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DELMAR D. NORTON, APPELLEE, V. BANKERS FIRE INSURANCE COMPANY OF LINCOLN, APPELLANT.

FILED APRIL 12, 1927. No. 24371.

1. **Pleading**: GENERAL DENIAL. A general denial in an answer is not only modified by that which follows, but is thereby supplanted to that extent.
2. **Appeal**: THEORY OF CASE. The theory adopted at the trial as to the issues will be followed on appeal.
3. **Trial**: INSTRUCTIONS. An instruction should not limit the consideration of the jury to certain facts enumerated therein, when there are other evidential facts bearing on the questions involved.
4. ———: ———. It is error to include in an instruction an assumption of a material fact not proved, and base a right of recovery thereon.

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

Hartigan & Fouts and *Rolland F. Ireland,* for appellant.

C. C. Flansburg, contra.

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

THOMPSON, J.

In this case the plaintiff, appellee herein, seeks to recover $10,200 for the wrongful conversion by defendant, appellant, of one certain promissory note for such amount and of such value, due and payable to the plaintiff, and secured by a mortgage on Colorado land. After the issues were duly joined, trial was had to a jury, and a verdict returned in favor of the plaintiff, and against the defendant, for the full amount claimed. Defendant appeals, and challenges such judgment for the following reasons: That the court erred in giving instructions Nos. 5, 6, 7, and 7½, respectively; further, that the verdict is not supported by the evidence and is contrary thereto. The petition is in

usual form, and the answer thereto, so far as is necessary for our consideration, is as follows: "1st. That the petition does not state facts sufficient to constitute a cause of action against this defendant in favor of the plaintiff. 2d. That the defendant denies each and every allegation of the plaintiff's petition filed herein. 3d. That the defendant herein purchased the mortgage and notes set out in plaintiff's petition in the usual course of business, for a valuable consideration, and without notice of any claim of defects therein, and is now the owner and holder thereof, free and clear of the claims of any persons whomsoever."

The facts set forth in the petition were sufficient to resist such demurrer, whether interposed as an independent pleading or as contained in the answer. It will be noticed, further, that the answer fails to allege that the claimed purchase was had prior to the maturity of the note, and thus it does not state facts sufficient to bring it within section 4663, Comp. St. 1922, defining a holder thereof in due course. The general denial first interposed in the answer is not only modified by that which follows, but is thereby supplanted to that extent. *Carson v. Hunt*, 113 Neb. 727. The trial was had on the theory thus presented by the pleadings, and, having been so conducted in the trial court, will be so treated here.

Considering first the contention of appellant that the verdict is not supported by the evidence, and is contrary thereto: It is sufficient to say that we have carefully examined the record, and are convinced that there was sufficient evidence to warrant its submission to the jury.

As to the challenge of appellant to instruction No. 5: Without quoting or going into detail in reference to this lengthy instruction, it is sufficient to say that it limits the consideration of the jury to certain facts enumerated therein, and denies to the jury consideration of other facts and circumstances disclosed by the evidence bearing on the questions involved. It is the duty of the jury in arriving at its conclusion as to any particular fact to consider all of the evidence bearing thereon. Thus, we conclude that by

so limiting the jury's consideration reversible error was committed.

Instruction No. 6 is as follows:

"You are instructed that a purchaser in good faith should be one who has purchased with due regard for the rights of the maker, and not one who, relying wholly upon paying value for the note and purchasing before maturity, without knowledge of any defects, is indifferent as to whether or not the same was honestly obtained from the maker. Where the evidence tends to show indifference, the question of *bona fides* of the transaction is for your determination."

This instruction is a substantial quotation taken from our opinion in *Shawnee State Bank v. Lydick*, 109 Neb. 76, 84. The giving thereof was not reversible error, when considered in connection with other uncomplained of instructions given, together with the facts and circumstances disclosed at the trial.

Instructions Nos. 7 and 7½ are as follows:

"(7) If you find from the evidence and under the instructions of the court that said George W. Kline, I. S. Ferguson, and C. W. McCord were some of the organizers, promoters and incorporators of the Bankers Trust Company, and so represented to plaintiff, and that plaintiff delivered said note, mortgage and assignment to them in payment for stock in said Bankers Trust Company, said note and mortgage would not become the property of said Kline, McCord, and Ferguson, but if the transfer were valid, it would belong to said Bankers Trust Company, and said McCord, Ferguson, and Kline would merely be agents of said Bankers Trust Company, without authority to sell said note and mortgage, unless they were first duly authorized by said corporation so to do."

"(7½) You are further instructed that an agent to sell a note and mortgage would have no power to receive anything but money therefor; and that any one dealing with an agent is bound to know that, unless specifically authorized

by the board of directors of the corporation, he would have no authority to sell corporate assets."

As to instruction No. 7: It will be noticed; as contended by appellant in its brief, that "this instruction assumes that there was such a thing as the Bankers Trust Company. There is no evidence that it was ever organized or incorporated, or that any stock was ever issued to any one. In fact, it is affirmatively shown that no right existed to issue stock." As we find, it was but a camouflage used by Ferguson, McCord, and Kline in their efforts to defraud the plaintiff. The evidence further shows that Maxiner received the note direct from Norton, however, through Ferguson, McCord, Kline, and one Schmutzer, the latter acting with Maixner in the procurement of the indorsement of such note and the assignment of the mortgage by Norton, and delivery of each thereof to Maixner. Notwithstanding this condition of the record, this instruction, in substance, directs the jury to find for the plaintiff, unless the defendant produces proof showing or tending to show that Ferguson, McCord, and Kline were agents of, and authorized by, a nonexisting corporation. In other words, the instruction required of defendant an impossibility. This conclusion renders it unnecessary for us to consider instruction No. 7½.

For the foregoing reasons, the judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED.

BANK OF PLYMOUTH, APPELLANT, V. WILLIAM O. RITCHEY ET AL., APPELLEES: ERNEST H. KOUBA ET AL., APPELLANTS.

FILED APRIL 12, 1927. No. 24732.

1. **Fraudulent Conveyances: PREFERENCE.** "A debtor has a right to satisfy or secure one or more of his creditors by the transfer of a reasonable amount of his property as security or payment

of a *bona fide* debt; and the debtor has the right to make such preference of his creditors, even though the effect thereof be to defeat, hinder or delay other creditors in the collection of their debts; and this is so, even though the parties knew that such would be the effect, and even though the property so taken as security was all the debtor had, if the value of the property so transferred is reasonably proportionate to the amount justly owing to the creditor so preferred, and was taken by the creditor for the sole and only purpose of protecting himself in the collection of his debt." *Blair State Bank v. Bunn*, 61 Neb. 464.

2. ———: DEED AS MORTGAGE. A conveyance of land by a debtor to secure a debt, though absolute on its face, and accompanied by a secret understanding that the deed is to operate as a mortgage, is not fraudulent as to the other creditors as a matter of law, but is only a circumstance to be taken into consideration with all other circumstances of the transaction, and the question of whether or not the conveyance is fraudulent is always a question of fact to be determined from all the circumstances entering into and surrounding the transaction.

3. ———: CHATTEL MORTGAGES: STIPULATION AS TO SURPLUS. It is a general rule that stipulations in a mortgage of realty or personalty or in an instrument in the nature of a mortgage given by a failing debtor, reserving to the grantor the surplus proceeds or the unsold property remaining after the payment of the debt or debts secured, is but the expression of what the law would imply without a reservation, and does not vitiate the instrument.

4. **Specific Performance.** Ordinarily, a vendor in a contract for conveyance of lands must either substantially perform or tender substantial performance of a contract before he is entitled to maintain an action for specific performance or an action of foreclosure on the contract for a breach thereof by the vendee. He cannot, in a court of equity, in the absence of waiver or estoppel, secure relief under the provisions of a contract which he has breached to such an extent that the contract he seeks to enforce is substantially other and different from the contract which was made by the parties.

5. **Vendor and Purchaser:** RESCISSION. Evidence examined, and *held* that the defendants Beaver and the bank have substantially breached the contract of sale entered into by Kouba and Kastanek to such an extent that by reason thereof the defendants last named are entitled, in the absence of waiver or estoppel, to

rescission thereof and to recover from the defendants the amount paid upon the contract.

6. **Fraudulent Conveyances.** Evidence examined, and *held* to support the decree of the district court in favor of Beaver and the City National Bank as to that portion of the court's decree denying relief to plaintiff herein, and establishing the right of subrogation in defendants named.

7. ———. Evidence further examined, and *held* to entitle the defendants Beaver and the Bank to a decree establishing their right to ownership of the promissory notes described in the record as against O. C. Larson.

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

Craven & Bickford, C. J. Campbell, Clarence G. Miles and *John J. Ledwith,* for appellants.

Hainer, Flansburg & Lee, W. L. Kirkpatrick and *R. H. Hagelin, contra.*

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

EBERLY, J.

This action was instituted by the Bank of Plymouth against the defendants to annul a conveyance to Commodore N. Beaver of certain real property, alleged to be fraudulent, and to subject property conveyed to the lien of plaintiff's judgment. As an alternative relief, plaintiff's petition contained a prayer for impounding the purchase price of the lands in suit derived from a sale thereof subsequently made to Ernest H. Kouba and Frank Kastanek.

The Federal Trust Company of Lincoln, Nebraska, a corporation, by answer and cross-petition, seeks to foreclose the first mortgage on the premises in litigation. The pleadings disclosed conflicting claims by O. C. Larson and in behalf of the City National Bank of York to promissory notes for $2,712 evidencing a portion of the purchase price of the sale made to Ernest H. Kouba and Frank Kastanek.

The two purchasers, Kouba and Kastanek, by cross-petition, seek to rescind the sale made to them and to secure the return of the money paid, as well as the cancelation of the promissory notes given as the consideration of the purchase of the real estate made by them from Commodore N. Beaver. The district court denied the plaintiff relief, and sustained the conveyance of the real estate to Commodore N. Beaver, and also sustained the contract of sale to Kouba and Kastanek, and a decree of foreclosure and sale was entered in favor of the Federal Trust Company, but giving the City National Bank and Commodore N. Beaver 40 days from date of decree to redeem by payment of the amount due thereon, and by such redemption were to be subrogated to certain rights enumerated in the decree. The court determined O. C. Larson to be the owner of the $2,712 notes in suit. The Bank of Plymouth, the Federal Trust Company, Ernest H. Kouba, and Frank Kastanek appeal.

The following embraces the principal facts out of which the controversy arises: In 1921, William O. Ritchey, through a trade and at a trade value of $30,000, became the owner of a 30-acre dairy farm near Bethany Heights, Lancaster county, Nebraska. At this time he was indebted to the City National Bank of York in the sum of $14,960 on promissory notes executed by him as principal, and to the extent of $6,500 as indorser and surety. He was also indebted to the City Trust Company of York, Nebraska, in the sum of $7,000 evidenced by his promissory note. The City National Bank and the City Trust Company are affiliated institutions, Commodore N. Beaver being the president of both. To secure this indebtedness, on November 10, 1921, William O. Ritchey and wife executed an instrument, in form a warranty deed, reciting a consideration of $30,000 and purporting to convey the 30-acre dairy farm to Commodore N. Beaver. The instrument recites that the premises conveyed are "free from incumbrance except one certain mortgage in the sum of $8,000," and that the grantors further covenant to "warrant and defend the same unto

the said C. N. Beaver and unto his heirs and assigns forever, against the lawful claims of all persons whomsoever." On April 19, 1923, an agreement of sale was entered into between William O. Ritchey, party of the first part, and Ernest H. Kouba and wife, Ana, Frank Kastanek and wife, Emma, parties of the second part, by the terms of which the dairy farm was sold to the parties of the second part in consideration of the sum of $19,000—$1,000 being in cash, $7,500 to be a mortgage placed upon the dairy farm, and $10,500 to be represented by a series of promissory notes executed by the purchasers. By the terms of this contract of sale it was agreed that "due conveyance of said premises" shall be made "by warranty deed executed and deposited in the City National Bank of York with a duplicate original of this contract within thirty days hereafter, conveying said lands to such persons as the second parties shall name, the said warranty deed to be supplemented by the good and sufficient quitclaim deed of the first party and his wife." This transaction was approved and ratified by Commodore N. Beaver and the City National Bank and the City Trust Company. The cash payment of $1,000 and the $10,500 in notes were accepted by the bank at par value and both credited on the indebtedness of Ritchey at par.

As part of the transaction, included in the sale of the dairy farm, it seems that William O. Ritchey had fraudulently carried out a side deal, unknown to Beaver and the bank and the City Trust Company, result of which was ultimately to secure the $2,712 in promissory notes executed by the purchasers and payable to O. C. Larson in addition to the consideration of $19,000 set forth in the contract of sale. These notes constitute the subject of the action as between the City National Bank and O. C. Larson.

In September, 1921, and prior thereto, William O. Ritchey was largely indebted to the plaintiff Bank of Plymouth. After the conveyance of the dairy farm by Ritchey to Beaver, a suit was instituted by the Bank of Plymouth against William O. Ritchey which, on December 28, 1922, ripened

into a judgment in favor of the bank for $15,102.27. On March 9, 1923, the defendant Ritchey paid the Bank of Plymouth on this judgment the sum of $5,943.70. Thereupon, after issuance and return of execution wholly unsatisfied, this action, in the nature of a creditor's bill, was commenced by the plaintiff to set aside the conveyance to Commodore N. Beaver and subject the dairy farm to the lien of plaintiff's judgment. According to plaintiff's witnesses the gross value of the dairy farm at the time of its conveyance to Beaver did not exceed $30,000. Evidence in the record establishes beyond controversy that at the date of the transfer attacked, September, 1921, the first mortgage lien, accruing interest thereon, taxes, and assessments against the farm were in excess of $10,000. This would leave as its highest possible net value $20,000. There is no evidence in the record that impeaches the claim that, at the time of the transfer of the land to Commodore N. Beaver, Ritchey was justly indebted to the City National Bank in the sum of $14,960 and interest upon promissory notes of which he was the maker, and in a like manner was indebted to the City Trust Company in the sum of $7,000, and that he was, in addition thereto, indebted to the City National Bank in the sum of $6,500 as indorser and surety upon other obligations. The highest net valuation of the property in suit being $20,000, the just claims of secured creditors being $21,960, or $28,460, had a mortgage in usual form been taken by these creditors, or by Commodore N. Beaver in their behalf, its validity would have been beyond challenge.

"A debtor has a right to satisfy or secure one or more of his creditors by the transfer of a reasonable amount of his property as security or payment of a *bona fide* debt; and the debtor has the right to make such preference of his creditors, even though the effect thereof be to defeat, hinder or delay other creditors in the collection of their debts; and this is so, even though the parties knew that such would be the effect, and even though the property so taken as security was all the debtor had, if the value of

the property so transferred is reasonably proportionate to the amount justly owing to the creditor so preferred, and was taken by the creditor for the sole and only purpose of protecting himself in the collection of his debt." *Blair State Bank v. Bunn,* 61 Neb. 464. See, also, *Costello v. Chamberlain,* 36 Neb. 45; *Davis v. Scott,* 27 Neb. 642; *Britton v. Boyer,* 27 Neb. 522.

Neither do we overlook the fact that the record discloses that Ritchey secured $570 of the rental of the dairy farm for 1922, and also disposed of $2,712 of the purchase price of the same in 1923. It may be conceded that, if this was fraudulently connived at, or knowingly permitted by the mortgagee or grantee, it would operate to invalidate the transaction. The facts of the situation, fairly reflected by the record, however, disclose that Beaver, the trustee, the City National Bank, and the City Trust Company, had no knowledge of the "side transaction" at or prior to the time of its occurrence, and were, in fact, the victims of a fraud of Ritchey, and not participators therein.

It would necessarily follow that the validity of the transactions between Ritchey and Beaver and the bank and trust company cannot be affected by the incidents above referred to. There being no "fraud" in fact in the transaction, the next question presented is: Does legal fraud appear in the "form of the transaction?"

The form made use of by the parties was a warranty deed without any defeasance clause in writing. The consideration named therein is $30,000, and full covenants of warranty, with exceptions as to mortgage of $8,000, as heretofore stated in this opinion, and $22 revenue stamps were placed on the instrument.

A fair inference is that the purchaser does not pay the vendor the full value of the mortgaged property, but that the amount of the mortgage is reserved in his hands as so much money for the purpose of discharging the lien. In the instant case, that inference would be strengthened by the fact that, though the mortgage of $8,000 is excepted

from the covenants against incumbrances, no similar exception is made as to the general covenant of warranty, and but $22 in United States revenue stamps were affixed to the instrument. In fact, by its face, this instrument in controversy fairly proclaims to the world that it is based on a net consideration of $22,000.

A mortgage properly drawn properly recites as its consideration the amount of the indebtedness secured thereby. In respect to consideration recited in this instrument before us, $22,000 is, to say the least, not in any manner or to any degree excessive. In view of the fact that the City National Bank, after all securities possessed by it had been liquidated, still possesses the obligations of Ritchey in excess of $10,000 unpaid, how can it be said that the amount of the security taken was excessive?

Neither do we find that, under the facts in this case, the form of the instrument being that of a warranty deed which was recorded as such invalidates the security. "Fraudulent intent * * * shall be deemed a question of fact, and not of law." Section 2557, Comp. St. 1922.

A conveyance of land by a debtor to secure a debt, though absolute on its face, and accompanied by a secret understanding that the deed is to operate as a mortgage, is not fraudulent as to other creditors as a matter of law, but is only a circumstance to be taken into consideration with all other circumstances of the transaction, and the question of whether or not the conveyance is fraudulent is always a question of fact to be determined from all the circumstances entering into and surrounding the transaction. *Kemp v. Small,* 32 Neb. 318; *Merillat v. Hensey,* 221 U. S. 333; 27 C. J. 608, sec. 356.

"It is a general rule that stipulations in a mortgage of realty or personalty or in an instrument in the nature of a mortgage given by a failing debtor reserving to the grantor the surplus proceeds or the unsold property remaining after the payment of the debt or debts secured is but the expression of what the law would imply without a reserva-

tion, and does not vitiate the instrument." 27 C. J. 604, sec. 349.

Fairly construed, there can be no dispute, in view of the evidence of the record that it was the intent and purpose of the parties to the conveyance attacked that, to the extent of their indebtedness secured thereby, all proceeds of that property should be applied thereto before anything should be considered for the benefit of, or be subject to, the order of Ritchey. The rights of the City National Bank and the City Trust Company were, in all respects, senior and superior, and their claims were to be satisfied before Ritchey was entitled to any part of the surplus remaining.

We, therefore, find that the district court did not err in denying relief to the plaintiff.

The Federal Trust Company presents two questions by its appeal. The first is a claim that the provisions of the decree of foreclosure, extending the time of redemption of the mortgaged premises to 40 days, is wholly unauthorized in law. Conceding, as a matter of argument, this to be well-founded, the 40 days allowed for this purpose have expired, and at this time the error, if error there was, cannot affect the substantial rights of the parties to the suit.

The next contention of the Federal Trust Company is based upon that portion of the final decree providing for subrogation in favor of Beaver or the City National Bank, and also providing for the assignment of the Federal Trust Company promissory notes thereby secured to Beaver and the City National Bank. It is claimed that these provisions last mentioned are neither supported by pleading nor sustained by evidence. This contention we cannot accept. Competent evidence to sustain this portion of the decree is to be found in the record, and an examination of the pleadings discloses that facts ample to justify this action of the district court appear in the pleadings of the parties. There is, however, no express prayer for that relief unless the general prayer contained in the answer and cross-petition of Beaver and the bank requesting "such other and dif-

ferent relief as may be just and equitable" is sufficient. Under the circumstances of the present case, we deem the prayer sufficient. At least, if error was committed, it would be error without prejudice. Section 8657, Comp. St. 1922. We are satisfied that these defendants, in view of the evidence, are entitled as awarded thereon.

It is also patent that under the terms of this decree there can be no effective subrogation in fact until the Federal Trust Company receives the complete payment of the amount adjudged to be due it. It follows that it is in no manner injured by the provisions of which it complains. *Kemp v. Small, supra;* 37 Cyc. 443.

We will next take up the issues presented and growing out of a contract of sale made between Ernest H. Kouba and Kastanek, on one hand, and Ritchey, on the other, which contract, as to $19,000, was approved and ratified by Beaver and the City National Bank and the City Trust Company. The first question to be disposed of arises between the City National Bank and O. C. Larson as to the right to $2,712 in notes executed by Kouba and Kastanek now in the possession of the bank. The evidence in the record is without a dispute and sustains the conclusion that these notes represent a part of the actual consideration of the sale and which, by a secret deal between Larson, Ritchey, Kouba, and Kastanek, were concealed, and that knowledge thereof was kept from the bank and the bank's trustee. While the notes in question were not referred to in the contract of sale, they unquestionably constituted a part thereof, and they were, as part of the consideration, property to which the bank and its trustee were entitled by virtue of the deeds executed by Ritchey to Beaver as trustee. It would seem that but one conclusion can be supported by the evidence in the record, and that is, as between the City National Bank and O. C. Larson, the bank is the owner of said notes, entitled to maintain possession thereof, and enforce payment in accordance with their terms in its own name. This finding and judgment is, however, without prejudice to the rights

of Kouba and Kastanek as they may be hereafter determined.

The rights of Kouba and Kastanek in this case must be determined and governed by the terms of the contract of sale. This contract, in part, provided that Kouba and Kastanek should pay for the dairy farm "the sum of $19,000, which sum the second parties jointly and severally agree to pay as follows, to wit, $1,000 in cash; $7,500 by a mortgage to be placed upon said real estate as of this date with the interest on said mortgage hereafter at the rate of 7 per cent. per annum, which mortgage and interest the second parties assume and agree to pay, and the balance in the sum of $10,500 to be evidenced by the forty-two (42) several notes of the second parties, dated this date, bearing interest at the rate of 7 per cent. per annum, payable semi-annually; the first of said notes to become due October 1, 1923, and the rest of them to be a series of which one note shall come due upon the first day of each month after the last said date; but with the option of the makers to pay said notes, or any or all of them at any time, provided, however, that none of them shall be taken up out of its order in said series."

It was claimed at the trial in the court below that the two mortgages dated May 1, 1923, and placed upon the dairy farm by Commodore N. Beaver, were in substantial compliance with the provisions of the sale contract above quoted; that, in fact, the $7,500 mortgage bearing interest at 6 per cent. payable semi-annually, and the $335 second mortgage evidenced the equivalent of but an additional 1 per cent. payable semi-annually, together, merely amounted to a $7,500 mortgage bearing 7 per cent. interest. But it must be admitted that the contract of sale provisions contemplated a mortgage of $7,500 bearing 7 per cent. per annum payable annually, and conceding the claim of the City National Bank and the trustee, Beaver, the two mortgages before us would bear interest at 7 per cent. payable semi-annually. In addition to this, it is to be noted that

the sale contract contains no stipulations as to the $7,500 mortgage assumed containing any terms providing the acceleration of the due date of the entire amount secured or the increase of interest rate in the event of the nonpayment of interest accruing thereon, or the nonpayment of any part of the principal, or of any taxes assessed on the premises, or of any insurance to be furnished by the mortgagors at their own expense to the mortgagee. The incorporation of these provisions in the mortgages placed upon the premises, assuming them to be otherwise in substantial compliance with the contract of sale, was a substantial violation of its terms. *Miller v. Ruzicka,* 111 Neb. 815.

But the decree before us discloses that the claims to the effect that the two mortgages combined were the legal equivalent of the mortgage contemplated in the contract of sale are utterly unfounded. On February 25, 1924, a decree of foreclosure was entered in this very cause in favor of the Federal Trust Company upon the two mortgages in suit for $9,181.39, which includes $143 for insurance premium. According to the stipulations of the contract of sale, we find that the maximum amount due on the mortgage therein referred to and described, with interest from the date of that contract to February 25, 1924, would not exceed $7,855.83. It follows that, in view of the terms of the instruments themselves and the amount of indebtedness evidenced by the two mortgages foreclosed, and which were placed upon the dairy farm after the contract of sale had been made, there was an express and substantial violation of this contract, which, in the absence of "waiver" or "estoppel," entitled Kouba and Kastanek to a rescission of the contract and to the return of all money paid by them constituting part of the purchase price, and to the cancelation of all obligations given because of, or pursuant to, said contract.

"Waiver" and "estoppel" to be available to persons seeking the benefits thereof must be pleaded. No such pleadings appear in the record. It follows, therefore, that, in dismissing the cross-petition of defendants Kouba and Kastanek and by denying them relief, the district court erred.

Accordingly, so much of the decree of the district court entered in this cause on February 25, 1924, which finds for the defendants City National Bank and Commodore N. Beaver, as against the plaintiff Bank of Plymouth, and also that part of said decree finding in favor of the Federal Trust Company, including the entry of the decree of foreclosure of sale, is affirmed.

So much of said decree as determines the ownership of $2,712 in notes to be in O. C. Larson is reversed, and so much of said decree as dismisses the amended cross-petition of defendants Kouba and Kastanek, and denies said defendants relief and awards relief against them, is reversed and remanded, with permission to Kouba and Kastanek and to those opposing relief sought by the defendants last named to file amended pleadings.

AFFIRMED IN PART, AND REVERSED IN PART.

STEPHEN PARNELL V. STATE OF NEBRASKA.

FILED APRIL 12, 1927. No. 25347.

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

Jamieson, O'Sullivan & Southard, for plaintiff in error.

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

Heard before DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ., BLACKLEDGE and SHEPHERD, District Judges.

BLACKLEDGE, District Judge.

The defendant and three others were informed against in Douglas county, charged with offense of robbery by violence. Defendant was convicted and sentenced to the penitentiary for a term of four years. He was, as disclosed by the evidence, one who, with others, on October 8, 1925, perpetrated a hold-up and robbery of two men who were seated

in an automobile in the vicinity of Twelfth and Martha streets in Omaha.

The propositions principally urged upon the hearing relate to the sufficiency of the evidence, in that certain admissions of confessions are alleged to have been wrongly received in evidence, and that certain new evidence tending to establish an alibi for this defendant, and which was first brought to the attention of the trial court upon the motion for a new trial, was sufficient to require that a new trial be granted. Defendant did not testify in his own behalf at the trial.

Upon examination of the record, we find that it is clear that the matter of the admissions or confessions was properly submitted to the jury under appropriate instructions. The evidence amply supports the verdict. The court committed no error in overruling the motion for a new trial. The sentence is not excessive in view of the offense.

The judgment of the trial court should be, and is,

AFFIRMED.

ESTELLA B. FRICKEL, APPELLEE, V. LANCASTER COUNTY ET AL., APPELLANTS.

FILED APRIL 26, 1927. NO. 24804.

1. Counties: HIGHWAYS: OBSTRUCTIONS: LIABILITY. A county cannot evade statutory liability for damages arising out of an obstruction in a highway by a plea that the repair of such highway at the point where the injury occurred has been delegated to another.

2. ———: ———: CONSTRUCTION: CARE REQUIRED. A county cannot be held to be an insurer of those who have occasion to use a county highway in process of repair. It is required to use such care as, under the circumstances, is reasonable and ordinary in its inspection of the highway and in the execution of such repairs as it finds necessary or undertakes to make. It is required to use reasonable and ordinary care to maintain the highways reasonably safe for the traveler using them while in the exercise of reasonable and ordinary care.

3. Negligence: PROOF. Where one injured in an accident was operated on for appendicitis about two months later and the only evidence that the injury was the proximate cause of the appendicitis was to the effect that there was a chance or a possibility that the accident caused the condition, all evidence relating to the appendicitis should be withdrawn from the consideration of the jury. Ultimate facts cannot be determined from mere conjecture.
4. ———: ———. Evidence of subsequent repairs made or precaution taken after an accident or the infliction of an injury is not admissible to prove antecedent negligence.

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

Elmer E. Ross, Dressler & Neely, Lester L. Dunn, Charles E. Matson, Max G. Towle and *Farley Young,* for appellants.

O. B. Clark, contra.

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

GOSS, C. J.

Plaintiff had a verdict and judgment against Lancaster county and Central Contractors for $12,000 for personal injuries. Both defendants appealed.

On July 26, 1924, the county was constructing a state and federal-aid road on the state highway west of Lincoln between Emerald and the west county line. Central Contractors, a copartnership, was doing the work under a written contract in which the county and the state by its department of public works were the parties of the first part and the contractors were the parties of the second part. The evidence shows that the grading had been completed, at least at the place involved here, and the contractors were hauling and depositing the gravel in piles, as dumped by trucks, on the north side, or shoulder, of the graded portion in the usual manner ready to be spread mechanically over the rest of the grade. They had first begun at the east end of the project, and had dumped gravel on the grade

from the end of pavement to the railroad viaduct. Then they began at the west end on the Seward county line and were dumping the gravel eastward to meet the point where they had left off on the eastern section. There was thus a gap of a mile or more between the west end of gravel at the viaduct and the east end of gravel on the part of the project where the accident occurred. On the roadway at this point there was left ample space for vehicles proceeding with ordinary care to meet and pass going east and west. Before daylight on the morning of the day named, the plaintiff, aged 21, and her husband, aged 22, having a vacation of two weeks, started from Lincoln by motorcycle on a trip to a point 207 miles distant in Kansas to visit relatives. They left Lincoln on West O street. Plaintiff was in a side-car at the right of the motorcycle and her husband was operating the vehicle. When they had gone about nine miles, the car ran into the piles of gravel and overturned. In some way plaintiff's hand was caught and injured and later two of her fingers were amputated. There was evidence that she was in a comparatively early stage of pregnancy and suffered a miscarriage the next night after the accident. Evidence was admitted showing that eight weeks later she was operated on for appendicitis.

Numerous errors are assigned and argued by the county and by the contractors separately, many of them applicable alike to both defendants, but we do not find it desirable nor necessary to list them all. They have to do chiefly with instructions to the jury, and refusal to give instructions requested, and with alleged error in the admission of evidence.

The county complains because the court overruled its demurrer and because it refused both at the end of plaintiff's evidence and at the end of all the evidence to instruct the jury to return a directed verdict in its favor. Section 2746, Comp. St. 1922, makes a county liable for any special damages happening to any person by means of insufficiency or want of repairs of a highway which the county is liable to keep in repair. Under section 8336 (the state highway

act) the county was required to maintain the road adequately, and under section 8342 it had authority to close temporarily to traffic any portion of the highway and give notice to the public by placing at the roadside signs stating that the road is closed to travel by order of the county board. The county is bound to use reasonable and ordinary care in maintaining and in repairing its highways. Its duty will not be extended by construction beyond the words and fair implications of this statutory liability. However, the county contends that, since it entrusted the work of grading and graveling to skilled and experienced contractors selected with reasonable care and judgment, the county is not liable for the negligent acts of the contractors in failing to keep the road sufficiently in repair or to maintain sufficient barriers or warnings to protect those allowed to use the highway while the work is going on. In *Sharp v. Chicago, B. & Q. R. Co.*, 110 Neb. 34, this court, in a discussion and application of section 2746, held that a county cannot evade statutory liability for damages by the plea that the repair and upkeep of the highway had been delegated to another. The same principle was involved in *Saltzgaber v. Morrill County*, 111 Neb. 392, and in *King v. Douglas County*, 114 Neb. 477, and was decided adversely to the respective counties involved. We find nothing in the facts here to warrant a departure from the rule announced in those cases.

The defendant contractors also insist that they are exonerated from liability because the county had assumed, by arrangement between the defendants, the responsibility of spreading the gravel and that the duty of the contractors ended when the gravel was deposited. The written proposal which ripened into the written contract and by the latter was expressly referred to and made a part of the contract was for "56,300 square yards gravel surfacing, in place, 3 inches deep, 26 cents, $14,638." The specifications which likewise were expressly made a part of the written contract contained provisions from which we excerpt: "The contractor shall provide and maintain proper guards, suitable

and efficient lights, and take all necessary precautions for the prevention of accidents;" and "The contractor shall assume all responsibility in the event of accidents, either personal injuries or property damage, sustained by persons or property due to the carrying on of his work." Under the specifications made part of the contract, it was the engagement between the county and state and the contractors that the county should spread the gravel for the contractors and be paid by the contractors for that work the sum of one and a half cents per square yard. In this specification the parties agreed that the contract should be considered fulfilled and final acceptance should be given by the state within 15 days after the spreading of the gravel. So it appears, first, that the contractors' duty did not end with the depositing of the gravel, and, second, that as to the spreading of the gravel the county was acting for and paid by the contractors.

The defendants severally offer strong arguments why the case presented by plaintiff on the merits of the evidence should not have been submitted to the jury. While we might think that the general knowledge that roads in Nebraska are under repair in the summer-time, that the fact that plaintiff had already on the morning in question passed over a part of this very project, that if the lights on the motorcycle were reflecting as the law requires and she was not keeping a lookout as ordinary care would dictate, that one driving or riding in the darkness is more liable to meet disaster than in the daylight, and such things might induce us if we were jurors not to have found for plaintiff, yet that was the province of the trial jury, as selected, and we cannot say that they should have been directed to return a verdict for the defendants or for either of them.

The defendants allege error as to several of the instructions given by the court, and because of the refusal to give instructions requested. The most serious complaint refers to the fifth instruction given by the court on its own mo-

tion, wherein the court charged the jury: "That it was the duty of Lancaster county to keep the highways within the county in repair, fit and safe for the plaintiff to travel along as a passenger in the side-car occupied by her, and if you find that the county failed so to keep the road in repair, and that the plaintiff, while exercising ordinary care, was damaged by reason of such failure of the county, you will find for the plaintiff." The county is a municipal unit and a governmental subdivision of the state. It is purely a creation of the legislature. It has no powers and it is charged with no duties save as those powers are granted to it, and as those duties are laid upon it, by the legislature. It was made possible for plaintiff to bring this action only by virtue of section 2746, heretofore referred to. The instruction made the county an insurer of the fitness and safety of the road, and rendered it liable to any special damages the plaintiff suffered while riding on the road, provided she exercised ordinary care. The county cannot be held to be an insurer. *Johnson County v. Carmen*, 71 Neb. 682; *Peitzmieier v. Colfax County*, 94 Neb. 675; *Lyons v. Greeley County*, 95 Neb. 104. While the act makes the county liable for the maintenance and repairs of a highway, it does not impose any new rules of evidence or of law, making its requirements as to the care or the manner of doing it any different in quality than imposed on those who use it; in other words, a county is required to use such care as, under the circumstances, is reasonable and ordinary in its inspection of the highway and in the execution of such repairs as it finds necessary or undertakes to make. It is required to use reasonable and ordinary care to maintain the highways reasonably safe for the traveler using them while in the exercise of reasonable and ordinary care. Even if we felt at liberty to say that the contrast in this instruction as to the care required of the respective parties could be helped out and cured by other instructions to the jury, yet a search through the entire charge to the jury is fruitless of any definition of any sort of care required

of defendants. It follows that the court erred when it imposed on the county the duty to keep the highway fit and safe, whereas in contrast with that and in the same instruction it imposed on the plaintiff the lesser duty of ordinary care.

We might stop here, but there are other things in the case, a discussion of which may be helpful if the case be retried. In her amended petition the plaintiff set forth at length and with considerable particularity, as well as in general terms, her injuries, but did not name appendicitis as one of them. In the statement of the pleadings to the jury the court did not mention either appendicitis or the other injuries specifically, but grouped them in the general statement, "and says that she received serious and permanent injuries for which she seeks recovery against the defendants." On the trial, evidence as to the appendicitis was received and it was sought to connect it with the accident, either directly as the proximate cause eight weeks before the operation, or indirectly through the miscarriage which occurred the next night after the accident. The doctor who amputated plaintiff's fingers, and who operated for appendicitis, testified from his observance of the case and from his experience; and another doctor, called as an expert, testified in answer to hypothetical questions. Both were cross-examined. Neither was able to express a steadfast opinion that the appendicitis was caused either by the trauma or by the miscarriage. The first doctor, at one point, stated: "Whether the appendicitis naturally followed the injury, or didn't, I couldn't state. I say that it could have caused it and no question but what it contributed to it, but whether it caused it I couldn't say." That is the only expression of anything approaching positive opinion in the testimony of either doctor that either the accident or the miscarriage caused the appendicitis. The evidence of both is sprinkled with answers, as to whether the accident caused the appendicitis, to the effect that there was "just a possibility," that it was "possible," that "there is a chance."

that "the inflammation of the appendix might have been the sequel to the injury." The ultimate fact and the ultimate opinion were thus left as pure matters of conjecture. In this state of the evidence the court was requested and refused to give the jury a tendered instruction to the effect that the evidence was insufficient to show that the appendicitis was proximately caused by the accident and that the jury should not allow anything on account of appendicitis. So the jury were left to consider this element and to fix the damages for appendicitis along with the other "bodily injuries to the plaintiff, together with physical and mental pain and suffering," as the jury were charged in the instructions on the measure of damages. We are of the opinion that there was no sufficient evidence connecting the accident as a proximate cause with the appendicitis, that it should not have been left to the jury on evidence of chance, possibility, or conjecture, and that the failure to withdraw it was prejudicial error.

On the trial the court permitted a witness, over objection, to testify that, on Sunday evening after the accident, which happened on Saturday morning, she saw a road patrolman place a red lantern at the end of the dumped gravel. This testimony should not have been admitted. Evidence of subsequent repairs made or precaution taken after an accident or the infliction of an injury is not admissible to prove antecedent negligence. *Pribbeno v. Chicago, B. & Q. R. Co.*, 81 Neb. 657 (citing cases); *Tankersley v. Lincoln Traction Co.*, 101 Neb. 578.

Considerable space in the briefs is devoted to the charge that plaintiff's counsel went beyond proper limits in bringing before the jury the supposed relations of defendants with an indemnifying insurance company. We find on examination that as to much of the conduct complained of the defendants have either waived their objections in certain matters or have not properly protected themselves so as to take advantage of the error claimed. But several instances remain where they have saved exceptions which,

under the rules of evidence obtaining in most jurisdictions, would have been available to the defendants here. Since this case was tried, but before the writer came to this bench, our court, by a majority, with three judges dissenting, announced as a rule of practice for all courts in this jurisdiction the following, as shown in the syllabus of *Jessup v. Davis*, *ante*, p. 1:

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

That rule is of course binding on us in review of the instant case; but there is no purpose on the part of the court to extend the rule in any respect beyond its literal meaning and beyond the proper implications to be drawn from its words. It does not give license to parties, attorneys, or witnesses, in the trial of a cause, to go beyond the limits of good faith and that spirit of fair and honest inquiry which is so often glorified as one of our national heritages; and it is the office of the trial judges to see that, as long as this rule remains in force, these principles are practiced. We will not say that the conduct of this case in respect of the insurance, duly preserved and here for review, was such as to violate the above rule, but there was some not so preserved that was dangerously near, if not over, the edge of error.

For the reasons given, the judgment of the trial court is reversed and the cause remanded for a new trial.

REVERSED.

ROSE, J., concurring in part.

I concur in the reversal on account of the errors pointed out in the opinion, but I do not think the failure to give warning of the gap between the two lines of gravel on the

roadside or the failure to put lights or guards at the ends of the gap was evidence of actionable negligence. At the place of the accident the highway was in a safe condition for travel. There was plenty of room to pass. The gravel at the end of the gap was no more dangerous than a bank of the same height at any bend in a road, a condition with which all travelers on public highways generally are familiar. Plaintiff and her husband passed a similar line of gravel without mishap. They knew that the road was being surfaced with gravel, that gravel was placed on the roadside for that purpose, and that time for surfacing was required. Knowing that the road was being improved, there was no right to assume that the improvement and work ended at the end of a line of gravel or at the gap. I am of the opinion there was no evidence of actionable negligence on the part of defendants.

ANDREW P. MORAN, APPELLANT, V. OTOE COUNTY NATIONAL BANK ET AL., APPELLEES.
ANDREW P. MORAN, APPELLANT, V. JOHN D. STOCKER, APPELLEE.

FILED APRIL 26, 1927. No. 25729.

1. Fixtures: REMOVAL. Where fixtures are erected upon and attached to leased real property, by a tenant or other person rightfully there, for a specific use connected with the occupancy during the leasehold term, and without any contrary agreement, express or implied, they may be removed by the tenant, or by those lawfully claiming under him, or by another rightfully there, during the term of the tenancy, provided the severance can be accomplished without injury to the landlord's freehold.
2. ———: ———. The owner of the real estate, from which the assignee of a valid chattel mortgage executed by a tenant or by one rightfully in occupancy, covering movable fixtures placed on said real estate, seeks to remove such fixtures after taking possession of them for the purpose of foreclosing his chattel mortgage, cannot interpose objections that may be made only by the mortgagor at the time of the foreclosure, when the owner

of the real estate has no legal or equitable interest in such chattels and the mortgagor has consented to the removal.

3. **Affirmance.** On a trial *de novo*, *held* that the decree of the district court was right.

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

D. W. Livingston, for appellant.

Pitzer & Tyler, contra.

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

GOSS, C. J.

This involves two equity suits in which plaintiff sought injunctions. The cases were consolidated and tried together in the district court. From decrees against him, the plaintiff appeals. The cases were argued and submitted together here. The appellant here was plaintiff below and will be referred to as plaintiff. The appellees will be referred to as defendants.

Plaintiff owns half a lot in Nebraska City on which was located a building erected for business purposes. In 1925 it was remodeled by the owner for use as a gas filling station and leased in writing for three years from June 1, 1925, to A. K. McPherson and H. A. Risk at a rental of $100 a month, payable monthly in advance. The lessees were partners. When they were let into possession, the necessary pumps, tanks and filling station equipment were placed on the property for their use by W. L. Peterson, an agent for an oil company, from whom the lessees purchased supplies. In November, 1925, the lessees sold their business and equipment to Peterson and he entered and operated the business until the restraining order was served. The evidence shows that plaintiff was asked by McPherson and Risk to give a lease to Peterson, and orally assented, but such lease was never given; that Peterson, however, paid the rental thereafter, but plaintiff made out

the receipts in favor of McPherson and Risk and delivered them to Peterson; and that McPherson, Risk and plaintiff all recognized that the McPherson and Risk lease was in force until the commencement of the litigation. We find from the evidence that Peterson's occupancy was lawful and with the knowledge and consent of plaintiff.

