. Street R. Co. v. City of Omaha* 483
6. Where the contractor for a federal aid road accepted payments on estimates made by the chief of the bureau of roads, instead of the state engineer, such estimates were admissible on the issue as to the amount remaining due the contractor. *Peterson v. State* 612
7. Where a grading contract provided the manner in which

the amount of material removed should be determined as a basis for calculating the price of the work, on failure of the state engineer to sign the final estimate, the court will follow the method indicated by the contract in determining the amount due. *Peterson v. State* 612
8. Though an autoist has the right of way, he should exercise ordinary care to prevent accident, even to the extent of waiving his right. *Thrapp v. Meyers* 689

Homicide.
1. *Held* not error to instruct the jury as to murder in the first and second degree, in view of the evidence. *Welter v. State* 28
2. Rulings on instructions as to degrees of murder *held* free from error. *Welter v. State* 28
3. Sentence imposed by the supreme court. *Welter v. State* 28
Banks v. State 33
4. Information for murder in the first degree *held* sufficient. *Ringer v. State* 404
5. The Constitution continues in force the law relating to murder. *Ringer v. State* 404
6. Evidence *held* to sustain conviction. *Ringer v. State* 404
7. Evidence *held* insufficient to sustain conviction for first degree murder. *Northey v. State* 543

Husband and Wife.
1 Instructions as to damages for alienation of affections *held* erroneous. *Sohl v. Sohl* 353
2. A married woman may sue in her own name for injuries to her person. *Graves v. Peck* 745

Indictment and Information.
1. If a statutory crime may be committed by any of several methods set forth in the statutes, the information may charge in a single count that it was committed by any or all of the enumerated methods, if not inconsistent. *Winkelmann v. State* 1
2. An information charging embezzling, abstracting, and misapplying bank's funds, where the acts charged relate to a single transaction, charges only one offense. *Winkelmann v. State* 1
3. Overruling a motion to quash the information for duplicity, or refusing to require an election by the state on which offense it will rely for a conviction, *held* not prejudicial, on a showing by a bill of particulars that a single offense was relied on for a conviction. *Winkelmann v. State* 1

4. Burglary and larceny may be charged in a single count, if the criminal acts constitute parts of the same transaction; and there may be a conviction of either or both felonies. *Zediker v. State* 292

Injunction. SEE WATERS, 1.

1. A suit to enjoin a licensed physician from practicing in a restricted territory in violation of contract is one of equitable cognizance. *Tarry v. Johnston* 496
2. A licensed physician who purchased a sanitarium and agreed not to practice within 150 miles therefrom, but subsequently defaulted, may be enjoined from violating his restrictive agreement, when such remedy is essential to the protection of the seller's contractual rights. *Tarry v. Johnston* 496
3. An action at law on purchase-money notes representing only portions of the consideration for the sale does not afford an adequate remedy for the purchaser's breach of the contract, where unpaid accruing net profits of a lucrative business included in the sale were part of the purchase price. *Tarry v. Johnston* 496

Insane Persons.

1. A final decree that a married woman is mentally incompetent *held* not necessarily binding on strangers, who accepted from her grantee mortgage security for a loan in reliance on an earlier decree that she was competent at the time of making the deed. *Montgomery v. Boesche* 314
2. The guardian of an insane person may be required to pay cost of his maintenance at a state hospital, under sec. 6928, Comp. St. 1922. *State v. Heupel* 797

Insurance.

1. An elevator owner may recover for loss by fire to grain held in storage. *Calnon v. Fidelity-Phenix Fire Ins. Co.* 53
2. A grain elevator erected on leased ground with privilege of removal *held* to be real estate and within the valued policy act. *Calnon v. Fidelity-Phenix Fire Ins. Co* 194
3. Violation of a condition in a fire insurance policy by mortgaging the insured property does not invalidate the insurance, unless it contributes to the loss. *Calnon v. Fidelity-Phenix Fire Ins. Co* 194
4. Judgment for four years' disability instead of five *held* proper. *Eastep v. Northwestern Nat. Life Ins. Co* 505
5. Insured *held* entitled to recover on an accident policy for four years' disability. *Eastep v. Northwestern Nat. Life Ins. Co* 505