On February 4, 1926, to secure his indebtedness to the bank, Peterson gave to Otoe County National Bank a $3,000 chattel mortgage, which was duly recorded, covering the fixtures installed by him and the personal property he had previously purchased from McPherson and Risk, all being in the filling station then and at the time of the trial. The last of the debt secured was due August 4, 1926, and has not been paid. On October 7, 1926, the chattel mortgage was sold and assigned to the defendant Stocker, in whose behalf his written demand for the possession of the mortgaged items for the purpose of foreclosure was made on Peterson at the filling station. Peterson gave his consent, McPherson and Risk expressly consented to the entry, possession was taken and, it being impracticable to remove the items that day, the station was temporarily closed. This action was brought by plaintiff the next day to enjoin the defendant from removing the fixtures and from interfering with plaintiff's use and enjoyment of the premises. Issues were joined and the trial resulted in favor of defendant Stocker and in a dismissal of all other defendants. On October 11, 1926, another suit was filed by plaintiff against defendant Stocker only. The pleadings are substantially the same, and, on trial of both cases together, this also resulted in a decree against plaintiff and in favor of defendant John D. Stocker.

Plaintiff properly states the questions to be decided: (1) Were the fixtures and equipment on plaintiff's premises and sought to be removed by the defendant Stocker removable fixtures, or were they a part of the realty? (2) Has the defendant Stocker a valid chattel mortgage upon said property?

The first case cited by plaintiff on the question of removable fixtures and the right to remove, and the only Nebraska case cited by him on that point, is *Stevens v. Burnham*, 62 Neb. 672. All that was declared in that case was the fact that there was no evidence that the barn involved was a removable structure, and the announcement of the proposition of law, supported by the citation of four earlier cases, that the right of a tenant, or of those claiming under him, to remove a trade or agricultural fixture expires with the tenancy. Plaintiff argues that chattels permanently affixed to realty, especially when adapted to a specific use, become a part of the realty and the property of the owner so that they may not be severed or removed. That may be true under certain circumstances, but the mere fact of fixation and adaptation does not furnish the test for all cases, nor for the one under consideration. This court has repeatedly held that fixtures erected by a tenant, which can be removed without material injury to the premises, may be removed by the tenant during his term. *Lanphere v. Lowe*, 3 Neb. 131; *Fenimore v. White*, 78 Neb. 520; *Ogden v. Garrison*, 82 Neb. 302. Where an owner of real estate instructed an agent to sell it for a fixed price, the agent so sold it; the purchaser, without a written contract, or the payment of any money, took possession pending the execution of the deed and began the erection of a house, but the owner repudiated the sale and took possession of the building constructed by the purchaser; held, that the purchaser was not divested of his title to the building, he being in no default, and having constructed the building in good faith, and that he could maintain replevin therefor. *Waters v. Reuber*, 16 Neb. 99. The question of the character of a steam heating plant, whether a permanent fixture or personal property which may be removed by a tenant during his term, is one of mixed law and fact, and the finding of the court upon that question, when based on fairly conflicting evidence, will not be disturbed. *President and Directors*

of Ins. Co. of North America v. Buckstaff, 3 Neb. (Unof.) 632.

We find that not only the weight of authority generally but our own decisions specifically conclude us on the question; and that where fixtures are erected upon or attached to leased real property, by a tenant or other person rightfully there, for a specific use concerned with the occupancy during the leasehold term, and without any contrary agreement expressed or implied, they may be removed by the tenant, or by those lawfully claiming under him, during his term, provided the severance can be accomplished without injury to the freehold of the landlord.

As to whether the items involved can be removed without damage to the owner's estate, we find, on reading the evidence, which it would serve no useful purpose to recapitulate, that the property described includes many articles not affixed to the land at all; and that the testimony of practical and expert witnesses leads to the inevitable conclusion upon which the trial court based the decrees, namely, that the storage tanks, pumps and other attached fixtures were so installed that they may be removed without damage to appellant's real estate.

The remaining contention of appellant involves his claims that the defendant Stocker has not shown that he has a valid chattel mortgage, because he failed to prove an assignment to him of the notes secured thereby, and because he failed to prove that no proceedings at law to collect the debt were had before starting foreclosure.

Really, these are questions which appellant is not in a position to raise, for, as we have decided, he has no legal interest in the removable fixtures and, therefore, is not concerned as to the validity of the chattel mortgage covering them. The evidence shows that Peterson, the owner and mortgagor of the fixtures, acceded to the written demand of John D. Stocker, as assignee of the mortgage, for possession of the chattels for the purpose of foreclosure and in writing gave him express permission to remove them for

that purpose. In neither suit involved here does the defendant John D. Stocker plead or pray for a foreclosure of his chattel mortgage; all he asks is restitution of possession on the ground that he has a lien on the articles by reason of his assignment of Peterson's chattel mortgage. It will be time enough to consider whether the debt or notes should be specifically assigned to him, or whether he has proceeded at law as conditions precedent to a valid foreclosure, when he gets possession of the mortgaged chattels and proceeds to foreclose.

We conclude that the several findings of fact, conclusions of law and decrees of the trial court were right. They should be, and are,

AFFIRMED.

PAINE-FISHBURN GRANITE COMPANY, APPELLANT, V. FRED REYNOLDSON, APPELLEE.

FILED APRIL 26, 1927. No. 24585.

1. Contracts: REFORMATION: BURDEN OF PROOF. In a proceeding to reform a contract on the ground of mutual mistake, the burden of proof is on the party interposing that plea.
2. ———: ———: PREPONDERANCE OF EVIDENCE. A preponderance of evidence sufficient to justify reformation of a written instrument requires proof that is clear, convincing and satisfactory.
3. ———: ———: MISTAKE. A mistake for which a written instrument will be reformed must be mutual.
4. ———: ———: MUTUAL MISTAKE. A mutual mistake is one common to both parties, each laboring under the same misconception.
5. ———: ———: INSUFFICIENCY OF EVIDENCE. In an action on a written instrument, a plea by defendant to reform it on the ground of mutual mistake, the evidence outlined in the opinion *held* insufficient to establish the mutuality essential to reformation.

APPEAL from the district court for Boone county: FREDERICK W. BUTTON, JUDGE. *Reversed, and judgment entered for plaintiff.*

Brown & Dibble and *Vail & Flory*, for appellant.

Albert & Wagner and *W. J. Donahue, contra.*

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

ROSE, J.

This is an action by the Paine-Fishburn Granite Company of Grand Island, plaintiff, to recover from Fred Reynoldson of Albion, defendant, $1,800, the purchase price of a granite monument and three granite markers ordered by defendant in writing April 20, 1921, and subsequently erected on the Reynoldson lots in Albion cemetery. Plaintiff furnished the memorials as ordered, but the purchase price has never been paid. The only defense to the suit is stated in a plea for the reformation of the contract of purchase on the ground that by inadvertence and mutual mistake defendant signed the order for the monument and markers in his individual name, "Fred Reynoldson," instead of "Fred Reynoldson, as administrator of the estate of Charles Reynoldson, deceased." The substance of the defense is that the memorials were purchased and furnished for decedent's estate and not for defendant individually. The issues of fact were raised by defendant's answer and a general denial by plaintiff and were tried to the district court as a suit in equity. From a decree reforming the contract and dismissing the suit, plaintiff appealed.

The appeal presents the cause for trial *de novo*, and a proper solution of the question at issue depends on the evidence. The controversy between the parties does not involve reasonableness of the purchase price or fraud or failure on the part of plaintiff to furnish the memorials exactly as ordered.

In a proceeding to reform a contract on the ground of mutual mistake, the burden of proof is on the party interposing that plea.

A preponderance of evidence sufficient to justify reforma-

tion of a written instrument requires proof that is "clear, convincing and satisfactory."

Where mutual mistake was the ground of equitable relief, one opinion goes so far as to quote with approval the following:

"In each case the burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties." *Home Fire Ins. Co. v. Wood*, 50 Neb. 381.

According to the law announced in that case the mistake must be mutual, not limited to one party. Within the meaning of the rules in equity, "A mutual mistake is one which is reciprocal and common to both parties, where each alike labors under the same misconception in respect to the terms of the written instrument, and sometimes of the agreement itself." 23 R. C. L. 328, sec. 20.

In the present record there is convincing testimony that defendant, in contracting for the memorials and in signing the order for them, intended to bind the estate of his deceased brother for payment of the purchase price, instead of himself individually, and that he thought plaintiff had the same understanding of the capacity in which he acted when he subscribed his own name to the order, instead of "Fred Reynoldson, as administrator of the estate of Charles Reynoldson, deceased."

In addition to testimony of the character outlined, however, the burden was on defendant to prove that plaintiff also labored under the same mistake in respect to the capacity in which defendant acted when he signed the order. On the issue of mutuality, affirmative evidence that plaintiff understood defendant acted in a representative capacity alone is far from satisfactory. The order was solicited by A. M. Adams, who induced defendant to look at the monu-

ments in plaintiff's place of business at Grand Island, where the selection was subsequently made and the contract executed. Though defendant indicated in preliminary conversations that he would not buy a monument on his own account, and that he wanted to pay for it in whole or in part, if ordered, out of his brother's estate, Adams did not assume or exercise authority to pass on the financial standing of a purchaser or to extend credit to any one for the purchase price, and so stated. Adams and defendant met the president and vice-president of plaintiff at Grand Island April 20, 1921. Defendant there repeated to those corporate officers his intention to make the purchase, in whole or in part, a charge against decedent's estate, and it is fair to infer that plaintiff indicated a willingness to file its claim in the county court. Afterward Adams prepared and defendant signed the order. At the same time and as part of the same transaction, defendant signed also in his own name a paper containing the data for three markers, one each for his father, mother, and brother Charles, all deceased. Adams testified he was told by defendant that the latter wanted the monument for the relatives named. The vice-president of plaintiff testified:

"I told Reynoldson at that time that we would file a claim, and if it was paid out of the estate that was their affair, but, if it was not, of course we would have to look to him for it, and we agreed to file the claim and we fixed up the claim and filed it."

The claim was never submitted to the county court for allowance and was withdrawn. There is testimony by the same witness to the following effect: Defendant said he wanted the estate to help him pay for the monument and the markers. He was told that, when plaintiff files a claim against an estate, the lettering on the memorial awaits the action of the court. Defendant signed the order personally and said he would be responsible for it. It was the duty of the vice-president to pass on the financial credit involved in the transaction. He did not rely on the estate, but took

the order for defendant and promptly procured a financial report showing that the latter's debt-paying reputation was good, that his manner of doing business was prompt, and that his estimated net worth was $100,000. Plaintiff relied on defendant and the financial report. The written instrument was evidence that former negotiations were merged therein and that defendant acted for himself alone. The foregoing is a mere summary of evidence on behalf of plaintiff.

In addition to evidence of the character outlined, there is a fair inference from circumstances that plaintiff understood defendant's assurance of payment to relate to his own debt, and not to a technical guaranty that the purchase price would be paid out of the estate of decedent. There were two acting administrators of decedent's estate, and one of them took no part in the ordering of the monument. It bears in large letters the inscription "Reynoldson" and stands on the family plot in the cemetery, where, with an additional marker, it may in the future be considered a monument for defendant as well as for his brother and parents. The allowance for so large a claim against the estate was questioned in advance by plaintiff, notwithstanding a willingness to file one at the request of defendant. A capable financial manager of a business would naturally hesitate to hazard $1,800 on the court's approval of such a claim under the circumstances disclosed. It seems clear from the oral testimony and from the inference arising from surrounding circumstances that plaintiff did not labor under the same mistake or misconception of defendant in respect to the capacity in which he acted when signing the order for the monument and markers. Mutuality of defendant's mistake, therefore, was not shown by clear, convincing and satisfactory evidence. In this view of the record, defendant failed to establish his plea for a reformation of the instrument in controversy.

The former judgment of affirmance is vacated. The judgment of the district court cannot be permitted to stand

and is reversed. Rather than prolong the litigation by remanding the cause for a new trial, a judgment in favor of plaintiff will be entered in this court and the cause will be remanded for the purpose of carrying it into effect. The order signed by defendant contains the following provision:

"If this contract is not paid for when the monument is erected in the cemetery it will then bear ten per cent. interest per annum from the date of such delivery until the same is fully paid."

Plaintiff did not plead nor prove the date of delivery. With the record in that condition, interest will be allowed from July 15, 1924, the date on which the petition was filed. For the principal and annual interest from that date at the rate of 10 per cent. on $1,800 until the final decision herein, judgment will be entered.

REVERSED, AND JUDGMENT ENTERED FOR PLAINTIFF.

SAVILLA BRADFORD PETTIS ET AL., APPELLANTS, V. ALPHA ALPHA CHAPTER OF PHI BETA PI ET AL., APPELLEES.

FILED APRIL 26, 1927. No. 25722.

1. **Constitutional Law: POLICE POWER.** "The police power, as such, is not confined within the circumscription of precedents, resting upon past conditions which do not cover and control present-day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public, and as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions, and what was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power." *Miller v. Board of Public Works*, 195 Cal. 477.
2. ———: "PUBLIC WELFARE." In the development of our civic life, the definition of "public welfare" has also developed until it has been held to bring within its purview regulations for the promotion of economic welfare and public convenience.

3. ———: POLICE POWER. The police power is inherent in the effective conduct and maintenance of government and is to be upheld, even though the regulation affects adversely property rights of some individual. *City of Aurora v. Burns*, 319 Ill. 84.
4. **Municipal Corporations**: ZONING ORDINANCES: INTERFERENCE BY COURTS. "If considerations of public health, safety, comfort, or general welfare could have justified zoning ordinance, the court must assume that they did justify it, and cannot take issue with the city council." *State v. City of New Orleans*, 154 La. 271.
5. **Constitutional Law**: POLICE POWER. The police power extends to all the great public needs. "It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Noble State Bank v. Haskell*, 219 U. S. 104.
6. **Municipal Corporations**: POLICE POWER. The right of the legislature to clothe the city with power to adopt a zoning ordinance is derived from that undefined branch of government known as the police power, which by some writers is said to bear the same relation to the municipality that the principle of self-defense bears to the individual.
7. **Constitutional Law**. "While the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet new and different conditions." *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365.
8. **Municipal Corporations**: ZONING ORDINANCES. "If the validity of legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365.
9. ———: ———: VALIDITY. Zoning law, drawn in general terms and providing reasonable margin to secure effective enforcement, will not be held invalid because individual cases may turn out to be innocuous in themselves. *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed, with directions.*

Kennedy, Holland, DeLacy & McLaughlin, John F. Moriarty and *Dana B. Van Dusen*, for appellants.

Stout, Rose, Wells & Martin, contra.

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

DEAN, J.

Omaha is a city of metropolitan class and has a population of upwards of 200,000 inhabitants. January 23, 1924, by appropriate prior proceedings by the city authorities, a comprehensive zoning ordinance which included the entire city within its scope, and which had theretofore been recently adopted, became of full force and effect. See sections 3611-3623, Comp. St. 1922. The city zoning districts are designated "A," "B," "C," "D," and "E," districts, respectively.

A Greek letter society, namely, the Alpha Alpha chapter of Phi Beta Pi, hereinafter called the fraternity, on June 1, 1926, or almost two and a half years after the zoning ordinance became operative, sought to establish a chapter house in the "A" residence district as a rooming house for 20 or 30 young men, students of the Creighton University of Omaha. To this end the fraternity bought a suitably large residence property, on the last above date, from Mrs. Katherine C. Allison for $25,000, and of this sum $6,000 was paid at the time and a $19,000 mortgage was given by the vendee fraternity to the vendor to secure the unpaid remainder. July 31, 1926, Mrs. Savilla Bradford Pettis, Mrs. Minnie L. Higgins, and Mrs. Alice Kountze, plaintiffs, alleging certain financial interests, as owners of three valuable residence properties in the "A" district, in which they respectively resided, joined in bringing this injunction suit in Douglas county for the enforcement, against the fraternity, of a certain restrictive provision in the "A" zoning district section of the ordinance, which will be more fully noticed later. Plaintiffs prayed that the "defendant fraternity and each and every one" of its members be enjoined from moving into the house as roomers or lodgers therein, "or from leasing and renting said house as a fraternity house or a lodging and rooming house," and from letting the rooms

for such purpose. On the same day that plaintiffs' petition was filed, a city ordinance being involved, the city of Omaha, hereinafter called the city, filed a petition of intervention and therein prayed for substantially the same relief as that prayed for by plaintiffs, and for such other, further and different relief as equity and justice may require. For convenience, the above named plaintiffs and the city, unless otherwise respectively designated, may hereinafter be called plaintiffs. October 18, 1926, the trial court found in favor both of the fraternity and the intervening defendant Mrs. Allison. Plaintiffs appealed from the judgment of the district court.

Following is section 2 of the 1924 zoning ordinance, No. 11989, so far as applicable here:

"Use District Regulations. In order to regulate and restrict the location of trades and industries and the location of buildings erected or altered for specified uses, the city of Omaha is hereby divided into 'use districts,' of which there shall be five, known as: 'A'—residence district, 'B'—residence district, 'C'—commercial district, 'D'—industrial district, 'E'—unrestricted district. * * * Except as hereinafter provided, no building shall be erected or structurally altered, nor shall any building or premises be used for any purpose other than is permitted in the use district in which such building or premises is located."

Section 3 of the ordinance, so far as applicable here, contains the following provisions which relate more particularly to the residence district in which the house in suit is situate:

"In the 'A' residence district no building or premises shall be used and no building shall be hereafter erected or altered, unless otherwise provided in this ordinance, except for one or more of the following uses: 1. One and two-family dwellings. 2. Churches. 3. Schools, elementary and high. 4. Libraries, museums, parks, playgrounds, branch telephone exchanges and community buildings owned and controlled by the municipality. 5. Farming and truck gar-

dening. 6. Hospitals or institutions of an educational, philanthropic or eleemosynary nature. 7. Accessory buildings * * * including one private garage when located not less than sixty (60) feet from the front line or within or attached to the dwelling. * * * 8. Uses customarily incident to any of the above uses when located on the same lot and not involving the conduct of a business; including home occupation not involving the conduct of a business on the premises," and so on.

Counsel for defendants contend that the "A" district is not in fact a "strictly private residential district." Very true. But it is not shown that any of the buildings referred to were established therein after the ordinance became effective. They also argue that Mrs. Allison "had and has a right to sell" the property to the fraternity "for its exclusive residential use as a family" within the meaning of the city ordinance. The ordinance, however, does not appear to uphold counsel's construction of the word "family" as used in the above cited "A" residence district section. Has it come to pass that a company of approximately 20 or 30 unrelated young fraternity men can properly come within the generally accepted meaning of the social unit which is designated as a family? We do not think so. And counsel's contention in respect of the "family rights" feature of the defendant fraternity is plainly negatived by the express provision that "fraternities," and other designated occupants as well, may be installed under the "B" section of the ordinance. Clearly the fraternity is confined to the "B" section.

Plaintiffs point out that, if the judgment of the trial court is sustained, the students will lodge in the Allison house and be served with two meals each day. And, of course, from time to time more room will be added to accommodate the future influx of students in attendance at a large, influential and rapidly growing university. Plaintiffs also contend that such use of the house "will cause

confusion on account of the numbers living in said house; will depreciate the value of the plaintiffs' property, and other property in the neighborhood; will cause confusion because of the presence of automobiles owned by members of said fraternity and, because of the proximity of the plaintiffs, the first named plaintiff being within 20 feet of said house, and the others being immediately across the street therefrom, plaintiffs will be specially damaged" by reason of its proximity. It is shown that "these three homes are all of the value of over $50,000 each, and are typical of the district," and that many like residences will be greatly depreciated in value in the event that the defendants prevail in this suit.

Plaintiffs gladly concede in the brief that the proposed young men occupants of the defendant fraternity house are high-class and well-behaved in their demeanor. But it will be presumed that they are not different from an equal number of young men students in somewhat similar situations at other seats of learning. *Hannan v. Harper*, 189 Wis. 588, is a case arising in Milwaukee wherein the court made this observation: "The occupancy of the upper flat of the dwelling house as headquarters and clubrooms of a college fraternity amounts to a constructive eviction of the tenant of the lower flat and a breach of an implied covenant for quiet enjoyment, entitling the tenant to an injunction to restrain such breach." And in the statement of facts, speaking of college students generally, the court observes that it is a matter of common knowledge and well established that groups of students are for the most part exuberant, boisterous, and hilarious, and that they do not ordinarily keep regular hours and are addicted to the use and abuse of vibrant and sonorous musical instruments.

It is to be borne in mind that the record does not present a case wherein a litigant is seeking to maintain a right of occupancy within a zoning district, which accrued before the ordinance became effective. Defendants were

not deceived in the premises. They knew, or were charged with knowledge, of the adoption of the zoning ordinance for more than two years before the house was purchased or a move was made to establish a "fraternity" residence within the confines of the "A" residence district. There is, of course, some difference of opinion and some conflict in respect of the subject under discussion here. But the courts generally agree that city zoning is based, in part, on the application of the police power to each individual situation. Counsel for the city of Omaha point out that the Omaha city planning commission consulted with experts on zoning propositions, and that the commission and the city counsel held public hearings, and that in pursuance of the recommendation of the city planning commission, and as an outgrowth of the public hearings, the city enacted the city zoning ordinance in suit. See sections 3611-3623, Comp. St. 1922.

In a zoning case decided in 1925, the question of the police power as relating thereto, is discussed at length, and the court, in an unusually instructive opinion, say:

"The police power, as such, is not confined within the circumscription of precedents, resting upon past conditions which do not cover and control present-day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public, and as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions, and what was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power. In its inception the police power was closely concerned with the public peace, safety, morals, and health, without specific regard for the general welfare, but the increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare was held by the courts to be a legitimate object for the exercise of

the police power, and as our civic life has developed, so has the definition of 'public welfare,' until it has been held to embrace regulations to promote the economic welfare, public convenience and general prosperity of the community." *Miller v. Board of Public Works*, 195 Cal. 477.

In *City of Aurora v. Burns*, 319 Ill. 84, the court held to the basic principle that the police power is inherent in the effective conduct and maintenance of government and is to be upheld even though the regulation affects adversely property rights of some individual. And in *State v. City of New Orleans*, 154 La. 271, it was held: "If considerations of public health, safety, comfort, or general welfare could have justified zoning ordinance, the court must assume that they did justify it, and cannot take issue with the city council." In *Noble State Bank v. Haskell*, 219 U. S. 104, Mr. Justice Holmes observed: "It may be said in a general way that the police power extends to all the great public needs. * * * It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

Barrett v. Rickard, 85 Neb. 769, has to do with the establishment of an excise ordinance, and it was there held: "The right of the legislature to clothe the city with power to adopt the rule in question is derived from that undefined branch of government known as the police power, which by some writers is said to bear the same relation to the municipality that the principle of self-defense bears to the individual."

Defendants cite *White's Appeal*, 287 Pa. St. 259. It appears that White converted an open front porch into a room, and in so doing he violated the prescribed setback line of a zoning ordinance. The Pittsburgh city officials ordered the removal of the porch. The common pleas court held for the city, but the supreme court, on appeal, reversed the judgment and held, in substance, that the porch, whether open or closed, was neither offensive to the eye

nor a source of sickness, nor did it materially increase or decrease the fire hazards. We are not convinced that the above case is in point.

State v. Edgecomb, 108 Neb. 859, 27 A. L. R. 437, is also cited by defendants, but we do not think it is applicable here. The *Edgecomb* case is one of first impression here, and is a comparatively early decision in city zoning litigation, and it dealt with only one feature of the Omaha zoning ordinance then in effect. Under the surrounding facts and the environment there involved, it was held that, to confine the relator to the use of 25 per cent. of its lots area, as the ordinance then prescribed, was so restrictive as to be an unreasonable exercise of the power granted by the legislature. The judgment of the trial court compelled the issuance to the relator of a permit, as requested, for the erection of a church edifice which would cover 37½ per cent. of the two lots, and the judgment was here affirmed.

In an opinion decided November 22, 1926, in respect of city planning and zoning and its recent rise and its application to cities generally, these subjects cannot be better stated than in the language of Mr. Justice Sutherland, in an exhaustive opinion in the case entitled *Village of Euclid v. Ambler Realty Co.,* 272 U. S. 365. In respect of its development, he said:

"Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been re-

jected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise." Continuing, the opinion holds: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." "Zoning law, drawn in general terms and providing reasonable margin to secure effective enforcement, will not be held invalid because individual cases may turn out to be innocuous in themselves." (47 Sup. Ct. Rep. 114.) The opinion further holds that, in city zoning cases, it is not "the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts." (Quoting from *State v. City of New Orleans*, 154 La. 271.) The weight of judicial authority clearly appears to support the proposition that, before a zoning ordinance can be declared unconstitutional, such ordinance must be either an arbitrary or an unreasonable pronouncement of the council, or it must be without substantial relation to public health, safety, morals, or general welfare. The conclusion is that the zoning ordinance here is well within the recognized exercise of the police power, and that in the application of its provisions to the property of the defendant it does no violence to the due process guaranties of the state or federal constitutions.

The judgment of the district court is reversed and the

cause is remanded, with directions to enter a judgment in conformity with the views expressed in this opinion.

REVERSED.

WILLIAM DRAWBRIDGE V. STATE OF NEBRASKA.

FILED APRIL 26, 1927. No. 25346.

1. **Intoxicating Liquors: INFORMATION CHARGING SALE: CONVICTION: PENALTY.** An information, which in due form charged, omitting formal parts, that the accused, on a day certain, "wilfully, knowingly, unlawfully and feloniously did sell intoxicating liquor to one Jack Moyer," charges an offense under section 3238, Comp. St. 1922, and a person convicted on such information is punishable under the provisions of section 3288, Comp. St. 1922, to which may be added, in case a jail sentence is imposed, conditions prescribed in section 10169, Comp. St. 1922.
2. **Criminal Law: INSTRUCTIONS: FALSUS IN UNO, FALSUS IN OMNIBUS.** "Where the condition of the testimony is such as to justify and require the giving of an instruction, based upon the maxim *'Falsus in uno, falsus in omnibus,'* the court should give it. Such an instruction is, however, not required in all cases, but only where, from the evidence, the jury may be justified in believing that a witness has wilfully and corruptly testified to a falsehood, and, further, where the same witness has testified as to some other material issue in the case than that upon which he is directly impeached." *Markiewicz v. State*, 109 Neb. 514.
3. ———: ———: DUTY OF COMPLAINANT. "Where a defendant predicates error on the refusal of the court to give such an instruction, it is incumbent upon him to specifically point out that there is such a peculiar condition in the record as to warrant the instruction, and to designate to what material testimony he believes the maxim should have been applied." *Markiewicz v. State*, 109 Neb. 514.
4. **Limitation on Use of Word "Exclusively" in Syllabus of Former Case.** The use of the word "exclusively" in paragraph 5 of the syllabus of *Knothe v. State, ante*, p. 119, was intended to draw attention to the fact that the provisions of section 3288, prescribing punishment, should be applied in contradistinction to

those in chapter 106, Laws 1925, and not as a limitation on other provisions of the statute.

5. **Criminal Law**: VOID SENTENCE. Where a sentence of the court is void as being in excess of its power, the judgment may be set aside and the cause remanded to the district court to impose a sentence authorized by law.

ERROR to the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Reversed, with directions.*

Garlow & Long, for plaintiff in error.

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

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

DAY, J.

William Drawbridge, defendant, was placed on trial upon an information which in due form, in two counts, charged him with selling intoxicating liquor to one Jack Moyer. The first count charged the offense to have been committed on May 10, 1925, and the second count on May 11, 1925. The jury returned a verdict of guilty on the first count, and not guilty on the second count, whereupon the court sentenced defendant to pay a fine of $100 and to be committed to the county jail at hard labor for a period of 90 days. Alleging there was error on the trial, the defendant has brought the record of his conviction to this court for review.

It is first urged by defendant that the court erred in refusing to give an instruction, tendered by him, based upon the maxim, "*Falsus in uno, falsus in omnibus.*" The form of the instruction is not questioned, but it is contended by the state that the facts did not present such a situation as to require it to be given. The only basis for the instruction lies in the fact of a direct conflict in the testimony of the prosecuting witness and the defendant. The prosecuting witness, who was employed by the state to secure

evidence in this class of cases, testified that, on May 10 and 11, he purchased liquor from defendant. This fact was denied by defendant, in which he was corroborated by other witnesses. In the comparatively recent case of *Markiewicz v. State*, 109 Neb. 514, a similar question was presented and it was held: "Where the condition of the testimony is such as to justify and require the giving of an instruction, based upon the maxim *'Falsus in uno, falsus in omnibus,'* the court should give it. Such an instruction is, however, not required in all cases, but only where, from the evidence, the jury may be justified in believing that a witness has wilfully and corruptly testified to a falsehood, and, further, where the same witness has testified as to some other material issue in the case than that upon which he is directly impeached." Also: "Where a defendant predicates error on the refusal of the court to give such an instruction, it is incumbent upon him to specifically point out that there is such a peculiar condition in the record as to warrant the instruction, and to designate to what material testimony he believes the maxim should have been applied." We consider this case authority to sustain the ruling of the trial court.

The court gave the usual instruction as to the right and power of the jury in weighing the testimony, and that they were the sole judges of the credibility of the witnesses. The court also gave cautionary instructions warning the jury to exercise a greater care in weighing the testimony of persons who are employed to find evidence against the accused, because of the natural and unavoidable tendency of such persons to construe everything as evidence against the accused. This instruction clearly referred to the prosecuting witness, as he was employed by the state to collect evidence in this class of cases and the only witness who testified as to the sale.

It is next urged by the defendant that the judgment is contrary to law. The information, omitting formal parts, charged that the accused, on a day certain, "wilfully, know-

ingly, unlawfully and feloniously did sell intoxicating liquor to one Jack Moyer." This information, upon the authority of *Knothe v. State, ante,* p. 119, charged an offense under section 3238, Comp. St. 1922. The punishment for such on offense being provided by section 3288, Comp. St. 1922, and not by the provisions of chapter 106, Laws 1925. The court, in imposing the sentence, followed the provisions of chapter 106, Laws 1925, which provides as a penalty, for the first offense, a fine of $100 and imprisonment in the county jail not less than 60 days nor more than 90 days. The penalty prescribed by section 3288, Comp. St. 1922, provides for the first offense, a fine of $100 or imprisonment in the county jail not less than 30 days nor more than 60 days. It therefore appears that the court was in error in applying the provisions of chapter 106, Laws 1925, in pronouncing its judgment, and exceeded his jurisdiction in so doing. However, all proceedings up to the sentence are regular and valid.

In paragraph 5 of the syllabus in the *Knothe* case, we say: "It charges, however, an offense under section 3238, Comp. St. 1922, punishable exclusively as provided by section 3288, Comp. St. 1922." The word "exclusively" was inadvertently used, and was intended only to draw particular attention, that the provisions of section 3288 should be applied in contra-distinction to those prescribed by chapter 106, Laws 1925, and not as a limitation on other provisions of the statute.

Upon the authority of the *Knothe* case, the judgment is reversed and the cause remanded to the district court, with directions to impose a sentence as provided by section 3288, Comp. St. 1922, but without prejudice to the right of the court, if a jail sentence is imposed, to couple therewith a condition as prescribed in section 10169, Comp. St. 1922.

REVERSED.

FRED HOFELDT, APPELLEE, V. ELKHORN VALLEY DRAINAGE DISTRICT, APPELLANT.

FILED APRIL 26, 1927. No. 25605.

1. **Waters: RIPARIAN OWNERS.** A riparian owner may not, for his own convenience and benefit, embank against the ordinary overflow of a running stream, when the effect is to cause an increased volume of water on the land of another riparian owner to his injury, and, if he does so, he is answerable in damages.
2. **Instructions** examined, and *held* not prejudicial.
3. **Evidence** examined, and *held* sufficient to support the verdict and judgment.

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

Courtright, Sidner, Lee & Gunderson, for appellant.

Saxton & Hammes, contra.

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

DAY, J.

This action was brought by Fred Hofeldt, hereinafter designated plaintiff, against the Ekhorn Valley Drainage District, hereinafter called defendant, to recover damages claimed to have been sustained by plaintiff by reason of the construction of a dike by defendant along the bank of the Platte river which caused a deflection of the current of the river over and against the plaintiff's land, causing the loss of several acres by erosion and damaging his meadow and growing alfalfa by overflowing the same. The trial resulted in a verdict and judgment in favor of the plaintiff for $898.75. Defendant appeals.

The plaintiff's cause of action is predicated on the theory that the defendant had no lawful right to construct the dike and thus interfere with the natural course of the running waters of the river without making provision for the protection of his lands from the extra burden cast thereon

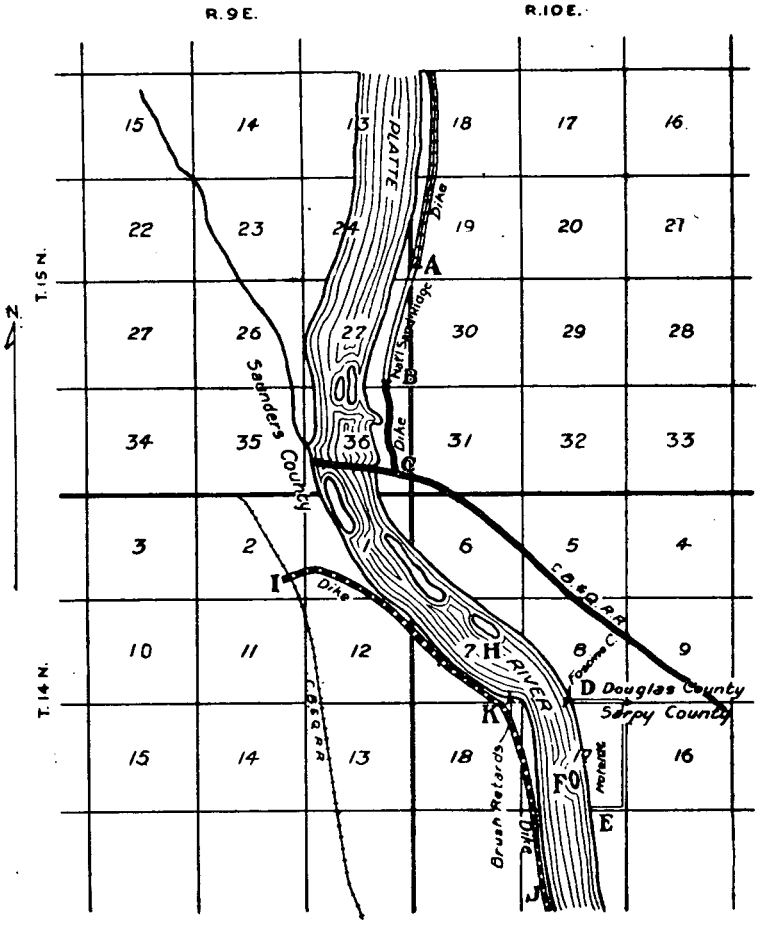
by reason of the dike. He also charged that defendant made a futile attempt to build some retards to protect his land from erosion, but they were so inadequate that, in reality, the retards tended to increase rather than decrease the erosion. The acts and omissions on the part of the defendant are characterized as negligence.

It was the contention of the defendant that it had the legal right to construct the dike to protect its own lands and was under no obligation to protect plaintiff's land from any increased burden which the construction of the dike might produce. Upon this phase of the case, defendant contends that the waters, against which it sought to protect itself by the construction of the dike, were surface waters and its acts were fully justified by the surface-water rule. On the other hand, the plaintiff claims that the overflow waters were still the waters of the river and the running-water rule should be applied.

The record shows that defendant is a drainage district corporation organized and existing under the laws of the state, relating to drainage districts, and comprising within its boundaries about 55,000 acres of land. These lands are located in the western part of Douglas and the northwestern part of Sarpy counties. The plaintiff's land is within this district.

For the purpose of a clearer understanding of the discussion, we have attached a map showing the relative location of the river, the artificial constructions, the plaintiff's land, and other matters referred to in this opinion. This plat does not include all of the district and is intended only to illustrate the discussion.

The general course of the Platte river, as it flows across the state, is in an easterly direction, but for a number of miles at and near the places in controversy it flows north and south. It forms the west boundary of Douglas and Sarpy counties. Generally speaking, it has a wide valley on either side, and flows through a flat and comparatively


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R.10E.
T.15N.
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PLATTE
Dike
A
B
North Side Ridge
Saunders County
C
C.B.&Q.R.R.
I
H
RIVER
Douglas County
Sarpy County
K
Bruno Retards
F
G
E
Dike

level territory, and at the points in controversy it is over half a mile in width. Its banks are very low.

The plaintiff is the owner of all of section 17, township 14 north, range 10 east, in Sarpy county, lying east of the Platte river and designated on the map "Hofeldt." His land is bounded on the north by the line separating Douglas and Sarpy counties, and in 1922 contained 244.11 acres.

The record shows that in 1919, as a part of its general improvements, defendant built a dike extending along the east bank of the Platte river from point A, designated on the map, northward for a distance of about 15 miles. The dike was built on defendant's land 200 to 300 feet from the river bank and was approximately 8 feet high. At the point A, the dike connected with a natural sand ridge, which paralleled the river bank for a distance of about one mile to the point B, where it connected with a dike constructed by the railroad company extending along the river bank for about a mile, terminating at the point C. The natural sand ridge and the dike constructed by the railroad company became a part of defendant's improvements. At the time of the construction of the dike, defendant made no improvement south of point C. Prior to the construction of the dike, generally speaking, the channel of the river opposite plaintiff's land was in the center or near the west bank. While the river formed the west boundary of plaintiff's land, the current at that point ran parallel with his land and caused but little erosion.

The testimony on behalf of plaintiff tends to show that, before the construction of the dike by defendant, in time of high water, the river would spread out over a broad expanse of about two miles at and above point A; that the flood waters would flow south and east, some of it returning to the original channel above plaintiff's land; that the overflow waters occasioned little damages to the plaintiff's crop and scarcely any to the land. The overflow periods occurred about once a year. An engineer testified

that after the construction of the dike, following a high-water period, it diverted the current, causing it to strike the opposite bank and rebound to plaintiff's land, striking it at an abrupt angle. He also testified that the construction of the dike narrowed and changed the channel, increased the velocity of the waters and greatly increased the erosion of plaintiff's land. The plaintiff testified that in 1921 he complained to defendant that his land was being washed away and requested it to take some action to protect him. Thereupon defendant caused three short ripraps to be placed about 200 feet apart toward the south end of his land. These ripraps soon sank. Again plaintiff made complaint to defendant, and it then put in 16 steel deflectors, widely separated, along the plaintiff's mile frontage. The same engineer testified that the work done by defendant was wholly insufficient, from an engineering standpoint, to protect plaintiff's land from erosion by the river; that the ripraps and steel constructions caused an island to be formed at point F which caused a strong current between the island and plaintiff's land, and that the work done by defendant, in fact, did more harm than good. Plaintiff's evidence tended to show that, prior to the construction of the dike, the river never inundated his land so as to injure his meadow or growing alfalfa, but thereafter the flood waters deposited sand and debris several inches deep over about 30 acres of his land.

On behalf of defendant, it was shown that prior to the construction of the dike, someone, other than defendant, had constructed a dike on the opposite side of the river from plaintiff's land and extending for more than a mile north of it. This dike is indicated by the red line I-J. About 1922 some one, not the defendant, built a brush retard at the point K in the river and, immediately below these, accretions formed. Some witnesses testified that the effect of these brush retards was to divert the waters directly across the river to the plaintiff's land.

The record shows that, within four years from the beginning of the action, about ten acres of plaintiff's land had been washed away and his meadow and alfalfa badly injured by the overflow. Under this state of the record, defendant insists that the court erred in not directing a verdict in its favor as requested. Whether the diversion of the water onto plaintiff's land was caused by the construction of defendant's dike or the brush retards, as claimed by defendant, at the point K, or by other obstructions in the river was, we think, under all the evidence, a question for the jury's determination.

The plaintiff's brief seems to present two theories: First, that defendant had no right to build the dike in such a manner as to divert the waters from its natural channel onto his land; and, second, having built the dike, it was negligence in not taking reasonable precautions to prevent the waters from encroaching on his land.

One of the questions presented by the record, and perhaps the main one, is whether the owner of land, so situated upon a natural stream of water that in time of flood it is overflowed, may for his own protection construct a dike, the natural and probable consequences of which must be, in time of ordinary floods, to cause the overflow to erode and damage the land of other riparian owners. There is a lack of uniformity in the holdings of the courts on this question. Some courts consider the overflow waters as surface water, against which an owner may protect himself by embankment, regardless of the effect it may have on his neighbor's lands. Other courts regard the overflow waters of running streams as a part of the stream and governed by the running-water rule.

In Gould, Waters (3d ed.) sec. 264, the rule is stated: "A stream does not cease to be a water-course and become mere surface water because at a certain point it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel."

In 3 Farnham, Waters and Water Rights, sec. 880, the author says: "To determine how far flood water in a river may be fought as a common enemy the form which the water assumes must be taken into consideration, and the facts of each case dealt with by themselves. Every stream flowing through a country subject to a changeable climate must have periods of high and low water. And it must have, not only its ordinary channel which carries the water in ordinary times, but it must have, also, its flood channel to accommodate the water when additional quantities find their way into the stream. The flood channel of the stream is as much a natural part of it as is the ordinary channel. It is provided by nature, and it is necessary to the safe discharge of the volume of water. With this flood channel no one is permitted to interfere to the injury of other riparian owners."

The dike constructed by defendant was from 200 to 300 feet distant from the ordinary channel, but obstructed the water before it reached the flood channel. The principles announced by the text-writers above quoted have been recognized in *Chicago, B. & Q. R. Co. v. Emmert,* 53 Neb. 237; *Brinegar v. Copass,* 77 Neb. 241; *Murphy v. Chicago, B. & Q. R. Co.,* 101 Neb. 73. In the latter case, in the course of the argument, it was said: "The basic principle which should determine the character of these waters seems to the writer to be the ancient maxim, *'Aqua currit et debet currere ut currere solebat.'* Water runs and ought to run as it has used to run. Each owner of lands bordering upon either the normal or flood channels of a running stream is entitled to have its waters, whether within its banks or in its flood channels, run as it has used to run, and no one has the right to interfere with its accustomed flow to the damage of another." In *Keck v. Venghause,* 127 Ia. 529, it was held: "A riparian owner cannot lawfully embank against the natural overflow of an inland stream where the same will cause an increased volume of water to flow upon the land of another to his injury." See, also, *Craw-*

ford v. Rambo, 44 Ohio St., 279; 27 R. C. L. 1064, sec. 5, and 1099, sec. 35.