6. Construction against forfeiture will be given if the terms of the policy permit it. *Eastep v. Northwestern Nat. Life Ins. Co.* ... 505
7. In construing an insurance policy, courts will ignore an inconsistent provision, to avoid a forfeiture. *Eastep v. Northwestern Nat. Life Ins. Co.* ... 505

Interest.
1. The U. S. Constitution *held* not to forbid a state legislating on rates of interest, nor to forbid contracts to pay interest. *Klattenburg v. Qualsett* ... 18
2. In absence of statute or of agreement therefor, interest on claims against the state cannot be allowed. *Peterson v. State* ... 612

Intoxicating Liquors. SEE CRIMINAL LAW, 37.
1. County court *held* without jurisdiction to impose sentence of both fine and imprisonment for unlawful sale of liquor. *State v. Smith* ... 659
2. County court *held* without authority to impose sentence of both fine and imprisonment for unlawful possession and transportation of liquor. *State v. Smith* ... 661
3. To make possession of a still unlawful, it must have been intended to be used for unlawful manufacture of intoxicating liquor. *McKelvie v. State* ... 831

Judgment.
1. A judgment of a sister state, duly authenticated, imports verity and plaintiff need not allege or prove that the foreign court had jurisdiction of the person. *Chamberlain v. Vanderhoof* ... 47
2. The plea of *res judicata* avails only in a subsequent action on the same claim or demand. *Ingram v. Bank of Commerce* ... 64
3. In a suit by heirs to set aside deed from decedent and wife, personal judgment against wife *held* not sustained by the pleadings. *Domann v. Domann* ... 563
4. 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. *Rogers v. Buettgenback* ... 834
5. If defendant omit to set up a counterclaim or set-off, he cannot recover costs in a subsequent action thereon. *Rogers v. Buettgenback* ... 834

Jury.
1. Failure of officers to comply with law in drawing names for the petit jury may be assailed by a challenge to the array. *Kronberg v. State* ... 393

2. The unit for drawing by lot names for a petit jury is the county, and not the precinct. *Kronberg v. State* 393
3. Overruling a challenge to the array of petit jurors *held* error, where the undisputed evidence showed that their names were drawn by precincts. *Kronberg v. State* 393
4. The court may direct the sheriff to summon jurors to fill the regular panel depleted by excusing members for cause. *Ringer v. State* 404
5. One who has formed an opinion of the guilt or innocence of accused from reading newspaper statements is not necessarily disqualified to sit as a juror. *Ringer v. State* 404

Kidnapping.
1. Consent of child *held* no defense in prosecution for taking a child under the age of eighteen with intent unlawfully to detain or conceal it from its parents or guardian. *Bundy v. State* 121
2. Instructions containing element of offense not in the statute nor in the information *held* to constitute reversible error. *Bundy v. State* 121

Landlord and Tenant.
1. A lessee, during occupancy of demised premises, holds both by privity of estate and of contract. *Mayer v. Dwiggins* 184
2. Assignment of lease transfers privity of estate to assignee. *Mayer v. Dwiggins* 184
3. Privity of contract is not transmitted to purchaser of leasehold by assignment of the lease; express covenants of the lessee remain obligatory on the lessee. *Mayer v. Dwiggins* 184
4. Lessee is not relieved from breaches of covenant occurring after assignment of lease by lessee by mere acceptance of rent by lessor from assignee. *Mayer v. Dwiggins* 184
5. Lessor retains right after assignment of lease to enforce all personal covenants in the lease against the lessee, notwithstanding assignee has deliberately incapacitated himself to perform his obligations. *Mayer v. Dwiggins* 184
6. Lessor *held* to have released lessee from covenants of lease. *Mayer v. Dwiggins* 184
7. Where lessor took possession of demised premises and brought suit to quiet title, *held* that the covenants of the lease were thereby terminated. *Mayer v. Dwiggins* 184
8. The tenant, and not the owner, is liable for a nuisance created by the tenant on leased premises. *City of Omaha v. Hugh Murphy Construction Co.* 573

Larceny.