In *McKee v. Nebraska Gas & Electric Co.,* 110 Neb. 137, it was held: "A riparian owner, who by his wilful act diverts the waters of a natural stream from its accustomed channel and causes them to flow upon the lands of his neighbor, is liable for the resulting damages, irrespective of any question of negligence or malice. It is sufficient in such case if plaintiff prove that the act was wrongfully done and that he was damaged thereby." In that case, in the course of the discussion, it was said: "Defendant changed the course of the river in such a manner that, whereas it flowed past plaintiff's land from north to south, when changed, it flowed east and west directly against plaintiff's west bank and at right angles thereto, the course of the river was greatly shortened, thereby accelerating the flow of the water, and the undisputed evidence shows that this caused the banks to wash away and the land to overflow. The court was therefore right in instructing the jury that the act of the defendant caused the damage, if any." For other cases bearing on the question see, *Bunting v. Oak Creek Drainage District,* 99 Neb. 843; *Miller v. Drainage District,* 112 Neb. 206; *Buchanan v. Seim,* 104 Neb. 444.

We think our decisions have committed us to the doctrine that a riparian owner may not embank against the overflow of running streams when the effect is to cause an increased volume of water on the land of another riparian owner to his injury, and if he does so he is answerable in damages.

Defendant complains of the giving of instructions 10 and 11 by the court. These instructions, standing alone, are subject to some criticism, but considered in connection with the entire instructions and the record, we have become convinced that the jury were not misled. Other errors have been assigned, which we have considered, but do not regard as prejudicial to the defendant. Upon considera-

tion of the entire record, we find no prejudicial error, and the judgment of the district court is therefore

AFFIRMED.

GOOD, J., dissenting.

I concur in the view expressed that instructions 10 and 11 are subject to criticism, but do not concur in the view that they were not prejudicial to the defendant. In my view, the instructions informed the jury that defendant owed a duty, which the law does not impose, and thereby permitted the jury to consider acts as negligence which were not, in fact, negligence, because no duty was imposed by law to maintain the dikes or other improvements. Since there was no duty imposed, there could be no negligence in failing to maintain the dikes or other improvements. As I view the matter, these instructions were prejudicial to the defendant and perhaps caused the jury to enter a verdict for the plaintiff when, but for such instructions, the verdict might have been for the defendant.

OLGA SPRIECK DELESKI, ADMINISTRATRIX, PLAINTIFF, V. PETERS TRUST COMPANY ET AL., IMPLEADED WITH CLARENCE C. KERN ET AL., APPELLANTS: JOHN MCNURLIN, APPELLEE: JOHN W. KERN, INTERVENER, APPELLANT.

FILED APRIL 26, 1927. No. 24796.

1. **Equity.** Where one of two innocent parties must suffer a loss, he whose negligence caused the injury should bear the loss.
2. **Mortgages: CANCELATION OF RELEASE: EQUITY.** A court of equity will not cancel and invalidate the release of a mortgage to the prejudice of an innocent purchaser for value of the mortgaged premises.
3. **Vendor and Purchaser: INNOCENT PURCHASER.** Where a release of a mortgage, through fraud of the mortgagor, has been procured and placed on record, and the mortgagor conveys the

premises to an innocent purchaser for value, such purchaser may convey a good title, divested of the lien, to any person other than his grantor.

4. **Election of Remedies.** In an equitable action, a party may not pursue two inconsistent remedies at the same time.
5. **Estoppel.** A court of equity will not permit one, who claims some interest in a real estate mortgage held by another, to assert such interest, when he knows that the holder of the mortgage is about to sell and transfer it to a third party and remains silent as to any claim or interest therein until after the sale is consummated and the purchase price paid.

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

W. P. Cowan and *Fay H. Pollock*, for appellants.

D. O. Dwyer, contra.

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

GOOD, J.

Olga Sprieck Deleski, as administratrix of the estate of Edward A. Sprieck, deceased, a former husband of the plaintiff, commenced this action to foreclose a mortgage, executed by defendants Clarence C. Kern and his wife, Ida Kern, and in which plaintiff's intestate was named as mortgagee. Defendants Peters Trust Company and Omaha Safe Deposit Company are holders of mortgages upon the same premises, which are senior to the plaintiff's mortgage. Defendant McNurlin filed a cross-petition, in which he claimed a first lien upon a part of the premises by virtue of a mortgage for $3,000, which had been previously released on the mortgage record. He alleged that the release had been procured by fraud; that his mortgage had not been paid and was an existing first lien upon the premises, which he sought to have established. John W. Kern, intervener, filed a cross-petition in which he alleged that, subsequent to the commencement of the action, he had purchased plaintiff's mortgage; that, at the time Clarence C. Kern had purchased the mortgaged

premises, the McNurlin mortgage had been properly released of record, and that he had no knowledge or information that McNurlin claimed any lien on or interest in the premises, and that Clarence C. Kern purchased the land in good faith, for $50,000, its full value; that he paid the $50,000 by assuming two mortgages upon the land, aggregating $15,000, and by paying $17,000 in cash and executing a mortgage for $18,000 to Edward A. Sprieck, his vendor, for the remainder of the purchase price. Intervener further alleged that since the commencement of the action he has purchased the equity of redemption from Ernest Heller.

The trial court found that the release of the McNurlin mortgage was procured by fraud; that his mortgage had not been paid, and that he was entitled to a lien upon the premises and to have his mortgage foreclosed, but subject to the mortgages in favor of Peters Trust Company and Omaha Safe Deposit Company. The court further found that, cross-petitioner John W. Kern having acquired the equity of redemption from Heller, his mortgage was merged in the superior title, and denied him a foreclosure. Defendants Clarence C. Kern and Ida Kern and intervener John W. Kern appeal.

The questions presented for determination are: Did the trial court err in canceling the release of the McNurlin mortgage, establishing his lien upon the premises and awarding him a decree of foreclosure for the amount of his mortgage, and in holding that intervener's mortgage was merged in the superior title and in denying foreclosure of his mortgage?

The following pertinent facts appear from the record: In 1914 Edward A. Sprieck was the owner of the premises, now incumbered by the several mortgages involved in this action. He borrowed $3,000 from McNurlin and executed a mortgage on a part of the premises to McNurlin to secure the payment thereof. This mortgage became due in 1919. In 1920 Sprieck and wife induced McNurlin to ex-

ecute a release of that mortgage, which release was duly recorded. For the purpose of this action it may be admitted that Sprieck led McNurlin to believe that the paper which he was executing was one for the extension and renewal of the mortgage for another five-year period, while, in fact, it was a release and satisfaction of the mortgage. On February 28, 1920, Sprieck and wife, by warranty deed, sold and conveyed the land to defendant Clarence C. Kern for a consideration of $50,000. This $50,000 was paid as follows: $15,000 represented by two mortgages, then on the land, which Clarence C. Kern assumed; $17,000 in cash, and a mortgage for $18,000 upon the premises in favor of Edward A. Sprieck. At the time, Clarence C. Kern had no knowledge or information, or any reason to believe, that McNurlin had any lien on the land, and he relied upon the fact that the record showed that the McNurlin mortgage had been satisfied and released. On March 1, 1920, Clarence C. Kern and wife, by warranty deed, sold and conveyed the premises to Albert Heller, and Heller therein assumed and agreed to pay the three mortgages on the premises, to wit, the mortgages of the Peters Trust Company for $10,000 and of the Omaha Safe Deposit Company for $5,000, and the mortgage to Edward A. Sprieck for $18,000. Later, Albert Heller sold and conveyed the premises to Ernest Heller. In 1921 Edward A. Sprieck departed this life, and at the time was the holder of the $18,000 mortgage. His widow, who subsequently married Deleski, was appointed administratrix of his estate, and, as such, instituted this action to foreclose the $18,000 mortgage. Subsequent to the bringing of this action, the county court, on application of plaintiff and a hearing thereon, entered an order, authorizing plaintiff to sell and assign the mortgage for a stated sum. Pursuant to this order, plaintiff sold and assigned the $18,000 mortgage and notes thereby secured to intervener John W. Kern, and at about the same time he, by a proper conveyance, acquired the equity of redemption from Ernest Heller. The creditors of the estate of Edward A. Sprieck, including McNurlin,

were given notice of the application of the administratrix of the estate for authority to sell and assign the mortgage. No objection was raised by McNurlin or any other creditor.

It appears that, while the premises were conveyed to Clarence C. Kern by Edward A. Sprieck, intervener John W. Kern furnished a part of the purchase money and was a joint owner of the premises with Clarence C. Kern, who was his brother. It is conclusively shown that neither Clarence C. Kern nor John W. Kern, at the time they purchased from Sprieck, had any knowledge or information that McNurlin had, or claimed to have, a lien upon the premises. It also appears that the purchase price, at which plaintiff was authorized to sell the mortgage, was paid by intervener John W. Kern, and that the proceeds thereof were prorated among the creditors of Edward A. Sprieck. Among these creditors was the defendant McNurlin, who received a sum in excess of $1,900 upon a claim that had been duly allowed by the county court. After Kern had purchased the $18,000 mortgage and filed his cross-petition as intervener, McNurlin filed what is termed a reply thereto, in which he sought to have his $3,000 mortgage lien satisfied out of the $18,000 mortgage, then held by John W. Kern.

The following equitable maxims and rules are applicable to the situation here disclosed: "Where one of two innocent parties must suffer a loss, he whose negligence caused the injury should bear it." *Porter v. Ourada*, 51 Neb. 510. Courts of equity will not cancel and invalidate the release of a mortgage to the prejudice of innocent persons. *Whipple v. Fowler*, 41 Neb. 675; *Cram v. Cotrell*, 48 Neb. 646; 9 C. J. 1222, sec. 123.

In the instant case, McNurlin was negligent in not reading, or causing to be read to him, the instrument which he executed. Through his negligence, either he or a third person must suffer a loss. Clarence C. Kern was an innocent purchaser, without fault or negligence. It therefore follows that the loss should be borne, as between the two, by the one whose negligence caused it.

Since Clarence C. Kern took title to the premises divested of any lien of the McNurlin mortgage, it follows that he had a right to transfer the premises to any other person, save his grantor, free from that lien. Clarence C. Kern having conveyed the premises to Albert Heller, he, in turn, to Ernest Heller, and the latter to John W. Kern, it follows that John W. Kern was an innocent holder and took the premises free from any lien of the McNurlin mortgage.

It has been argued in behalf of McNurlin that he was entitled to have his $3,000 mortgage debt paid and discharged out of the $18,000 mortgage, originally held by Edward A. Sprieck. We think his contention is not tenable for the following reasons: Such contention is at variance with his main contention that his mortgage was still a lien. Before he would be entitled to have his mortgage paid out of the $18,000 mortgage, he must recognize, first, that his mortgage lien was divested and that he was not entitled to a reinstatement of it. He was attempting to assert two inconsistent remedies in the same action at the same time. He is not entitled to this relief for another reason. At the time the application was made by the plaintiff for an order permitting her to sell the mortgage, McNurlin was notified of such application. He made no objection to the sale of the mortgage. He permitted it to be sold, and when the purchaser had paid the proceeds to the administratrix, McNurlin was a direct beneficiary and received a part of that money, which was applied towards the payment of a claim, duly allowed against the estate of Edward A. Sprieck. Had he desired to assert any right to an interest in that mortgage, it was his duty to have done so before a sale thereof. He could not sit by and permit such a sale and reap a profit from it, and at the same time seek to avoid the sale either *in toto* or in part.

We next inquire whether there was a merger of the $18,000 mortgage into the equity of redemption, when both were acquired by John W. Kern. The rule is that, whenever

a person acquires a greater and lesser estate in the same property and there is no intervening estate, ordinarily the lesser is merged in the greater, but where there is an intention that the estates remain separate and distinct no merger can ensue, and the intention will prevail. *Mathews v. Jones*, 47 Neb. 616.

From the facts disclosed by the record, it may be inequitable to decree a merger of the two estates in John W. Kern. There is nothing to indicate an intention on his part to effect a merger, and his having asserted the right to foreclose, coincident with the time of taking the lesser estate, clearly indicates his intention not to have a merger of the two estates. The district court erred, first, in decreeing a foreclosure of the McNurlin mortgage, and, second, in decreeing that there was a merger of the two estates in intervener John W. Kern and in denying him a decree of foreclosure.

The judgment of the district court is therefore reversed and the cause remanded, with directions to enter a decree denying McNurlin any relief in the premises, and awarding to intervener John W. Kern a decree of foreclosure upon his mortgage.

REVERSED.

IN RE ESTATE OF JOHN W. WINSLOW. JAHUGH WINSLOW ET AL., APPELLANTS, V. IDA BELLE WARRINER, APPELLEE.

FILED APRIL 26, 1927. No. 24802.

1. **Bastards:** LEGITIMATION. At common law, an illegitimate child cannot inherit property from his father, but in this state, by virtue of section 1228, Comp. St. 1922, such a child may be legitimated and inherit from his father when the latter shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child.
2. ———: ———. Such an acknowledgment need not be in a formal paper, executed for the specific purpose, but may be contained in a letter, provided the father unequivocally ac-

knowledges therein his paternity of the illegitimate child, and signs the written acknowledgment in the presence of a competent witness.

3. ———: ———. The signature to such acknowledgment need not be actually written in the handwriting of the father, but is sufficient if he directs another to sign his name thereto.

4. Signatures. Where a person's name is signed to an instrument for him, at his direction and in his presence, by another, the signature becomes his own.

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

Pratt, Hamer & Beynon, for appellants.

C. P. Anderbery and *Snyder & Snyder, contra.*

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

GOOD, J.

This is an action to determine whether the estate of John Woolman Winslow, deceased, who died intestate, never having been married, shall descend to his collateral kindred or to Ida Belle Warriner, who claims to be an illegitimate daughter of said Winslow, and that she has been legitimated by his action so as to be entitled to inherit. The district court found that Mrs. Warriner was born an illegitimate daughter of Winslow, and that she had been legitimated by his action, and entered judgment, adjudging her to be the sole heir of his estate.

Under the common law, an illegitimate child could not inherit from his father. In this state, by virtue of the provisions of section 1228, Comp. St. 1922, such a child, under certain prescribed conditions, may inherit from his or her father. That section provides *inter alia*: "Every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered as an heir of his mother, and shall inherit his or her estate in whole or in

part as the case may be, in the same manner as if he had been born in lawful wedlock."

Counsel for Mrs. Warriner contend that the facts disclosed show that Mr. Winslow in his lifetime, in writing, signed in the presence of a competent witness, acknowledged himself to be the father of Mrs. Warriner; and counsel for the collateral kindred strenuously urge that the facts disclosed in the record do not show a compliance with the statute.

It is established beyond question that Mrs. Warriner was an illegitimate daughter of Winslow. There are certain letters, in his handwriting, which were addressed to and received by Mrs. Warriner, and in which he addressed her as "Dear daughter" and signed himself "Your loving father, J. W. Winslow." It is also established that Mr. Winslow became nearly blind and could not see to write; that he procured one Mrs. Peebles to write three letters for him to Mrs. Warriner. These letters were written at the dictation of Mr. Winslow in his presence. They were addressed to Ida Belle Warriner, and therein the salutation was "Dear daughter," or "Dear daughter and children," and the letters ended: "Your loving father, J. W. Winslow." These letters, written by himself, and also the ones written by Mrs. Peebles at his dictation, contain an unequivocal acknowledgment that he is the father of Mrs. Warriner. There is the written acknowledgment. The only question is whether these letters were signed in the presence of a competent witness. That the letters written by himself were signed by him is clearly established, but the evidence as to whether it was done in the presence of a competent witness is not as clear as could be desired. The record shows that one William Winslow, a cousin of the deceased and one of his collateral kindred, who would be entitled to inherit unless Mrs. Warriner is properly adjudged to be his sole heir, for a number of years lived in the home of decedent. He testified, apparently with some reluctance, that several of the letters in question are in the handwriting of John W. Winslow;

that Winslow wrote them, and that the witness read a number of the letters after they were written. He testified that after they were written they were handed to him by Winslow for him to read. In answer to another question, he said that no part of the letters was in his handwriting, and that there was no one present except himself and Winslow. Taking his evidence as a whole, we think a fair inference is that the letters were written and signed by Winslow in his presence. If such be the fact, then there is a compliance with the statute which would legitimate Mrs. Warriner and entitle her to inherit.

With reference to the letters written by Mrs. Peebles, the evidence discloses that she was present, took the dictation of Mr. Winslow, and that after she had done so she, in each instance, read the letter over to Winslow, including the address, the salutation and the signature, above which were the words, "Your loving father." A sister of Mrs. Peebles was also present when one of these letters was written, and she heard it read, including the salutation and the signature, and knew that it was read to Mr. Winslow. The letter, as a whole, was written at his instance and request. After it had been written and read to him it was sealed in an envelope and Winslow, himself, took the letter and deposited it in a United States mail box.

The statute requires the acknowledgment to be signed in the presence of a competent witness, but that does not necessarily mean that the actual writing of the signature shall be made by the father. If one is disabled by reason of crippled hands or defective eye-sight so that he cannot write, no one would contend that it would be impossible for him to comply with the statutory provision. He may direct another to write his name, and when he does so the signature is as much his own as though he had held the pen which wrote his name. "Where a person's name is signed for him, at his direction and in his presence, by another, the signature becomes his own." 36 Cyc. 451. Winslow requested Mrs. Peebles to write the letter for him. He intended, as

evidenced by his act in depositing the letter in the mail box, that it should be sent to Mrs. Warriner. Inferentially and in effect, Winslow requested Mrs. Peebles to write his name. Moreover, he ratified and adopted her writing as his signature, and did so intentionally. The signature was appended in his presence and, as to one of the letters, in the presence of both Mrs. Peebles and her sister.

The evidence fully justifies the finding of the district court that Winslow did, in writing, in the presence of a competent witness, acknowledge himself to be the father of Mrs. Warriner. He thereby legitimated her as his daughter, and she is entitled to inherit his estate.

The judgment of the district court is therefore

AFFIRMED.

JOHN BOSTEDER, APPELLANT, V. WILLIAM B. DULING ET AL., APPELLEES.

FILED APRIL 26, 1927. No. 24858.

1. **Pleading:** GENERAL DENIAL. A general denial in an answer may be qualified and supplanted by that which precedes as well as that which follows it.
2. **Record** examined, and *held* that the judgment of the trial court as rendered is erroneous and clearly against the weight of the evidence and the law applicable thereto.
3. **Witnesses:** ADMISSION OF CONVICTION OF FELONY. Under section 8848, Comp. St. 1922, where a witness on cross-examination admits previous conviction of a felony, it is error to allow further inquiry on the subject or to permit the record of the conviction to be introduced.
4. ———: PRIVILEGED COMMUNICATIONS. "Under section 7894, Rev. St. 1913 (now section 8836, Comp. St. 1922), a person is not incompetent to testify in respect of independent acts performed by him, for or in behalf of a person since deceased, when it appears that he had no conversation with the person since deceased with respect to such acts, and in which the deceased did not participate." *Larson v. Swingley*, 105 Neb. 116.
5. **Criminal Law:** ATTAINDER. Corruption of blood or forfeiture of estate, as imposed by the common law on persons attainted of felony, are unknown to the laws of this state, and no conse-

quences follow conviction and sentence by reason thereof save and except such as are declared by Constitution or statute.

6. Torts: JOINT AND SEVERAL. "An act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally." *Schweppe v. Uhl*, 97 Neb. 328.

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

Allen & Requartte and *E. G. Maggi*, for appellant.

Reavis & Beghtol and *Adams & Zimmerman, contra.*

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

THOMPSON, J.

This case is one in which the plaintiff, appellant, seeks to recover damages for an injury caused by the wrongful acts and neglect of the defendants, appellees. At the close of the plaintiff's testimony the defendants respectively moved the court to dismiss the action for the following reasons: "(1) Because the record shows that the plaintiff has been convicted of a felony, has lost his civil rights, and has no right to maintain an action in the courts of Nebraska; (2) because the evidence is not sufficient to sustain a verdict in favor of the plaintiff and against this defendant; (3) because the plaintiff has not sustained any of the allegations of his petition against this defendant." These motions were sustained and judgment of dismissal entered. Plaintiff appeals.

The plaintiff's petition is in usual form in such cases, and in substance charges the defendants with being joint owners of an ensilage cutting machine, operated and used by them as neighboring farmers in Lancaster county; that the machine was worn, out of repair, unfit for use, and dangerous, especially as to the one feeding the same, and so known to be by defendants, but not by the plaintiff, as defendants well knew; that notwithstanding such defects defendants directed the plaintiff as their employee and servant to feed

corn stalks into such machine, which he did, and while so doing received the injury complained of; that defendants thus failed and neglected to furnish plaintiff with a reasonably safe place to work and reasonably safe appliances with which to do the work, which neglect was the proximate cause of the injury, and the resulting damages complained of; all without fault or negligence on the part of the plaintiff.

Separate answers were filed by Duling and Barrett, each, however, identical in terms. Thereafter the defendant Barrett died, and before trial the case as to him was revived in the name of appellee Mary Barrett, administratrix of his estate. However, new pleadings were not filed. One of such answers, omitting the formal parts, will be here extended in substance: (1) Admits that the defendant is engaged in the business of farming in Lancaster county, and is one of the owners of an ensilage cutting machine; (2) that, at the date mentioned in plaintiff's petition, plaintiff injured his hand while operating such machine; (3) a general denial; (4) that the injury to plaintiff was not caused by any carelessness or negligence on the part of defendant, but was occasioned solely by the gross negligence and carelessness of plaintiff; (5) that the risks and dangers of operating the machine were open, obvious, and known to plaintiff, and that he assumed such risks and dangers by reason of his entering and continuing in such employment.

The reply denied specifically, as well as generally, that plaintiff's injury was caused by his own negligence, either gross or otherwise, and also denied that the risks of operating such machine were open and obvious, or known to him, or that he assumed the risks connected therewith.

It will be seen that the first paragraph of the answer admits that the defendants were engaged in the business of farming, and were the owners of such ensilage cutting machine. The second paragraph admits that on the day in question the plaintiff injured his left hand while operating such machine. The fourth paragraph admits the injury. Without going into a discussion of the actual legal scope

of the fifth paragraph, it can safely be said that it admits that the operation of such machine presented risks and dangers; that the plaintiff was employed in the operation of the machine, and while so engaged he received the injury complained of. As to the third paragraph of the answer, such general denial is qualified and supplanted by that which precedes as well as that which follows it. *Carson v. Hunt*, 113 Neb. 727. Thus, the denial would be effective only as to the facts contained in the petition which were not admitted by the answer.

In addition to the facts admitted in the answer, the record reflects the following: Defendant Duling, at the instance of Barrett, then co-owner of the machine in question, went to the plaintiff and told him in substance that Barrett was preparing to ensilage his corn stalks with such machine, and thereafter store it in his silo on his farm, as to which conversation plaintiff testified: "Mr. Duling said Mr. Barrett had called him up and they wanted to fill the silo and they wanted I should feed the machine. * * * He (Duling) said they would have to wire it to hold it in gear, and I told him I wouldn't feed it that way because, if anything happened, you couldn't get it out of gear." As to a conversation with Duling a few days later, plaintiff testified: "He (Duling) said that he had saw Mr. Barrett, and Mr. Barrett told him he had the machine repaired and it was in good shape and ready to go as soon as they got there with the engine to furnish the power, and when they did I should go over and feed the machine." Further, on the day of the accident, in a conversation with Duling plaintiff testified: "He (Duling) was coming to Lincoln that day, and he said if Mr. Barrett called up while he was gone and was ready that I should go over there and feed the machine;" that plaintiff, relying upon the fact that the machine had been repaired, went to the Barrett farm in response to a telephone call from Barrett, and on his arrival there the machine in question was in operation, and was being fed by Barrett; that Barrett stepped aside, and plaintiff entered

upon his duties and commenced to feed the machine, and Barrett left the machine and went into the silo and never returned until after the injury to plaintiff's hand and arm had taken place. This employment on the part of Barrett and the authority given to Duling by Barrett is also strengthened by the testimony of R. O. Dillman, who testified to a conversation he had with Barrett on the day of the accident, and just prior thereto, as follows: "I said, 'Mr. Barrett,' I said, 'Who is going to do the feeding?' He says, 'Mr. Duling is sending his man to do the feeding; he fed it last year'." That the machine had not been repaired is evidenced by the testimony of this same witness, that immediately after the accident and the release of plaintiff from the machine he (Dillman) fed the machine, and, "The first thing I did was to try the safety. It worked, but nothing extra. She would jump and grab and she wouldn't release fully. * * * It would stop a minute and then the gears would make several revolutions and let loose again.* * * It wouldn't stay out of gear only just a second or two. * * * Catch and start in motion again." Futher, on direct examination, the testimony of the witness R. O. Dillman, in part, is as follows: "Q. Just what was his (plaintiff's) position and condition when you first heard him hollering and looked at him? A. The minute I seen him when he hollered this hand was straight through the rollers. He had this hand on the safety lever. Q. Was that safety lever near there? A. Yes, sir; where he could reach it with his right hand. Q. What was he doing with his hand on the safety? A. Trying to throw the safety and stop the rollers. Q. Was he able to do that? A. No, sir. Q. What did you do? A. I come over the table from the wagon and pulled on the safety and couldn't make it go. Q. You were not able to release it? A. No, sir." And, on cross-examination: "Q. When was it you saw him reach around and reach for the lever? A. His hand was on the lever when I got there. Q. When you got there he had his right hand on the lever, did he? A. Yes, sir. Q. And his left hand in the roller? A. Yes, sir."

Thus, the facts alleged in the plaintiff's petition find support, not only by way of admissions contained in the answer, but also by the uncontradicted evidence introduced at the trial; there being no evidence introduced on the part of the defendants.

As to the law applicable to such a state of facts, see, *Poos v. Krug Brewing Co.*, 101 Neb. 491, and *Carnahan v. Chicago, B. & Q. R. Co.*, 102 Neb. 76.

Hence, in any view taken, we are impelled to conclude that the judgment of the trial court, as rendered, is erroneous, is clearly against the weight of the evidence and the law applicable thereto, and should be reversed.

Nevertheless, as a new trial must be had, it may be helpful to pass upon the other errors presented. On the cross-examination of plaintiff he was asked by defendant's counsel if he had not been convicted of a felony. To which he answered, "Yes, sir." Over objections of plaintiff properly lodged, the defendant was permitted to continue this inquiry to some length, and then procured to be identified by the reporter a complete record of such criminal trial and conviction, which was then offered, and, over objections, received in evidence, and, as evidenced by the motions to dismiss and the ruling thereon, was considered in the further disposition of the case. The action of the trial court in allowing further inquiry on the subject of the felony conviction, after plaintiff had admitted that he had been convicted of a felony, was reversible error, as was also the receiving in evidence of the record of such felony conviction, as held by us in *Vanderpool v. State, ante*, p. 94:

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

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

If such is the law in a criminal case, we know of no reason why a different rule should be applied in a civil action.

It is further contended by the appellant that error was committed by the trial court in its refusal to permit the plaintiff to testify as to the condition of the machine at the time of the accident, and what he did at that time. The evidence, as before indicated, conclusively shows that at the time covered by the above questions Barrett was inside the silo, and was not present where he could see or know any of the conditions that existed at the time of the accident. As we held in *Larson v. Swingley*, 105 Neb. 116: "Under section 7894, Rev. St. 1913 (now section 8836, Comp. St. 1922), a person is not incompetent to testify in respect of independent acts performed by him, for or in behalf of a person since deceased, when it appears that he had no conversation with the person since deceased with respect to such acts, and in which the deceased did not participate." While the witness may testify as to facts and circumstances which are independent acts performed by him, and as to which the deceased did not personally participate, nevertheless "he must furnish other and competent evidence connecting those acts with the subject of his demand, or his evidence will be stricken from the case," as we held in *Fitch v. Martin*, 83 Neb. 124. Therefore, we conclude that such testimony was admissible, and it was error to exclude it. This conclusion will answer as well for other similar objections to this line of questioning which were interposed by defendant and sustained.

Further, it must have been considered by the trial court, as evidenced by his ruling in permitting the record and judgment of the criminal trial to be introduced in evidence, as well as in sustaining the motions to dismiss, that, by reason of the plaintiff's having been convicted of a felony, he was deprived thereby and by reason thereof of his civil rights, and therefore was without authority to prosecute this action. In support of this holding of the court, section 2, art. XV of the Constitution, and sections 1894, 9933, and 10262, Comp. St. 1922, are cited. It will be seen that section 2, art. XV of the Constitution, simply deprives the convicted person of the right to hold office. By section 1894, he is deprived of his right to vote. Section 9933 renders him incompetent to serve as an elector or juror, or to hold any office of honor, trust or profit within this state, unless pardoned. Under section 10262, rights denied him by statute are restored when he is discharged through the board of pardons.

Considering the above constitutional provision and such sections of the statute, together with section 15, art. I of the Constitution, which provides that "no conviction shall work corruption of blood or forfeiture of estate," none thereof deprives such convicted person of other or different rights than those specifically named therein respectively. Thus, "corruption of blood" and "forfeiture of estate," as imposed by the common law on persons attainted of felony, are unknown to the laws of this state, and no consequences follow conviction and sentence by reason thereof, save and except such as are declared by Constitution or statute. As well said in 13 C. J. 914, sec. 6: "In accordance with the modern policy of a more humane administration of the criminal law, the early doctrines of the common law in regard to the attainder, forfeiture, and corruption of blood of convicts have been either entirely swept away or modified by constitutional and statutory provisions."

As no conviction shall work "corruption of blood or forfeiture of estate," certainly none of such sections cited de-

prives this plaintiff, by reason of his conviction of a felony, of his civil right to his property and earnings, as existed prior to such conviction, and neither do they deny to him due process in our courts to protect his property or earnings. Civil death, as known to the common law, is without place in our jurisprudence.

The further question is presented that these defendants are not jointly liable, and, not being so, cannot under this record be held individually. The evidence presented brings this case clearly within our holding in *Schweppe v. Uhl*, 97 Neb. 328, wherein we held: "An act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally." Further, as held by us in *Koehn v. City of Hastings*, 114 Neb. 106: "If one suffers injury and damage as the proximate result of the negligence of two others, and the damage would not have occurred but for the negligence of each of such parties, both are liable to the person so injured."

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

REVERSED.

CITY OF FREMONT, APPELLANT, V. FRIEDA LEA, APPELLEE.

FILED APRIL 26, 1927. No. 25454.

1. Master and Servant: WORKMEN'S COMPENSATION: REVIEW. On appeal from the district court to the supreme court in a workmen's compensation case, findings of fact supported by sufficient evidence and findings of fact on substantially conflicting evidence will not be reversed unless clearly wrong.
2. ———: ———: AFFIRMANCE. Evidence examined and *held*, that the action of the district court in this case, determining that deceased, Lea, was a paid employee of the city of Fremont, that the injury which caused his death was accidental and not due to his willful negligence, and arose out of, and in the

course of, his employment, is,' in view of the rule above announced, sustained by the record here presented.

3. ———: ———: ATTORNEY'S FEES. Where defendant, on appeal to the district court, in a workmen's compensation case, secures a substantial reduction of the amount of recovery against him, plaintiff's attorney's fees for services performed in the district court may not be allowed and taxed against the defendant.

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

Brogan, Ellick & Raymond and *Quintard Joyner*, for appellant.

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

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

EBERLY, J.

Frieda Lea, hereinafter referred to as plaintiff, presented to the compensation commissioner of Nebraska a claim against the city of Fremont on account of the death of her husband, based on the provisions of the Nebraska compensation act. The claim was, by the commissioner, heard and allowed. The city appealed to the district court for Dodge county, where the action of the compensation commissioner was confirmed, except as to penalty. The defendant now prosecutes a further appeal to this court.

This appeal, thus made, is now to be heard and determined subject to the limitations of the doctrine heretofore adopted and repeatedly announced by this court: "On appeal from the district court to the supreme court in a workmen's compensation case, findings of fact supported by sufficient evidence and findings of fact on substantially conflicting evidence will not be reversed unless clearly wrong." *American Smelting & Refining Co. v. Cassil*, 104 Neb. 706. See, also, *Tragas v. Cudahy Packing Co.*, 110 Neb. 329; *Simon v. Cathroe Co.*, 106 Neb. 535.

Appellant city here contends that Lea had no compensable

status; that the fire department of which he was a member and a representative at the time of his injury was strictly a voluntary organization and constituted no part of the city government; that he was not legally employed by the city; that his death was due to his own wilful negligence; but, if it should be determined that he was an employee of the city of Fremont, then that the fatal injury that he received did not arise out of, or in the course of, such employment.

A brief summary of some of the important events which furnish the setting of the transaction before us may be of assistance. The state firemen's organization, in 1925, held its forty-third annual meeting at Hastings, Nebraska. In accordance with the object of its creation, the program and arrangements of this association for this meeting, as usual, afforded visiting firemen opportunities to inspect, examine, and study modern and improved fire-fighting apparatus, and also to receive instructions in the latest and approved ways of fire fighting and protection against fire. In 1925, as well as for many years prior thereto, the Fremont fire department was represented at this meeting of the state organization by a delegation selected from the membership of the department, consisting in part of nonpaid members, and in part of paid members. It appears from the record that for years it had been apparently an established municipal policy of this city that one or more of the paid members of its fire department should be sent to this state meeting for instruction. Lea, as such, had attended the annual meeting of the state association held in 1924 on full pay, and with the cost of substitute provided for at the expense of the city. Such, indeed, was his situation while in attendance at the Hastings convention in 1925. After arrival at that city with the "Fremont delegation," he was proceeding along the public street to the place of registration, as provided and required by the rules of the state organization, in the immediate company of the chief of his department; and a toy cannon, then under sole control of a third party, was accidentally discharged, which wounded

Lea, from the effects of which he died. The toy cannon in question was one which for 20 years or more had been in the possession of the Fremont fire department and was used by it for saluting purposes. Lea was in no manner connected with the operation of the cannon at the time he was injured. Earlier in the morning, however, Lea had been engaged in firing the cannon at Fremont, en route from Fremont to Hastings, and in Hastings. He had, however, discontinued this diversion some time before the injury in controversy was received.

For more than 25 years the city of Fremont has been a city of the first class, having more than 5,000 and less than 25,000 inhabitants. The provisions of its charter appear in chapter 44, Comp. St. 1922. During this period it has been, by charter, empowered to provide for the organization and support of a fire department; to procure fire engines, hooks, ladders, and buckets and other apparatus; to organize fire engine, hook and ladder, and bucket companies, and prescribe rules for duty and the government thereof, with such penalties as the council may deem proper, not exceeding $100, and make all necessary appropriations therefor. Comp. St. 1922, sec. 4006.

These express statutory powers are further supplemented by provisions fully empowering the mayor and council to provide, in absence of statutory provisions, whatever details may be necessary for the full exercise of the powers conferred. Comp. St. 1922, sec. 4038. This grant is in the nature of a police power exercisable for public benefit. The fire department, organized thereunder, is organically a part of the city government. It is to be supported by public funds caused by taxation. The relation between the city and the members of the fire department, organized under, and as contemplated by, the provisions of the charter above referred to, was that of master and servant, or public employees. Whether the department should be organized on a volunteer or nonpay basis, or whether as a paid department, or as a mixed volunteer and paid department,

was and is a mere matter of detail, a question of administration for the mayor and council to determine. But the matter of compensation, or the absence of it, in no manner affected the extent and character of the powers exercisable by the mayor and council over the organization, or the duty of the members of the fire department to comply with the regulations prescribed by the city.

The mayor and council of the city of Fremont, by the adoption of appropriate ordinances, proceeded to exercise the charter powers above referred to. All the ordinances on the subject of the Fremont fire department do not purport to be set forth at length in the record. Enough appears, however, to sustain the conclusion that this fire department is organized pursuant to, and in harmony with, the charter powers enumerated, and that the chief of the department, as well as the department itself, and the members thereof, are subject to the paramount control and direction of the mayor and council of the city of Fremont. It, therefore, follows that the contention that members of a volunteer fire department, or a fire department of the class to which the city of Fremont belongs, have no public status or lawful connection with the municipal government, and can be regarded only as private individuals acting in their own interest and behalf, cannot be accepted. Members of such departments must be accorded the position or status of municipal servants or employees.

It is an undisputed fact in the record that Lea, at the time of his death, and for more than two years prior thereto, was a paid member of the Fremont fire department, and, as such, served continuously and in good faith under such employment by the city. During this period his compensation had been regularly audited and allowed by the mayor and council and paid him pursuant to such action. At the time of his death, and prior thereto, his rate of pay was $115 a month. In view of these facts, we find that his employment was, therefore, within the protection of the Nebraska employers' liability act. Comp. St. 1922, sec. 3038.

Under these facts the city will not be heard to deny the legality of Lea's appointment or employment. *City Council of Sheffield v. Harris,* 101 Ala. 564.

Nor does the fact that the members of the Fremont fire department, thus organized, have united together and adopted a constitution and by-laws for the advancement of their mutual interests and the promotion and objects of their organization in any manner affect the conclusions here reached. The statutory grant to the city is controlling. The organization effected by the membership of the department is necessarily subject to and subordinate to the due exercise of the powers conferred upon the city by the terms of the statute. Therefore, their status was in no manner changed by the voluntary action thus taken. In fact, the wisdom of permitting organizations such as these to exercise a certain subordinate power within restricted spheres has the sanction of legislative recognition. Thus, similar powers are, by statute, expressly conferred upon members of national guard companies. Comp. St. 1922, sec. 3335.

We have also carefully examined the provisions of the constitution and by-laws of the Nebraska State Volunteer Firemen's Association. The object of this association, among others, is "the protection and promotion of the best interests of the firemen of Nebraska." The qualifications for membership are provided for by section 1, art. V of the Constitution, in the words: "Every organized fire department or company, in any city, town or village in the state of Nebraska, may become members of this association by the payment of an entrance fee of $2." This express language confers eligibility alike upon paid organizations and nonpaid organizations. Finally, it contains no provisions excluding a member of a volunteer nonpaid, who subsequently becomes a member of a paid department, from the benefits of the association.

Therefore, we take it that the facts that Lea was a member of the J. C. Cleland hose team of Fremont, a nonpaid organization, and was an elected representative of it to the

forty-third annual convention of the Nebraska State Volunteer Firemen's Association, create no presumption that his status, while attending that state meeting, was other than a paid member of the organization he represented.

It is insisted by the appellant that Lea's previous connection with the instrumentality which caused his death was such as to charge him with wilful negligence and to deny him recovery. But Lea had no connection with the toy cannon, and was not participating in its use at the time of the accident which caused his death. It cannot be said that his previous acts were the proximate cause of his injury. Those acts had spent their force so far as their potentiality for harm may have existed. The proximate cause of Lea's injury was the act of the third person in charge of the cannon at the time of its discharge which resulted in the injuries from which Lea died. *Boyce v. Burleigh*, 112 Neb. 509.

An express grant of power to a municipality implies on part of the latter the duty to exercise it in a reasonable manner for public good. This necessarily involves on part of city authorities, subject to express or implied restrictions in the terms of the grant, the right to adopt and carry out reasonable plans and to pursue reasonable methods to make the grant effective, and to accomplish the result intended by the donor of the power. As we have seen, the power to organize, support, and maintain fire departments was expressly conferred upon the city of Fremont by the terms of its charter. As cities increase in size, under modern conditions, the necessity of an adequate fire protection correspondingly increases. It must be admitted that, in order to accomplish this necessary work effectively, the city must have men who are instructed and skilled in such work, and able, because of their skill, to combat this increasing peril. The necessities of the situation plainly imposed the duty to provide for the proper instruction of the fire department upon the mayor and council of the city of Fremont.

In discharge of this obligation, the city of Fremont adopted the plan or policy of sending representatives of the

fire department to, or causing them to attend, the annual state convention where such necessary instruction was available. It must be conceded that, as a plan or policy, it was both economical and reasonable and proper. It was within the discretion of the municipal authorities to adopt and carry out. Pursuant to this plan, Lea attended the Hastings convention for the purpose of receiving this essential instruction.

We do not deem the absence of express verbal direction to Lea to attend the Hastings convention, if such was the fact, at all material, in view of the circumstances of this case. An order is but the will of the master which it is the duty of the servant to obey and conform to. It is admitted that it was the "desire" of the authorities that Lea attend. The chief of the fire department approved his going, secured his election as a delegate, and arranged for his attendance. His traveling expenses were provided for. His substitute for local fire duty was secured to be compensated at city expense. His own pay was to continue. In view of all this evidence, it cannot be said that in the slightest degree Lea failed to conform to the municipal will in his attendance at the Hastings convention. Besides, it appears that this was but following a custom that had prevailed for years, and was known and approved by the mayor and council. It therefore follows that the injury occurred when Lea was in the course of his employment. *Stockley v. School District*, 231 Mich. 523.

It is insisted, however, that the accident occurred upon the public streets of Hastings, and that the danger created by the accidental discharge of the cannon was one to which the public, generally, was exposed, and not one which arose out of, or was inherent in, Lea's employment. Under the facts in this case, the question here raised is foreclosed by our previous decision. Even though the accident be sustained by reason of risk incidental to the streets, the accident, under the circumstances of this case, arises out of, as well as in, the course of his employment. *Coster v. Thompson Hotel Co.*, 102 Neb. 585.

This case is supported by the weight of authority. *Refuge Assurance Co. Ltd. v. Millar,* 5 Butterworth, Com. Cas. (Eng.) 522; *M'Neice v. Singer Sewing Machine Co. Ltd.,* 4 Butterworth, Com. Cas. (Eng.) 351; *Bett v. Hughes,* 8 Butterworth, Com. Cas. (Eng.) 362; *Dennis v. White & Co.,* 2 K. B. Div. 1916 (Eng.) 1; *Pierce v. Provident Clothing and Supply Co. Ltd.,* 1 K. B. Div. 1911 (Eng.) 997; *Milwaukee v. Althoff,* 156 Wis. 68; *Matter of Katz v. Kadans & Co.,* 232 N. Y. 420; *Matter of Roberts v. Newcomb & Co.* 234 N. Y. 553; *Foley v. Home Rubber Co.,* 89 N. J. Law, 474.

The language restricting a master's liability for compensation under our compensation act to "an accident arising out of, and in the course of, employment" was first used in the English act. These words, in this connection, appear in practically all of the American compensation statutes. The English act was largely the source of American legislation. The phrase, "arising out of, and in the course of employment," was construed with reference to street risks by the House of Lords in the case of *Dennis v. White & Co.,* 2 K. B. Div. 1916 (Eng.) 1. In this decision, which publicists generally concede as one of the most important decisions under the compensation acts ever handed down, that tribunal laid down the law with reference to street accidents as follows:

"Where a workman is sent into the streets on his employer's business, whether habitually or occasionally, and whether on foot or on a bicycle, or on an omnibus or a car, and he meets with an accident by reason of a risk of the streets to which his employment exposes him, the accident arises out of as well as in the course of his employment; and it is immaterial that the risk which caused the accident is one which is shared by all members of the public using the streets under the like conditions."

Adhering to *Coster v. Thompson Hotel Co., supra,* it follows that the injury in the present case was not only received while in the course of employment, but arose out of Lea's employment.

Penalties for "delayed payment" to the extent of 50 per

cent. allowed by the compensation commissioner in this case were disallowed on appeal by the district court, which action we approve. It follows, adhering to the construction of the statute involved here adopted, attorney's fees of plaintiff's attorney for services rendered in the district court may not be allowed and taxed to defendant, and that portion of the judgment of the district court so ordering is erroneous and is reversed.

The judgment of the district court, thus modified, is, in all things, affirmed.

AFFIRMED AS MODIFIED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLEE, V. FARMERS STATE BANK OF DIX: VAN E. PETERSON, RECEIVER, APPELLANT: OMAHA NATIONAL BANK, CLAIMANT, APPELLEE.

FILED MAY 7, 1927. No. 24909.

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." *State v. Atlas Bank*, 114 Neb. 646.
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." *State v. Atlas Bank*, 114 Neb. 646.
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." *State v. Atlas Bank*, 114 Neb. 646.

4. ———: ———: ———. Transaction examined, and *held* not to be a deposit protected by the guaranty fund.

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

Roland V. Rodman and *C. M. Skiles,* for appellant.

Smith, Schall, Howell & Sheehan, Gaines, Van Orsdel & Gaines and *Warren H. Howard, contra.*

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

PER CURIAM.

On February 20, 1924, a receiver was duly appointed in the above entitled action to take charge of and wind up the affairs of the Farmers State Bank of Dix, Nebraska, which, for convenience, will hereinafter be referred to as defendant.

In the course of liquidation, the Omaha National Bank filed a claim with the receiver for $3,000, based upon a certificate of deposit issued by the defendant, and prayed that it be allowed as a preferred claim and adjudged payable out of the depositors' guaranty fund. The trial court allowed the claim against the bank and further adjudged that it be paid out of the guaranty fund. No objection is made to the allowance of the claim against the bank, but the receiver appeals from that part of the judgment ordering the claim to be paid out of the guaranty fund.

It appears that defendant, on July 26, 1923, issued a certificate of deposit to one George A. Roberts for $3,000, due January 26, 1924. In due course of business and before maturity, Roberts assigned the certificate to the claimant as collateral security for an obligation held by it against Roberts. The certificate was in proper form and on its face bore no evidence of irregularity. Under the evidence, the bank is clearly liable for the amount of the certificate and interest. Is the depositors' guaranty fund liable for the payment of this certificate? A determination of this

question involves an examination of the circumstances surrounding its issue.

It is the claim of the receiver that the certificate is not protected by the guaranty fund because the circumstances of its issue bring the transaction within the inhibition of section 8033, Comp. St. 1922, as reenacted by chapter 191, Laws 1923, which reads as follows:

"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."

The record shows that R. A. Babcock was, at the time of the transaction and for several years prior thereto, an officer and stockholder of the defendant bank; that during the entire period the bank was hard pressed for funds to meet its current demands. While it had a capital of $20,000 and deposits of approximately $100,000, its cash reserve was way below the 15 per cent. requirement of the law. Taking account of its bad paper, it had lost more than its entire capital stock and surplus. For more than two years its cash reserve was habitually below the legal requirement. That Babcock knew of the straits in which the bank was placed seems clear.

With reference to this transaction, Babcock testified that he called Roberts over the telephone "and told him that we needed some money at Dix for the business there, and if he could spare me $3,000 that I would send him a note which I had in my note case at Potter to secure him for this $3,000, and he told me that he could arrange it to let me have the money." Babcock thereupon pledged as collateral a note of $4,000 and drew a draft on Roberts for $3,000, which he honored. This $3,000 was deposited to the personal credit of Babcock. A short time thereafter Babcock drew his personal check for $3,000 payable to the bank

and had a certificate of deposit therefor issued in the name of Roberts. This certificate was dated January 26, 1923, and was renewed July 26, 1923. This latter certificate is the one in controversy. During the period of these transactions the cash reserve was way below the requirements of the law. On cross-examination, Babcock was asked: "Q. Then, did you pledge your personal property in order to give money to the Farmers State Bank of Dix, your company's bank, to give it money to take care of its current needs? A. I did. Q. That was what that $3,000 was there for? A. Yes, sir."

Stripped of all form, the transaction amounts to this: Defendant bank was hard up for ready money, of which Babcock was fully aware. He borrowed $3,000 and placed it in the bank to his credit for the purpose of bolstering up the immediate needs of the bank. Later, he drew his check in favor of the bank for the amount he had deposited and, instead of having the certificate of deposit issued to himself, he had it issued to Roberts, who in turn surrendered Babcock's obligation which he held and returned his collateral. This latter transaction is the same as though the certificate had been issued to Babcock and indorsed by him to Roberts. But if the transaction be considered as though Babcock had drawn his check to Roberts who had cashed and deposited the same in the bank and taken a certificate of deposit, the result would be the same. Roberts was also an officer of the bank, knew its pressing needs and had theretofore advanced large sums to bolster up its immediate demands. Under the facts in this record, it could not be said that Roberts was a depositor within the meaning of the guaranty law. At the present sitting of this court, we affirmed, without a written opinion, a series of claims against this same bank, based upon certificates of deposit issued to Roberts, and held that under the circumstances the advances made by Roberts were loans, and not deposits, within the protection of the guaranty law.

In *State v. Atlas Bank of Neligh*, 114 Neb. 646, the question presented was, in its essential features, substantially

the same as the one at bar. In the course of the discussion in that case it was said:

"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,"—citing *Kidder v. Hall*, 113 Tex. 49; *First Nat. Bank of St. Cloud v. Hirning*, 48 S. Dak. 417.

We are quite convinced that Babcock did not place the money in the bank as a matter of safe-keeping or for his own use, but that his purpose was to help the bank in meeting a pressing demand upon it. It was not a deposit in the ordinary and usual course of business. It was a transaction within the inhibition prescribed by section 8033, Comp. St. 1922, and not protected by the guaranty fund.

An argument was presented by the claimant that the certificate of deposit was a negotiable instrument and it being an innocent purchaser would have recourse against the defendant and the guaranty fund. The question presented by this argument has been determined adversely to claimant's contention in so far as it applies to the liability of the guaranty fund. In *State v. Farmers State Bank*, 111 Neb. 117, it is said:

"The circumstances under which the guaranty fund may

be liable are entirely apart from the law pertaining to negotiable paper. A holder of a certificate of deposit in a bank who seeks to hold the guaranty fund liable for its payment must show that the transaction leading up to the issuance of the certificate was such that the law holds the guaranty fund liable for its payment. The mere fact that a certificate recites on its face that a certain sum has been deposited, or that officers of the bank may have stated that the deposit is protected by the guaranty law, does not make the guaranty fund liable for payment, if in fact a deposit has not been made, as that term is understood in the guaranty law. The banks have nothing to do with the guaranty fund as such. It is a fund raised by assessments against all state banks, administered by officers of the state to protect deposits in banks."

So far as participating in the guaranty fund, the claimant stands in the shoes of Babcock and Roberts, neither of whom could recover against the guaranty fund.

From an examination of the record, we conclude that the district court erred in allowing the claim as one payable out of the guaranty fund. The judgment is therefore reversed and remanded, with directions to enter judgment in accordance with this opinion.

REVERSED.

BETTY JEAN WILSON, APPELLEE, V. THAYER COUNTY AGRICULTURAL SOCIETY ET AL., APPELLANTS. *

FILED MAY 7, 1927. No. 24996.

1. **Agriculture**: COUNTY AGRICULTURAL SOCIETIES: STATUS. A county agricultural society organized under section 6, art. I, ch. 1 (secs. 1-80) Comp. St. 1922, has the power to sue and be sued, and is not a governmental agency exempting it from liability for torts, nor is it such part of the county organization as to require it to be sued in the name of the county.
2. **Evidence**: EXHIBITION OF INJURIES TO PERSON: DISCRETION OF COURT. The extent to which one suing for damages for personal

* See note, 37 Yale Law Journal, 113.

injuries may be allowed to exhibit the evidence of such injuries to the jury on the trial is a matter largely of discretion of the trial court. *Held*, in the instant case, that this discretion was not abused.

3. **Negligence.** In the circumstances shown by the evidence in this case, "the negligence of a parent * * * cannot be imputed to an infant who is injured through the carelessness of another party." *Huff v. Ames*, 16 Neb. 139.

4. **Master and Servant:** LIABILITY OF MASTER. It is the duty of one who does in person, or causes to be done by another, an act which from its very nature is liable, unless precautions are taken, to do injury to others, to use reasonable care that those precautions are taken; and he cannot escape his duty by turning the whole performance over to a contractor. When the work is one that is likely to result in injury to others unless preventive measures be adopted, the employer cannot relieve himself from liability by employing a contractor to do what was his duty to do, to prevent such injurious consequences.

5. ———: LIABILITY. A principal is liable to third persons for misfeasances, negligence and omissions of duty of his agent, and the agent is also liable to third persons for his own misfeasances and positive wrongs. But the agent is not ordinarily liable to third persons for his own nonfeasances or omissions of duty in the course of his employment.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Affirmed in part, and reversed in part.*

M. H. Weiss and *Lloyd Dort*, for appellants.

J. T. McCuistion and *Hartigan & Fouts, contra.*

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

GOSS, C. J.

Betty Jean Wilson, a minor, suing by Taylor Wilson, her father, had judgment for $3,500 against Thayer County Agricultural Society and others for personal injuries, and the defendants appealed.

The evidence shows the plaintiff, then two years old, was taken by her father and mother on the evening of Sep-

tember 1, 1921, to attend the county fair at Deshler in Thayer county. Admission fees were paid by the father and mother to the grounds and to the grandstand. No fee was paid or asked for the child, who was carried by the father. With others gathered in the grandstand at the fair grounds they were witnessing a fireworks exhibition provided by the society. It was charged in the petition, and there was evidence to prove, that during the course of the setting off of the fireworks in front of the grandstand from a point some distance across a race track, a ball of fire or sparks therefrom came over into the grandstand and alighted on the dress of the little girl below her chin, while she was lying on her father's arms. This set fire to her clothing and before the fire was extinguished she was badly burned and permanently injured. A few seconds previously a baby buggy near-by had been so set on fire in the grandstand near the seats of the Wilsons. At the time of the trial the area of a large portion of plaintiff's breast showed that it was burned over and there were deep scars on her neck and chin. A well-known surgeon who examined her testified that the scars on her neck and breast carried through the skin and fatty layer beneath the skin, into the deep *fasciæ*, or internal structure of the connective tissues, of the neck and breast; certain plastic surgery may release the deep adhesions and contractions, but there will always be a mottled appearance of the skin; by proper exercise she is stretching the scars and relieving some of the deformity of posture caused by their presence.

The Thayer County Agricultural Society was organized under section 6, ch. 1, Comp. St. 1922, by virtue of which, whenever 20 or more persons, residents of a county, shall organize themselves into a society for the improvement of agriculture, and shall have adopted a constitution and by-laws and shall have raised not less than $50 in any one year and certified the amount to the county clerk, the county board shall levy a tax upon assessable property,

not exceeding three-fourths of a mill, or sufficient to pay a certain amount, dependent upon the population of the county, and shall pay the amount of taxes collected thereon to the treasurer of such agricultural society. Each county society has the power of eminent domain, limited to the appropriation of not to exceed 40 acres of land; and to have as an *ex officio* member of the state board of agriculture either the president of the society or an accredited delegate. Section 57 of the same chapter provides that counties in their organized governmental capacity may establish and maintain county fairs by going through certain procedure and by vote of the people of the county, as provided in subsequent sections, but the defendant society was not such.

In support of their first assignment of error, the defendants argue that the court erred in receiving any evidence over their objection, on the theory that the proceeding is one in reality against the county, and that this society is a part of the county organization and as such exercises authority of sovereignty and is a governmental agency. If the county itself had organized the society under authority of a vote of the people, by the power granted by the legislature in section 57, *supra*, that objection might have pertinence. That question, however, is not before us, and is not decided here and is merely stated for the purpose of aiding a decision as to what was the legislative intent when the present society was provided for by legislative enactment. The legislature separately provided for agricultural societies organized by individuals and for agricultural societies organized by counties as conductors of fairs. Each must be separately tested as to its liabilities under the law. Defendants cite cases to the effect that mandamus will lie to compel the county board to act on a claim for a statutory allowance for the benefit of a county fair organized as this defendant was. That is true, but it is because such a claim is a claim against the county and must first be presented to the county board, upon whom the law places the

duty of passing on claims against a county, and, if disallowed, the jurisdiction to hear the case on appeal then resides in the district court, which does not have jurisdiction in the first instance. In such a case mandamus lies to compel the county board to perform its plain administrative duty to pass on the claim one way or the other; but the fact that a society may successfully invoke mandamus against a county does not of itself prove that the society is a governmental agency. Tested by the dominion actually exercisable by the county, the argument also fails, for the county had no control over the society either in law or in fact in the character of exhibition put on by the society or in the manner of its execution.

Defendants cite *State v. Robinson,* 35 Neb. 401, as authority for the conclusion that an agricultural society is a governmental agency and therefore supports the proposition that the suit here should have been instituted against the county. While in that case the court said that "agricultural societies are not corporations within the ordinary meaning of the term, but rather agencies adopted by the state for the purpose of promoting the interests of agriculture and manufacturing," yet the case bears internal evidence to refute defendants' application of it to the point in issue. It was a case where the agricultural society was suing the county to require the county to provide funds to pay the society the amount fixed by statute as due the society from the county. If plaintiff is capable of suing, it is, in the absence of a prohibitory statute, likewise capable of being sued; it is a separate entity from the county. It is adopted by the state or fostered by the state in the sense that the legislature provided for its creation and for certain uniform sustenance for the purpose of promoting the interests of agriculture. It is an agency in the generic definition of that word, but it is not an agent in the legal sense that can bind a governmental principal and itself be relieved from liability on its own contracts or for its own torts on the ground that it is a governmental agency as that term

is legally understood. The legislature never intended to limit the amount that could be paid by the county to support this society and at the same time, by implication, to make it an agency that could subject the county to suits for its acts. It follows that the court did not err in refusing to receive evidence on the ground assigned.

Defendants complain that the court, during the examination of the mother as a witness, permitted the injuries of the child to be viewed by the jury for a period of 5 to 12 minutes. No objection was made to the exhibition, but merely to its length and to the use of her to illustrate the questions put to the mother and her answers. We do not find from the character of the evidence and what happened there, as shown by the record, that the court in any way abused its discretion or that the jury were likely to be stirred up unduly by this view of the child.

As to the complaint that the damages awarded are excessive, it appears, in addition to the scars as heretofore briefly described, from the evidence, that plaintiff was in the hospital and otherwise undergoing treatment for these burns for a long period. From her neck to her inter-mammillary line, the skin was burned off and the tissues were deeply involved so that nearly all of that area was disfigured in addition to the deep horizontal scar across the neck under the chin. The pain endured by this little child, just at the age when speech begins to dawn, must have been like the inarticulate suffering of some stricken animal. Her physical disability had not ended at the time of the trial three years later. She will always, to some degree, bear the stamp of the flame. It seems to us, therefore, that the finding of the jury on this point shows that the jury were not inflamed by the exhibition of the child at the trial and manifested restraint in their assessment of damages.

Considerable space in defendants' brief and argument is devoted to a discussion of the alleged error of the court in receiving evidence and rejecting evidence, and relating to instructions concerning the relation of the parent to the

child. The plaintiff grounded her case, and the court submitted it to the jury, on the theory that the agricultural society was negligent in the manner of exploding or directing the handling and exploding of its fireworks, and that it did not furnish her a reasonably safe place to sit with her parents to view the fireworks, in that the portion of the grandstand where they were seated was not provided with proper screens to prevent dangerous missiles from entering the grandstand, though some of the grandstand was so protected by a wire backstop. The defendants' theory of the law is that there was notice to the parents of the dangerous character of the place before the child was injured, and that the child should have been removed before the accident occurred. While, in the action of a father for his own benefit to recover damages which he has suffered by reason of injury to his child, his own negligence contributing to the injury may defeat his recovery *(Tucker v. Draper,* 62 Neb. 66*)* yet, under the rule long in force in this state, "The negligence of a parent * * * cannot be imputed to an infant who is injured through the carelessness of another party." *Huff v. Ames,* 16 Neb. 139; *Tucker v. Draper,* 62 Neb. 66; *Hajsek v. Chicago, B. & Q. R. Co.,* 68 Neb. 539. While the cases do not entirely agree on this point, this is the majority view and the great weight of authority. 15 A. L. R. 414, note; 20 R. C. L. 155, sec. 129.

The society had a written contract with North American Fireworks Company of Chicago to exhibit displays of fireworks four nights of the fair. This injury occurred on the third night. The society, among other things, furnished and paid helpers to erect the necessary supports for the fireworks and to aid in setting them off, though the expert direction was by a man sent by the company for that purpose. The defendants strenuously insist that the fireworks company was an independent contractor, and that the defendants, therefore, are not liable for any tort that may have been committed through the contractor's negligence; and that the trial court erred in holding as a matter of

law that the evidence was insufficient to submit the case to the jury on that theory of defense. The meaning of what is an independent contractor is not readily susceptible of precise or fixed definition to fit all cases that may arise. Each case must be determined on its own facts. Here, at the best that might be stated truly for the society, there was interwoven the duty of the fireworks company in presenting the exhibition and the duty of the agricultural society to furnish a reasonably safe place for its invited spectators. And that leads us to say here that, in the circumstances, we do not consider the plaintiff a trespasser or at best a mere licensee, as described by the defendants, but rather an invitee, even though no admission fees were actually paid for her. By the act of the society in admitting a child of her tender years, in the arms of a parent, past the cashiers of the outer gate of the grounds and the inner gate of the grandstand, a portion of the admissions paid by those in charge of her will, if necessary, be considered attributable to her. One of the most applicable discussions on the defense of independent contractor is found in our own reports. It arose in the suit of an infant of five years against an exposition company and its officers and against a fireworks company, and the same defense of independent contractor was interposed as a matter of law on demurrer. *Bianki v. Greater American Exposition*, 3 Neb. (Unof.) 656. In the opinion the court said:

"While it has often been held that the owner of premises, who has put an independent contractor in charge thereof, is relieved from liability for damage to persons injured by the acts of such independent contractor, on the other hand it is the duty of every one who does in person, or causes to be done by another, an act which from its very nature is liable, unless precautions are taken, to do injury to others, to see to it that those precautions are taken; and he cannot escape his duty by turning the whole performance over to a contractor. * * * The distinction is, when the work is one that will result in injury to others unless

preventive measures be adopted, the employer cannot relieve himself from liability by employing a contractor to do what it was his duty to do, to prevent such injurious consequences. It is one's duty to so conduct his own business as not to injure another, and this duty continuously remains with the employer."

Having employed the fireworks company to put on the exhibition and having furnished and paid part of the help in erecting and exploding the fireworks, the society cannot now say that its agent to do this work was an independent contractor and thus escape liability for any failure to do its duty, provided that failure is proved and submitted to the jury in due form.

The suit was against the defendants Thayer County Agricultural Society, Adam Kahle, Henry C. Struve, Paul Grupe, Richard W. Rodenburg, John Albrecht, George Barthel, Edward J. Mitchell, Albert Caughey, and Edward R. Henrichs. The court instructed the jury that the action had originally been brought against all of them, but that at a former trial the defendants Struve and Barthel had been relieved of liability by order of the court. The other defendants complain of this instruction. We fail to see how it prejudiced the other defendants both as the case then stood and by reason of our following discussion. The remaining personal defendants assign error in the failure of the court to eliminate them for lack of evidence of their personal liability. The amended petition describes these defendants as "the officers, directors and managers of the defendant association," but does not allege any specific acts done by them or any one of them; nor do we find in the brief of appellee any reference to evidence proving any specific acts of these defendants showing that they participated in any acts of malfeasance toward the plaintiff, except they were managers and directors of the society. While this is a law case and we are not trying it *de novo* and we are under no obligation to read the evidence save as pointed out, yet the writer has searched the record in

vain, seeking specific evidence on which the personal defendants were held by reason of any active participation in the matter. It would seem, therefore, that the only ground on which they could be liable would be for nonfeasance; that is, for their failure as directors and managers to furnish a reasonably safe place to view the exhibition, or to see, as such officers, that the duty of the society to use reasonable care not to injure a spectator by sending explosives into the place provided for the spectators was done. We do not understand that to be the rule of law applied to defendants in their situation. The society was the principal. These defendant officers were its agents charged as such with the execution, in the scope of their employment, of such duties as belonged to their principal. In discussing the liability of agents for torts Judge Story says: "The law upon this subject as to principals and agents is founded upon the same analogies as exist in the case of masters and servants. The master is always liable to third persons for the misfeasances and negligences and omissions of duty of his servant, in all cases within the scope of his employment. So the principal, in like manner, is liable to third persons for the like misfeasances, negligences and omissions of duty of his agent, leaving him to his remedy over against the agent in all cases where the tort is of such a nature as that he is entitled to compensation. * * * The agent is also personally liable to third persons for his own misfeasances and positive wrongs. But he is not, in general (for there are exceptions), liable to third persons for his own nonfeasances or omissions of duty, in the course of his employment. His liability, in these latter cases, is solely to his principal." Story, Agency (9th ed.) sec. 308, citing *Henshaw v. Noble*, 7 Ohio St. 226. In *Bianki v. Greater American Exposition, supra*, this court held that in a similar case the directors and officers were not liable for the negligence of the special agent employed to do the work. So, we conclude that the court ought to have sustained the several motions of the individual personal de-

fendants to direct a verdict or for a judgment in their favor. The brief on behalf of the defendants discusses a large number of other errors assigned in relation to the instructions of the court and instructions requested by the defendants, but refused by the court, as well as some propositions aside from the instructions. The necessity for discussing many of these has already been eliminated by what we have heretofore said and particularly by our release of the individual defendants; the others were not, in our opinion, the cause of prejudicial error as to the remaining defendant, and it would serve no useful purpose to discuss them and thus prolong this already necessarily extended opinion. It follows that the judgment of the trial court should be affirmed as to Thayer County Agricultural Society; and as to the other defendants it should be, and is, reversed, with directions to enter judgment of dismissal in favor of the individual personal defendants.

AFFIRMED IN PART, AND REVERSED IN PART.

WILLIAM M. KIMBLE, APPELLANT, V. CLYDE A. ROEDER, APPELLEE.

FILED MAY 7, 1927. NO. 24763.

1. **Appeal:** DISMISSAL: REVIEW. Where the district court excuses the jury and dismisses the action after admitting proof by each party, the appellate court, in reviewing the decision, will assume the existence of every material fact which the evidence on behalf of plaintiff establishes or tends to prove and give him the benefit of proper inferences therefrom.
2. **Trial:** EVIDENCE: QUESTIONS FOR JURY: Where the evidence is conflicting on the trial of a controverted issue of fact, the credibility of witnesses and the probative effect of their testimony are questions for the jury.
3. ———: DISMISSAL. Where the evidence is sufficient to sustain a verdict in favor of plaintiff on a material issue of fact raised by the pleadings, it is error to excuse the jury and dismiss the action.
4. **Physicians and Surgeons:** MALPRACTICE: EVIDENCE. Physicians

and surgeons performing an exploratory operation resulting in the removal of a kidney cannot, as a matter of law, defeat an action for malpractice by testimony that, possessing ordinary knowledge and skill, they unanimously determined on the course pursued in the exercise of their best judgment, if they did not in fact use ordinary care in making their diagnosis after exposing the kidney and if they were in fact chargeable with negligence in removing it.

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

J. E. Daly and *J. J. Harrington,* for appellant.

Gurley, Fitch & West and *F. A. Wright, contra.*

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

ROSE, J.

This is an action to recover damages in the sum of $87,600 for malpractice by defendant as physician and surgeon. Defendant denied the negligence with which he was charged in the petition. The cause was tried to a jury. Evidence on both sides was adduced at great length. Over 3,600 questions were propounded to witnesses and the proofs covered more than 700 pages of the record. After the parties rested, the trial court on motion of defendant excused the jury and dismissed the action. Plaintiff appealed.

The appeal presents the involuntary nonsuit for review. Owing to the nature of the charges against defendant and the volume and character of the testimony, grave questions searching all the evidence were submitted to the trial court. The review also requires consideration of the evidence from every standpoint, but details to which the parties resorted in the trial, in the briefs and in the arguments must necessarily be avoided in expressing the views of the appellate court.

Plaintiff, a resident of Dodge county, became suddenly

and critically ill January 20, 1921. Doctors E. A. Buchanan and H. C. Pederson of Fremont were called to attend him. They were unable to make a definite or satisfactory diagnosis. Suspecting kidney trouble requiring surgery, defendant was called into the case as an expert in that branch of the medical profession. At different times cystoscopic examinations of plaintiff's bladder and kidneys were made by different physicians. In efforts to determine the nature of the disorder the X-ray was used. Specialists in different lines of practice examined plaintiff and made reports to defendant, who, by means of an incision February 19, 1921, explored the right side of plaintiff's abdomen, including the right kidney, without discovering the disturbing cause. Plaintiff remained in a serious condition until June 6, 1921, when Buchanan and Pederson, suspecting an abscess in the left kidney, inserted needles without finding pus. They consulted with defendant June 7, 1921. Fearing an infection of the left kidney, they all agreed that an exploratory operation in the region thereof was necessary. With the assistance of Buchanan and Pederson, this operation was performed by defendant at the Fremont Hospital, in Fremont, June 9, 1921. The left kidney was exposed for examination and removed.

Negligence in the diagnosis after the left kidney was exposed and in the permanent removal of that organ without sufficient cause were controverted issues in the case. In testing the sufficiency of the evidence for the purpose of reviewing a compulsory nonsuit, the court is committed to the following rule: Where the district court excuses the jury and dismisses the action after admitting proof by each party, the appellate court, in reviewing the decision, will assume the existence of every material fact which the evidence on behalf of plaintiff establishes or tends to prove and give him the benefit of proper inferences therefrom. *Central Nat. Bank v. Ericson*, 92 Neb. 396; *Nothdurft v. City of Lincoln*, 66 Neb. 434; *Paxton v. State*, 59 Neb. 460; *Harris v. Lincoln Traction Co.*, 78 Neb. 681; *Tate & Ehr-*

hardt v. Loney, 85 Neb. 559; *Schmelzel v. Leecy*, 104 Neb. 672; *O'Hara v. Hines*, 108 Neb. 74; *Shawnee State Bank v. Lydick*, 109 Neb. 76; *Traphagen v. Lincoln Traction Co.*, 110 Neb. 855; *Hall v. Union P. R. Co.*, 113 Neb. 9.

In the present case there was evidence tending to prove that the left kidney, when raised to the surface of plaintiff's body for examination during the exploratory operation, did not disclose pus visible to the naked eye, and that defendant failed to require a microscopic examination for indications of infection. There was other evidence tending to prove that the capsule of the kidney and the surrounding tissues did not disclose the presence of pus. There is also testimony, if believed by the jury, sufficient to create the inference that the actual condition of the left kidney and of the surrounding region did not necessitate the removal of that organ, and that defendant did not exercise ordinary skill and care in making a diagnosis and in removing the kidney after exposing it for examination. The necessity for an exploratory operation implied lack of definite information disclosing the real cause of plaintiff's abnormal condition and required the usual and ordinary care exercised in making a diagnosis in view of the additional knowledge acquired by the exploration. On this issue the witnesses did not agree. Where the evidence is conflicting on the trial of a controverted issue of fact, the credibility of witnesses and the probative effect of their testimony are questions for the jury.

Where the evidence is sufficient to sustain a verdict in favor of plaintiff on a material issue of fact raised by the pleadings, it is error to excuse the jury and dismiss the action.

In behalf of defendant it is argued that the three operating physicians and surgeons used their best judgment with full knowledge of the history of the case and of former explorations, examinations, observations, treatments and conditions. Physicians and surgeons performing an exploratory operation resulting in the removal of a kidney

cannot, as a matter of law, defeat an action for malpractice by testimony that, possessing ordinary knowledge and skill, they unanimously determined on the course pursued in the exercise of their best judgment, if they did not in fact use ordinary care in making their diagnosis after exposing the kidney and if they were in fact chargeable with negligence in removing it.

For error in failing to submit issues of fact to the jury, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. CITIZENS STATE BANK OF RALSTON: R. O. BROWNELL, RECEIVER, APPELLANT AND CROSS-APPELLEE: SOUTHERN SURETY COMPANY, CLAIMANT, APPELLEE AND CROSS-APPELLANT.

FILED MAY 7, 1927. No. 25767.

1. Banks and Banking: GUARANTY FUND: DEPOSITS. "In determining whether a transaction creates a 'deposit' within the protection of the guaranty fund, the law will look through all semblances and forms to ascertain the actual facts as to whether there has been a *bona fide* deposit, and, if not, the guaranty fund does not protect the transaction, no matter how it may be evidenced." *State v. Farmers State Bank*, 112 Neb. 380.
2. ———: ———: ———. Where a state bank, to induce a surety company to become surety on a supersedeas bond, issues cashier's checks to the surety company which it deposits in another bank in a special account and draws a check thereon for the amount, payable to the state bank issuing the cashier's checks, and in lieu thereof the state bank issues to the surety company certificates of deposit, such transaction does not evidence a deposit by the surety company, within the meaning of the depositors' guaranty fund law.
3. ———: ———: JUDGMENT FOR A TORT. A judgment against a state bank, in an action founded on tort, is not within the protection of the depositors' guaranty fund.
4. ———: ———: JUDGMENT ON CONTRACT. Where a depositor

in a state bank, whose deposit is protected by the guaranty fund, reduces his claim to judgment, and the bank fails before the judgment can be enforced, such judgment is within the protection of the depositors' guaranty fund.

5. ———: ———: JUDGMENT: RIGHTS OF ASSIGNEE. The assignee of a judgment against a state bank, which is protected by the guaranty fund, is entitled to the same relief as the original judgment creditor.

6. ———: ———: ———: INTEREST. The fact that a judgment against a state bank for a deposit protected by the guaranty fund draws interest at 7 per cent. does not deprive the holder of such judgment of the protection of the depositors' guaranty fund.

7. Judgment: MERGER. It is a general rule that a judgment is to be regarded as a new debt, and that the cause of action on which it is founded merges therein, but such general rule is subject to limitations and exceptions.

8. ———: ———. The law of merger does not forbid all inquiry into the nature of the cause of action. If the prevailing party was entitled to certain privileges under his contract, he may be entitled to the same privileges after the entry of judgment.

9. ———: ———. Though a debt or obligation may be merged in a judgment as to certain property, it may still remain as an effective cause of action against other property or funds.

10. ———: ———. The doctrine of merger will not be so applied as to be permitted to destroy the protection of the guaranty fund to a depositor who has reduced his claim for deposit to judgment.

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

C. M. Skiles and *Jackson B. Chase,* for appellant.

Dressler & Neely, contra.

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

GOOD, J.

The Southern Surety Company, hereinafter called claimant, filed certain claims against the receiver of the insolvent Citizens State Bank of Ralston, hereinafter referred to as

the bank, and prayed their allowance as preferred and payable from the depositors' guaranty fund. Objections to their allowance as preferred claims were filed by the receiver, on the theory that the claims did not represent deposits and were not within the protection of the guaranty fund. The trial court found for the claimant in part and adjudged the sum of $4,449.40 to be a preferred claim and payable from the guaranty fund, and the remainder of the claim or claims was allowed only as a general claim. The receiver has appealed from that part of the judgment which allowed a part of the claim as preferred, and the claimant has filed a cross-appeal from the disallowance of the remainder of the claims as preferred.

The following pertinent facts appear from the record: One Noersgaard was a depositor in the bank while it was a going concern. He demanded and the bank refused payment of his deposit. Thereupon he brought suit against the bank, and a trial in the district court resulted in a finding that Noersgaard was a depositor, and awarding him a judgment in the sum of $3,567.23. At about the same time one Rasmussen brought suit against the bank in the nature of a tort action and recovered a judgment for $2,175.40. The bank, then a going concern, desired to appeal from both judgments to the supreme court and procured the claimant to furnish supersedeas bonds. As a condition to its furnishing the supersedeas bonds, claimant demanded indemnity from loss. Thereupon the bank issued to the claimant or its agents two cashier's checks, aggregating $6,000. The agents indorsed and deposited these cashier's checks in an Omaha bank in a special account, and immediately drew a check on the special account for $6,000, payable to the bank, and upon presenting this to the bank it issued to the claimant two certificates of deposit, one for $3,700 and the other for $2,300. These certificates drew 4 per cent. interest. At the expiration of a year they were renewed for the original amounts, plus interest. The two cases were appealed to the supreme court, where

the judgments of the district court were affirmed and mandates issued to the district court. Thereupon execution was issued and returned unsatisfied. The bank at this time was in control of the guaranty fund commission. The claimant paid to Noersgaard and Rasmussen the amount of their respective judgments, with interest, and took an assignment thereof. In filing its claim, claimant set out all of these facts and prayed for allowance of the entire amount as preferred.

Claimant argues that the two certificates represent deposits, and that it is entitled to an allowance of the full amount thereof as a preferred claim, or, in lieu, to be allowed the amount of the judgments as preferred.

With reference to the two certificates of deposit, we think it is quite plain that claimant did not become a depositor by virtue of the issuance of these two certificates. It placed no money of its own in the bank. What it did was to take the bank's money and place it in another bank to its credit, and then check it back to the bank and receive therefor two certificates of deposit, of which the ones in controversy are renewals. We think the transaction is precisely the same as though the bank, in the first instance, had issued the certificates directly to claimant as an indemnity because of its liability as surety on the supersedeas bonds. The bank, not the claimant, furnished the money, and by a circuitous method the bank's credit was transferred to the claimant and by the claimant back to the bank.

In *State v. Farmers State Bank*, 112 Neb. 380, it was said: "In determining whether a transaction creates a 'deposit' within the protection of the guaranty fund, the law will look through all semblances and forms to ascertain the actual facts as to whether there has been a *bona fide* deposit, and, if not, the guaranty fund does not protect the transaction, no matter how it may be evidenced." Under the rule there announced, we think it clear that the certificates, nominally evidencing a deposit, do not represent such within the meaning of the guaranty fund law.

We next come to the question as to whether claimant, as the assignee of the judgments, is entitled to the protection of the guaranty fund. The judgment in favor of Rasmussen was not based on a deposit. At no time, so far as the record discloses, was he a depositor in the bank. He obtained a judgment in a tort action and, as such, was a mere judgment creditor. An ordinary judgment creditor of a state bank is not within the protection of the guaranty fund law. Since Rasmussen was not a depositor and was not protected by the guaranty fund, the assignment of his judgment would give to the claimant no greater right. It is clear that the district court properly denied claimant a preference, as assignee, of the Rasmussen judgment. This disposes of the questions presented by the cross-appeal.

There remains to be determined the question as to whether claimant, as the assignee of the Noersgaard judgments, is entitled to the protection of the guaranty fund. That Noersgaard was a depositor is beyond question. As a depositor, he sued the bank while a going concern and obtained a judgment, which was a judicial determination that he was a depositor and determined the amount of the deposit. By the assignment of that judgment, claimant has obtained whatever rights Noersgaard had. If Noersgaard at the time of the assignment was entitled to have his claim preferred and adjudged payable from the guaranty fund, this claimant, as his assignee, is entitled to the same relief.

Counsel for the receiver argue that, by bringing action and reducing his claim to judgment, Noersgaard lost his status of depositor and became merely a judgment creditor, and that, as such, he is not within the protection of the guaranty fund law. They further argue that as the guaranty fund law limits the rate of interest on deposits to 4 per cent., and since Noersgaard's claim has been reduced to judgment, under the law it draws 7 per cent., and for that reason it is not within the protection of the guaranty fund.

We do not think that these contentions can be upheld. Noersgaard was a depositor and, as such, was protected by the guaranty fund. He was entitled to draw the money from the bank whenever he desired. The bank refused to pay. If the position of the receiver is tenable, then one having a deposit in a state bank protected by the guaranty fund is in the position that, if he attempts to withdraw his deposit and the bank refuses to pay, he must either submit to the bank's unjust refusal until such time as the bank fails and goes into the hands of a receiver, or, if he seeks to enforce payment by an action at law, he will forfeit the protection of the guaranty fund. If he retains his deposit, as such, in the bank and waits until the bank fails and goes into the hands of a receiver, then his deposit will be protected by the guaranty fund, but otherwise not. If the receiver's contention is sound, it would lead to this anomalous situation: that one having a deposit protected by the guaranty fund, and who is not able to collect from the bank because of its unjust refusal to pay, can do nothing, if he wants to retain the protection of the guaranty fund, except to hold the claim until the bank fails. In the meantime, if the bank continues as a going concern for a period of five years or more, the depositor's claim, if on an open account, after four years would be barred by the statute of limitations, and, if upon a certificate of deposit, it would be barred by the statute of limitations at the expiration of five years after the maturity thereof. If such a situation were permitted to prevail, the guaranty fund law would be a snare to entrap the unwary. It would permit an unscrupulous banker to obtain deposits, then refuse to pay the depositor when the amount was due, and, if the depositor sought to enforce payment, to require him to forego the protection of the guaranty fund. The protection of depositors that the law was designed to afford would be nothing less than farcical.

In this case, Noersgaard was entitled to his money on demand from the bank. The latter refused to pay. Noers-

gaard thereupon sued and recovered a judgment and had a judicial determination that he was a depositor and the amount of his claim as such. By what reasoning can it be said that Noersgaard ceased to become a depositor? Does the fact that he reduced his claim for a protected deposit to judgment deprive him of the protection afforded by law? If so, it must be on the theory that the protected claim is merged into an unprotected claim, when reduced to judgment.

It is no doubt a general rule that a judgment is to be regarded as a new debt, and that the cause of action on which it is founded is merged therein, but to this general rule there are limitations and exceptions. As to the limitations and exceptions to the general rule, 2 Freeman, Judgments (5th ed.) sec. 550, has this to say: "The law of merger as applied to judgments does not forbid all inquiry into the nature of the cause of action. Such inquiry may be prosecuted for any purpose consistent with the judgment, and is frequently necessary to its interpretation. The place where a contract was made may be ascertained, in order that the *lex loci*, which was a part of the contract, may have its effect upon the judgment. And for some purposes a judgment will be treated as an old debt in a new form. The doctrine of merger is calculated to promote justice and will be carried no further than the ends of justice require. The judgment does not annihilate the debt. The essential nature of the cause of action remains the same. The law of merger does not forbid all inquiry into the nature of the cause of action. If the prevailing party was entitled to certain privileges * * * under his contract, he may be entitled to the same privileges and exemptions under his judgment. Whenever justice requires it, the judgment will generally be construed, not as a new debt, but as an old debt in a new form. * * * A court may, under proper circumstances, look back of a judgment to see whether it is in contract or tort, and so may a court of equity, to ascertain whether a claim is really one of a

nature that equity is justified in enforcing." In section 551 of the same work it is said: "Though a debt or obligation may be merged in a judgment upon it, as to certain persons or property, it may still remain an effective cause of action against other persons or property. Where a party has cumulative remedies, as where he has a lien or other collateral security to either or both of which he is entitled to resort, a judgment upon one does not so merge his claim as to bar resort to the other. And if two distinct judgments have been entered on the same cause of action, the merger of one of those judgments in a statutory judgment does not affect the other. * * * The doctrine of merger is not inflexibly applied in equity and will not be permitted to destroy the security of a decree as a lien, when such a result is not in keeping with the ends of justice."

As a general rule, the doctrine of merger will be applied only when the ends of justice will be thereby subserved. To apply the doctrine of merger in this case would be to deprive a depositor of the protection afforded him by law. Justice and equity forbid the application of the doctrine under the facts disclosed by the record.

Under the guaranty law, a bank may not pay in excess of 4 per cent. interest on deposits which are protected by the guaranty fund, and because of this provision of the statute, it is argued, since Noersgaard's claim, when reduced to judgment, draws 7 per cent. interest, it is no longer within the protection of the guaranty fund. The purpose of the statute was to prevent the bank and depositor from contracting for a rate of interest in excess of 4 per cent. upon deposits that were protected by the guaranty fund. In this case there was no contract between Noersgaard and the bank to pay any rate of interest. The law fixed the rate of interest after the claim was reduced to judgment. Had the bank paid the claim, as it was in duty bound to do when demand was made, there would have been no interest. The fact that the law fixes a rate of interest after the claim has been reduced to judgment does not violate the depositors'

guaranty fund law. Under the law, when a claim is allowed on a deposit against a failed bank, it draws 7 per cent. interest from the time of its allowance. If the receiver sees fit to appeal from the allowance to the supreme court, the claim may draw interest at the rate of 7 per cent. for many months, and no one has had the temerity to contend that such interest rate would deprive the claimant of the protection of the guaranty fund. What essential difference is there in the two situations? In our view, there is no good reason why a distinction should be drawn. Because the law fixes the legal rate of interest on a judgment at 7 per cent. does not deprive Noersgaard of the protection of the guaranty fund. Since claimant, by an assignment from Noersgaard, has the same rights and the same protection as the judgment creditor, its claim, in so far as founded upon this judgment, is within the protection of the guaranty law.