The unexplained possession of stolen property shortly after theft may justify the inference that the possessor is the thief. *Barr v. State* 853

Master and Servant.

1. The right to bring an action against a third party causing an injury rests with the employer until the employer has neglected or refused to sue. *O'Donnell v. Baker Ice Machine Co.* 9
2. A minor unlawfully employed *held* not chargeable with contributory negligence nor assumption of risk. *O'Neill v. Rovatsos* 142
3. Fall of stack of freight *held* not evidence of negligence. *Laf Ferry v. Chicago, B. & Q. R. Co.* 219
4. Risk of injury from replacement of freight *held* assumed. *Laf Ferry v. Chicago, B. & Q. R. Co.* 219
5. Rule of assumption of risk of coemployee's negligence *held* not to apply. *Laf Ferry v. Chicago, B. & Q. R. Co.* 219
6. Evidence *held* to sustain finding that employee was engaged in the regular business of the employer, within the employers' liability act. *Bauer v. Anderson* 326
7. Under our compensation act, the accident causing injury must be one arising out of and in the course of the employment. *Gale v. Krug Park Amusement Co.* 432
8. Compensation is not recoverable for an injury from a peril common to all mankind. *Gale v. Krug Park Amusement Co.* 432
9. Death of workman from destruction of a building by a storm *held* not compensable under the compensation act. *Gale v. Krug Park Amusement Co.* 432
10. The common-law action for personal injuries remains open to all employees not subject to the workmen's comsation act. *Herrmann v. Franklin Ice Cream Co.* 468
11. A claim under the employers' liability act may be filed within one year after culmination of disability from a latent injury of a progressive nature. *City of Hastings v. Saunders* 475

Mechanics' Liens.

Evidence *held* to sustain decree of foreclosure of a mechanic's lien. *Parker v. Sutton* 450

Mortgages.

1. Taking a stay of sale waives errors in appointing receiver and granting foreclosure. *Theisen v. Peterson* 150
2. Evidence *held* insufficient to sustain decree of foreclosure. *Macumber v. Thomas* 290

3. One holding an interest in the proceeds of sale by reason of rights possessed in the mortgage is a necessary party to a foreclosure suit. *Webb v. Patterson* 346
4. An interested person, not made a party to a foreclosure suit, ordinarily may intervene as a matter of right at any time before sale. *Webb v. Patterson* 346
5. In a suit to foreclose a mortgage, the note and mortgage are evidence of the amount due. *Citizens State Bank v. Krutsinger* 366
6. The burden is on mortgagor to prove that he was not given a credit to which he was entitled when the amount of his indebtedness was computed before the mortgage was executed. *Citizens State Bank v. Krutsinger* 366
7. Evidence as to consideration for mortgages *held* to sustain decree. *Kleckner v. Barnes* 453
8. The assignee of a junior incumbrance has priority over a senior incumbrancer only in case his assignment is in registerable form and recorded before the senior incumbrance. *Dawson County State Bank v. Durland* 605
9. Alteration of bond and mortgage on homestead *held* to cancel the bond and debt as to the wife and to discharge the mortgage as to both husband and wife. *David City Building & Loan Ass'n v. Fast* 621
10. Evidence *held* to sustain decree foreclosing as a mortgage a deed given to cover a bank cashier's shortage. *Peterson v. Winkelmann* 714
11. Modification of the terms and conditions of a trust may be made by the makers and the trustee at any time before the bonds secured by the deed of trust are negotiated. *American Life Ins. Co. v. Bennett Live Stock Co* 749
12. A mortgagee in possession is chargeable with reasonable rental value of the premises plus amounts received in excess thereof, and should be credited with reasonable cost of necessary repairs and improvements, and with amounts paid for insurance and taxes. *Hays v. Christiansen* 764
13. In a mortgage foreclosure, if 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. *Reed v. Good* 777
14. In foreclosure of a mortgage, plaintiff is required to plead, and, if denied, must prove that no proceeding at law to recover the debt has been instituted. *Young v. Thompson* 804
15. Taking of a deed by trustee for mortgagee *held* not to operate to cancel the mortgage. *Citizens State Bank v. Petersen* 809

16. Ordinarily, when one having a mortgage on land becomes owner of the fee, the former estate is merged in the latter. *Citizens State Bank v. Petersen* 809

17. A mortgagee becoming owner of the land may keep his mortgage alive if essential to his security against an intervening title, and it will be presumed, in absence of circumstances indicating a contrary purpose, that he intended to do that which would prove most advantageous to himself. *Citizens State Bank v. Petersen* 809

Municipal Corporations.

1. If notice of a defect in a street is given to a city council, in open session, five days before an accident caused thereby, a written notice filed with the city clerk is not prerequisite to the right of recovery. *Stewart v. City of Lincoln* 96

2. Sec. 4123, Comp. St. 1922, authorizing a municipal tax levy of five mills for lighting streets and for extension or maintenance of a lighting system *held* modified by sec. 5910. *Drew v. Mumford* 100

3. Secs. 4396, 4397, Comp. St. 1922, providing for a levy of five mills for the purchase, construction and maintenance of municipal lighting systems *held* modified by sec. 5910. *Drew v. Mumford* 100

4. Admission of evidence as to private rules, usages or customs relative to parking a motor truck, in determining question of negligence, *held* error. *Koehn v. City of Hastings* 106

5. A city under a home rule charter may enact any legislation not contrary to the Constitution or general statutes. *Standard Oil Co. v. City of Lincoln* 243

6. A city of the first class may adopt a charter in the form of a grant or a limitation of powers. *Standard Oil Co. v. City of Lincoln* 243

7. Where a city engages in a purely business enterprise, it acts in a private capacity, and is bound by the rules of law applicable to others engaged in a like enterprise. *Cook v. City of Beatrice* 305

8. Maintenance of an electric plant *held* outside of a city's governmental functions, so as to dispense with filing claim and notice. *Cook v. City of Beatrice* 305

9. Ordinance of Omaha regulating auto-busses, *held* regulatory, and not to grant, extend, change, or modify the terms of a franchise, and that permits granted thereunder were valid. *Omaha & C. B. Street R. Co. v. City of Omaha* 483

10. Courts will not inquire into the motive of a city council

in its exercise of a discretionary power. *Omaha & C. B. Street R. Co. v. City of Omaha* 483

11. It is not required that special benefits assessed against each lot in a paving district bear any proportionate relation to the actual value of the lot. *Whitla v. Connor* 526

12. Ordering a sidewalk and providing that the cost shall be assessed on the abutting lot is a legislative determination that the improvement is proper and that the property will be benefited, and such determination cannot be denied effect in a judicial proceeding if the board had power to act, and one challenging its authority has the burden of alleging and proving invalidating facts. *Whitla v. Connor* 526

13. Temporary walks may be constructed on ungraded and unimproved village streets under sec. 4285, Comp. St. 1922, and an ordinance therefor may be enacted by a majority vote of the village board, under sec. 4329. *Whitla v. Connor* 526

14. Errors, irregularities and inequalities in special assessments or in proceedings prior thereto, not raised by objection before the city council or village board, are waived. *Whitla v. Connor* 526

15. The charter of cities of the second class having a population of less than 5,000 empowers the city council, by a three-fourths vote, to pave a street without a petition by property owners. *City of Superior v. Simpson* 698

16. The burden is on one assailing a paving assessment as void to prove the invalidity. *City of Superior v. Simpson* 698

17. Under the charter of cities of the second class, the council is not required to insert in a resolution providing for paving assessments a finding that benefits were equal and uniform. *City of Superior v. Simpson* 698