The judgment of the trial court properly disposed of every question presented and is, therefore, in all things

AFFIRMED.

THOMPSON, J., dissents.

META LARSEN, APPELLEE, V. NICK LARSEN ET AL., APPELLANTS.

FILED MAY 7, 1927. No. 24799.

1. **Trial**: INSTRUCTIONS. It is elementary that it is the duty of the trial court in its instructions to the jury to fairly state the issues raised by the pleadings.
2. **Pleading**: ADMISSIONS IN ANSWER. In an alienation case brought by the wife against the husband's father, mother and sister, the admission in the answer that the respective relatives, without ulterior motives, counseled with the husband, when so requested, as to his interests and affairs, is not an admission of any wrongdoing on their part.
3. **Husband and wife**: ACTION FOR ALIENATION OF AFFECTIONS: MEASURE OF DAMAGES. Ordinarily, in such a case, the measure of plaintiff's recovery, if any, is the damage which she may have

sustained by loss of comfort, society, love and protection, usually expressed by the word "consortium."

4. Witnesses: HUSBAND AND WIFE: COMPETENCY. In such a case, statements made by the husband to the wife out of the presence of the defendants, are competent evidence to indicate the condition of the husband's mind and his feeling toward his wife at the time; and, prior to July 1, 1925, the husband could not be heard to contradict such statements. However, on the last-named date a legislative enactment amending section 8837, Comp. St. 1922, became effective so as to make the husband a competent witness in all such cases tried after this amendatory act took effect, without regard to when the cause of action arose.

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

Albert S. Johnston, Claude S. Wilson and *Waring & Waring*, for appellants.

Sloans, Keenan & Corbitt, contra.

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

THOMPSON, J.

This is an action commenced in the district court for Fillmore county by appellee, Meta Larsen, hereinafter called plaintiff, against Nick Larsen, Anna Larsen, and Ida Larsen, father-in-law, mother-in-law, and sister-in-law respectively of plaintiff, appellants, and hereinafter called defendants, seeking to recover damages from such respective defendants for alienating the affections of plaintiff's husband, and depriving her of his support, maintenance, comfort, and companionship. After the issues were duly joined, the case was tried to a jury, and verdict returned and judgment entered for plaintiff against the defendants, and each thereof: to reverse which such defendants respectively appeal. The petition also charged the defendants with having wrongfully and maliciously formed a conspiracy seeking to deprive the plaintiff of the above indicated

rights enuring to her by reason of such marital relations; and in furtherance of such conspiracy charged the defendants with the wrongful commission of sundry other acts affirmatively pleaded, leading up to and forming the basis of plaintiff's alleged right of recovery.

The defendants answered separately, and such answers were identical in terms. Each thereof, in substance, was as follows: Admits the marriage, defendants' relationship with Charles Larsen, the husband, and that no objections were interposed by defendants to such marriage; admits that as such father, mother, or sister, as the case may be, they at various times have advised with such Charles Larsen in reference to his personal affairs, when solicited by him to do so, but in good faith and without malice, and with a view solely to his welfare as such relative; further admits that plaintiff commenced an action for separate maintenance against her husband alleging as cause his breach of marital duties, of which no act of defendants was the controlling cause, and that plaintiff voluntarily dismissed such application; and for further answer, and as an independent paragraph thereof, defendants interposed a general denial to each and every allegation in plaintiff's petition "not hereinbefore expressly admitted or alleged."

To these respective answers plaintiff interposed by way of reply a general denial.

The errors relied on for reversal are as indicated by the motion for a new trial, the briefs filed, and oral argument had, and include the usual charge that the verdict is not supported by the evidence and is against the weight thereof; also exceptions to every instruction given by the court, and the refusal of the court to give numerous instructions asked by the defendants; also errors of law occurring at the trial.

We will first consider the challenge to the instructions, so far as we deem it necessary to a proper disposition thereof. Instruction No. 1, complained of, contains an extended synopsis of the facts set forth in the petition; also

that part of the answers heretofore indicated, save and except the general denial, which was omitted; further, a statement that the reply to such answers was a general denial, and then closes as follows: "These pleadings make the issue which you are to determine by your verdict." There were many material facts alleged in the petition, and necessary to be proved by plaintiff, which were not met, or intended to be met, by the answer, save by means of such general denial. It is elementary that the duty of the trial court in such a case is to fairly state the issues raised by the pleadings. By reason of such omission this was not done. The issues as stated left the facts forming the basis of plaintiff's recovery largely confessed by the defendants, an error so prejudicial as to impel reversal of the judgment.

As the case may be retried, it might be well to consider the law applicable to the facts, as we view the record. The admission in the answers that these respective relatives counseled with the husband, when so requested, as to his interests and affairs, was not an admission of any wrong-doing on their part, as they were clearly within their rights in so counseling. As we said in *Melcher v. Melcher*, 102 Neb. 790: "If the evidence is that the parents' sole motive was to promote the welfare of their son, and the circumstances and conditions were such that they might reasonably believe that the advice given was justifiable and for the best interest of all parties concerned, they cannot be held in damages."

Instruction No. 19, complained of by defendants, is as follows: "You are instructed that if you are satisfied that the defendants, or any of them, alienated the affections of Charles Larsen for Meta Larsen, and she thereby suffered the loss of the association and support of her husband through the agency of the defendants, or any of them, her measure of damages, against such defendant or defendants, would be her actual loss of support, and also the loss of affections and companionship of her husband, Charles Larsen, and the humiliation, if any, which she

might suffer as a logical result thereof." As the uncontradicted evidence in this case shows, the husband was a stout, able-bodied man, 39 years of age, and possessed of at least $2,400 worth of personal property, and that he personally, as well as his property, was within the jurisdiction of the court at all times, and as the law clothes the wife with the right to require him to contribute to her support—a right of which she was not deprived by defendants—there would be no liability on their part for such support in this alienation case, even if the evidence otherwise sustained the charges of the petition, which we do not decide. Under such a state of facts, the recovery, if any, must be for loss of comfort, society, love, and protection, usually expressed by the word "consortium." Hence, as this instruction failed to eliminate such husband's primary liability, it did not correctly announce the law of the case, and as this defect was not cured by any other instruction, the giving thereof was error. *Sohl v. Sohl,* 114 Neb. 353.

On the trial of the case the wife was permitted, over objections of the defendants, to detail in evidence conversations which she had had with her husband, in the absence of the defendants, for the purpose of showing, or tending to show, the condition of her husband's mind and his feelings toward her at such respective times. As we said in the course of our opinion in *Stocker v. Stocker,* 112 Neb. 565: "While evidence of what the husband said out of the presence of the defendant would ordinarily be hearsay and incompetent to prove such wrongful conduct of defendant as would tend to cause the husband to lose his affection for his wife, such evidence may be properly received to show the state of the husband's feelings toward his wife, and in this case the court, by proper instruction, informed the jury that such evidence was received only for such purpose." Hence, error was not committed by the trial court in admitting this evidence for such purpose.

Defendants, on their respective parts, procured the husband to be sworn as a witness, but owing to the objection

of plaintiff he was not permitted to testify. Extended offers were then made of the facts sought to be proved by such witness, to which objections were made and sustained. Under the law as it then existed, the husband was not a competent witness, and error was not committed by the court in refusing such proffered testimony. *Stocker v. Stocker, supra.* However, on July 1, 1925, a legislative enactment (Laws 1925, ch. 75) amending section 8837, Comp. St. 1922, became effective, so as to make the husband a competent witness in all such cases tried after this amendatory act took effect, without regard to when the cause of action arose.

While other errors are complained of as to instructions, as well as to the introduction of testimony, they are not likely to occur at a future trial of this case, if such should be had, and therefore are not further considered.

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

REVERSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. MACY STATE BANK: ROLLIE W. LEY, RECEIVER, APPELLEE: METROPOLITAN SAVINGS BANK & TRUST COMPANY, CLAIMANT, APPELLANT.

FILED MAY 7, 1927. No. 25651.

1. **Banks and Banking**: GUARANTY FUND: DEPOSITS. During the time a state bank is permitted by the banking department to remain open for commercial banking and thus continues in full exercise of its charter powers, under full charge and apparent control of its own officers, a transaction had with it by a depositor, in good faith, of such nature as to ordinarily create a deposit within the protection of the guaranty law, cannot be successfully challenged in behalf of the guaranty fund on the sole ground that at the time of such transaction such bank was deficient in lawful reserve, or was even insolvent.
2. **Evidence** examined, and *held* to establish the good faith of claimant as a "depositor" and its right to the payment of its claim as such from the guaranty fund.

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

Ziegler & Dunn, for appellant.

C. M. Skiles, Fred S. Berry and *James E. Brittain, contra.*

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

EBERLY, J.

The Macy State Bank, due to financial straits, was taken over by the department of trade and commerce on June 25, 1925, and placed in the charge of the guaranty fund commission of the state of Nebraska.

On August 21, 1925, pursuant to an order of the district court for Thurston county, in an action entitled the State of Nebraska, ex rel. O. S. Spillman, Attorney General, v. Macy State Bank of Macy, Nebraska, a receiver was duly appointed.

Thereupon there was presented by the Metropolitan Savings Bank & Trust Company, successors to the Metropolitan National Bank, a claim in the sum of $1,000 based upon a certificate of deposit for that amount, dated March 14, 1925, due two months after date. From the order of the district court denying its allowance "as a claim having priority of payment, and payable from the depositors' guaranty fund of Nebraska," claimant appeals.

The facts surrounding this transaction are as follows: Pursuant to arrangements with one J. E. Elliott, who was not connected with the bank and was then at Pittsburgh, Pennsylvania, on April 28, 1923, certificate No. 251 was made out payable to the order of J. E. Elliott, and was mailed by the Macy bank to him. No money was received by the Macy bank on that day, but a cash item was placed in the till to balance the entry made. On May 7, 1923, a letter dated May 3, 1923, was received from the Metropolitan National Bank of Pittsburgh inclosing a draft for $5,080.25, and stating further: "Proceeds of your

certificate of deposit to the order of J. E. Elliott which kindly place to his credit." On the same day a check for $169.75 was received from J. E. Elliott to cover the difference between the face of the certificate of deposit and the amount of this draft. This certificate was thereafter renewed from time to time, and the following narrates the subsequent history of the transaction, setting forth the date, number, and amount of each renewal, the difference in amounts between successive renewals representing the payments made upon the indebtedness thus evidenced by the Macy bank:

October 31, 1923	No. 280	$5,250
December 31, 1923	No. 287	$5,250
February 29, 1924	No. 306	$5,250
June 4, 1924	No. 319	$5,250
July 2, 1924	No. 323	$3,500
October 3, 1924	No. 339	$1,750
January 3, 1925	No. 369	$1,000
March 14, 1925	No. 391	$1,000

It is upon the certificate of $1,000 last named that the claimant based its application for an allowance, which was rejected, and from which it appeals.

The receiver, in support of his objections to the allowance of the claim as against the guaranty fund, contends that, so far as right to participate in guaranty fund is concerned, the status of a certificate of deposit is fixed when issued *(Fourth Nat. Bank v. Wilson,* 110 Kan. 380, *State v. Farmers State Bank,* 112 Neb. 380); that in the instant case the original certificate of deposit was, because of the facts surrounding its issue, not within the protection provided by the guaranty law. This contention may be conceded, but neither the letter of the rule referred to, the reasons on which it is based, nor the authorities cited in its support, necessarily render it applicable to "renewals" which are made in good faith, in a manner sanctioned by custom, on terms within the provisions of statute, while the bank involved is a going con-

cern. Indeed, this court, by repeated decisions, is thoroughly committed to the contrary rule. *State v. Wayne County Bank*, 112 Neb. 792; *State v. American Exchange Bank*, 112 Neb. 834; *State v. South Fork State Bank*, 112 Neb. 623; *State v. American Exchange Bank*, 114 Neb. 626; *State v. Newcastle State Bank*, 114 Neb. 389.

Giving full force and effect to the letter of the rule, the reasons which support it, and the authorities quoted which announce it, it is not necessarily controlling in this case. Here, the bank received every dollar of the amount evidenced by the first certificate of deposit issued. The interest rate in this transaction has, at all times, been strictly within the 5 per cent. limitation then in force, and the other terms of the renewals, so far as shown by the record, were completely in conformity with the provisions of the guaranty law. There is nothing in the evidence which, in any manner, brings home to the claimant knowledge or notice of the financial condition of the Macy bank, or the slightest participation in the irregularities that took place behind the doors of that institution at the time of the issuance of the original certificate of deposit. The claimant appeared first in the record as a purchaser in good faith of a written obligation concededly good against the Macy bank, and whose subsequent actions were strictly in conformity with the law relating to the protection of *bona fide* deposits.

True, the Metropolitan Savings Bank was importuned to renew the certificates from time to time, but this court has held: "The soliciting and receiving of funds by a solvent bank do not necessarily show the making of loans as distinguished from deposits within the meaning of the bank guaranty law." *State v. Newcastle State Bank*, *supra*.

Indeed, the principle announced in the opinion of this court in *State v. American Exchange Bank*, 114 Neb. 626, would seem applicable to the facts before us: "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,* 114 Neb. 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."

If, even to the repentent sinner, this court extends the benefits of the rule last announced by Redick, D. J., certainly the claimant who has done no wrong, who possesses no knowledge of wrongdoing, whose every act has been strictly in conformity with the law, is not to be punished by invalidating the renewals it makes, by reason of the fact that, in a transaction out of which the original certificate of indebtedness was born, irregularities occurred of which claimant knew nothing, but which, as to the original certificate only, rendered it an improper claim against the state guaranty fund. The subsequent dealings, extending over a period of more than two years, would seem to effectively purge the original transaction of the effects of the sin which could not be repented by claimant because unknown to it.

It follows that, in view of the circumstances under which these renewals were made by the Macy bank while it was yet a "going concern" in full exercise of its charter powers, with its business controlled and carried on by its duly appointed officers, the transaction is purged of the taint of illegality which may have attached to the original certificate, and the claim, based on a subsequent renewal thereof, was strictly within the protection of the guaranty act.

The action of the district court, therefore, in denying its allowance was erroneous, for which reason the judg-

ment of the district court is reversed and the cause remanded.

REVERSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. CITIZENS STATE BANK OF RALSTON: R. O. BROWNELL, RECEIVER, APPELLANT: W. J. KENNEDY ET AL., CLAIMANTS, APPELLEES.

FILED MAY 7, 1927. No. 25768.

1. **Banks and Banking: GUARANTY FUND: DEPOSITS.** During the time a state bank is permitted by the banking department to remain open for commercial banking and thus continues in full exercise of its charter powers, under full charge and apparent control of its own officers, a transaction had with it by a depositor, in good faith, of such a nature as to ordinarily create a deposit within the protection of the guaranty law, cannot be successfully challenged in behalf of the guaranty fund on the sole ground that at the time of such transaction such bank was deficient in lawful reserve, or was even insolvent.
2. **Evidence** examined, and *held* to sustain judgment of the district court.

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

C. M. Skiles and *Jackson B. Chase,* for appellant.

Philip E. Horan, contra.

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

EBERLY, J.

This is an appeal presented by the receiver of the Citizens State Bank of Ralston, Nebraska, hereafter referred to as the bank, from an order of the district court for Douglas county, overruling the receiver's objections to the claims of W. J. Kennedy *et ux.*, based upon certificates of deposit, aggregating, with interest at 5 per cent., $21,144.91,

and directing that said sum be "payable from the depositors' guaranty fund of Nebraska."

The bank received "actual money" for each of these certificates. The interest rate and all of the immediate terms and conditions of the contract sued upon were strictly within the provisions of the "state guaranty law." It is contended, however, by the receiver that, shortly after one T. J. Shanahan had retired from the presidency of the bank, it was discovered that a check account which claimant had opened March 8, 1919, had been credited with $1,245.39 as interest, computed at a rate in excess of 5 per cent.; also, that the directors, two of whom were likewise executive officers of the bank, together with Secretary Knudson of the banking department of Nebraska, held a conference relative to this matter at the Omaha Club in Omaha, Nebraska. After a discussion of the situation, the directors were advised by Mr. Knudson to see Kennedy and two other depositors who were in like situation, and to make this "suggestion to them," or "this agreement with them:" (1) That the excess interest was to be refunded to the bank; (2) a new contract of deposit be made with interest at a rate permitted by the terms of the guaranty statute; (3) another deposit of substantially equal amount be made in addition to the former deposit. If these conditions were complied with, Knudson assured the directors that he would stand behind the agreement and the moneys would be within the protection of the guaranty act. Of course, Knudson's statement, because of lack of authority, involved no legal consequences.

Whether transactions between the bank and the Kennedys that followed this conference were the result of a "suggestion" merely, or were pursuant to a definite "agreement" between the parties, the record is somewhat in doubt. But subsequently Kennedy, on December 4, 1924, converted his checking account into a certificate of deposit drawing 5 per cent., eliminating therefrom the sum of $1,245.39 which was claimed to be "excess interest." He also depos-

ited the further and additional sum of $10,500 in cash, also upon like terms.

On the date of the issuance of these certificates, the bank, as a corporation, was in full exercise of its charter powers. Its business was controlled and directed by its board of directors. Its officers were in apparent charge. It was a going concern. While the fact now appears that, because of its questionable financial condition, it was then subject to special supervision by the state banking department and to special examinations by the state bank examiners, this was unknown to claimants Kennedys. It was a fact not published to the world.

The mere relation of depositor and bank is not one which would charge the former with the knowledge of the condition of the latter's solvency. Therefore, deposits made in fact and in good faith in this depository "are to be protected against the consequences of economic avalanche, financial panic, misfortune, poor banking methods, and the dishonesty of bank managers." The result of the transaction was that the Kennedys abandoned the claim for the $1,245.39, and, in good faith, converted their previous check deposit into a 5 per cent. deposit, and likewise made additional deposits, intending to conform, and actually conforming, to all conditions prescribed by the state guaranty law.

There appears to be no sufficient evidence before us of any valid "collateral agreement" which would taint either of the deposits thus made. Rather, the transaction, as an entirety, presented by the record is one to which the language of this court in *State v. American Exchange Bank*, 114 Neb. 626, is applicable. Redick, D. J., author of the opinion, says in part: "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."

It follows, therefore, that the allowance of these claims by the district court is right, and the judgment of the district court is

AFFIRMED.

COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, APPELLEE, V. GUSTAV NIEBUHR, APPELLANT: MATTIE NIEBUHR ET AL., APPELLEES.

FILED JUNE 1, 1927. No. 24965.

APPEAL from the district court for Madison county: DE WITT C. CHASE, JUDGE. *Affirmed.*

Willis E. Reed, for appellant.

T. B. Dysart and *James Nichols, contra.*

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

PER CURIAM.

Affirmed on authority of (1) *Phillips v. Hunt, ante*, p. 395; *Klattenburg v. Qualsett*, 114 Neb. 18; (2) *Knox v. Lee*, 12 Wall. (U. S.) 457.

LE ROY L. BROWN, APPELLEE, V. HARRY MCCALLUM ET AL., APPELLEES: LESTER HUNT, APPELLANT.

FILED JUNE 1, 1927. No. 24966.

APPEAL from the district court for Madison county: DE WITT C. CHASE, JUDGE. *Affirmed.*

Willis E. Reed, for appellant.

Spillman & Beach and *H. B. Muffly, contra.*

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

PER CURIAM.

Affirmed on authority of *Phillips v. Hunt, ante,* p. 395; and *Klattenburg v. Qualsett,* 114 Neb. 18.

ALBERTA VOBORIL, APPELLEE AND CROSS-APPELLANT, V. JAMES VOBORIL, APPELLANT AND CROSS-APPELLEE.

FILED JUNE 1, 1927. No. 25833.

1. **Divorce:** CUSTODY OF CHILDREN. "In divorce actions, in making disposition of the custody of a child of tender years, the policy of the law is to look to the welfare and best interests of the child." *Feather v. Feather,* 112 Neb. 315.
2. **Parent and Child:** CUSTODY OF CHILDREN. "The statute and the demands of nature commit the custody of young children to their parents rather than to strangers, and the court may not deprive the parents of such custody unless it be shown that such parent is unfit to perform the duties imposed by the relation or has forfeited the right." *Norval v. Zinsmaster,* 57 Neb. 158.
3. **Divorce:** CUSTODY OF CHILDREN. Evidence examined, and *held* that the welfare and best interests of the minor child require that its custody should be committed to its father, who is found fit, rather than to its grandparents, though they are also found fit, for the reason that the mother makes her home with the grandparents of the minor child and is found unfit to have its custody.

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

Henry J. Beal and *Dan Gross,* for appellant.

Crofoot, Fraser, Connolly & Stryker and *James T. English, contra.*

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

GOSS, C. J.

Plaintiff sued for divorce on the ground of cruelty. Defendant filed an answer and cross-petition praying for a divorce. Defendant was awarded a decree with qualified custody of the minor child. Soon thereafter he applied for a modification of the decree as to the actual custody of the child. This application was denied. He appealed from the decree and the other final order; and plaintiff cross-appealed from the decree granting defendant the divorce.

Plaintiff and defendant were married February 25, 1920. The daughter, Betty, was born November 3, 1921. In 1923 plaintiff sued defendant for divorce and was awarded a decree. Some months afterward a reconciliation was had, the decree was set aside, and they resumed the relations of husband and wife until February 23, 1926, when she began this suit. On December 7, 1926, the court entered a decree finding that plaintiff had offered no evidence in support of her petition, that the evidence in her behalf to sustain the allegations of her answer to the cross-petition was not sufficient, finding generally for defendant, and finding specifically that the plaintiff was not a fit and proper person to have the care of the child, and that such was not for its best interest, but that the defendant was a fit and proper person to have such custody. Further finding that the parents of plaintiff, living near Ulysses, Nebraska, were fit and proper persons to have the temporary custody of the child and had expressed a willingness to do so, the court entered the order granting defendant the divorce, ordering defendant to deliver the child to the grandparents on or before December 15, 1926, at Ulysses, there to be kept by them until June 1, 1927, when they were to return the child to defendant, who was to have it during the summer, and that, just prior to September 1, 1927, a further hearing should be had with particular reference to school facilities for the child. In its findings the court further found that it was permissible for plaintiff to live at the home of her parents while the child was there, the evidence having shown the

intent of plaintiff to make her home with her parents. January 10, 1927, after issues joined and a hearing thereon, the court overruled the application of defendant for a modification of the decree as to the custody, and defendant appealed from the decree and from the order. Plaintiff cross-appealed from the decree of December 7, but not from the order of January 10.

It seems to us that no good purpose can be forwarded by a detailed recital of the evidence in this case. Doubtless chivalry as well as delicacy and good judgment led counsel and court in the pleadings and decree to restraint of language in the charges and findings. We are well content to emulate their good example and to state for the permanent records of the court only what seems necessary to an understanding of the case. We are so minded also in the hope that these two young people, with so many attractive qualities, with such an inducement as this little child and its future welfare to lead them, may again be reconciled and renew their vows. The child needs both a father and a mother. If there be a chance that the natural love of a father and a mother for flesh of their flesh may again bridge the gap between them, we intend that no words of ours shall necessarily widen that space. Plaintiff, herself, has admitted, as we find from the evidence, that she was indiscreet and foolish. Suffice it to say the evidence shows that the court was justified in granting the defendant the divorce. We are satisfied to let that part of the decree stand affirmed without further discussion.

The chief controversy between the parties concerns the order for the temporary custody of the child, pointing, as might appear from the evidence, as well as from the decree itself, to a possible, if not a probable, permanent decree assigning that custody to the grandparents. The defendant had had a difficult financial situation to contend with. He obtained his present position where he is at the head of the used-car department of a well-known motor car distributor and earns an average income of several hundred dollars a month, depending on sales. The nature of the po-

sition requiring exacting attention and his previous financial experiences spurring him, he devoted himself to hard work and long hours most commendably, but perhaps more assiduously than was conducive to his domestic welfare. He bought a home for $8,500, paying $500 cash and assuming a first mortgage of $5,000 and a second mortgage of $3,000, and in two or three years he has paid off the second mortgage and reduced the first mortgage to about $4,000, besides providing a good living for his wife and daughter. The home is in one of the best parts of the city, is equipped with all modern conveniences, including automatically controlled, oil fuel, hot air heat to all rooms, and is within a few blocks of the excellent Dundee grade and kindergarten school. The evidence shows, not only the industrious habits of the defendant, but his general good reputation was proved by his employer and others. It shows his unremitting love for and devotion to the welfare of the little daughter, and his plans to have his brother and the brother's wife, who have no children, but who love them, to come and live in his home and aid in caring for the child. The grandparents, that is, the mother and stepfather of plaintiff, own a farm more than four miles from Ulysses and its schools and more than a mile from their district school. They likewise have a modern home with hot air furnace heat capable of heating all but one room, and expressed at the trial a willingness to take the grandchild into their family and to care for it. They expect also to provide a home for the plaintiff and were doing so since the separation and at the time of the trial. They, too, are people of substance and character, as shown by the evidence. They offered on the hearing, in answer to questions on that subject, to see that the child was transported to and from the Ulysses schools, properly accompanied at school by one of their own children, and, if desirable, the child should be furnished a warm luncheon in town. The main objection to this arrangement, aside from the father's natural claim to the custody of the child and his decreed fitness, was the presence in that home of the mother. While the decree on that feature of the

case was not permanently final, it looked toward the result; and temporarily, at least, the orders appealed from by defendant took from him the custody of the daughter and gave it to her grandparents with the result that temporarily, if not permanently, it had the practical effect of assigning the custody to the mother. The findings and order in this respect are criticised as inconsistent, and it is suggested that the court misinterpreted, or misapplied, the general rule that the welfare of the child will be considered in decreeing its custody.

This requires us to seek the proper rule applicable to the particular situation heretofore sketched. The general rule, as well stated by the brief of the plaintiff, is that in divorce actions, in making disposition of the custody of a child of tender years, the policy of the law is to look to the welfare and best interests of the child. *Feather v. Feather*, 112 Neb. 315; *Hammond v. Hammond*, 103 Neb. 860; *Nathan v. Nathan*, 102 Neb. 59; *Boxa v. Boxa*, 92 Neb. 78. These cases, and probably the majority of divorce cases, require an exercise of discretion in the court as to the assignment of custody of the minor child as between the plaintiff and defendant, and in such cases, where one parent is unfit and the other is found to be fit and receives the decree of divorce, the general rule is that the custody of the infant is given to the successful and fit party.

Section 1581, Comp. St. 1922, provides: "The father and mother are the natural guardians of their minor children and are equally entitled to their custody, services and earnings and to direct their education, being themselves competent to transact their own business and not otherwise unsuitable. If either dies or is disqualified for acting, or has abandoned his or her family, the guardianship devolves upon the other." In *Norval v. Zinsmaster*, 57 Neb. 158, a frequently cited opinion written by Judge Irvine, then a commissioner of this court, and adopted by the court, the first sentence of the above section is quoted and then is followed by this discussion: "We are aware that this court has several times asserted that in such controversies as the

present the order should be made with sole reference to the best interests of the child. But this has been broad language applied to special cases. The court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide. The statute declares and nature demands that the right shall be in the parent, unless the parent be affirmatively unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided. If that were the law, it would soon be changed, by revolution if necessary." In that case the mother of the children had been given their custody in a divorce suit against her husband; a few months thereafter she had remarried and, upon the application by the divorced husband for a modification of the decree so as to award him the custody of the children, she had, without action by the court on the application, but under stress and to save trouble, let them go to live with their paternal grandfather with whom their father lived. This court in a habeas corpus suit by the mother awarded her the custody of the children on the theory expressed in the opinion quoted. This has been cited with approval in this court in the following cases: *Terry v. Johnson*, 73 Neb. 653; *Tiffany v. Wright*, 79 Neb. 10; *State v. Bryant*, 95 Neb. 129; *Steward v. Elliott*, 113 Neb. 421. "The parents have a right nevertheless, by nature and by law, to the custody of children, which right should never be denied, except for the most cogent reasons." 19 C. J. 344, sec. 796; 9 R. C. L. 475, sec. 290. We think the rule as expressed in *Norval v. Zinsmaster, supra*, not at all in conflict with the general rule in our other cases cited, and that it is peculiarly fitted for application to the case before us. After a careful perusal of all the evidence and after considering the proper rules of law applicable, we are of the opinion that the custody of the child should have been awarded to the father without qual-

ifications so long as the conditions continue measurably as they were at the time of the decree.

The decree below made an allowance to the attorneys for their services. The allowance we think was proper. It also made stipulated monthly allowances to be paid to the grandparents for the support of the child and for her clothing, which in view of our decision should be eliminated. In the proceedings to modify the decree, the trial court denied the application for attorney's fees, without prejudice to plaintiff making further application here. While the plaintiff has been unsuccessful here on her cross-appeal, yet she is without funds and was brought here by defendant's appeal. In the circumstances, we are of the opinion that, in addition to the $50 heretofore allowed plaintiff for her expenses in this court, we should, and therefore do, allow her the additional sum of $200 to cover expenses and attorney's fees here.

For the reasons advanced in this opinion, the decree of the district court is affirmed so far as it grants the divorce to defendant, and reversed, with directions that it be modified as to the custody of the child so as to conform to this opinion; and that it provide, as herein stated, for the additional attorneys' fees.

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

JAMES O. SWOGGER V. STATE OF NEBRASKA. *

FILED JUNE 1, 1927. No. 25509.

1. **Criminal Law: WITNESSES: CREDIBILITY: QUESTIONS FOR JURY.** In a prosecution for statutory rape, the credibility of prosecutrix and defendant as witnesses and the probative effect of their testimony are questions for the jury.
2. **Rape: CORROBORATION OF PROSECUTRIX.** In a prosecution for statutory rape, corroboration of prosecutrix may consist of circumstances and is not limited to the principal fact.
3. ———: ———. "In a prosecution for rape upon a female child

* Note—Reversed on rehearing, 116 Neb. ——.

not previously unchaste, proof of facts and circumstances justifying a finding, independently of her own testimony, that accused had the opportunity and inclination to ravish her may be sufficient corroboration of direct and positive evidence by her that he did so." *Whetstone v. State*, 99 Neb. 469.

4. ———: SUFFICIENCY OF EVIDENCE. In a prosecution for statutory rape, the testimony of prosecutrix and the corroboration outlined in the opinion *held* sufficient to sustain a verdict of guilty.

5. **Witnesses.** "Evidence which directly tends to disprove the facts to which a witness has testified is admissible in contradiction." *Heyen v. State*, 114 Neb. 783.

6. **Criminal Law: WITNESSES: CROSS-EXAMINATION.** In a prosecution for statutory rape, the extent to which the cross-examination of a witness for defendant may be pursued is largely in the discretion of the trial court and it is only for a prejudicial abuse thereof that a conviction will be reversed for a failure to limit the inquiry to proper bounds.

7. ———: EVIDENCE OF OTHER OFFENSES. To the general rule of criminal law that evidence of a felony not charged is inadmissible, an exception for the purpose of showing criminal intent permits proof that accused in a prosecution for statutory rape had criminal relations with prosecutrix on other occasions closely related in time to the principal offense.

8. ———: ———. "In the prosecution of a party for rape upon a female child under the age of consent, testimony as to improper conduct on the part of the defendant, at other times than that charged, with the same child and of the same character named and set out in the information is properly received." *Evers v. State*, 84 Neb. 708.

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

J. T. McCuistion, Herman G. Schroeder and *J. W. James*, for plaintiff in error.

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

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

ROSE, J.

In the district court for Thayer county defendant was convicted of rape as defined by statute, and for that offense was sentenced to serve a term of seven years in the penitentiary. As plaintiff in error he presents for review the record of his conviction.

The principal question raised is the sufficiency of the evidence to sustain the verdict of guilty. It is argued by defendant that there is no proof corroborating testimony by prosecutrix that defendant committed the felonious act charged. The assignments of error under this head and the questions presented in behalf of defendant require consideration of the evidence in detail, covering as it does over 300 pages of the record, but in the opinion references to the testimony and the deductions therefrom must necessarily be brief.

According to evidence adduced by the state, the felony charged was committed by defendant January 25, 1926. From August, 1925, to March, 1926, prosecutrix, a member of a family named "Leach," made her home with her parents, two sisters and four brothers on a Thayer county farm managed by defendant. During the interim the Leach family resided in one of two houses on the farm mentioned and defendant occupied the other for a considerable portion of that period. The father of prosecutrix and her oldest brother were in the employ of defendant, working on the farm, each receiving stipulated wages. Defendant was frequently in the Leach home and there mingled with the members of the Leach family. Prosecutrix was 15 years of age December 21, 1925. She was therefore 35 days older January 25, 1926, the date of the alleged offense. She testified positively to facts showing that the felony charged was committed on the latter date in the kitchen of her home between 8 and 11 o'clock at night and that she was not previously unchaste. On the issue of previous chastity her testimony is uncontradicted. Defendant admitted he was in her home between those hours and that he was momentarily alone with her in the kitchen while getting a drink of water in

the meantime, but he testified emphatically that he was not guilty of the offense charged. He testified also that he was 58 years of age at the time of the trial—April 26-28, 1926. The credibility of prosecutrix and defendant as witnesses and the probative effect of their testimony were questions for the jury. Prosecutrix told a convincing story and her testimony was not weakened by cross-examination. The verdict of guilty shows that she was believed by the jury. Was she corroborated?

Corroboration may consist of circumstances and is not limited to the principal fact. In the present instance the circumstances must be tested by the following rule:

"In a prosecution for rape upon a female child not previously unchaste, proof of facts and circumstances justifying a finding, independently of her own testimony, that accused had the opportunity and the inclination to ravish her may be sufficient corroboration of direct and positive evidence by her that he did so." *Whetstone v. State,* 99 Neb. 469; *Dawson v. State,* 96 Neb. 777.

Independently of the testimony of prosecutrix, the jury had before them evidence of the following facts and circumstances: During the months of October and November, 1925, defendant showed and expressed an attachment for prosecutrix. He was a married man. His wife was absent from him most of that time. He sued her for a divorce and the action was pending. He told witnesses not related to the Leach family that prosecutrix was to be his wife as soon as he got his present wife off his hands. He said that a seamstress to whom he spoke would make his next wife's wedding dress. He stated to another witness that his next wife would be prosecutrix. November 6, 1925, he was seen on a cot in the Leach home with his arms around prosecutrix when the two were alone in a room. The same day he started with her alone to Fairbury. At another time he was observed kissing her with both arms around her. He admitted on cross-examination that while alone with her he had made three trips by automobile to Deshler and two to

Hebron, distances of several miles. For one trip at least she missed school. Defendant admitted he was in the Leach home for two hours or more between 8 and 11 o'clock at night while all members of the Leach family, except prosecutrix, her mother and two little children, were absent in his automobile with his consent. That was the time and place of the felony charged. The mother was then ill. Her hearing was impaired by medicine. Her physician so testified. She and the two infants were not out of bed while her husband and those who accompanied him were away. There was a sitting room between the bed rooms and the kitchen. Except when momentarily attending the mother, prosecutrix and defendant were in the sitting room or the kitchen. There was ample corroborating evidence of his opportunity to commit the offense as she described it. Later she was examined by a physician. She had been ravished and the physician expressed the opinion that she was pregnant. There was no evidence contradicting testimony by her that she never had criminal conversation with any person except defendant. Being married, he was ineligible as an honorable suitor. A manly courtship was out of the question. From evidence of the nature outlined the jury were warranted in finding, independently of her testimony, that defendant's attitude and conduct showed an amorous disposition and an inclination to ravish her. Though he testified to innocent interpretations of his attitude and conduct, the jury were not compelled to accept his explanations in view of reasonable inferences of a different import. If circumstances and incidents of the character outlined do not amount to corroboration, malefactors who are inclined to commit this revolting crime may devise in advance the means of evading the law and of preventing just punishment. The conclusion is that the conviction should not be set aside either for insufficiency of direct evidence of guilt or for lack of corroborating evidence.

The cross-examination of defendant in relation to his suit against his wife for a divorce is challenged as erroneous. It is argued that the inquiry related to extraneous matter

and went beyond the bounds of proper cross-examination. Defendant testified in his own behalf that his suit for divorce was a ruse to bring his wife back to him. Counsel for the state asked him about the nature of the charges pleaded in his petition for a divorce and his answers indicated that he had made serious accusations against his wife, which tended to discredit the story of a ruse. The cross-examination on this subject conformed generally to the following rule:

"Evidence which directly tends to disprove the facts to which a witness has testified is admissible in contradiction." *Heyen v. State,* 114 Neb. 783.

The extent to which a cross-examination may be pursued is largely in the discretion of the trial court and it is only for a prejudicial abuse thereof that a conviction will be reversed for a failure to limit the inquiry to proper bounds. *Brown v. State,* 88 Neb. 411.

Under this assignment of error prejudice to defendant is not affirmatively shown.

One of the assignments of error is directed to the proposition that immaterial testimony of a different crime was admitted in rebuttal. The argument of defendant on this point does not disclose a sufficient reason for a reversal. Defendant testified he did not commit the act charged and adduced evidence that his reputation as a law-abiding citizen was good. One of the witnesses for prosecutrix was a married woman. She was the mother of seven children. With them and her husband she resided for a few weeks in the fall of 1925 on the farm managed by defendant. They made their home in the house not occupied by the Leach family. The witness was permitted to testify in effect on rebuttal that, late in October, 1925, while in her home, she was futilely pursued by defendant for an hour or more and subjected to indecent proposals. This, if true, occurred near the times when, according to the testimony of some of the witnesses, defendant gave undue attention to prosecutrix. The testimony challenged might have been admitted during the examination in chief to show a criminal intent

like that indicated by the felonious act to which prosecutrix testified. The admissibility of evidence of other offenses to show criminal intent in a prosecution for statutory rape is one of the exceptions to the general rule excluding evidence of felonies not charged. In applying an exception for the purpose of showing criminal intent in a prosecution for arson the following rule was adopted:

"Where a person is charged with the commission of a specific crime, testimony may be received of other similar acts, committed about the same time, for the purpose only of establishing the criminal intent of the accused." *Knights v. State*, 58 Neb. 225.

Exceptions to the general rule apply also to forgery and burglary. *Taylor v. State*, 114 Neb. 257; *Welter v. State*, 112 Neb. 22. In a prosecution for statutory rape, exceptions to the general rule go further than proof of criminal intent and permit in corroboration of prosecutrix evidence that accused had similar criminal relations with her at other times. *Woodruff v. State*, 72 Neb. 815; *Leedom v. State*, 81 Neb. 585.

In the present case prejudice because the story indicating criminal intent came out in rebuttal was not shown. Defendant took advantage of the opportunity to contradict that testimony.

It is argued further that the trial court misdirected the jury. The information contained three counts. The first is the one already considered. The second and third charged subsequent acts like that described in the first, all in Thayer county, the victim being the same in each instance. The respective dates of the second and third offenses charged were January 30, 1926, and February 16, 1926. One of the instructions contained the charge in each count and a later instruction directed:

"If you are satisfied from the consideration of all the evidence beyond a reasonable doubt that the defendant is guilty as to any one of said counts, your verdict must then be guilty as to the said count concerning which you are so agreed, and not guilty as to the other two counts."

In this condition of the record the jury brought in a verdict of guilty on each of the three counts, but the trial court refused to accept it and sent them back to the jury room with a direction to observe the instruction quoted. Later the jury returned with a verdict of guilty on the first count and not guilty on the others. The latter verdict was the one under which defendant was sentenced. The procedure described did not prejudice defendant. Evidence that he perpetrated the second and third acts was admissible in proving the first. At the trial there was evidence of each of the three offenses. The following principle of criminal law is well settled:

"In the prosecution of a party for rape upon a female child under the age of consent, testimony as to improper conduct on the part of the defendant, at other times than that charged, with the same child and of the same character named and set out in the information is properly received." *Evers v. State,* 84 Neb. 708. *Leedom v. State,* 81 Neb. 585.

The second and third counts warned defendant that evidence of each offense charged would be offered against him. He had time to prepare for his defense. If the instruction quoted was inconsistent with the one containing the three accusations, the error was in his favor and prevented conviction for three offenses instead of one. The record has been searched from beginning to end without finding a reversible error.

AFFIRMED.

OAK CREEK VALLEY BANK OF VALPARAISO, APPELLANT, V. JESS HUDKINS, APPELLEE.

FILED JUNE 1, 1927. No. 24342.

Replevin: DAMAGES. "In replevin, damages for the detention of the property are recoverable only in case of a return. If the property is not returned the measure of damages is the value of the property as proved, together with lawful interest thereon from the date of the unlawful taking." *Romberg v. Hughes,* 18 Neb. 579.

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

Stewart, Perry, Stewart & Van Pelt, for appellant.

Fred C. Foster, O. K. Perrin and *S. M. Kier, contra.*

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

DEAN, J.

This case was tried in Lancaster county to the court and a jury. The action involves a sheriff's sale, under an execution against certain exempt personal property which belonged to one of the defendants herein. The Oak Creek Valley Bank, plaintiff, hereinafter called the bank, became the owner of certain secured promissory notes by purchase. These instruments were made by Jess Hudkins, hereinafter called the defendant. The security consisted of cattle, horses, mules, swine, and certain farm implements and machinery. The jury found that certain of the property was exempt from sale and execution under the replevin writ from the fact that defendant was the head of a family; and in addition to the value of the exempt property, which the jury fixed at $575, the jury found that defendant suffered damage for its unlawful detention for a period of three months "in the sum of $375, making a total of $950." The jury, however, as against Jess Hudkins, aside from its finding in respect of the exempt property, found under the facts on the merits that the plaintiff bank "had a special interest in and is entitled to the immediate possession of the balance of the property in question." In its judgment the court affirmed the findings of the jur throughout. Plaintiff appealed.

It may here be observed that Ray Hudkins, a son of Jess, was a party to the action by reason of an agister's lien for feed furnished by him and for the care of the live stock for a certain designated period. The jury found that he was entitled to $465 under his lien. After the trial

was over and before the appeal to this court was perfected the bank paid the agister's lien in full and by this payment the lien was discharged. Hence, no further reference will be made thereto nor to Ray Hudkins in this behalf.