18. Mere irregularities do not necessarily invalidate paving assessments. *City of Superior v. Simpson* 698

19. Under a city charter requiring an engineer's estimate of cost of paving, the council may reject a bid because in excess of the estimate, readvertise and let the contract to the original bidder under a new bid, if within a revised estimate made in good faith. *City of Superior v. Simpson* 698

20. Prior to 1925, cities of the second class were not required to let paving contracts by advertisement and competitive bidding. *City of Superior v. Simpson* 698

21. A city ordinance signed by the mayor is not invalidated by failure of the city clerk, in publishing a copy, to

erase the name of a former mayor and insert the incumbent's name. *City of Superior v. Simpson* 698
22. The signing of a city ordinance by the mayor may be shown by the city clerk's record, in absence of the original ordinance. *City of Superior v. Simpson* 698

Negligence.
1. Rule as to comparative negligence, stated. *Mitchell v. Missouri P. R. Corporation* 72
2. If injury results from the negligence of two persons, both are liable. *Koehn v. City of Hastings* 106
3. Ordinarily, negligence of driver of a public taxicab cannot be imputed to a passenger or an invitee. *Koehn v. City of Hastings* 106
4. What constitutes negligence is ordinarily a question of fact for the jury. *Thrapp v. Meyers* 689
5. It is the duty of an autoist approaching a highway intersection to look to the right and left for approaching vehicles; whether he did his full duty is ordinarily a question of fact for the jury. *Thrapp v. Meyers* 689
6. An autoist should have his car under such reasonable control as will enable him to avoid collision with other vehicles operated with due care. *Thrapp v. Meyers* 689

Nuisance.
1. To perpetually enjoin operation of an asphalt plant as a nuisance, in absence of a showing that it cannot be operated in a manner not to constitute a nuisance, *held* error. *City of Omaha v. Hugh Murphy Construction Co.* 573
2. Persons injuriously affected by the operation of an asphalt plant are entitled only to have continuance of the nuisance enjoined, in absence of showing that it cannot be operated in a manner not to constitute a nuisance. *City of Omaha v. Hugh Murphy Construction Co.* 573

Occupying Claimants.
Whether the breaking of unimproved land by an occupying claimant is a lasting and valuable improvement is to be determined as any other fact; the measure of recovery being the enhanced value of the land, if any. *Brokaw v. Cottrell* 858

Parties. SEE MORTGAGES, 3, 4.
1. The statute providing for intervention should be liberally construed. *Webb v. Patterson* 346
2. Overruling motion to strike petition of intervention lodged without leave given is equivalent to granting

leave, and relates back to date of filing such petition. *Webb v. Patterson* 346

Partition.

1. A will devising a life estate to testator's wife and remainder to heirs may restrict compulsory or involuntary partition during widow's life. *Freeland v. Andersen* 822
2. A will devising a life estate to testator's wife and remainder to heirs may operate as a restriction on compulsory or involuntary partition during widow's life. *Freeland v. Andersen* 822
3. A life tenant and remaindermen cannot compel other remaindermen to submit to compulsory or involuntary partition in derogation of will. *Freeland v. Andersen* 822

Physicians and Surgeons.

The owner of a sanitarium may employ physicians to practice therein without subjecting himself to penalties for practicing medicine without a license. *Tarry v. Johnston* 496

Pleading.

1. It is not an abuse of discretion to refuse to permit an amended answer presenting a new defense to be filed at time of trial, if the facts pleaded in the amendment were known when the original answer was filed, and no excuse is offered for the delay. *Chamberlain v. Vanderhoof* 47
2. The filing of an amended petition after entry of final decree not appealed from will not be considered an abandonment of the decree upon an order of the appellate court remanding the case simply for an accounting. *Hays v. Christiansen* 764

Principal and Agent.

1. A principal is bound by acts of his agent to the extent of his apparent authority. *Advance-Rumely Thresher Co v. Bartzat* 35
2. An agent who makes a written contract *held* to have authority to waive a provision thereof. *Advance-Rumely Thresher Co. v. Bartzat* 35
3. A party asserting ownership of commercial paper through an indorsement of one other than the owner has the burden of proving authority to make the indorsement. *First Bank of Ulysses v. Birkel* 318

Process.