Plaintiff's counsel, C. H. Slama, was present at the execution sale of the property and on the part of his client testified that he bid $555 over and above the lien of the bank under the direction of Jul. Petermichel, the bank's vice-president and general manager, and that this direction was imparted to him by telephone from the bank in response to his several telephone inquiries while the sale was in progress. Counsel's statement is corroborated by the evidence of Petermichel on the cross-examination. On this point Petermichel's evidence follows:

"Q. You instructed him to bid $555 over and above the mortgage? A. Yes, sir. Q. That is correct? A. Yes, sir. Q. And did you intend to discharge the mortgage, then, Mr. Petermichel? A. Not until we got hold of the property. Q. Well, if you had got hold of the property, did you intend that that bid of $555 would be over and above the mortgage that was owed against the property? A. Yes, sir; sure. Q. You, then, would cancel the notes and return them to Hudkins? A. No; did not have to return them to him; did not say anything about it. Q. You would have canceled them? A. Canceled them and released the mortgage in order to sell them to somebody else. Q. That would have been the end of the chattel mortgage on the property? A. Certainly." Petermichel further testified: "Q. And did you give Mr. Slama any instructions about how to bid out there? A. Yes; I told him to bid and see that it did not go too cheap. Q. Did you tell him how much to bid? A. No; I did not give him any specified amount. Q. Did you tell him what to start the bidding at? A. I told him to bid it in so that it did not go too cheap, and then he called me up and, as I recollect it, two or three times. Q. During the sale? A. During the sale. * * * Q. Did he tell you Ray Hudkins had bid $550 above the mortgages? A. Yes, sir. Q. Did you tell him

to raise that bid? A. Told him to raise the bid." In pursuance of the above instructions, plaintiff's counsel raised the bid $5, as above noted, and this was the final bid under the sale pursuant to the replevin writ.

The bank complains, *inter alia*, because the jury awarded $375 for the "use" value "as damages for four months detention of live stock" and some articles of machinery. The argument is that this award is unreasonable, and that, solely under the facts here, if any award can be lawfully made for the unlawful detention of the property, aside from its proved value, it should be for the legal rate of interest on such value during the time of its detention, and no more.

A review of the record discloses that the value of the use of the personal property for which the defendant was awarded damages in the sum of $375 is based on evidence that was so speculative and mythical that its effect would be to confuse and mislead the jury. On this point the defendant testified in respect of the supposed value of certain prospective litters of some of the sows, and was asked if he knew "whether or not they would have pigs." He answered: "Oh, certainly." This was followed by like evidence in response to an inquiry in respect of the "average number of pigs, * * * live pigs that would be had from a litter." He answered that the number would be about five to fifteen, and that some might be lower and some higher than others. And, in respect of the value of some of the sows, he testified that "if you go to some big hog man in the state to buy those thoroughbreds they would be awful high." In respect of the value of the use of the horses, defendant testified that it would be "two dollars a day, I should think," and that for some of the machinery from the first of May until the date of the trial it "would be about a dollar a day, * * * something like that."

The incompetent evidence submitted by defendant, and apparently acted on by the jury, in respect of the "use" value of the property, was intensified by at least two in-

structions which were submitted by the court of its own motion. In one instruction the court informed the jury that "the value of said property at the time so taken, together with 7 per cent. interest from the date taken until the date of the trial, or the value of its use, if that exceeds the interest rate," would be the measure of damages for unlawful detention. In another instruction the jury were informed that, if they found that defendant was entitled to possession of the exempt property, their verdict should be for the return thereof, "or its value on the date replevined, together with interest thereon since said date, or in lieu of said interest the net usable value of said property less depreciation in the event it exceeds the interest."

In view of the evidence, as it relates both to unlawful detention and damages therefor, we think the court erred in that the instructions, on this feature of the case, were not confined solely to an allowance of interest on the value of the property at the lawful rate for the time that it was unlawfully detained. The court, however, in its instructions, evidently followed the rule announced in syllabus paragraph numbered 5 in *Schrandt v. Young*, 62 Neb. 254, wherein we said:

"Interest is the ordinary measure of damages of the defendant in replevin; but where the use of the property has a value which exceeds the interest, he may recover such value, and his right so to do does not depend upon return of the property."

We take no exceptions to the above rule as announced in the Schrandt case, but we think it is not applicable to the facts in the present case. In the cited case, however, as disclosed by the concluding paragraph of the opinion, we held, as here, that all damages awarded defendant "for detention of the property in controversy in excess of lawful interest upon the value of his interest from the date of taking" be remitted, and that, failing therein, the action would be remanded for a new trial. The rule that has been

applied to like facts, as those presented here, has long prevailed in this jurisdiction. In an early case we said:

"In replevin, damages for the detention of the property are recoverable only in case of a return. If the property is not returned the measure of damages is the value of the property as proved, together with lawful interest thereon from the date of the unlawful taking." *Romberg v. Hughes*, 18 Neb. 579.

We conclude that the judgment of the district court, in so far as it awards damages for unlawful detention in excess of 7 per cent. per annum on $575 for the time that it was unlawfully detained, is erroneous. Computed at 7 per cent. the amount of interest on $575 for wrongful detention amounts to $13.45. The award of $375 is therefore excessive in the sum of $361.55. If defendant, however, within 30 days will remit from the judgment the sum of $361.55, as of the date of the judgment in the district court, then such judgment will be affirmed; otherwise, the judgment will be reversed and the cause remanded.

AFFIRMED ON CONDITION.

STATE OF NEBRASKA, APPELLANT, V. BONE CREEK TOWNSHIP, BUTLER COUNTY, APPELLEE.

FILED JUNE 1, 1927. No. 24527.

Appeal: REVERSAL. Where a judgment in favor of defendant on the merits of the case is reversed on appeal and a retrial in the court below results in another judgment in favor of defendant, the new judgment may also be reversed, if at variance with the rulings on the first appeal.

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

O. S. Spillman, Attorney General, and *Richard F. Stout,* for appellant.

Coufal & Shaw, contra.

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

DEAN, J.

This action was commenced in the district court for Butler county by the state against the defendant, and is first reported in *State v. Bone Creek Township*, 109 Neb. 202. In the trial court the defendant prevailed. On appeal we reversed the judgment and remanded the cause for a new trial. Thereupon it was retried and the court again rendered a judgment for defendant and the state again appealed.

The liability of the defendant township for plaintiff's claim and the applicability of the invoked constitutional provision to the defenses interposed were discussed and determined upon the former appeal in plaintiff's favor and we decline to recede from our former holding; so that, upon a reexamination and further consideration of the questions now presented, we conclude that the additional matter interposed by the township as a defense to plaintiff's cause of action does not require a different conclusion than that heretofore announced by us. We hold therefore that the former opinions properly dispose of the entire matter.

The judgment of the trial court is reversed and the cause remanded to the district court, with directions to enter judgment in favor of plaintiff.

REVERSED.

JAMES COXBILL V. STATE OF NEBRASKA.

FILED JUNE 1, 1927. NO. 25704.

1. **Constitutional Provisions.** The Constitution of the United States and of this state guarantee a fair and impartial trial to every person accused of crime, and that no person shall be compelled in any criminal case to be a witness against himself; nor shall he be deprived of life, liberty or property without due process of law.
2. **Criminal Law: INTOXICATING LIQUORS: COMPLAINT.** In the

present case, the substance of the complaint charged that on November 29, 1925, in Nuckolls county, Nebraska, the defendant "did * * * unlawfully sell," to a person named, "about one gallon of intoxicating liquor, commonly known as whiskey." This language charged an offense under section 3238, Comp. St. 1922, and is punishable as provided by section 3288, Comp. St. 1922. The complaint herein does not come within the provisions of section 3239, Comp. St. 1922, as amended by chapter 106, Laws 1925, commonly known as the "bootlegging" statute.

3. Intoxicating Liquors: SENTENCE. Under the complaint in the present case the trial court was without jurisdiction, under section 3288, Comp. St. 1922, to impose a penalty of both fine and imprisonment.

4. Witnesses: EXAMINATION: PREVIOUS CONVICTION. Under section 8848, Comp. St. 1922, "a witness may be interrogated as to his previous conviction for felony." But the act does not contemplate that a witness may be interrogated as to his alleged previous conviction for a misdemeanor.

ERROR to the district court for Nuckolls county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

J. E. Willits, for plaintiff in error.

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

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

DEAN, J.

The county attorney of Nuckolls county filed an information against James Coxbill, defendant, wherein it is charged that he on November 29, 1925, in Nuckolls county, Nebraska, did "unlawfully sell to one Edgar Van Winkle about one gallon of intoxicating liquor, commonly known as whiskey." The jury found defendant guilty and the court imposed a $100 fine and sentenced him to 90 days in the county jail. A motion for a new trial was overruled. Defendant thereupon entered into a recognizance in the sum of $500 and has prosecuted error to this court.

The information comes within the meaning of section

3238, Comp. St. 1922, and, under the rule announced in *Knothe v. State, ante,* p. 119, where the jury finds a defendant guilty under section 3238, it is the court's duty to sentence him under section 3288, Comp. St., 1922, which provides that a defendant, upon conviction for the violation of "any of the provisions of this (liquor) 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." But the court, instead of imposing a sentence under section 3288, erroneously imposed a fine of $100, and also imprisonment in the county jail of not less than 90 days. This penalty was imposed under section 3239, as amended by chapter 106, Laws 1925.

The title to section 3239, as amended, follows: "An act to amend section 3239, Compiled Statutes of Nebraska for 1922, relating to intoxicating liquors; providing penalties for first, second and subsequent convictions for bootlegging; to repeal said original section; and to declare an emergency." Section 3239, as amended, is set out in full and is discussed at some length in *Knothe v. State,* above cited. In respect of this act we there said: "A fair construction of the amendatory provisions of chapter 106, Laws 1925, discloses that both as to title and substance, properly construed, the amendment pertains wholly to the subject of 'bootlegging' and applies to section 3239, Comp. St. 1922, only, and does not relate to, modify, or affect or qualify section 3238, Comp. St. 1922, or any other provisions of the liquor law. The title, therefore, of the amendatory act is sufficient; the effect of the amendatory act is restricted to the section amended, and is within the limits of its title." To substantially the same effect is *Drawbridge v. State, ante,* p. 535.

Inasmuch as the defendant was not informed against under section 3239, as amended, he could not, of course, be lawfully tried or sentenced thereunder. And, where the

imposition of an erroneous penalty is the only reversible error in a record, the case can be remanded with directions for a resentence under the proper statute. But counsel has pointed out additional errors which require a reversal. It appears that the defendant was a witness in his own behalf, and complaint is made that, upon the cross-examination, the state repeatedly interrogated him in respect of an alleged conviction for having sold intoxicating liquor in Clay county recently before the present trial. A part of defendant's cross-examination on this point follows, so far as material here, and it is to this persistently offensive conduct that the defendant takes exception:

"Q. I will ask you, Mr. Coxbill, if you have not recently been convicted of selling intoxicating liquor in the county court of Clay county, Nebraska, and if you didn't testify in that case and testify that you didn't make the sale of which you were convicted." This was objected to, the objection was overruled, and the defendant answered: "I don't just exactly understand that question. Q. Will the reporter please read it again. (Question read.) A. I plead not guilty in these other cases. Q. You pleaded not guilty; did you not also testify as a witness in your defense of those cases? A. Yes, sir. Q. Did you? A. That I was not guilty? Q. Didn't you testify in those cases under oath that you did not make the sale? A. Yes, sir. Q. Isn't it true that you were convicted in that court of making, in one case, four different sales of intoxicating liquor?" Again defendant's objection was overruled, and he answered: "I would like to hear the question again. (Question read.) A. Why I don't know as to that. * * * Q. I will ask you, Mr. Coxbill, if in those cases in Clay county tried recently, I think in the month of March, you were not found guilty on the trial in county court? A. They were both appealed."

Besides the errors in the cross-examination, above pointed out, many questions of the same tenor, and fully as erroneous, which we do not find it necessary to reproduce, were put to defendant by the state, and appropriate ob-

jections were made by counsel, but they were overruled.

We do not think the defendant was fairly tried. It is an elementary proposition of our criminal jurisprudence that every person accused of crime shall have a fair and impartial trial; and that no person shall be compelled in any criminal case to be a witness against himself; nor shall he be deprived of life, liberty or property without due process of law. Both the federal Constitution and our state Constitution contain the above provisions, but the constitutional guaranties were set at naught by incompetent and grossly irrelevant questions which were put to the defendant in respect of collateral issues, that bore no relation to the crime for which he was charged, and for which he was at that very time on trial. It is one of the boasts of Anglo-Saxon civilization that every man, no matter what his estate or condition, shall have a fair and impartial trial when he is charged with the commission of a crime. *Carr v. State,* 23 Neb. 749, is a case where the defendant was on trial for murder. An eye-witness for the state, after narrating the circumstances in detail which surrounded the tragedy, testified that the accused was standing near-by with a gun in his hand, and that soon after the shooting he walked away carrying the gun with him. The witness, when asked by the prosecuting attorney, why he did not arrest or assist in arresting the accused, stated, over objection, that the reason why he did not assist was because he did not think it safe to follow the accused. This was held to be a violation of our constitutional guaranties, and for this error the judgment was reversed and the cause was remanded.

"A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof." Comp. St. 1922, sec. 8848.

The above section, however, does not contemplate an inquiry in a misdemeanor case in respect of an alleged previous conviction of a witness for a misdemeanor. But this was done in the present case and it constitutes reversible

error. It may be added that, under the complaint in the present case, the trial court was without jurisdiction, under section 3288, Comp. St. 1922, to impose a penalty of both fine and imprisonment.

Our attention has been directed to other alleged errors, which, under the present state of the record, we do not find it necessary to discuss.

In view of the substantial errors pointed out, the judgment must be, and it hereby is, reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED.

CECIL E. HASHBERGER, APPELLANT, V. CITY OF SCHUYLER, APPELLEE.

FILED JUNE 1, 1927. No. 25850.

1. **Appeal: HARMLESS ERROR.** Where a verdict for a defendant in a personal injury action was the only one warranted by the evidence, error, if any, in the court's instructions to the jury will not avail the plaintiff as a ground for reversal, since they could not have been prejudicial to him.
2. **Evidence** examined, and *held* insufficient to show any actionable negligence on the part of defendant.

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

George W. Wertz, for appellant.

B. F. Farrell and *Wallace S. Porth, contra.*

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

GOOD, J.

This is an action to recover damages for personal injuries, alleged to have been sustained by plaintiff in consequence of the negligence of defendant in failing to keep a manhole properly and safely covered. Defendant denied

negligence. Trial resulted in a verdict and judgment for defendant. Plaintiff appeals.

The negligence complained of is that defendant maintained a manhole in the sidewalk and covered the same by placing thereover a circular, metal plate, which was loosely and negligently placed, was not clamped or fastened down, and was so light in weight and so negligently placed that a slight force of any kind could move it to one side and leave the cover in such a position that it might be easily turned or tilted by a person stepping thereon; that in the condition in which it was maintained it was a menace to pedestrians going across or near the manhole, and that such condition was well known to the officers of the defendant city.

The errors alleged relate to instructions given and refused, and in the overruling of the motion for a new trial. The defendant contends that under the evidence no other verdict than one for defendant could have been rendered, and that, therefore, any errors that may have been committed by the trial court in the giving or refusing of instructions were not prejudicial to the plaintiff.

In view of the contention made by defendant, we have examined all the evidence introduced. The record discloses that at one of the principal corners of the business center of defendant city, where the sidewalk is about twelve feet wide, the city maintained a manhole about three feet from the outer edge of the sidewalk, and between this manhole and the outer edge was a drinking fountain. The manhole was constructed and used for the purpose of giving access to the water pipes leading to the drinking fountain. The opening into the manhole was about 18 inches in diameter, and this opening was cemented and therein was placed an iron band. This opening and band were either flush with or slightly elevated above the sidewalk. The manhole was covered by an iron lid, weighing 25 pounds. On the underside of this lid or cover and about three-fourths of an inch from the outer edge was a circular rim, extending down-

ward from three-eighths to one-half of an inch from the underside of the cover. This rim fitted snugly into the iron band in the top of the opening of the manhole. The outer edge of the lid or cover formed a flange, about three-fourths of an inch wide, which rested on the cement in which the iron band was embedded. The record further discloses that the cover was such as is used as an ordinary cistern cover; that it had been in use for a great many years in the particular location; that it was such as was generally used in like situations. It is not shown that during its many years of use any one had ever suffered any injury on account thereof, or that it had ever become displaced, or that it could be easily displaced by one walking over or stumbling against it. It is shown that, when properly in place, it would be difficult for a person to move or disturb the cover by striking it with his foot or stumbling against it. There is no evidence that prior to plaintiff's injury, any person ever saw the cover displaced or that any one had ever stumbled over or moved it by kicking or striking against it.

On the evening of August 1, 1921, plaintiff and one Doctor Fisher were approaching the drinking fountain, when plaintiff stepped upon the cover of the manhole and it immediately tipped or tilted, and he fell astride of the tilted cover and received serious injuries. Plaintiff, himself, testified frankly that he did not know how the accident occurred. He only knew that for some reason the cover tilted and he fell astride of it. Doctor Fisher, the only other eye-witness, testified that when plaintiff stepped upon the cover it tilted edgewise and plaintiff was precipitated into the manhole, astride of the cover.

It seems evident that some one had moved the manhole cover from its proper position and had left it slightly to one side of where it properly belonged, so that one edge of the cover, instead of resting on the cement forming the top of the manhole, was resting over the edge of the hole, and plaintiff stepping thereon caused the lid to tilt. There is no evidence that this condition of the cover had existed for any considerable length of time, or that the cover was

placed in this improper position by any officer, agent or servant of the city. There is no evidence that any officer, agent or servant of the city knew of such condition, and evidence on behalf of the city tends to show that one of its officers or agents had been in the vicinity of the manhole within an hour of the accident, and that the cover was then in place. There is evidence in the record tending to show that there is another type of manhole cover which has a locking device, so that, when the cover is placed in position and turned, hooks which are on the underside of the cover extend under lugs in the band, and the cover is thereby locked. But the evidence shows that this locking type of cover has only recently come into use and was not generally used at the time of the accident, and that at that time the type of cover used was the one generally approved and in use in cities for the covering of manholes. Negligence cannot be predicated on the use of such a cover. That the manhole cover had been moved by some person a short time before plaintiff stepped thereon may be stated with reasonable certainty; but, since the defendant had no knowledge of such fact and it is not shown that whoever moved the cover did so at the direction or by permission of any city official or employee, it cannot be said that any negligence has been shown that would render the defendant liable.

Since no negligence on the part of defendant was proved, no verdict, other than the one rendered, would be supported by the evidence. In this view of the case, it is immaterial what instructions were given by the trial court, and we will not examine them to ascertain whether or not they correctly state the law. Under the facts as shown by the record, the trial court would have been justified in directing a verdict for the defendant, and doubtless would have done so, had a request therefor been made.

From what has been said, it follows that the judgment of the district court is right and is

AFFIRMED.

TILLIE ANDERSON, APPELLEE, V. ROY J. CUSACK ET AL., APPELLANTS: FIRST STATE BANK OF NORTH BEND, APPELLEE.

FILED JUNE 1, 1927. No. 24325.

1. Homestead: CONVEYANCE: VALIDITY. "A contract in writing to convey a homestead, which has been signed by both husband and wife, but which they have not acknowledged, is void, and will not be in any way enforced. The homestead means something more than and different from the $2,000 exemption which the statute allows the homestead claimant as against the claims of creditors; it means the actual home of the family, including the land and buildings which constitute the same, and the possession and ownership of all which may be successfully defended by either husband or wife during the marriage state against the independent acts of either, and against the void acts of either, or both." *Anderson v. Schertz*, 94 Neb. 390.
2. ———: INVALID MORTGAGE. "A mortgagee, holding a mortgage upon a homestead, properly executed and acknowledged by husband and wife, may ordinarily take advantage of the invalidity of a prior mortgage upon the homestead which is invalid because not properly acknowledged." *Trevett, Mattis & Baker Co. v. Reagor*, 112 Neb. 470.
3. *Mudra v. Groeling*, 89 Neb. 829, examined and distinguished.

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

Cain & Johnson and *R. A. Robinson*, for appellants.

J. J. Gleeson and *Dolezal, Spear, Mapes & Stevens, contra.*

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

THOMPSON, J.

This suit was instituted by appellee, hereinafter called plaintiff, against her husband, Andrew D. Anderson, and appellants Roy J. Cusack, and the First National Bank of North Bend, hereinafter called the bank, to have a mortgage then appearing of record in Dodge county on 120 acres of land situate therein, claimed by plaintiff as the homestead of herself, husband, and family, declared void and

such Cusack and the bank forever enjoined from enforcing the same. After the issues were duly joined, trial was had to the court, and judgment in favor of plaintiff entered as prayed, to reverse which Cusack and the bank appeal.

The questions presented for our consideration are: Was such mortgage void for want of a legal acknowledgement? If void, was it so as to the entire tract, or only to the extent of a $2,000 in value homestead interest therein either to be set apart to plaintiff and her family in cash or an equivalent in land? Was the plaintiff estopped by the facts pleaded from questioning the validity of such mortgage?

The facts reflected by this record show without question that, at the dates involved, prior thereto and ever since, such tract was owned and occupied by plaintiff, her husband and their minor children as a home, and was in fact their homestead under the laws of this state; that prior to the date of the mortgage in question the husband had become indebted to the bank at numerous times, which indebtedness was evidenced by notes amounting in number to seven, and totaling about $11,000; that Cusack was a stockholder, president, and business manager of the bank at the time and long prior thereto; that on the date of this transaction, to wit, December 29, 1919, Cusack became desirous of having this indebtedness in some way secured to the bank, and so informed the husband, and in furtherance thereof Cusack drafted the mortgage, which is in the usual form of such instruments, and the note of $11,000 secured thereby, each thereof running to him; that afterward each was signed by the plaintiff and her husband, and Thomas H. Fowler, a notary public, who was at the time a stockholder in the bank and its cashier, was called to witness and acknowledge the same, which he did in the usual form, so far as is indicated by the mortgage; that the note and mortgage were then left with the bank as the owner and holder thereof, and the bank procured the mortgage to be recorded and then returned to it, where such note and mortgage have since remained. While this note and mortgage ostensibly appear to be the property of Cusack, the evidence shows that each

thereof is in fact that of the bank, and was so understood to be by Cusack and all parties concerned at the time, the mortgage being taken in Cusack's name for convenience of the bank, and not otherwise, and as collateral security of the notes previously signed by the husband heretofore referred to. Thus, we find the note and mortgage to be the property of the bank, and the notary taking the acknowledgement to have been at the time directly financially interested in the transaction. Being thus directly interested, he was disqualified as such notary to act. The land covered by such mortgage having been found to be the homestead of the mortgagors, and the notary taking the acknowledgement being disqualified, under our holdings in construing section 2819, Comp. St. 1922, which provides that "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife," such mortgage was void as to the entire tract, and the trial court did not err in so entering judgment. *Chadron Loan & Building Ass'n v. O'Linn*, 1 Neb. (Unof.) 1; *Trevett, Mattis & Baker Co. v. Reagor*, 112 Neb. 470. We are further supported in this conclusion by the following: In *Lichty v. Beale*, 75 Neb. 770, we held: "An executory contract for the sale of a homestead, made by either husband or wife without joinder by the other, is void as to the whole homestead tract, without regard to value, and not only will specific performance of it not be decreed, but a breach of it will not afford a cause of action for damages."

In the course of the opinion in the last cited case, on page 772, it is stated: "In the last of these cases (*Teske v. Dittberner*, 70 Neb. 544) there is a very elaborate and exhaustive review of the authorities and of the principles involved, by the former Chief Justice Holcomb, and the doctrine is emphatically reaffirmed that such a contract is void as to the whole homestead tract, as well as to the reversionary interest, and this in both instances, without regard to value. * * * That this conclusion is sound and essential to the protection and preservation of the homestead right and is

in accordance with the manifest spirit, if not the strict letter, of the statute, we have not the least doubt, so that we are constrained to hold that the contract in suit, in so far as it treats of the homestead tract of the plaintiff, is wholly void."

In *Anderson v. Schertz,* 94 Neb. 390, we held: "A contract in writing to convey a homestead, which has been signed by both husband and wife, but which they have not acknowledged, is void, and will not be in any way enforced. The homestead means something more than and different from the $2,000 exemption which the statute allows the homestead claimant as against the claims of creditors; it means the actual home of the family, including the land and buildings which constitute the same, and the possession and ownership of all which may be successfully defended by either husband or wife during the marriage state against the independent acts of either, and against the void acts of either, or both."

This holding is affirmed by us, as to the homestead tract, in *Davis v. Merson,* 103 Neb. 397, and is now the settled law of this state.

Appellants cite as controlling in this case, *Mudra v. Groeling,* 89 Neb. 829. We have examined the facts as reflected by the opinion as written, and it is sufficient to say that such facts are materially different from those in this case; hence, the conclusion reached therein is without force here.

As to the question of estoppel: Plaintiff was clothed with the authority to prosecute this action. The indebtedness evidenced by the notes to which the $11,000 note in question was to be held as collateral was in no manner a debt or obligation owing by her to the bank. Neither it nor Cusack was in any manner misled by her to their injury, and both of them were possessed of full knowledge of all the facts entering into or in any manner connected with the execution and delivery of such mortgage. They each knew the premises to be the homestead of the plaintiff, her husband and family; they each knew that the note and mortgage

were the property of the bank and of no other person; they each knew that it was so understood by all parties connected with the execution and delivery thereof. The bank and its president could not be heard to say that they did not know that the notary was a stockholder and cashier of the bank, and an interested party in the procuring and delivery of such note and mortgage, and thus disqualified to act. The unfortunate situation in which they found themselves was one of their own seeking, and in no manner urged upon them by either the plaintiff or her husband. On this proposition the record fully sustains the judgment of the trial court.

Futher, at the instance of the bank, Cusack and plaintiff, the First State Bank of North Bend, which at the time owned two notes, each secured by mortgage on this same 120 acres of land executed and delivered to it by plaintiff and her husband, was made a party defendant, and by way of answer and cross-petition it challenged the authority of the notary to take the acknowledgement to the mortgage here in question. The trial court found the two mortgages of the First State Bank to be in full force and effect, and sustained its challenge to the mortgage running to Cusack. This finding is in harmony with our holding in *Trevett, Mattis & Baker Co. v. Reagor, supra,* wherein we stated: "A mortgagee, holding a mortgage upon a homestead, properly executed and acknowledged by husband and wife, may ordinarily take advantage of the invalidity of a prior mortgage upon the homestead which is invalid because not properly acknowledged." Hence, the court was not only within the law applicable to the facts in finding in favor of the plaintiff as to this mortgage in question, but was also within the law in holding such mortgage void on the cross-petition of the First State Bank.

The judgment of the trial court is right and is in all things

AFFIRMED.

STEPHEN A. KUHLE, APPELLEE, V. FARMERS STATE BANK OF COTESFIELD, APPELLANT.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. FARMERS STATE BANK OF COTESFIELD: I. A. KIRK, RECEIVER, APPELLANT: STEPHEN A. KUHLE, CLAIMANT, APPELLEE.

FILED JUNE 1, 1927. No. 25822.

1. **Banks and Banking:** CLAIMS AGAINST GUARANTY FUND: BURDEN OF PROOF. "A holder of a certificate of deposit in a bank who seeks to hold the guaranty fund liable for its payment must show that the transaction leading up to the issuance of the certificate was such that the law holds the guaranty fund liable for its payment." *State v. Farmers State Bank*, 111 Neb. 117.
2. **Estoppel.** The estoppel pleaded is without force under the record herein disclosed.
3. **Banks and Banking:** GUARANTY FUND. Neither banks nor their officers can impose a liability upon the guaranty fund; such obligation is one fixed by statute alone.

APPEAL from the district court for Howard county: BAYARD H. PAINE, JUDGE. *Affirmed.*

C. M. Skiles, Taylor & Spikes and *Albert S. Johnston*, for appellant.

H. G. Wellensick, contra.

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

THOMPSON, J.

The Farmers State Bank, as its name indicates, is a corporation organized for the purpose of, and at the dates of the claimed deposits in this case was, conducting business at Cotesfield. Afterwards it was adjudged insolvent, and a receiver was appointed to wind up its affairs. Kuhle filed a claim, based on an alleged certificate of deposit, for $2,000 with interest thereon at 5 per cent. from February 9, 1925, the date of such certificate, to the date it became due, to wit, August 9, 1925, and 7 per cent. interest thereafter, and

prayed that the same and each item thereof be ordered paid out of the guaranty fund. To the issue thus presented the receiver interposed a general denial, and the claimant by way of reply pleaded an estoppel as to the bank and its officers. Trial was had to the court, and judgment rendered, in substance, finding that such certificate was issued by the bank to claimant for a check drawn by A. J. Bandura (at the time cashier, a stockholder, and director of the bank) on this bank for $2,000, of the date of the certificate, and that Bandura's account in the bank at the time showed a balance of $2,019.89, but that only $1,400 thereof represented a *bona fide* deposit, and that the latter with 5 per cent. interest thereon for one year should be allowed, to wit, $1,470, which amount was ordered paid out of the guaranty fund, and the remainder of the claim was disallowed; from which allowance the receiver appeals, and from such disallowance the claimant files a cross-appeal.

We have carefully examined the contentions of the parties as evidenced by their respective briefs, and also reviewed the transcript and bill of exceptions, and are convinced that the judgment of the trial court was the only judgment that could have been entered under this record. To detail the facts which lead us to this conclusion would serve no useful purpose, and might involve interests not before us for determination.

Thus, we determine that the claimant has met the burden cast upon him as to the $1,400, but has failed to meet such burden as to the rejected $600. This conclusion is in harmony with our holding in *State v. Farmers State Bank*, 111 Neb. 117.

The estoppel pleaded is without force under the record herein disclosed. Neither banks nor their officers can impose a liability upon the guaranty fund; such obligation is one fixed by statute alone. *State v. Farmers State Bank*, 112 Neb. 380.

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

AFFIRMED.

CITY OF CHADRON, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

FILED JUNE 9, 1927. NO. 24896.

1. **Highways: CHANGE OF GRADE: EXPENSE OF LOWERING CITY WATER PIPES.** A city of the second class obtaining its water supply from outside the city limits, having its pipes beneath the county roads by permission of the county authorities, holds such right subject to the use of the roads for the public welfare and travel; and whenever such use reasonably demands it, those in charge of said roads may change the grade of the roads and, if it be necessary to change the grade of the water pipe lines belonging to the city, it is the duty of the city to make such change at its own expense.
2. ———: ———: DESTRUCTION OF WATER PIPES: LIABILITY. Those in charge of the grading of the public roads of the state have no legal right to tear up and destroy the water pipes of a city laid under such public road, without giving the city reasonable notice and opportunity to change or relay its pipes; and when, as in the circumstances of this case, those in charge of the work for the state, in the scope of the work and to carry out its general plan, so destroy the water pipes of the city, and the city is duly granted leave to sue, the state will be held responsible for the damages resulting from such act.
3. ———: ———: ———: DAMAGES. In such a case, the city will not be allowed to recover damages for that portion of its pipes disconnected from the part of the pipe line destroyed, when such portion of the pipe line is not disturbed, except by the disconnection, and is not destroyed or otherwise damaged; but, under the rule as to the measure of damages adopted in this case, will be allowed to recover the reasonable value of the pipes destroyed, ascertained as of the date of their destruction.

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

Greydon L. Nichols, G. T. H. Babcock, E. D. Crites and *F. A. Crites,* for appellant.

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

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

GOSS, C. J.

The city of Chadron appealed from a dismissal, by the district court for Lancaster county, of its suit against the state. The sovereignty of the state rendering it immune from suit, the plaintiff presented its claim to the legislature of 1923 and was authorized by House Roll No. 718, approved May 3, 1923, to sue. The case was tried to the court under section 1103, Comp. St. 1922, which says that the court "shall hear and determine the matter upon the testimony according to justice and right, as upon the amicable settlement of a controversy, and shall render award and judgment against the claimant, or the state, as upon the testimony right and justice may require."

Chadron, classified as a city of the first class, owns and maintains its own water-works. It has a gravity system, obtaining its water by dams across the creek in the hills about seven miles south of the city. It began its service about 35 years ago with an 8-inch cast-iron pipe line. In 1911 this was supplemented by a 10-inch wood stave line; and supplemented further, about the time the controversy arose, by a new 14-inch wood stave pipe line which is not involved as an item of recovery. Portions of these lines were laid beneath the public roads.

In August, 1920, the state, through its department of public works and the board of county commissioners of Dawes county, as parties of the first part, entered into a contract with a contractor, as party of the second part, to build a road, known as federal aid project number 76A, between Chadron and the south line of Dawes county, of which Chadron is the county seat. This is a part of the highway connecting Alliance and Crawford. In the performance of the work of bringing this road to proper grade, the contractor encountered the iron water pipe and the old stave pipe in several places. The former had been laid about five feet and the latter about four feet underground. There

is testimony to show that there were informal conferences between the engineers of the project and the city officials whose duty it was to look after the water supply. There is testimony to the effect that a qualified promise was made by one of the engineers in charge for the state that the city would be reimbursed for damage caused by removal. Informally the city officials told those engaged on the work not to continue to reduce the grade so as to require the taking out of the water pipes. The city took no other steps, except by these conversations, unofficial on both sides save as the participants held the respective offices designated, to stop the grading. The contractor proceeded with his grading, with the result that the city claims about three miles of the stave line were destroyed and about half that quantity of stave pipe line disconnected and so made useless; and that it was put to an expense of nearly $2,000 to relay the iron pipe exposed and removed by the grading of the project. It asks damages totaling $13,691.92 with interest from January 1, 1921, covering the various items.

When the exigency arose, neither side treated the matter with the seriousness that such a situation would seem to demand. The city did not take action by injunction or otherwise to test the right of those who were in charge of and actually doing the grading to tear out those portions of the pipe lines that obstructed their reduction of the road to the projected grade; nor, to apply the language of the statute, guiding the courts where leave to sue the state is so granted, did those in charge for the state seem to proceed quite "according to justice and right, as upon the amicable settlement of a controversy." The evidence does not show any clear-cut official notice by the state to the city that the state intended to proceed with its grading, that it claimed the legal right to do so, and that the city should protect itself by relaying its pipe lines in advance of the grading. Those in charge of the execution of the project ordered the uncovering and tearing out of the pipes that were in the way. Of course, the qualified promise of the

state's engineer in charge, above referred to, could not bind the state. It was not within the scope of his agency. His work was to direct the preparation of the highway for travel in accordance with the plans and the contract entered into to carry those plans into effect.

The main questions arising in this case are: (1) Whether the city of Chadron had such an easement (or other right) in the public road as to be prior in right to that of the public, so that the city could not be required to change the grade of its water pipes at its own expense? If so, then any party desiring them lowered would be liable for the entire expense of taking them out and replacing them, so as to conform to the new grade of the highway. (2) Even if the above question is not answerable in the affirmative, but if, nevertheless, the defendant without proper preliminary notice and without legal warrant destroyed some of the lines and rendered other parts useless, what, if anything, is the defendant's responsibility, and, if the defendant state is liable, what is the proper measure of damages in the particular circumstances of this case?

At the outset it is pertinent to say that the construction and operation of the water-works system by the city was not the exercise of a governmental function, but rather in the nature of a private enterprise for the convenience of the municipality, its inhabitants and property owners. *Metropolitan Utilities District v. City of Omaha,* 112 Neb. 93.

It is fundamental that the right of the state to provide roads for the use of its citizens and for the public generally is a sovereign right. If the right to make them fit and safe is a proper exercise of the police power of the state, then it must follow that any private corporation or any municipality engaged in rendering service like that of a private corporation holds whatever rights it acquires in the public roads of the state subject to these two great elements of sovereignty. The inherent sovereignty of the state and the power of the legislature to supervise matters affecting

the safety and welfare of the public in its relation to the streets were signally upheld in *Chicago, B. & Q. R. Co. v. State,* 47 Neb. 549, this court holding that such power could not be bartered away by contract or otherwise. On error to the supreme court of the United States, the judgment of this court was in all things affirmed. *Chicago, B. & Q. R. Co. v. Nebraska,* 170 U. S. 57. Numberless cases might be cited upholding this well-established rule of law. Such being the rule, it would seem patent that neither the individual owners of adjoining land, as owners of the fee, by conveying an easement, nor Dawes county, by permitting an easement under the county roads, would thus be able to create a right, by "contract or otherwise," superior to the right of the public in said road. While such a road bears the additional burden of the water pipes, it must bear it without interference with all of the conventional and implied rights of the public to use the road in the best way to serve the public welfare.

In the view we take of the rights of the parties, it will be unnecessary to try to abstract from rather unsatisfactory and incomplete evidence the title of the city to the use of the road. Suffice it to say that some of the pipe lines ran through private property and some under public roads from about 1892; that all portions of the line involved were outside the city limits. Roads were later established over a part of the route where they did not exist before. It may be assumed as shown, for the purposes of this case, that the city had rights over all the route here involved either by virtue of deeds or by consent or acquiescence of the county. But wherever the route of the city's water pipes ran originally in a public road or wherever later a public road was established over the route of the pipe lines, the right of the public was dominant and the right or easement of the city was servient. It is presumed that, if the original establishment of a new road over the route occupied by the pipe line damaged the city in any actionable manner, those damages were claimed and compensation paid before the property came under the superior dominion of the coun-

ty or state. When the road was accepted and taken over in 1910 by the state as a part of the federal aid project, it took it with the water pipe lines and whatever rights the city had in the road, but that taking did not vary the rights of the city which were secondary to the primary rights of the public to such uses of and changes in the road as the public welfare might reasonably demand. This answers the first question under consideration in the negative, and it follows that it was the duty of the city upon proper notice and within a reasonable time to lower its water pipes so as to conform to any reasonable change of grade of the road.

The evidence indicates that neither the state nor the city actually realized the change necessary to be made until the contractor in grading the road came upon the pipes. Upon informal conferences, heretofore touched upon, the state proceeded, under direction of those in charge, to tear out the pipe lines, with the results heretofore indicated, without the formalities that would seem to be due in the circumstances. The state argues that, under the doctrine of *Benda v. State*, 109 Neb. 132, the state is not liable for the damages done to the property of the plaintiff by the servants of the state. In that case the damage was done by individual members of a state surveying party, on private property, where such members were without permission of the state engineer in charge, on a mission personal to themselves, and not in the scope of their employment. The case is not applicable for the reason that here the water pipes were in the field of operation of the state in grading the public road so as to make it conform to the general plan of the system. The act of destruction arose in and because of the performance of the work itself, and not aside from its scope. While, in the circumstances of this case, the state and its contractor had the ultimate legal right so to grade the road, yet to do so without reasonable and proper notice to the city and without giving it a fair opportunity and a reasonable time to lower the pipes or to remove them is, as we view the law, actionable.

It remains to consider the damages due the city. It claims damages, not only for all stave pipe line actually destroyed, but also for that portion of the stave pipe line put out of commission, as well as for the cost of relaying the pipe, including the relaying of the cast-iron pipe which was torn out but not destroyed. In no branch of the law is there more difficulty than in arriving at the proper measure of damages. The law is not dogmatic in fixing the rules relating thereto.

"Definite rules which will measure the extent of recovery in all cases even of a particular class are difficult to formulate owing to the consideration which must be given in each case to its specific and perhaps peculiar surrounding circumstances. Stated in broad terms, however, the measure of damages is such sum as will compensate the person injured for the loss sustained, with the least burden to the wrongdoer consistent with the idea of fair compensation, and with the duty upon the person injured to exercise reasonable care to mitigate the injury, according to the opportunities that may fairly be or appear to be within his reach." 17 C. J. 844, sec. 166.

Applying that principle, which seems fitting, to this case, we are of the opinion that the city is entitled to recover, but that its recovery should be limited to the reasonable value of the material destroyed in the stave pipe line; that it cannot recover for the value of that portion of the stave pipe line disconnected and put into disuse by reason of the destruction of part of the line; and that it cannot recover for the cost of relaying either the part of the stave line destroyed nor for the relaying of that portion of the iron pipe that was removed by the grading. Fortunately, while neither party tried nor argued the case on the theory we have adopted, the proofs contain enough evidence upon which a judgment and decree can be based. The testimony shows that 15,726 feet of stave pipes were torn out, but that 726 feet of this was salvaged by the city; that the reasonable value of the 15,000 feet of wood pipe completely

destroyed, if new at the time of destruction, is $8,554; but that it should be considered as depreciated 40 per cent; and that its real value was therefore, as we compute it, $5,132.40. That we think, for the reasons given in this opinion, would have been the fair amount due, according to justice and right as upon the amicable settlement of a controversy, if the parties had settled when the controversy arose. The state should pay 7 per cent. interest on this amount from January 1, 1921.

For the reasons stated in this opinion, the judgment of the district court is reversed and the cause is remanded, with directions to enter judgment in favor of the city of Chadron against the state for $5,132.40, with interest at 7 per cent. from January 1, 1921, and costs.

REVERSED.

The following opinion on motion for rehearing was filed July 26, 1927. *Rehearing denied.*

Interest. When the state, engaged in business functions, commits a wrong and damages the property of another and that other duly obtains the sanction of the legislature to sue the state to secure an adjudication of the controversy, the court may, under the authority of such legislative sanction and under the authority of section 1103, Comp. St. 1922, where justice and right require it, include interest in a judgment rendered against the state.

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

GOSS, C. J.

A motion and brief for rehearing were filed herein by the state. The court is of the opinion that the motion should be overruled, but deem it advisable to discuss one point presented therein, namely, the complaint because the court allowed interest against the state.

On grounds of public convenience, it has long been the

general rule that interest is not to be awarded against a sovereign government unless its consent to pay interest has been manifested by an act of its legislature or by a lawful contract of its executive officers. *In re Gosman,* 17 Ch. Div. (Eng) 771; *United States v. North Carolina,* 136 U. S. 211; *State v. Board of Public Works,* 36 Ohio St. 409; *Peterson v. State,* 114 Neb. 612. In the last named case, this court said: "The legislature has not provided by statute for payment of interest upon claims against the state. It follows that, in the absence of a statute, or of an agreement therefor, such claims (meaning for interest) cannot be allowed." The distinguishing feature between the *Peterson* case and the present case is this: In the present case the legislature expressly gave the plaintiff the right to sue the state, but in the *Peterson* case the suit was brought in the district court after a disapproval of the claim by the board of public works and a disallowance by the state auditor, but without express sanction of the legislature. When the state undertakes business functions, as in this case, and while thus engaged commits a wrong, as it did here, and thereafter the state in a legislative capacity grants leave to the party wronged to sue it and the suit is conducted under a statute (Comp. St. 1922, sec. 1103) directing that the court "shall hear and determine the matter upon the testimony according to justice and right, as upon the amicable settlement of a controversy, and shall render award and judgment against the claimant, or the state, as upon the testimony right and justice may require," we are of the opinion that, if the case, irrespective of the sovereignty and personality of the parties, is such as justly to call for payment of interest, then the state should not be exempted from such payment by reason of its sovereignty. While the question was not considered at length in *Commonwealth Power Co. v. State,* 104 Neb. 439, yet in that case the act of the district court in allowing interest was expressly affirmed. The opinion hereto-

fore adopted in the case under consideration, *ante*, p. 650, is adhered to, and the motion for rehearing is

OVERRULED.

EDWARD P. LEWIS V. STATE OF NEBRASKA.

FILED JUNE 9, 1927. No. 25843.

1. Record examined, and *held* sufficient to sustain the verdict.
2. Rape: CORROBORATIVE EVIDENCE. "Where, in a prosecution for assault with intent to commit rape, prosecutrix testifies unequivocally to facts which would constitute the offense, a sufficient corroboration is shown if opportunity and inclination, on the part of the defendant, to commit the offense are shown, and the circumstances proved by other witnesses tend to corroborate the testimony of prosecutrix." *Aller v. State*, 114 Neb. 59.
3. Criminal Law: EVIDENCE: OBJECTIONS. "Where, in a prosecution for assault with intent to commit rape, the articles of clothing, worn by the prosecutrix at the time of the assault, are fully identified and offered in evidence, an objection that no sufficient foundation has been laid is insufficient to raise the question as to whether the clothing is in the same condition that it was immediately following the assault. Such an objection, to be availing, should challenge the trial court's attention to the specific ground for objection to the introduction of the articles." *Aller v. State*, 114 Neb. 59.

ERROR to the district court for Box Butte county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Boyd & Metz, for plaintiff in error.

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

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

GOSS, C. J.

The defendant was convicted of assault with intent to commit rape, was sentenced to a term of years in the penitentiary, and has brought the case here for review upon

his petition in error. He assigns as errors that there was not sufficient evidence to sustain the verdict and that the court erred in three cited instances in admitting evidence.

Testimony was submitted to the jury showing the following: Rachel Roach, the prosecutrix, lived with her husband and children near the railroad viaduct in Alliance. Shortly after 6 o'clock on the morning of July 10, 1926, the defendant, Edward P. Lewis, and Ted Moran (who was tried jointly with Lewis and convicted also), driven in a car by Millard Donovan, called at the Roach home, just as the family was getting up, and said they wanted to talk to Mr. Roach. He dressed and went outside a few minutes to talk to them. The next time she saw them was about 10:30 in the forenoon. Her husband had left for his work and her five children had gone to a neighbor's to play. She was alone in her kitchen rolling out pie crust. The kitchen door was open. Moran entered, remarked that he had left his hat there earlier in the day, and passed through the living room into the bedroom. He returned immediately, and as he passed behind her he grasped her about the waist, giving expression to his intent to assault her, lifted her and carried her into the bedroom, where he threw her on the bed. By that time the defendant, Lewis, was in the room. She kicked and made an outcry, but her mouth was covered and her arms were pinioned by Moran. The defendant, Lewis, tried to aid Moran by removing her bloomers, and likewise indicated his own criminal intent toward her by his language. By that time the third man, Donovan, had entered the room. Lewis tore the bloomers, but prosecutrix resisted so vigorously that they were unable to accomplish their purpose. She escaped from the room with Moran clinging to her dress. He caught her again in the living room. She hit him in the face and he slapped her and threw her down on her back. She called to Donovan to help her and he pulled Moran off. She ran from the room and house to the home of a neighbor, Mrs. Fredericks, who telephoned for the

police. Mr. Fredericks, a switchman who works nights, was at home. He testified that Mrs. Roach's hair was mussed up and she had a scratch around her neck. The chief of police, who responded to the telephone call with the sheriff and others, testified that she was nervous and crying, and testified that prosecutrix had spots on her cheek, a bruise on her cheek bone, finger nail scratches on her neck, and black and blue marks on one of her arms. The sheriff testified somewhat generally along the same line.

The defendants Moran and Lewis categorically deny all of the testimony of the prosecutrix tending to prove an assault, and Donovan supports them so far as he was connected with their movements and actions.

"The law does not require that the prosecutrix be corroborated by other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." *Aller v. State,* 114 Neb. 59.

In the light of the law and the evidence, the case was for the jury. The court committed no error in submitting it to the jury and in overruling the assignment of error relating to the sufficiency of the evidence. There was ample evidence to show the evil intent of the defendant. The corroboration was sufficient.

Defendant complains that the court erred in admitting the torn bloomers and torn dress in evidence over his objections that they were incompetent, irrelevant and immaterial, and that no foundation had been laid. It should be borne in mind that Mrs. Roach had testified, without objection, when asked to examine the bloomers, that they were not torn when the men arrived, and that they were torn by Lewis; and had likewise testified, without objection, when asked to examine the dress, that it was not torn when the men arrived, and that it was torn by Moran. She testified that she wore those bloomers and that dress when

the men came and she identified the particular tears shown as the tears made by the respective defendants. The objection made by defendant was too indefinite. It did not challenge the court's attention to the specific objection that is now urged. *Aller v. State*, 114 Neb. 59.

We conclude that the judgment should be, and it is

AFFIRMED.

AVERY COMPANY ET AL., APPELLANTS, V. ROBERT M. HANKS ET AL., APPELLEES.

FILED JUNE 9, 1927. No. 25731.

New Trial. Lack of diligence in producing evidence on a material issue in a cause on trial may be sufficient justification for the denial of a new trial in an independent suit in equity commenced during a subsequent term of court and based on the ground of newly discovered evidence.

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

Raymond & Fitzgerald, for appellants.

Morrow & Morrow, Mothersead & York and *Field, Ricketts & Ricketts, contra.*

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

ROSE, J.

This is an independent suit in equity for a new trial of a former cause wherein the district court had rendered a decree foreclosing a mortgage for $15,000 on 80 acres of land described as the south half of the southwest quarter of section 12, township 21 north, range 55, Scotts Bluff county. The equitable pleas for a new trial are based on misconduct of the successful litigants in procuring the former judgment by fraud and on newly discovered evidence. The facts on which the present suit is based were

put in issue by answers of defendants herein. After a lengthy trial in the second cause the district court entered a nonsuit. From the dismissal plaintiffs appealed.

The appeal presents the cause for trial *de novo*. Does the evidence show that plaintiffs are entitled to a new trial on the ground of newly discovered evidence after expiration of the term at which the former decree was entered? This is the question for solution and requires an examination of two complicated records. The opinion, however, will necessarily be confined to a mere outline of the vital issues, proofs and circumstances.

The former suit was a proceeding in the nature of a creditor's bill and was commenced by the Avery Company to set aside a deed from Robert M. Hanks to Annettie B. Hanks, his wife, and to cancel a subsequent mortgage for $15,000 from them to the First National Bank of Gering, hereinafter called the "bank." The land thus conveyed and mortgaged is the 80-acre tract in controversy. The purpose of the creditor's bill was to subject the land to the payment of a judgment for $4,487.75, which the Avery Company had recovered against Robert M. Hanks and Will F. French, partners engaged in raising wheat and operating a garage. Another judgment creditor also appeared as a litigant. The defendants therein were the Hanks and also the bank and other secured creditors. The Avery Company pleaded that, for the purpose of defrauding it and of preventing it from collecting its judgment, the husband deeded the land to his wife, and that for the same purpose the parties to the deed subsequently mortgaged the land to the bank, an alleged participant in the fraud. There were similar pleas by the other unsecured judgment creditor. The Hanks and the bank denied the fraud charged. The bank pleaded in substance that the mortgage for $15,000 was given to it in good faith as collateral security for debts aggregating more than $41,000, evidenced by notes of Robert M. Hanks or his partner and payable to the bank or officers thereof. There was

a prayer for the foreclosure of the mortgage. Some of the notes collaterally secured had been transferred by the bank and the transferees appeared and asserted rights to the collateral security. Upon a trial of the issues in the former cause the district court found that the deed and the mortgage were fraudulent and entered a decree canceling those instruments and establishing in favor of the judgment creditors liens on the 80-acre tract in controversy.

From the decree in favor of the judgment creditors, the bank, the other litigants claiming the protection of the mortgage as collateral security and Annettie B. Hanks appealed. Upon a trial *de novo* the supreme court found in effect, in the first suit, that Annettie B. Hanks and the bank did not intend to, and did not, defraud the unsecured creditors of Robert M. Hanks, and also found that the mortgage for $15,000 was given and accepted in good faith as collateral security for the payment of *bona fide* debts evidenced by promissory notes on which Robert M. Hanks was liable as maker. Consequently the decree in the creditor's bill was reversed and the cause remanded to the district court, with directions to enter a decree foreclosing the mortgage, ordering a judicial sale of the land, applying the proceeds to the extent of $15,000, if realized, to the claims of the bank and its transferees, and the excess, if any, to the judgment of the Avery Company. The cause was remanded to the district court, where the decree thus directed was entered. At a subsequent term of the lower court the present suit in equity was begun to set aside the decree which the supreme court directed and to procure a new trial of the creditor's bill on the two grounds already stated—fraud of the prevailing parties and newly discovered evidence.

On the issues of fraud in the procuring of the first decree the evidence is wholly insufficient to sustain the charge and the trial court properly so found.

The newly discovered evidence pleaded as a ground for a new trial consisted principally of additional testimony

tending to prove that officers of the bank in procuring the mortgage for $15,000 joined with the Hanks in previously undisclosed oral and written agreements tending to show that the bank already had ample security; that officers of the bank appreciated former patronage from Robert M. Hanks, a depositor and borrower, and desired to reciprocate; that the real purpose of the mortgage was to protect mortgagors and prevent the seizure and sale of their mortgaged land by judgment creditors, referring particularly to the Avery Company; that the bank did not intend to foreclose the mortgage and that the lien thereof should not be released without the consent of the mortgagors.

This testimony and other details of a similar nature cover a considerable portion of the record, but do not necessarily establish the right to a new trial at a subsequent term of court. The issue of fact to which this evidence applied was, in the former suit, tried and adjudicated adversely to plaintiffs in equity in the second proceeding. If the failure to adduce it at the first trial resulted from the lack of proper diligence on the part of the unsecured judgment creditors, it was not sufficient at a subsequent term of court for the purpose of procuring a new trial. It would have been admissible in the former suit. The pleadings of the bank warned the judgment creditors to prepare for proof refuting the allegations of good faith in the transaction assailed as fraudulent. The principal witnesses who testified in the present suit to the facts under consideration were witnesses at the trial of the creditor's suit. They then knew what they stated at the second trial. At the former trial they had been asked on the witness-stand about the circumstances attending the execution of the mortgage and with full knowledge of the facts they then withheld the information by them disclosed at the next trial. On cross-examination in the present suit they testified they would have answered at the former trial, had they been asked, questions calling for the facts herein related by them. Diligence required the disclosure of this information

at the former trial and, in the second suit, it does not establish the right to a new trial at a subsequent term of court. In *Gutru v. Johnson, ante,* p. 309, the opinion contains the following language:

"If a litigant may neglect such obviously important inquiry — inquiry which would have so certainly resulted in complete information — with his lawsuit approaching, and then, after the suit has gone against him, repair the damage which his neglect has occasioned by a resort to equity, there can be no end to litigation. If by the exercise of reasonable diligence a defendant may produce certain evidence disproving the testimony of the plaintiff as to defendant's conduct and representations and tending to prove perjury on the part of the plaintiff, and through inertia or carelessness fails to do so, he cannot thereafter have the judgment in said suit set aside by the production of said evidence in an equity action for that purpose." Citing, *Secord v. Powers,* 61 Neb. 615; *Barr v. Post,* 59 Neb. 361; *Scudder v. Evans,* 105 Neb. 292.

In addition to the lack of diligence, there is a view in which the new evidence, in connection with other disclosed facts, indicates good faith in the execution and acceptance of the mortgage. It was given as collateral security. The mortgagors so testified at both trials. The notes collaterally secured represented actual debts owing by Robert M. Hanks, one of the mortgagors, to the bank. Other security held by it had been decreasing in value with general deflation. Capable bankers might have solicited additional security under the circumstances without intending to defraud other creditors. They could consistently promise to postpone foreclosure for a prospective improvement in farm values. A substantial motive for defrauding a judgment creditor without serving any pecuniary interest of their own was wanting. On their face the notes and the mortgage securing them collaterally imported good faith in the transactions. The validity of those instruments was regularly adjudicated against the judgment creditors in a contested case wherein the intention to defraud them

was a prominent feature. A decree of foreclosure followed. Upon full consideration of the evidence in both causes, the conclusion is that, in the present suit, the district court properly denied a new trial.

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLEE, V. SECURITY STATE BANK OF EDDYVILLE, APPELLEE: COMMONWEALTH LIFE INSURANCE COMPANY, CLAIMANT, APPELLANT.

FILED JUNE 9, 1927. No. 25096.

Banks and Banking: GUARANTY FUND: "DEPOSITS." Where money purporting to be a deposit is placed in a state bank, for which the bank issues and delivers to the purported depositor certificates of deposit in terms providing for payment of 5 per cent. annual interest, and where, by an understanding between the parties, the bank pays to such person a bonus above the lawful rate of 5 per cent. interest, *held* that such transaction does not constitute a deposit within the meaning of the bank depositors' guaranty act, but is a mere loan of money to the bank. Comp. St. 1922, sec. 8008.

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

Jackson B. Chase, for appellant.

Horth, Cleary & Suhr and *C. M. Skiles, contra.*

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

DEAN, J.

The district court for Dawson county disallowed a certain claim of the Commonwealth Life Insurance Company, hereinafter called claimant, against the depositors' guaranty fund for $5,351.86, with 5 per cent. yearly interest, from January 1, 1923, for money deposited by claimant in the lately failed Security State Bank of Eddyville, hereinafter

called the bank. From this disallowance of its claim an appeal has been prosecuted by claimant.

It appears that there was an arrangement between the claimant and the bank by which assistance was to be rendered by the bank's officers to the claimant's agents, in the Eddyville vicinity, to procure life insurance for claimant and, in consideration of such assistance, the claimant was to maintain certain of its deposits in the bank.

In behalf of the state the attorney general argues that, during the period in which the transactions happened out of which the claim arose, there was a "fraudulent agreement between the officers of the bank and the officers of the insurance company for interest in excess of 5 per cent., by reason whereof the funds left with the bank constituted a loan and not a deposit." And the district court so found and decreed by its judgment. While the claim was allowed as a general claim against the receiver of the bank, the claimant was not, of course, reimbursed from the depositors' guaranty fund. Hence this suit.

George C. Gage was a bank examining agent for the bank receiver and he testified that the bank records disclosed that a bank certificate of deposit for $500, dated on or about April 30, 1921, was issued to claimant, and that, under the same date, an expense item of $3.75 was charged to the bank in suit, and that this $3.75 item represented excess interest which was paid by the bank to claimant for the deposit. He testified that the bank records showed other like instances. In corroboration of his statement the witness produced a letter from M. Goldsmith, claimant's agent, written on claimant's letterhead, to the cashier of the bank. The letter follows:

"April 30th (1921).

"Mr. Robert O'Meara, Security State Bank,

"Eddyville, Nebr.

"Dear Friend Bob: Attached please find check for $500 for which please send the company a C-D bearing 5% and a draft for the additional interest $3.75. Mr. Parker promised me another $500 at least next week and I will

send it then. Trusting this will meet with your approval and I will get the rest as fast as possible.

"Yours truly,
"(Signed) Milton Goldsmith."

Gage also testified that another certificate of deposit for $1,000, dated March 14, 1921, was issued to claimant and, under the same date, an expense item of $7.50 was charged to the bank, and this $7.50 item represented excess interest paid by the bank for the deposit. In this he was corroborated by a letter from Goldsmith to the cashier of the bank. The letter follows:

"March 14th, 1921.

"Mr. Robert O'Meara, Security State Bank,
"Eddyville, Nebr.

"Dear Friend: On your business mailed into the office for which I thank you I notice that you have made an error on two of the applications and I enclose them for you to make the corrections. Frank Duggins, age 34, rate $39.84, and you charged him the disability twice and you will please refund him $1.78 as the disability is included in the rate book at the stated age. James C. O'Meara, age 32, rate $38.33, and you charged him at age 35 also charging him the disability twice and you will see that his rate should be $38.33 so you will please refund him the difference between $40.65 and $38.33 which is $2.32 plus $1.72 which is the disability charged twice making a total refund to him of $4.04.

"I am also enclosing our draft No. 36785 for $1,000 and you will please send in a C/D for $1,000 at 5 per cent. and a draft for $7.50 making the interest 6½ per cent. as per our arrangement. I will see you a week from today and trust that you will have a nice line for me to work on. Again thanking you for the business written this week I beg to remain,

"Yours truly,
"(Signed) M. Goldsmith, District Agent."

Robert O'Meara, cashier of the bank, testified that Gold-

smith was the first man with whom arrangements were made whereby he, the cashier, was to write insurance for claimant on a commission basis, and that the arrangement was that claimant would deposit the money received for insurance premiums and that it was to be left in the bank. But he testified that some of this money was sent to the bank from Omaha and some was deposited personally by Goldsmith. But it is contended that Goldsmith was not an authorized agent of the claimant. Mr. Uehling, however, former president of the Commonwealth Life Insurance Company, testified that any business relations between the Commonwealth and the bank might have been instigated by Goldsmith, and that after Goldsmith had made some overtures and negotiated some business it was taken up with the Omaha office. He denied that there was any agreement made with the bank by which they were to receive more than 5 per cent. interest, but, apparently on reflection on this point, Mr. Uehling testified: "Q. There might have been, however, Mr. Uehling, without your knowledge? A. There might have been; yes, sir."

Counsel for the bank, on page 49 of his brief, argues: "Even though by some strange process of reasoning this alleged excess interest agreement upon which the receiver so confidently relies could be considered in force down to the closing of the bank, such fact would not change the rights of this claimant in the slightest particular. Because the evidence shows that no excess interest was paid after June, 1921, and said section (8008) prohibits the paying of excess interest and not the mere request or agreement for excess interest." But the letter written by Goldsmith to the cashier of the bank, "after June, 1921," appears to bear directly on the facts before us and it is apparently inconsistent with the argument of counsel. The letter follows:

"February 2d, 1922.

"Mr. Robert O'Meara,
"Eddyville, Nebr.
"Dear Bob: Your letter of the 1st at hand and con-

tents noted and I did not write to you to try and make you sore or anything of that nature but to try and get you to see the position the company is in when they make deposits with banks. The company does not want any bank to use any of their own funds to finance our premium notes and they want to deposit with each bank an equal amount of money for each note taken and they are willing to do that. Now in regard to the deposit out there which is more than what the notes amount to. I did not threaten to draw this money but I did say that the company was liable to draw it and would not feel that they should renew it all. We aim to do business on the square and will do it that way or not at all and the company will keep on adding to your deposit as we do business and as you stated there is business to be had out there and I would like to come out and work with you and place in your bank a cash deposit of equal amount for the notes taken. It is true that the business we have written out there will need some attention and we surely want you to attend to it and want to keep on such terms with you and your bank that you will be glad to do it and we can do enough business out there to make this deposit reach the $10,000 mark if you will work with me.

"Please wire me at my expense if you will work with me out there next week and the notes taken will be offset by a cash deposit from the company. I am having Mr. Uehling sign this letter also so that you will know the company is aware of the promise I am making you. Hoping to receive this wire not later than tomorrow, I beg to remain,

"Yours very truly,

"(Signed) F. J. Uehling, President.

"(Signed) M. Goldsmith, District Agent."

It will be noted that in the above letter of February 2, 1922, Mr. Goldsmith was the intermediate agent, the go-between, in making the unlawful arrangements with the bank for excess interest, and he wrote to the cashier of

the bank, O'Meara, to assure him, as such official, that he does not want to make him "sore or anything," but only wanted to get the cashier "to see the position the company is in when they make deposits with banks" and that claimant wanted to keep on such terms with the bank as would be profitable to both. And this letter, in token of its verity, as having been inspired by the claimant, is countersigned by F. J. Uehling, its president.

Mr. J. R. Paisley, president of the International Life Insurance Company, succeeded Mr. Uehling as president of the claimant company in January, 1923, and from his evidence, on defendant's part, it appears that there was a consolidation of the claimant company with the Standard Life Insurance Company, and "a subsequent merger into the International Life Insurance Company," whereby the International acquired all of the assets of the Standard, "including the claim against the Eddyville bank." He denied that excess interest or a bonus over 5 per cent. on deposits was ever received by claimant to his knowledge "unless it was by some error in the accounting," and that no fraudulent agreement was entered into between the company and the bank while he was its president, nor prior to that time, "that we have any record or knowledge of." On this feature of the case Mr. Paisley testified that he had it in mind that it was not advisable to make any deposits in Nebraska banks "on a collateral agreement (because they) would not be entitled to payment out of the guaranty fund." The evidence of this witness was somewhat evasive and mostly negative in character.

Robert O'Meara was not only an unwilling witness, but he was positively hostile in his attitude toward the state. In respect of the time and the facts surrounding the transactions, in regard to the payment of excess interest on the $500 deposit and the $1,000 deposit and the relations of the bank with the claimant generally, his evidence follows: "And you wrote them a C. D. for $1,007.50, didn't you? A. If the records show that I did; yes. Q. And on the same day you charged $7.50 to the expense account of the bank,

didn't you? A. Probably did. * * * Q. What does it say there,—well, it is charged to expenses, isn't it? A. Yes; but it is interest on deposit; that isn't concealing anything, is it? Q. Is that the expense account there? A. That's the expense account right there. Q. And did you charge interest to expense? A. Yes, sir. Q. You do? A. Yes, sir. Q. And when you issued them a cashier's check for $3.75, what did you charge that to? A. Charged it to expense. Q. And when you charged $100 attorney's fees to expenses, what was that for? A. That's expenses. Q. What expense,—what attorney did you pay it to? * * * Q. You resent the inference that you have charged certain things to something other than for what they were paid, don't you, Mr. O'Meara? A. No, sir. Q. You did charge the bank with $100 attorney's fees? A. Yes, sir. Q. And that was commission, wasn't it? A. No, sir. Q. What attorney was it paid to? A. I don't know. Q. It wasn't paid to any attorney? A. It was paid to Joe Mutchie. Q. Is he an attorney? A. I don't know whether he is or not. Q. You know he isn't, don't you? A. He is no attorney. Q. Then, why did you charge it to attorney's fees? (no answer.)" On the cross-examination, he further testified: "Q. Now, you say that when you first commenced doing business with Goldsmith he and you entered into an agreement whereby your bank was to pay a bonus of 1½ per cent. on certain moneys placed in the bank on time deposit? A. Yes, sir. Q. Was that agreement for that bonus entered into with Goldsmith? A. Yes, sir. * * * Q. What was your understanding as to who was to get this bonus? A. Well, I didn't really know who was to get it, I put it in the time certificates and he (Goldsmith) took the certificates with him, I don't know who was to get it, whether he got it or whether the company got it. Q. But your agreement was with him, was it? A. Yes. Q. That you would pay a bonus? A. Yes. Q. Did he ask you to put it in the certificate? A. Yes; he asked me to put it in the certificate. Q. Now, as a matter of fact, the bonus was paid sometimes by cashier's check? A. I suppose it was."

Elsewhere in his cross-examination, O'Meara, who was the defendant's leading witness, testified that the account herein, from its beginning until its close, "figured out 4¾ per cent." But this evidence is not borne out by the record and is so at variance with other evidence of this witness that it is not entitled to credence.

Where money purporting to be a deposit is placed in a state bank, for which the bank issues and delivers to the purported depositor certificates of deposit in terms providing for payment of 5 per cent. annual interest, and where, by an understanding between the parties, the bank pays to such person a bonus above the lawful rate of 5 per cent. interest, such transaction does not constitute a deposit within the meaning of the bank depositors' guaranty act, but is a mere loan of money to the bank. Comp. St. 1922, sec. 8008; *Iams v. Farmers State Bank*, 101 Neb. 778.

The state cites section 39, ch. 191, Laws 1923, which became effective April 7, 1923. The claimant contends that to apply this act to the facts before us would give it a retroactive effect. But we do not find it necessary to invoke section 39 in the decision of the present case, hence we do not decide the objection interposed by counsel. We have repeatedly held that cases which involve an interpretation of the depositors' guaranty law appear to be such that each case must, in large part at least, be determined by the facts surrounding the individual case. And in the present case it seems clearly to appear that the law in question was violated, and that the judgment of the trial court is without reversible error. The judgment is therefore

AFFIRMED.

LEE MCDANIEL, APPELLANT, V. WESLEY EUGENE WOLCOTT, APPELLEE.

FILED JUNE 9, 1927. No. 24788.

1. **Physicians and Surgeons:** ACTION FOR NEGLIGENCE: SUFFICIENCY OF PETITION. Petition examined, and *held* to state a cause of action, upon the theory of negligence of defendant, a surgeon, in failing to exercise proper skill in the performance of an operation on plaintiff's hand and subsequent treatment thereof; that the petition does not charge negligence on the theory of a lack of proper skill in determining that an operation ought to be performed.
2. ———: ———: SUFFICIENCY OF EVIDENCE. "In an action against a physician for malpractice, where the acts charged as negligence require in their performance the exercise of professional skill and knowledge, and are such with respect of which a layman can have no knowledge at all, the jury may not draw the inference of negligence without the aid of expert testimony as to the quality of such acts to guide them; in such case the doctrine *res ipsa loquitur* has no application." *Tady v. Warta*, 111 Neb. 521.
3. ———: ———: ———. Evidence examined, and *held* insufficient to require the submission of the question of negligence to the jury.

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

W. F. Moran, Edwin Moran and *Gerald F. Harrington*, for appellant.

Switzler, Ringer, Switzler & Shackelford, contra.

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

DAY, J.

This action was brought by Lee McDaniel, plaintiff, against Wesley Eugene Wolcott, an orthopedic surgeon, to recover damages for malpractice. At the close of the evidence, on motion of the defendant, the trial court instructed the jury to return a verdict for defendant, which was done, and thereupon the court entered judgment dis-

missing plaintiff's cause of action. Motion for a new trial having been overruled, plaintiff appeals.

The ultimate question presented is whether the court erred in its instruction to the jury. At the outset it seems necessary to determine the theory on which the action is founded as disclosed by the petition. In defendant's brief it is suggested that the petition is based upon the theory that defendant contracted and agreed to cure the plaintiff's hand, and failing to do so there was a breach of contract. In plaintiff's brief it is argued, *inter alia,* that the defendant was negligent in his diagnosis in determining that an operation should be performed. Plaintiff also argued that defendant was negligent in the actual performance of the operation.

An examination of the petition convinces us that it states a cause of action based upon the theory of the unskilful and negligent manner in which the operation was performed, rather than negligence in diagnosis. After describing the condition of plaintiff's hand and the undertaking on the part of defendant to exercise skill and care of a high degree and to operate on said hand and cure the same, the petition recites that the defendant "performed said operation in such a careless, negligent and unskilful manner, and set said bones and connected tendons, nerves and flesh in such unskilful manner," as to cause the plaintiff to lose control over the movement of his hand, etc., "all of which was due to the unskilful, negligent and careless manner in which said operation was performed."

In practically the same language, two subsequent operations, which were performed on plaintiff's hand, were described. In still another paragraph, the petition recites that "the careless, negligent and unskilful manner in which defendant performed said several operations" had caused the plaintiff to lose the entire use of his right hand. Nothing is said in the petition as to any negligence or lack of skill in forming a judgment that an operation was the proper treatment.

The record shows that on February 5, 1922, plaintiff suffered a Colle's fracture of the right wrist. The fracture was reduced in the usual manner and in the course of time the splints and cast were removed. At that time the alinement of the hand was in proper condition, but the movement of the wrist joint was somewhat impaired; the backward extension being considerably restricted, due to a deposit formed on the bones of the wrist. Whether this was due to an improper reduction of the fracture or to other causes is unnecessary to consider. Plaintiff's wrist grew stronger and in the late summer he engaged in some work which required the use of said hand. According to the record the movement of his wrist was impaired from 40 to 50 per cent.

In the latter part of November, 1922, plaintiff consulted defendant concerning his wrist, and a few days later submitted to an operation performed by defendant which involved cutting away a wedge-shaped portion of the bone at the wrist joint. This operation proved unsuccessful, an infection of the bone set in which necessitated two subsequent operations and ultimately resulted in the practical loss of the use of plaintiff's hand.

Was defendant liable in damages for the bad results? The rule is well established in this jurisdiction that physicians and surgeons do not impliedly warrant the recovery of their patients and are not liable on account of any failure in that respect unless through default of their duty. *Booth v. Andrus*, 91 Neb. 810. The rule is also established that—"Physicians and surgeons are not required to possess the highest knowledge or experience, but the test is the degree of skill and diligence which other physicians in the same general neighborhood and in the same general line of practice ordinarily have and practice." *Booth v. Andrus*, 91 Neb. 810; *Kline v. Nicholson*, 151 Ia. 710.

A number of surgeons testified in behalf of defendant and all of them approved the method of treatment adopted by him. They testified that the practice followed by him was the usual and ordinary course in orthopedic surgery.

There was no physician or surgeon called on behalf of plaintiff who testified that the treatment adopted by defendant was not the usual treatment recognized and adopted by skilled surgeons in cases of that character.

The plaintiff's theory, so far as reflected by the testimony in his behalf, seems to be that the bad results alone were sufficient evidence of negligence to submit that question to the jury. In *Tady v. Warta*, 111 Neb. 521, the rule was stated as follows: "In an action against a physician for malpractice, where the acts charged as negligence require in their performance the exercise of professional skill and knowledge, and are such with respect of which a layman can have no knowledge at all, the jury may not draw the inference of negligence without the aid of expert testimony as to the quality of such acts to guide them; in such case the doctrine *res ipsa loquitur* has no application."

On cross-examination of one of defendant's witnesses, a surgeon, plaintiff developed that good practice, in cases of an operation of this character, would be to make a blood test. The same witness also testified that in such operations blood tests were not regarded as necessary and in his own experience he frequently operated without such tests. Other physicians testified that blood tests were not necessary and had nothing to do with the infection in this case. The physician who reduced the fracture and treated plaintiff in the first instance testified in his behalf and gave it as his opinion that a surgeon skilled in his profession would not have performed these three operations. The gist of his testimony went to the question of negligence as to whether the operation should have been performed, rather than to negligence in the performance of the operation. His testimony in this respect was not responsive to any issue presented by the pleadings.

Considering the evidence as a whole, there was a total lack of competent testimony tending to show that in the operation itself and the treatment thereafter there was any negligence on the part of the defendant. From what has

been said, it follows that the court did not err in instructing the jury to return a verdict for the defendant.

The judgment of the district court is

AFFIRMED.

CLARENCE NEUMANN ET AL., APPELLANTS, V. JOHN W. KNOX, MAYOR OF CITY OF SUTTON ET AL., APPELLEES: FAIRBANKS, MORSE & COMPANY, INTERVENER, APPELLEE.

FILED JUNE 9, 1927. No. 25848.

1. **Municipal Corporations**: ILLEGAL EXPENDITURES: INJUNCTION. "A resident taxpayer, without showing any interest or injury peculiar to himself, may enjoin illegal expenditures by a public board or officer." *Woodruff v. Welton*, 70 Neb. 665.
2. ———: ELECTRIC LIGHTING PLANT: PURCHASE OF APPLIANCES. A contract for the purchase of an engine, machinery and appliances for repairing and remodeling a municipal electric light plant, at a cost of more than $500, contemplates an "improvement," within the meaning of section 4180, Comp. St. 1922, as amended by chapter 51, Laws 1925.
3. ———: ———: ———: ADVERTISING FOR BIDS. Section 4180, Comp. St. 1922, as amended by chapter 51, Laws 1925, construed, and *held* to require the council of a city of the second class, before entering into a contract for the purchase of an engine, machinery and appliances for the repair and remodeling of a municipal electric light plant, where the cost thereof exceeds $500, to first advertise for bids for the furnishing of such engine, machinery and appliances.

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

Sloan, Keenan & Corbitt and *John B. Scott*, for appellants.

Stiner & Boslaugh, Edmund P. Nuss and *Dressler & Neely, contra.*

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

GOOD, J.

This action was brought by a number of resident taxpay-

ers of the city of Sutton who are patrons of the municipal electric light and water plants of said city and users of the electric current generated by said light plant, on behalf of themselves and others similarly situated, to enjoin the city officials of said city from carrying out or proceeding with a certain contract between the city and Fairbanks, Morse & Company for the purchase of an engine, other machinery, appliances and accessories thereto for the city's light plant, and to declare said contract illegal and void. Fairbanks, Morse & Company intervened and joined with the city officials in defending the action. The defendants and intervener admit the execution of the contract and the intention to proceed to carry it out unless enjoined, and contend that the contract is valid and enforceable. A trial of the issues resulted in a finding and decree for defendants and intervener. Plaintiffs appeal.

The contract in question provided for the purchase by the city of machinery, therein described, for a price in excess of $30,000, and also contemplated, in effect, a loan to the city of more than $5,000; that the contract price should be paid by warrants drawn upon the water and light fund of the city, and that the purchase price should not be a general indebtedness of the city for which the city's general fund would be liable. Plaintiff's allege that the contract was illegal and void for various reasons, among them, that said contract was for a sum in excess of $500 and was let without first advertising for bids, in violation of the provisions of section 4180, Comp. St. 1922, as amended by chapter 51, Laws 1925. Defendants and intervener urge that plaintiffs have not legal capacity to maintain the action, and that, as private citizens, they cannot maintain an action to restrain the acts of public officials, unless they show that they will suffer an injury as taxpayers different in kind, and not merely in degree, from that suffered by the public generally, and contend that, under the facts disclosed in this case, plaintiffs do not show that they will suffer any injury by reason of the contract if it is carried out.

The contract calls for the expenditure of upwards of

$35,000. It is true that it provides that this sum shall be paid by warrants drawn upon the water and light fund of the city. The city owns its light and water plants, and they have been earning a profit for the city. This profit has been, and doubtless would continue to be, available to meet other expenditures of the city that would be otherwise raised by taxation. The appropriation of these profits to meet the city's obligation, which would be created by the contract in question, would necessarily affect every taxpayer of the city. Plaintiffs, as patrons of the city's light and water plants, would be required to pay rates for water and electric current which might be materially affected by the expenditures contemplated by the contract between the city and intervener.

We think the question presented has been definitely settled against the contention of defendants and intervener in the recent cases of *Fischer v. Marsh,* 113 Neb. 153, and *Woodruff v. Welton,* 70 Neb. 665. In the latter case it is held: "A resident taxpayer, without showing any interest or injury peculiar to himself, may enjoin illegal expenditures by a public board or officer." The rule thus announced was reaffirmed in *Fischer v. Marsh, supra.* We think the plaintiffs come within the rule announced, and are therefore entitled to maintain the action.

The most important question for consideration relates to the right of the city to enter into such a contract without first advertising for bids. The statute, relied upon by plaintiffs as requiring the council to advertise for bids, is contained in section 4180, Comp. St. 1922, as amended by chapter 51, Laws 1925. The section is one of a series which defines the powers and duties of city officials. The first part of section 4180, as amended, defines the duties of the city engineer, and then provides as follows: "Before the city council or village board of trustees shall make any contract for building bridges or sidewalks, or for any work on the streets or for any other work or improvement which exceeds five hundred dollars ($500) in cost, an estimate of the cost thereof shall be made by the city or village engineer and

submitted to the council, or board of trustees, and no contract shall be entered into for any work or improvement for a price exceeding such estimate, nor without advertising for bids."

It is clear that if the contract in question is governed by the provisions of the quoted statute, the council could not enter into a contract for the purchase of an engine and appliances for a light plant in a sum in excess of $500 without first advertising for bids. Defendants and intervener argue that the statute quoted has no reference to such articles as are described in the contract; that the engine, machinery and appliances are not works or improvements, within the meaning of the statute; that, in any event, the statute is intended to apply only to street work or improvements; that the rule of *ejusdem generis* is applicable, and that the words "other work or improvement" are limited to things of the same character as those specifically enumerated in the preceding part of the quoted section. Defendants and intervener cite, as sustaining their contention that the engine, machinery and appliances do not fall within the term "work or improvement," a number of cases, which we shall now examine.

The first case cited is *City of Trenton v. Shaw,* 49 N. J. Law, 638. In that case it is held that a charter provision of a city which requires all contracts for doing work and furnishing material for any improvement, provided for under the act, shall be given to the lowest bidder applies only to contracts relating to the streets, and not to one for furnishing rubber hose for the fire department. The next case cited is *Sanitary District of Chicago v. Blake Mfg. Co.,* 179 Ill. 167. In that case it is held that a statute, providing that all contracts for work, the expense of which shall exceed $500, shall be let to the lowest bidder, did not apply to a contract for hiring pumps at $42.50 a day, when no definite time was fixed and the contract might be terminated at any time. The next case cited is *Electric Light & Power Co. v. City of San Bernardino,* 100 Cal. 348. The opinion in that case holds that the lighting of streets with electric

lights, placed above the intersection of streets, is not street work, within the meaning of the statute, providing that, in the erection of public buildings and in all sewer and street work, it shall be done by contract, let after notice by publication. The next case is *Tanner v. Town of Auburn,* 37 Wash. 38. The opinion in that case holds that a contract for lighting the streets and public places of a town is not one for the erection, improvement or repair of a public building or work, or for street and sewer work, within the meaning of the statute, which requires a contract for such purposes to be let to the lowest responsible bidder. Another case cited is *Chippewa Bridge Co. v. City of Durand,* 122 Wis. 85. The opinion in that case does not support the contention of defendants and intervener, but, as we interpret the opinion, it holds to the reverse. In our opinion, the cases cited are not in point and do not sustain the view contended for by defendants and intervener. We are convinced that an engine, machinery and appliances for the altering and remodeling of an electric light plant fall within the term "improvement," as used in the statute quoted.

It is next argued by defendants and intervener that the statute requiring advertisement for bids relates only to improvements upon the streets and for buildings. It is contended that the rule *ejusdem generis* is applicable and that the words "other work or improvement" are limited to things of the same character as the specific items that precede it in the statute. The preceding things mentioned in the statute are the building of bridges or sidewalks. This provision is followed by the phrase, "or for any work on the streets," which, in itself, is a general clause and would cover any and every kind of work done upon the streets. Then follows the clause: "or for any other work or improvement which exceeds five hundred dollars ($500) in cost." Were it not for the intervening general clause, there would be reason for applying the rule as contended for by defendants and intervener.

In determining whether the rule, as contended, should be applied, it is proper to consider: What was the object

of the legislation? It is evident that the legislature was intending to protect the citizens of cities and villages in the expenditure of their moneys by their officials, and also to protect the taxpayer from possible venality of the officials and prevent them from entering into improvident contracts for work or improvements, of the cost of which they might not be well advised. The legislature doubtless believed that the public would be more likely to receive fair treatment, and there would be less likelihood of improvident contracts being entered into, if bids were advertised for and contracts publicly let for improvements of any considerable amount. We think it may be safely presumed that members of the city councils and village boards are more likely to be acquainted with the cost of ordinary street improvements and repairs than they would be of such machinery as is contemplated by the contract in question. They would be more likely to know the cost of brick, cement, curbing, guttering, paving, concrete, gravel, and such items, than of expensive machinery for an electric light plant. It is only at very infrequent intervals that such an expenditure, as called for by this contract, would be required in any city of the second class, while street work and improvements are matters occurring at frequent intervals and would be, therefore, very much more likely to be within the knowledge of the average city official. It does not seem reasonable to suppose that the legislature would require a contract for grading, erecting bridges, culverts, curbing and paving, when it exceeded $500, to be let only upon advertising for bids, and at the same time permit city officials to enter into contracts for amounts totaling many thousands of dollars for the purchase of machinery and appliances for an electric light plant, as to which they would have, in all probability, little actual personal knowledge.

It is but fair to observe that no contention is made in this case that the members of the council were acting corruptly or with other than the best of motives. No corrupt motive has been attributed to them. The evidence

discloses, however, that the contract, attempted to be let, was not a provident one. It appears that other contractors would have furnished machinery and appliances, equivalent to those called for by the contract, for several thousand dollars less than the contract price. It illustrates forcibly what we deem the wisdom of the legislature in requiring that, before such contracts should be entered into, bids should be advertised for, so that there may be competition in bidding and the public may be protected through contracts publicly entered into.

We are satisfied that a correct interpretation of the statute requires that a contract for the purchase of an engine, machinery and appliances for an electric light plant, when the same exceeds $500, shall not be entered into until bids have been advertised for, as provided in the statute above referred to.

The view we have taken of the questions discussed herein renders it unnecessary to consider other questions raised and discussed in the briefs and on oral argument. From what has been said, it follows that the judgment of the district court should be and is reversed and the cause remanded, with directions to enter an injunction permanently enjoining the defendants from carrying out the contract in question.

REVERSED.

MARY A. ELLIS, APPELLANT, V. THALBERGE H. ELLIS, APPELLEE.

FILED JUNE 9, 1927. No. 25791.

1. **Divorce: ABANDONMENT.** Under section 1516, Comp. St. 1922, a divorce may be granted "when either party shall wilfully abandon the other without just cause, for the term of two years." However, before a charge of abandonment can be sustained, it must be shown that the door of the home has remained open for the repentance and return of the absent husband or wife for the full term.