Before service by publication can be made on a non-resident, an affidavit must be filed pursuant to sec. 8584, Comp. St. 1922. *Reed v. Good* 777

Railroads. SEE CARRIERS.

1. A railroad company may be liable for injuries to animals going on its track at a place where the company is required to fence, although there is no collision between its train and the animals. *Middaugh v. Chicago & N. W. R. Co.* 438
2. Requested instruction of railroad company as to party fence *held* properly refused. *Middaugh v. Chicago & N. W. R. Co.* 438

Rape.

Sufficient corroboration of prosecutrix is shown, if opportunity and inclination on part of defendant and corroborative circumstances were shown. *Aller v. State* 59

Robbery.

1. In a prosecution of an accessory after the fact for harboring bank robbers, a ruling which prevented him from answering a question as to why he did not tell a police officer was not erroneous or prejudicial. *Heyen v. State* 783
2. A sentence of nine months in jail and a fine of $300 for harboring robbers *held* not excessive. *Heyen v. State* 783

Sales.

Evidence as to false representations *held* to sustain verdict for plaintiff. *Advance-Rumely Thresher Co. v. Bartzat* 35

Schools and School Districts.

1. Statute authorizing posted notices of an election to vote bonds in school districts having less than 150 pupils *held* not impliedly repealed by amendatory act requiring newspaper notice of such elections in districts having more than 150 pupils. *Union P. R. Co. v. School District* 578
2. The state superintendent has no authority to refuse to issue a school teacher's certificate on the sole ground that the applicant is less than 18 years of age. *State v. Matzen* 795

Statute of Frauds.

1. A cash sale of stock on an oral agreement to repurchase *held* not within the statute. *Grotte v. Rachman* 284
2. A contract is not within the statute merely because it may or probably will not be performed within a year. *Grotte v. Rachman* 284

Statutes.

1. Sec. 4123, Comp. St. 1922, *held* part of an act complete in itself. *Drew v. Mumford* 100

2. An earlier statute inconsistent with a later one will be deemed to have been repealed. *Drew v. Mumford* 100
3. Ch. 5, Laws 1922, legalizing certain publication of notices, and enacted at a special session of the legislature, *held* within the governor's proclamation and valid. *Nicholson v. Kafka* 303
4. Courts will, when necessary to effectuate the obvious intention of the legislature, construe conjunctive words as disjunctive. *State v. Brictson Mfg. Co* 341
5. "And," in the statute relating to appointment of trustees when a corporation is ousted *and* dissolved, construed as "or." *State v. Brictson Mfg. Co* 341
6. A statute attempting to incorporate within itself solely by reference, and without reenactment, certain provisions of another statute which had been held void, and by its terms made expressly supplemental to said invalid statute, is void. *Swanson v. Dolezal* 540
7. The legislative intent is the cardinal rule in the construction of statutes. *King of Trails Bridge Co. v. Plattsmouth Auto & Wagon Bridge Co* 734
8. If words of a statute are plain, direct, and unambiguous, no interpretation is needed. *State v. Heupel* 797
9. By reference in sec. 8335, Comp. St. 1922, relating to changing state highways, to secs. 1017-1021, providing method for appropriating land, the latter sections were adopted; and the former are not amendatory of the latter. *Sheridan County v. Hand* 813
10. Title of Civil Administrative Code *held* to include laws relating to state highways. *Sheridan County v. Hand* 813

Taxation.

1. 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. *Missouri P. R. Corporation v. Board of Equalization* 84
2. Secs. 6101-6103, Comp. St. 1922, *held* not to deprive a purchaser at tax sale of right to judgment for money paid, with interest at 15 per cent. *Caspary v. Boyd County* 124
3. Inheritance tax *held* a tax on the right of succession in the nature of an excise tax on a right created by statute. *In re Estate of Rudge* 335
4. Statutes exempting legacies from an inheritance tax will be strictly construed, and to be exempt a legacy must come within the strict letter of the statute. *In re Estate of Rudge* 335

5. A legacy to a religious society is subject to inheritance tax. *In re Estate of Rudge* 335
6. The state may permit an inheritance tax to be levied against a legacy to itself, any of its subdivisions, or governmental agencies. *In re Estate of Rudge* 335
7. Under sec. 6153, Comp. St. 1922, a legacy to trustees of a cemetery, *held* subject to inheritance tax. *In re Estate of Rudge* 335
8. Persons taking property under a will are liable for inheritance tax, it being immaterial that devises or bequests were made to carry out a previous contract between testarix and her husband, who had formerly owned the property, and that devisees and legatees might have established their right to the property through such contract. *Krug v. Douglas County* 517
9. Subject to costs of administration, taxes and debts, title to a legacy passes to a legatee on death of testator, though will is not probated until after death of legatee. *Krug v. Douglas County* 517
10. Statute relating to designation of newspapers for publication of notices required by the scavenger tax law, construed. *Davis v. Richardson County* 580
11. In an action to enforce taxes against a bank, it is not competent to show that the assessed value of its real estate was too low; application to the board of equalization being the only remedy. *State v. American State Bank* 740
12. A tax title is invalid unless statutes are strictly complied with. *Brokaw v. Cottrell* 858
13. A statute requiring proof of publication of notice by affidavit of the publisher, manager, or foreman of the newspaper is not met by an affidavit by the editor. *Brokaw v. Cottrell* 858
14. A tax deed void for want of proper affidavit of proof of service is not validated by filing a subsequent affidavit showing compliance with the statute. *Brokaw v. Cottrell* 858
15. An unauthorized tax deed is void, and the owner is entitled to redeem. *Brokaw v. Cottrell* 858

Torts.

When wrongdoers are liable jointly and severally, stated. *O'Neill v. Rovatsos* 142

Trial. SEE APPEAL AND ERROR, CRIMINAL LAW.

1. Submitting issue not presented by the pleadings or evidence, if prejudicial, is ground for reversal. *Shepard v. Hamaker* 42
2. The court should submit to the jury only such issues

pleaded as are in controversy and supported by evidence. *Koehn v. City of Hastings* 106
3. It is error to submit to the jury an issue not supported by evidence. *Koehn v. City of Hastings* 106
4. The giving of conflicting instructions is error. *Koehn v. City of Hastings* 106

5. Where the verdict and pleadings show that plaintiff is entitled to recover interest, the court should make the computation and include it in the judgment. *Calnon v. Fidelity-Phenix Fire Ins. Co.* 194
6. Refusal to give an instruction embraced in an instruction given *held* not error. *In re Estate of O'Connor* 266
7. The party who is required to first produce evidence is entitled to open and conclude the argument to jury. *Bennington State Bank v. Petersen* 420
8. The findings of facts and judgment must conform to and be supported by the pleadings. *Domann v. Domann* 563
9. Where jury are instructed to find a general verdict and also to answer special interrogatories, and in a sealed verdict they fail to answer the interrogatories, it is not error to direct the jury to return and agree on answers to the interrogatories. *In re Estate of Wilson* 593
10. Error cannot be predicated on the fact that there were law reports with markers therein in the jury room, in absence of a showing that they were examined by any member of the jury. *In re Estate of Wilson* 593

Trusts.

A trustee is not ordinarily subject to the limitations and disabilities of an individual. *State v. Exchange Bank* 664

Vendor and Purchaser. SEE FRAUD.

1. Whether a buyer was justified in relying on representations by a seller, and whether such representations were made to induce the sale, *held* questions for the jury. *Advance-Rumely Thresher Co. v. Bartzat* 35
2. Recital of value of lands in a contract for exchange of properties, as a basis for determination of the marginal consideration, *held* not a contract to pay such value on failure to transfer. *Rea v. Pierson* 173
3. Recovery for failure to convey land is based on market value, irrespective of recital of value in contract. *Rea v. Pierson* 173
4. A purchaser may within a reasonable time rescind a contract for the purchase of land for vendor's failure to furnish title in accordance with the terms of the contract. *Green v. Ruzicka* 308

5. Leasing of premises by purchaser *held* not to defeat his right to rescind the contract to purchase for failure of vendor to perfect and furnish good title, where purchaser offers to surrender the premises and rentals to vendor. *Green v. Ruzicka* 308
6. The record of an unacknowledged deed of assignment is a nullity, furnishing no protection to assignee as against creditors of assignor. *Dawson County State Bank v. Durland* 605

Waters.
1. Detention of waters of a stream may be enjoined by a riparian owner. *Flader v. Central Realty & Investment Co.* 161
2. Construction of a dam resulting in a continuing injury may be enjoined. *Flader v. Central Realty & Investment Co.* 161
3. The owner of land may be enjoined from removing an impediment to flowage from a natural lake, thereby causing injury to another, and damages may be recovered in the same suit. *Graham v. Pantel Realty Co.* 397
4. Evidence in proceeding to forfeit appropriation of water for nonuser *held* to support judgment for contestee. *State v. Delaware-Hickman Ditch Co.* 806
5. Action against a drainage district for damages from overflow *held* premature. *Uldrich v. Sanitary District* 641

Wills. SEE EXECUTORS AND ADMINISTRATORS.
1. Will construed to devise to testator's wife the entire estate without limitation, except that if she died without issue, one-half of the property remaining unconveyed by her passed to testator's brothers and sisters. *In re Estate of Darr* 116
2. In an action to set aside a will because of undue influence, the burden of proof is ordinarily upon contestant. *In re Estate of Kees* 512
3. Evidence in will contest *held* to justify peremptorily directing the jury to return a verdict sustaining the will. *In re Estate of Kees* 512
4. The burden of proving undue influence is on the party alleging it. *In re Estate of Wilson* 593
5. An oral contract to transfer realty by deed or will in consideration for personal services may be shown by parol proof and the execution of a will, subsequently destroyed, where the services were fully performed. *Robinette v. Olsen* 728
6. Performance of personal services as consideration for an oral contract to convey realty by deed or will may be

shown by evidence that the services were performed and accepted. *Robinette v. Olsen* 728
7. Requests for personal services may be implied from evidence that they were rendered and accepted. *Robinette v. Olsen* 728
8. Breach of an oral contract to transfer realty by deed or will in consideration for personal services may be shown by proof of failure to pay for them and evidence that the transfer was never made and that the means of performance were destroyed. *Robinette v. Olsen* 728
9. Equity may entertain a suit for damages for breach of an oral contract to transfer realty by deed or will in consideration for personal services, where equitable considerations essential to an adequate remedy are involved in addition to the main issue. *Robinette v. Olsen* 728
10. The value of realty *held* the measure of damages in a suit for breach of an oral contract to convey. *Robinette v. Olsen* 728
11. In a suit for damages for breach of an oral contract to transfer realty, the available proceeds of a wrongful sale to an innocent purchaser may be subjected to payment of plaintiff's claim. *Robinette v. Olsen* 728
12. Where probate of a will was contested because of incompetency of the testator, due to insane delusions, the only question was whether the delusions influenced the testator. *In re Estate of Ayer* 849
13. Testator suffering from insane delusions *held* competent. *In re Estate of Ayer* 849

Witnesses.
1. Permitting leading questions is ordinarily discretionary, but should be avoided in examining a friendly witness on important issues. *Koehn v. City of Hastings* 106
2. Evidence of general reputation that a female witness is, or has been, not law-abiding, nor chaste, is inadmissible for the purpose of impeachment either on cross-examination or rebuttal; nor is evidence as to specific acts or instances admissible. *Daggett v. State* 238
3. A witness may not be interrogated as to his previous conviction of a felony for the purpose of impeachment. *Daggett v. State* 238
4. Admission of evidence to contradict a witness is largely discretionary. *Heyen v. State* 783
5. Evidence directly tending to disprove facts to which a witness has testified is admissible in contradiction. *Heyen v. State* 783