2. ———: ———: LIMITATIONS. In such a case, if by the acts of the accusing party this door is closed against the other, such acts toll the running of the statute.
3. ———: ———. While a divorce proceeding is pending, the parties must live separate and apart, and, as such a separation is not wrongful, a charge of abandonment cannot be based thereon.
4. ———: SUFFICIENCY OF EVIDENCE. Evidence examined, and found insufficient to support a decree of divorce on the ground of abandonment, but sufficient to sustain such a decree on the ground of extreme cruelty as against the plaintiff and in favor of the defendant.

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

T. F. A. Williams and *Homer L. Kyle,* for appellant.

G. E. Hager, contra.

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

THOMPSON, J.

The parties to this suit are husband and wife, the former 68 years of age, the latter 62. Each had been previously married, and had grown children. Plaintiff, the wife, seeks to obtain a decree for separate maintenance, her petition being in usual form and based on alleged facts indicating extreme cruelty on the part of the husband. The husband admits the marriage, also that he is the owner of certain properties described in the petition; denies each and every other allegation, and pleads by way of a cross-petition extreme cruelty on the part of the plaintiff, and prays for an absolute divorce. After the issues had been duly joined and the evidence taken, defendant asked to amend his cross-petition by adding thereto a count in which he charged that the plaintiff had without just cause abandoned him for more than two years then last past. To such amendment the plaintiff lodged an objection that, not counting the time that had elapsed since the defendant

filed his cross-petition charging cruelty, two years had not run from the time that plaintiff left the home of the defendant. This objection was overruled, and the case submitted on the evidence. The court found against the plaintiff on her claim for separate maintenance, against the defendant on his charge of extreme cruelty, but in favor of defendant and against plaintiff on the ground of abandonment for more than two years, and entered a decree granting an absolute divorce from the plaintiff. To reverse the finding that plaintiff was not entitled to separate maintenance, and the finding of abandonment on the part of the plaintiff, she appeals. To reverse the finding in favor of the plaintiff and against the defendant as to the extreme cruelty charged by defendant, he appeals. Hence, the case is before us for trial *de novo* on every issue that was raised in the lower court.

A statement of the facts involved, further than as above indicated, save and except as to the charge of abandonment, would serve no good purpose.

As to the abandonment: The record shows that plaintiff left the family home of defendant at Bethany, September 15, 1924. She commenced this suit November 18, 1925. Defendant's first answer was filed December 21, 1925. The suit was tried June 24 to June 28, 1926, when each party rested their case, and the same was taken under advisement by the court. On October 1, 1926, the defendant, by leave of court, withdrew his rest and asked and was granted leave, over objections of plaintiff, to amend his cross-petition by adding a count charging that plaintiff wilfully and without just cause, abandoned the defendant and absented herself from his home September 15, 1924, and has so absented herself ever since. Was there an abandonment for two years, as contemplated by statute?

The plaintiff was not seeking a divorce, but simply asking the defendant to comply with his marital contract by providing her with reasonable maintenance. It will be noticed that at the time the defendant interposed his

answer and cross-petition charging the plaintiff with extreme cruelty and praying a divorce by reason thereof, the plaintiff had been absent a year and three months; and that at the time defendant amended his cross-petition to include abandonment the two years required by statute had not elapsed, unless there is added nine months accruing after the original answer was filed and the suit pending. Under section 1516, Comp. St. 1922, a divorce may be granted "when either party shall wilfully abandon the other without just cause for the term of two years." However, before a charge of abandonment can be sustained, it must be shown that the door of the home has remained open for the repentance and return of the absent husband or wife for the full term. If by the acts of the accusing party this door is closed against the other, so long as such acts remain effective the running of the statute is abated, and a cause of action by reason of such departure does not accrue. It is elementary that while a divorce proceeding is pending the parties must live separate and apart. Such a separation is not wrongful, hence a charge of abandonment cannot be based thereon. In filing his cross-petition charging his wife with extreme cruelty and praying for a divorce, the defendant thereby intended to, and did, deny to her the right of repentance and return, and as the law conclusively presumes from such acts such an intent, he cannot gainsay or deny it. We therefore conclude that such tacking of time cannot be had, and that the trial court erred in holding to the contrary. The decree of the court granting the defendant a divorce on the ground of abandonment must be, and is, set aside.

Further considering the contentions of the defendant, was he entitled to a divorce on the ground of extreme cruelty? These parties each have their own separate family ties; each has lived beyond the years of what may be said to be that of an ordinary span of life; each has grown children devotedly attached to their respective parents; and it should be said to their credit that these children have been extremely considerate of their respective duties

toward each of these contesting parties. Hence, we feel that we owe it to each and all connected with this unfortunate situation not to set forth in detail the facts reflected by the record leading to our conclusion. It is sufficient to say that we have, with much care, considered the entire record, and find that the evidence amply supports the allegations of defendant's cross-petition wherein the plaintiff is charged with extreme cruelty, and further find that the defendant is entitled to a decree of divorce as prayed by reason of such cruelty.

As to the question of alimony: Each of the parties at the time of their marriage, as well as at the time of the trial, was the owner and possessed of independent properties, which were respectively acquired prior to their marriage. The defendant's properties, however, as shown by the evidence, were in extent and value at the time of the trial about the same as they were at the time of the marriage, while that of plaintiff had been reduced from $9,000 to $3,000, partly on account of the fact that she had contributed thereof to the support of the family. Further, it may be said in behalf of this plaintiff that she aided in safeguarding and protecting this property held by her husband in a wifely way for something like eight years. From these and other facts reflected by the record, we conclude that in good conscience there should be awarded to the plaintiff, as alimony, to be paid by the defendant as a part of the judgment and decree to be entered herein, the sum of $3,000, payable within nine months from the entering of final judgment herein, without interest, and in lieu of all awards heretofore made and not paid, including attorney fees; and that the defendant be taxed with the costs of this action. It is further considered that the petition of the plaintiff is without supporting evidence, and therefore should be dismissed.

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

REVERSED.

FAY C. HILL, RECEIVER, APPELLANT, V. LOUIS E. MAY ET AL., APPELLEES.

FILED JULY 1, 1927. No. 25881.

Equity: JURISDICTION. In a suit brought by a receiver of an insolvent state bank, the district court will not take jurisdiction in equity to determine the liability of the makers on notes given to the bank as a pledge that the stockholders will pay the levy of an assessment of 100 per cent. on the capital stock, where such makers are all united in one suit and jurisdiction is sought to be maintained on the ground of thus avoiding a multiplicity of suits, and where there is no question of accounting, but the claim against each maker is an independent and purely legal demand for the amount due on the note.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

C. M. Skiles, John M. Stewart, E. D. Crites and *F. A. Crites,* for appellant.

Courtright, Sidner, Lee & Gunderson, Allen G. Fisher, Samuel L. O'Brien and *Crossman, Munger & Barton, contra.*

Heard before GOSS, C. J., ROSE, DAY, EBERLY and THOMPSON, JJ., and SHEPHERD, District Judge.

GOSS, C. J.

The plaintiff appeals from a final order and decree of the district court sustaining demurrers of six defendants and, upon refusal of the plaintiff to plead over, dismissing the action as to these six defendants, and sustaining the special appearances of the remaining two defendants.

A statement of the main facts alleged in the petition is necessary to an understanding and disposition of the case. The plaintiff is the receiver of the Citizens State Bank of Chadron, in Dawes county. The bank was capitalized at $75,000 and was under the jurisdiction of the department of trade and commerce. On January 17, 1925, the department took possession of the property and business of the

bank to examine into its condition, and on January 19, 1925, after examining into its affairs for two days, a special examiner of the department, acting for the department, informed the officers of the bank that, on account of the impairment of its capital stock and the lack of cash reserve, the bank could not continue as a going concern nor reopen for business unless its cash reserve was replenished and the impairment of the stock made good. Thereupon on the same day there was held a stockholders' meeting at which more than two-thirds of the stock was represented. The directors were authorized by a unanimous vote of these stockholders to levy an assessment of 100 per cent. on its capital stock. The stockholders also authorized, upon consent thereto by the department, a reduction of the capital stock from $75,000 to $50,000, directed the board to charge off the surplus account of $25,000 and use that amount and the amount of the reduction of capital in taking out worthless paper from the bank. All of the defendants were present in person and voted for the resolutions except defendant Joseph H. May, who was represented by his proxy, defendant Louis E. May, who, as such proxy, voted for the resolutions. Louis E. May was not a stockholder, nor was the defendant Charles H. Loewenthal who represented Ben Loewenthal. On the same day the board of directors met and made the assessment authorized, aggregating $50,000, to be paid on or before February 12. The defendants, as a pledge to secure the payment of said assessments, thereupon executed their several negotiable promissory notes payable to the bank, or order, totalling $50,000. There were ten notes, but the discrepancy between the number of notes and number of defendants is accounted for by the fact that, apparently in order to furnish prompt pledges for the payment of the assessments, some of the parties present signed their individual notes covering their own assessment liability and also signed individual notes covering assessment liabilities on the stock for others not present. The notes were delivered to the special examiner then in charge of the

bank, and by him delivered to the bank to be returned to the makers when the several assessments were paid. In reliance on the notes, the bank was permitted by the department to continue its business on the plans above stated, and on the 22d day of January the department refreshed the reserve of the bank with a cash deposit of $16,000 from the conservation fund. The bank continued its banking business, receiving deposits, incurring obligations and generally operating as a going concern. About February 10, 1925, defendant Louis E. May demanded a return of the notes executed and delivered by him, being one for $15,800 and one for $3,800, denying his liability, claiming that said notes were given without consideration and asserting that his notes were not to be valid until the bank's losses had been made good. The petition alleges that the other defendants, who had been ready and willing to pay the amounts agreed by them, on learning of Louis E. May's action, refused to pay the amounts of their notes and joined with him in refusing to pay their assessments.

In view of the discussion later, we quote the last paragraph and the prayer of the petition: "Plaintiff alleges that said notes were executed by the defendants, respectively, at the same time and place, and under the same agreement and circumstances, and that the defendants have a common interest in the question as to their liability thereon; that, on account of defendant's denial of plaintiff's title to said notes and their liability thereon, the plaintiff is unable to advantageously sell said notes, and that action at law would involve a multiplicity of suits; that plaintiff has no adequate, efficient or prompt remedy at law. Wherefore, plaintiff prays (1) that the plaintiff's title to the promissory notes herein described be quieted and confirmed; (2) that it be adjudged and decreed that said promissory notes are the valid and unconditional obligations of the makers thereof, and that plaintiff is entitled to recover judgment thereof; (3) for such other and different relief as equity and justice may require."

Several of the defendants lived in and were served in Dawes county where the action arose and where suit was brought. Joseph H. May was served in Cherry county and Louis E. May in Dodge county. The defendants other than the Mays severally filed demurrers, on the grounds of improper joinder of parties, of improper joinder of causes of action, and that the petition does not state a cause of action. The defendants May severally filed special appearances and objections to jurisdiction because of service on them in other counties than Dawes. The court sustained the demurrers and the objections to jurisdiction, and dismissed the action as to all defendants, without prejudice, however, as to the defendants May, saving plaintiff the right to sue them individually in a suit in a court having jurisdiction.

Plaintiff contends that this is a proper suit for equity. Defendants vigorously assert that it seeks to combine eight law actions in one equity suit and to deprive them of a right to separate jury trials. The defendants May particularly stress their legal and constitutional right to a jury in a forum, not of plaintiff's choice alone, but in a jurisdiction where they may be served with process as individual defendants and may contest their liability unhampered by codefendants sued on other and different contracts with different defenses.

In the several briefs various questions are argued. The chief proposition in the case, as contended for by the appellant, is this: That equity has jurisdiction in this action because there is a common and decisive point of litigation between the plaintiff and the separately liable defendants, both as to the facts and as to the law involved; and that, in such situation, the convenience of the plaintiff is not overcome by the greater inconvenience of the defendants, and equity will join such defendants in a single suit in order to avoid a multiplicity of suits. The appellees do not so much oppose this proposition as a general rule sustained by a great weight of authority in proper cases, but they argue that the rule is not applicable to

the instant case. In support of his proposition the appellant cites *Wyman v. Bowman*, 127 Fed. 257, *Crawford Co. v. Hathaway*, 67 Neb. 325, *Bailey v. Tillinghast*, 99 Fed. 801, and *Lake Charles Rice Milling Co. v. Pacific Rice Growers Ass'n*, 295 Fed. 246.

Wyman v. Bowman, 127 Fed. 257, wherein is stated the general rule contended for here by the appellant, was an action in which the receiver of a corporation was enabled by the application of the rule to enforce in equity a sufficient percentage of the original unpaid subscription of the several defendants to the capital stock of an insurance company to liquidate its debts upon insolvency and exhaustion of its assets. In the opinion in that case Judge Sanborn clearly indicated the difference between its facts and those of "*Hale v. Allinson*, 188 U. S. 56, in which the supreme court sustained the dismissal of a bill in equity brought by a receiver against 47 stockholders to enforce their double liability;" and the more recent case of *Carey v. McMillan*, 289 Fed. 380, calls attention to the fact that *Wyman v. Bowman* is not in conflict with *Hale v. Allinson*, nor with the case then under consideration, and holds as follows: "A receiver for a corporation which is hopelessly insolvent cannot by an ancillary bill confer jurisdiction in equity on the receivership court to determine the liability of the makers on notes given to the corporation in payment for its stock, on the ground of avoiding a multiplicity of suits, where there is no question of contribution or accounting, but the claim against each maker is an independent and purely legal demand for the amount due on his note."

Crawford Co. v. Hathaway, 67 Neb. 325, is but an affirmation of the general rule that, in order to prevent a multiplicity of suits, equity has jurisdiction to enjoin in one action a large number of riparian owners from infringement, under color of right, of superior rights under the irrigation act. *Bailey v. Tillinghast*, 99 Fed. 801, merely applies the general rule that equity has jurisdiction to prevent a multiplicity of suits where there is a common

question of law arising upon similar facts, but it should be noted that this is in a case where the suit was to enforce a liability of the stockholders in a national bank where the assessment is less than the full amount of their liability. *Lake Charles Rice Milling Co. v. Pacific Rice Growers Ass'n*, 295 Fed. 246, the last case cited by appellant on the point of multiplicity of suits authorizing equity jurisdiction, was a suit for accounting and for judgment against each of the appellees who had contracted through their association with appellant and refused to account for their liabilities. It reverses a dismissal of a bill in equity for misjoinder of parties defendant. The case is grounded on the same reasoning as *Wyman v. Bowman*, heretofore discussed, as it was based on facts in general similar in principle to those of the latter case.

We are not without authority in our own court on this subject. In *Burke v. Scheer*, 89 Neb. 80, this court said in the syllabus: "A single suit in equity cannot be maintained by the receiver of an insolvent mutual hail insurance company, organized under chapter 43, Comp. St. 1909, against all of the policy-holders of such insolvent company, for the separate liability of each policy-holder for unpaid assessments, whether levied by the directors of the company before insolvency, or by the court thereafter, on the ground that such single suit would prevent a multiplicity of actions at law; nor can such a suit be maintained on the ground that it is ancillary or auxiliary to the main insolvency proceeding; nor upon the ground that the money when collected would become part of a fund that would be distributed under the direction of the court, since no question is involved in which the defendants have a common interest, and the suit is merely an aggregation of separate actions at law, each involving separate issues and having no relation to each other, except that there is a common plaintiff, and in each of which the remedy at law is adequate, and is the remedy pointed out by the statutes governing such companies." In the body of the opinion, the court said: "The claim that the present suit will avoid

a multiplicity of suits is without merit. Except as it may operate as a 'big stick' in preventing policy-holders from defending the suit at long range, it would not materially lessen the litigation, as each defendant would have a perfect right to employ counsel, set up his separate and independent defenses, and demand a separate jury trial. *Hale v. Allinson,* 102 Fed. 790, affirmed in 188 U. S. 56; High, Receivers (4th ed.) sec. 316; *Republic Life Ins. Co. v. Swigert,* 135 Ill. 150; *Winters v. Armstrong,* 37 Fed. 508; *Smith v. Johnson,* 57 Ohio St. 486; Smith, Receiverships, sec. 231."

In *Dickinson v. Kline,* 96 Neb. 435, the court quotes from the case of *Hale v. Allinson,* 188 U. S. 56, and from *Kennedy v. Gibson,* 8 Wall. (U. S.) 498, the general rule that, "Where the whole amount is sought to be recovered the proceeding must be at law;" and then say: "This is the rule that this court has sought to apply in *Burke v. Scheer, supra,* and in other cases. * * * But a stockholder who is liable at all events for a definite fixed amount has no community of interest in questions of law or fact with any other defendant."

The suit of the appellant against the appellees aggregated the same amount as the assessed liability against the stockholders. The suit was upon notes given by individual defendants. Each note was a separate contract. The defendants might be classified as occupying different positions with different defenses to obligations evidenced by their several notes. Community of interests of defendants in questions of law and of fact was not definitely present. The ultimate purpose of the plaintiff was to recover separate, and not joint, judgments against the several defendants on the notes as specifically indicated in his prayer, though other clauses of the prayer screened that purpose to some extent, but not effectually. On the principle announced in our previous holdings, we are of the opinion that the action was one at law, and not a suit in equity. This being so, it is unnecessary to carry the discussion further on the lines taken by some of the defend-

ants; for, having determined that it is not cognizable as a suit in equity, over the objections of the defendants, in the forum selected by the plaintiff, on the ground of doing away with a multiplicity of suits, it follows that the demurrers of the defendants residing in Dawes county were well taken, and also that the special appearances of the nonresident defendants were properly sustained. The judgment of the trial court should be, and is

AFFIRMED.

ESSIE E. DAVIS ET AL., APPELLEES, V. ELMER BEEM ET AL., APPELLANTS.

FILED JULY 1, 1927. No. 24969.

1. Appeal. A finding that shows the result of a judicial inspection of premises involved in a suit in equity may be considered on appeal from the final decree, if applicable to the issues determined.
2. Waters: RIGHTS OF RIPARIAN OWNERS. The principle that "A landowner who is not guilty of negligence may, in the interest of good husbandry, accelerate surface water in the natural course of drainage without liability to the lower proprietor," *held* inapplicable to the water of a permanent lake on a cattle ranch in a semi-arid region.
3. ———: DRAINAGE OF LAKES: INJUNCTION. The draining of a lake through a cattle ranch over objections of an owner who would suffer recurring damages by the drainage, *held* properly prevented by injunction under the evidence outlined in the opinion.

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

Holmes, Chambers & Holland, for appellants.

James C. Quigley and *J. J. Harrington, contra.*

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

ROSE, J.

The litigants are owners of cattle ranches in Cherry county. By means of open ditches partially completed defendants attempted to exercise the right of drainage from their lands through intervening lands to hay valleys of plaintiffs. In a suit in equity for an injunction, the unfinished work was stopped by a preliminary order and defendants were required to make a dam in a partially completed ditch. The facts constituting the cause of action and the defense were formally pleaded. During a trial of the issues in the district court for Cherry county, testimony covering over 400 pages of the record was adduced. The result was a perpetual injunction in favor of plaintiffs. Defendants appealed.

The appeal presents the cause for trial *de novo* and requires consideration of conflicting evidence on the controlling issues, but owing to the great volume of the testimony an analysis of the evidence in detail will not be attempted.

The theory of plaintiffs is that defendants, if not prevented by injunction, will, by cutting ditches through natural barriers, empty permanent lakes into a valley that will conduct the lake waters to, and annually destroy, growing crops of hay in meadows on the cattle ranch of plaintiffs. The petition, answer and reply present also the issue that the drainage contemplated by defendants, if permitted, will open a natural surface barrier between the water-shed in which the lakes are situated and turn the lake waters into a different water-shed or valley where they will eventually reach and irreparably injure the meadows and crops of plaintiffs.

The theory of the defense is that the ditches were dug in the natural course of drainage where defendants commenced in good faith to make them in the interest of good husbandry, their purpose being to drain the lakes and produce hay in the empty basins, without pecuniary damage to plaintiffs. They insist that their lakes can be emptied

after harvest when the water in passing through the ranch of plaintiffs in a natural depression and course of drainage will not injure it or the crops, and that thereafter the surface waters from the area drained will be beneficial to plaintiffs or at least harmless.

Each of the theories outlined was supported by testimony of engineers and also by nonexpert witnesses familiar with the topography of the ranches and with the surrounding country. On behalf of plaintiffs there is testimony tending to prove facts or justify inferences summarized for the purposes of the appeal as follows: The cattle ranch owned by plaintiffs contains several thousand acres of land consisting principally of hills for pasturage. The hills are too dry to produce grass for hay, but plaintiffs own also two valleys among the hills where the moisture is sufficient for that purpose. The witnesses called one of these valleys "Home Valley" and the other "Race-horse Valley." The two valleys produce annually about 1,000 tons of hay on approximately 800 acres. The lake waters diverted by artificial ditches reach the Home Valley first. That valley contains a meadow about three miles in length with a maximum width of half a mile. The meadow is nearly level both longitudinally and transversally. Through it there is no defined water-course or depression. In the natural state of Home Valley, lake waters, if drained into it, will spread over the entire meadow and destroy, or injure, the crops, consisting, as they do, of timothy, clover and wild grasses. The uncompleted drainage system adopted by defendants has already injured plaintiffs' growing crops and will result in irreparable injury unless enjoined. West or northwest of plaintiffs' ranch defendants own cattle ranches consisting also of hills and valleys. On the ranch of one of the defendants there is what is known as "Felts Lake," a natural body of water with an area of approximately 150 acres and an average depth of 5 feet, into which other lakes had been drained. It has no natural surface outlet and except for abnormal precipitation at rare intervals there is no overflow. The distance from

Felts Lake through Home Valley to Race-horse Valley is about 11 miles with an average fall of less than 7 feet to the mile. Defendants dug a ditch nearly 3 feet deep through a natural barrier surrounding Felts Lake and by extending the drain eastward or southeastward turned part of the lake water loose on a ranch between the ranches of the adverse litigants, from whence the diverted lake waters followed the natural slope of the country to the hay valleys of plaintiffs and injured their crops. It is the intention of defendants to empty Felts Lake by lowering the bottom of their ditch at their artificial outlet to a depth of 7 or 8 feet. Though some of the water from that lake, as nature left it, percolates through sand and eventually supplies beneficial moisture for crops in the Home Valley and in the Race-horse Valley, Felts Lake is in a different water-shed, where the natural course of surface drainage is through a different valley. The bed of Felts Lake, if emptied in the manner contemplated by defendants, will collect rain and melted snow from an extensive water-shed and the ditch, the connecting valleys and the general slope of the country will conduct water continually in unusual and destructive quantities into plaintiffs' meadows. This is a mere summary indicating the character of the evidence and the nature of the conclusions upon which plaintiffs rely for a perpetual injunction.

On the other hand, the testimony of defendants' witnesses on the controverted issues is of a different import and tends to support the defense. They testified to facts tending to show: The ditch from Felts Lake will turn the water thereof into a natural, well-defined depression, runway or water-course, extending into, through and beyond the hay valleys of plaintiffs, and will not damage their meadows or crops. The cattle ranches generally in that region will be benefited by the contemplated drainage, if permitted. This plan of drainage, if carried into effect, will turn the bed of Felts Lake into hay land. The improvement was undertaken in good faith in the interest of good husbandry. The constructive work was free from

negligence. This brief outline indicates the nature of voluminous testimony adduced by defendants.

With the evidence in hopeless conflict, the litigants requested the trial judge to visit and inspect for himself the premises involved in the controversy. After compliance with the request, he made judicial findings in favor of plaintiffs and granted the relief sought by them. The result of the judicial inspection inheres in the decree below and under the circumstances may properly be considered by the appellate court. The preponderance of the evidence in the record seems to be in favor of plaintiffs. Some features of the case appear to be free from doubt. Felts Lake as nature created and left it was a permanent one without any surface outlet under normal conditions. By artificial means defendants deliberately diverted water from the natural bed of Felts Lake. This caused it to spread over the meadows in the hay valleys of plaintiffs to their damage. It would require costly ditches to confine the escaping lake waters in a narrow channel through those meadows. The ditches, if practicable, would require perpetual care and expense. There is no law authorizing defendants to injure or destroy these valuable hay meadows in order to create new hay meadows of their own. In equity there is a recognized rule that "A landowner who is not guilty of negligence may, in the interest of good husbandry, accelerate surface water in the natural course of drainage without liability to the lower proprietor," as stated in *Steiner v. Steiner*, 97 Neb. 449; but this rule by its own terms is limited to surface waters. It does not necessarily apply to the waters of a permanent lake having no surface outlet under normal conditions. Upon consideration of all the evidence from every standpoint the conclusion is that the injunction was properly allowed.

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLANT, V. FARMERS STATE BANK OF ADAMS, APPELLANT: JEANNETTE MCCARTY ET AL., APPELLEES.

FILED JULY 1, 1927. No. 25240.

1. **Banks and Banking**: MONEY PAID BY CHECK. It is self-evident that money deposited in a bank and paid out by the bank pursuant to the depositor's bank check in the regular course of business is, ordinarily, no longer subject to the control of the depositor.
2. ———: GUARANTY FUND: DEPOSIT. A state bank was in failing circumstances and an assessment of 50 per cent. was therefore made on the several shares of stock. About a year and a half thereafter the bank failed and a receiver was placed in charge. Thereupon certain stockholders filed claims for the recovery of the money respectively paid by them under the assessment on the alleged ground that it was a deposit. The receiver disallowed the claims. On appeal the district court ordered the claims paid out of the depositors' guaranty fund. *Held*, that the court erred in ordering the claims paid from the fund in question.
3. ———: ———: ———. Where, under the provisions of section 39, ch. 191, Laws 1923, funds are deposited in a state bank upon any collateral agreement or condition other than an agreement for length of time to maturity and rate of interest, such deposit is not protected by the depositors' guaranty fund.
4. ———: ———: POWERS OF STATE OFFICERS. A state bank officer cannot lawfully take from nor add to the provisions of section 39, ch. 191, Laws 1923, which provides under what circumstances claims may be paid out of the bank depositors' guaranty fund.
5. ———: ———: ———. The custodians of the depositors' guaranty fund cannot lawfully order that payments be made to depositors of money in a failed bank out of the depositors' guaranty fund other than the payments provided in section 39, ch. 191, Laws 1923.
6. **Appeal in Equity**: MOTION FOR NEW TRIAL. A receivership is an equity proceeding and an appeal in equity causes will lie to this court from the final order or judgment of the district court in the absence of a motion for a new trial.

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

C. M. Skiles and *G. E. Hager,* for appellants.

Robert J. Greene and *Lloyd E. Chapman, contra.*

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

DEAN, J.

This suit is prosecuted in the name of Mrs. Jeannette McCarty, on behalf of herself and Melvin E. Darnell and the Stearns-Knight Auto Sales Company, as claimants, seeking to recover from the bank depositors' guaranty fund the aggregate sum of $1,750 which it is alleged was severally deposited by claimants in the now defunct Farmers State Bank of Adams, while it was a going concern, on or about January 15, 1924, and of this aggregate sum Jeannette McCarty and Melvin E. Darnell each claimed $250, and the Stearns-Knight Auto Sales Company claimed $1,250, as their respective shares of the deposits. All claimants are stockholders and they paid the money in suit over to the bank as an assessment on their respective shares of stock. Darnell and the auto company severally assigned their respective claims to Mrs. McCarty, the consolidation of funds being so made, as alleged, solely to save costs of litigation. There is no dissension among the claimants. The suit arose in Gage county. In defense of the guaranty fund, the state contends that the money so paid over to the bank was not in any sense a bank deposit within the meaning of the law. The district court found against the state and adjudged that the claims were all deposits and that all claimants should be severally paid the amount of their claims out of the bank depositors' guaranty fund, with lawful interest thereon. The state, by the attorney general, has appealed.

It appears that on or about June 9, 1925, the bank in suit, hereinafter called the bank, was adjudged insolvent

and E. J. Dempster was appointed receiver. September 26, 1925, the receiver filed objections to the allowance of the consolidated claim, and all of its constituent parts, "either as a general claim or as a claim entitled to priority or payment out of the guaranty fund." The state contends, as above pointed out, that claimants voluntarily paid the money to the bank for its benefit under certain resolutions regularly adopted for a special assessment on the bank stock. In respect of the action of the stockholders and the directors in the matter of the assessment the record discloses the following material facts:

December 20, 1923, at a special meeting of the stockholders of the bank, at which all claimants were present, a motion was made and unanimously carried that an assessment of 50 per cent. be made on the capital stock. On the same day the board of directors of the bank, pursuant to a like motion which was unanimously carried, made an assessment "against the stock of 50 per cent. to take care of bad papers and to give the bank a good working reserve; this assessment to be paid at once and not later than January 15, 1924, as per resolutions on file of this date." And on the same day, namely, December 20, 1923, as tending more clearly, perhaps, to point out with definite certainty the sole consideration and purpose for which the money was to be paid out by claimants and other stockholders, the board of directors unanimously adopted the following resolution:

"Resolved that the capital stock of the Farmers State Bank of Adams, Nebraska, be and the same is hereby assessed fifty per cent. of its face value, such assessments to be paid in money, or notes, or other security to be approved by the board of directors, and that notes and other securities now owned by said bank to the amount of twelve thousand five hundred dollars be selected by the directors of said bank and taken out of the assets of the bank, in lieu of the proceeds of said assessment, and that said notes and security so taken out be assigned and delivered to the cashier of said bank to be held by him in trust for the

use and benefit of the stockholders of said bank, and that said cashier shall reduce said notes and securities to cash or other notes or securities of value, and the proceeds thereof delivered to said Farmers State Bank of Adams, Nebraska, in lieu of other worthless or doubtful notes or securities owned by said bank, and such notes and securities as may be selected by the board of directors, taken from the assets of said bank and delivered in trust to said cashier in trust as aforesaid, and that the proceeds thereof by said cashier received be paid and delivered pro rata to the various stockholders of this bank according to the amount of stock owned by each respectively.

"Further resolved that, if such assessment be not paid on or before the 15th day of January, 1924, each and every share of stock, the assessment against which has not been paid, shall be sold according to law."

Pursuant to the resolutions the claimants paid the money in suit over to the bank in a laudable but futile effort to protect the stock of the bank from depreciation and to avoid the closing of its doors. And it appears to be clearly established that the money of claimants was used by the bank officials in an effort to prevent, or for a time to stave off, the financial collapse of that institution, and it was applied to this expressly definite purpose by the bank officers. Almost a year and a half elapsed between the date when the money was paid by the respective claimants under the assessment to the bank and the date when the doors of the bank were closed by the state department. So that, for about a year and a half the payment so made accomplished the object for which the money was paid and the bank was thereby enabled to remain a going concern for that period. Can the money so paid in and so used and so applied by the bank now be held to have been a deposit of money in the bank which is entitled to the protection of the bank depositors' guaranty fund? This is the question for decision here.

On the direct examination one of the claimants testified that at the stockholders' meeting the claimants were as-

sured by A. L. Larson, the cashier, that the money would be returned to them "if every one doesn't make their deposit." It appears that this assurance was made by the cashier to the claimants at the meeting where they were all assembled. On the cross-examination the above witness further testified: "Q. You didn't go down to make a deposit in the bank? A. Not for an ordinary deposit, but that is the way I understood it at the time. * * * Mr. Larson assured me, for I asked him the question frankly, whether or not I would get my money back, and he says, 'Yes, unless every one deposits', and I understood they were going to use it and make the bank safe. That was the condition, and soon I made up my mind to write my check. * * * Q. You didn't understand that you were to get your check back? A. Yes; I understood I was to have my money back in case every one did not pay their assessment. * * * Q. You got your (canceled) check back? A. I did; I have searched for it and I have it." The evidence and the exhibits show that the two $250 checks of the depositors were written and canceled January 15, 1924, and the $1,250 check was dated January 7, 1923, and canceled January 18, 1924. To substantially the same effect, in respect of representations and the like, was the evidence of the other claimants. All the evidence of claimants, however, discloses that they felt they were deceived by the representations of the cashier and of the president of the bank, and that they believed and acted on the deceptive statements so made and were thereby induced to write their checks and pay over their money to the bank. Is argument required to establish that the money when checked out of the bank no longer stood to the credit of the claimants and was then no longer subject to their control? The resolution plainly provides that the assessment of 50 per cent. was definitely made against the stock "to take care of bad papers and to give the bank a good working reserve."

Section 39, ch. 191, Laws 1923, of the bank depositors' guaranty law, so far as applicable here, expressly provides:

"No state bank shall receive any deposit upon any col-

lateral agreement or condition other than an agreement for length of time to maturity and rate of interest, and no money deposited in any such bank, upon any such collateral agreement or condition, shall be guaranteed by the depositors' guaranty fund."

Clearly, claimants violated both the letter and the spirit of section 39 when they made a "collateral agreement or condition" to pay over their money to the bank on a promise by cashier Larson that it would be returned under the conditions that are disclosed by the record. That he greatly exceeded his authority is shown by his own evidence. He testified that he told the stockholders that they would have to raise the money to pay the assessment on their stock, and that to do this "there was only one right thing, and that was to pay in the 50 per cent. assessment on the stock and take out the bad paper," and that this bad paper was to be held in a separate fund and collected afterwards. He also testified: "Q. Were any of these stockholders given any deposit slip or any evidence of any deposit they were making in the bank at that time? A. They were given a receipt." And it fairly appears from the cashier's evidence that the president of the bank was the owner of 25 shares of stock, and that he did not pay in his assessment, and that he, the cashier, did not pay his assessment because the president did not pay his. In this both the cashier and the president deceived their associates.

A bank officer cannot take from nor can he add to the provisions of section 39 of the guaranty law above cited. The only agreement that a bank officer can make with a depositor is plainly stated in the act. It is, of course, unthinkable that the legislature created the depositors' guaranty fund with the intention that its lawful custodians should use this fund as a clearing house for the payment of bad debts or to reimburse the losses of imprudent investors. *Iams v. Farmers State Bank,* 101 Neb. 778; *State v. Security State Bank, ante,* p. 667.

Claimants contend that this court is without jurisdiction

from the fact that a motion for a new trial was not filed. But a receivership is an equity proceeding. 2 Smith, Receivers (Tardy) (2d ed.) sec. 593. In *Swansen v. Swansen,* 12 Neb. 210, in an opinion by Judge Maxwell, this court held: "An appeal in equity causes will lie to the supreme court from a final order or judgment of the district court, in which case no motion for a new trial is necessary." And the receiver contends that the claims of Darnell and the auto sales company were not prosecuted in the name of the real party in interest. But, in view of our decision, we do not find it necessary to decide this question. Other objections have been raised that do not go to the merits and we do not find it necessary to discuss them here. The conclusion is that the money of the claimants, so paid, was not a deposit within the meaning of the above cited bank depositors' guaranty law and it does not therefore come within its protection. *State v. Gross State Bank,* 113 Neb. 119, and cases there cited.

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

REVERSED.

LUCILLE E. MCDONALD, APPELLEE, V. CHARLES W. MCDONALD, APPELLANT.

FILED JULY 1, 1927. NO. 25646.

1. **Appeal:** TRIAL DE NOVO. "While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." *Johnson v. Erickson,* 110 Neb. 511.
2. **Evidence** examined, and *held* to sustain the findings and judgment of the district court.

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

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

James E. Addie, contra.

Heard before ROSE, DAY, GOOD, THOMPSON and EBERLY, JJ., and HASTINGS, District Judge.

DAY, J.

Plaintiff commenced this action for divorce on the ground of extreme cruelty, praying, also, for the custody of two minor children, the issue of the marriage, for alimony and for an allowance for the support of the minor children. The defendant by cross-petition sought a divorce from plaintiff on the grounds of extreme cruelty and adultery. He also prayed for the custody of the minor children.

The trial resulted in a decree awarding the plaintiff a divorce and the custody of the children, permanent alimony in the sum of $3,500 and the allowance of $20 a month for the support of each child until he should arrive at the age of 18 years. Defendant was given permission to visit the children on all suitable occasions. An allowance was also awarded plaintiff for suit money and attorney's fees. From this judgment defendant has appealed.

In the opinion prepared by our commission and approved by this court, we reversed the judgment of the trial court, with directions to render a decree of divorce in favor of defendant upon his cross-petition, giving him custody of the two minor children, with the right given to the plaintiff to visit the children at reasonable times. We also required the defendant to pay the costs of the appeal, including the sum of $100 for plaintiff's attorney. A motion for rehearing was filed by plaintiff, upon which we allowed a reargument before the court, which, in fact, amounted to a resubmission of the case.

The parties were married January 31, 1915. Two children were the issue of the marriage, Kenneth and Joy, respectively 8 and 4½ years of age at the time of the trial. Each of the parties had been previously married. The

plaintiff had one son by her former marriage, 17 years of age, and the defendant had two sons, both of whom were of age. Although each of the parties was asking for a divorce, there was a bitter contest as to which one should receive the decree. It is quite apparent that the custody of the children was an important factor which tended to embitter the parties in their testimony against each other.

It will serve no useful purpose to discuss the evidence in detail. Suffice it to say that the testimony on the part of the plaintiff was amply sufficient to sustain the plaintiff's charges of extreme cruelty. The admission of the defendant as to certain acts tended strongly to corroborate plaintiff's testimony. On the question of misconduct on the part of the plaintiff, as charged in the defendant's cross-petition, there was direct conflict in the evidence.

A number of witnesses testified on behalf of defendant, as to facts from which an inference of improper conduct on the part of plaintiff might be drawn, which was directly denied by plaintiff. Some of this testimony was in the form of depositions and some by witnesses in open court. It is often difficult, especially in this class of cases, to determine where the truth lies. The immediate neighbors of the plaintiff gave her a good name, and testified that she was an industrious woman, devoted to her children, and a proper person to be intrusted with their care and training. In *Johnson v. Erickson*, 110 Neb. 511, it was held: "While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." The same general rule was announced in *Greusel v. Payne*, 107 Neb. 84, and *Shafer v. Beatrice State Bank*, 99 Neb. 317.

Upon a review of the entire record, and giving proper consideration to the finding of the trial court, who observed

the witnesses, we are of the opinion that the testimony fails to establish the charge of infidelity as alleged in the cross-petition.

Upon a consideration of the testimony, we have come to the conclusion that our former judgment should be set aside, the opinion of the commission be withdrawn and the judgment of the district court in all respects affirmed; defendant to pay the costs of this appeal, including the sum of $100 to plaintiff's attorney. The judgment of the district court is

AFFIRMED.

PARK L. DAY, APPELLEE, V. METROPOLITAN UTILITIES DISTRICT, APPELLANT.

FILED JULY 1, 1927. NO. 25232.

1. **Statutes**: CONSTITUTIONALITY: TITLE OF ACT. Where the title of a legislative act is to amend a particular section of an existing statute, the proposed amendment must be germane to the subject-matter of the act sought to be amended.
2. **Negligence**: COMPARATIVE NEGLIGENCE: QUESTION FOR JURY. In actions for personal injuries, where the issues tendered are negligence of the defendant and contributory negligence of the plaintiff, the duty to make the comparison provided by statute rests with the jury, unless the evidence as to negligence is legally insufficient or contributory negligence is so clearly shown that it would be the duty of the trial court to set aside a verdict in favor of the plaintiff.
3. **Evidence** examined, and *held* to be sufficient to require the submission of the issues of negligence and contributory negligence to the jury.
4. **Rulings** of the trial court in the exclusion of evidence examined, and *held* free from error.
5. **Appeal**. If a party to litigation requests the giving of an improper instruction, he will not be permitted to predicate error thereon. A party will not be heard to complain of an error which he himself invited.

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

John L. Webster and *R. B. Hasselquist,* for appellant.

O'Brien & Powers and *Richard S. Horton, contra.*

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

GOOD, J.

This is an action to recover damages for personal injuries, alleged to have been caused in consequence of the negligence of defendant. In its answer defendant denied negligence and alleged contributory negligence on the part of plaintiff and his failure to file a claim with defendant and give notice of the time, place and cause of and circumstances attending his injury, as prescribed by section 3746, Comp. St. 1922. In his reply plaintiff denied contributory negligence. Plaintiff had the verdict and judgment thereon, and defendant appealed.

Defendant is a public corporation created by law for the purpose of taking charge of and operating public utilities owned by the metropolitan city of Omaha. It controls and operates the water and gas plants in said city. One of the instrumentalities used by defendant in carrying on its business is what is termed a "drag line." This machine is a caterpillar tractor on which is erected a revolving platform, and on this platform is a crane, with a boom 30 to 35 feet long. To this boom is attached a dipper or clam shell. The machine is used in digging ditches and making excavations. The entire drag line weighs something over 16 tons and is propelled from one place to another by its own power. The revolving platform is about 12 feet wide and 3 feet or more above the ground. At the time of the injury complained of, defendant's servants were moving the drag line along Thirtieth street in the city of Omaha at about the hour of 11:45 p. m., traveling in a northerly direction. In approaching Scott street, which intersects Thirtieth street, the ones operating this machine desired to turn eastward on Scott street. The drag line was traveling at the rate of about a mile or a mile and a half per hour, and had been on the east or right-hand side

of the street, but as he approached Scott street the operator veered the course of the drag line to northwest so as to have ample room in which to make the turn into Scott street. On Thirtieth street there is a double-track street railway. At the time of the accident, plaintiff was a motorman operating a north-bound street car upon the east track on Thirtieth street. While operating the street car, he ran into and against the drag line at the time it was veered to the northwest for the purpose of entering Scott street, and received the injuries complained of. He avers that there were no lights upon the drag line; that one corner of the rear end of the revolving platform projected over the west rail of the east track of the street railway; that he did not see and, in the exercise of reasonable care, could not have seen the drag line until too late to avoid collision.

Many errors are assigned by defendant for reversal. They may be grouped under the following heads (1) Plaintiff is not entitled to recover because of his failure to serve and file the written notice, stating the time, place and cause of the injury and other details, prescribed by section 3746, Comp. St. 1922; (2) plaintiff was guilty of such contributory negligence that, as a matter of law, it deprives him of the right to recover; (3) errors in the admission and exclusion of evidence; (4) errors in giving and refusal of instructions.

Plaintiff concedes that no notice or claim was filed by him with defendant, as prescribed by section 3746, Comp. St. 1922, but contends that the statute is void because, in its enactment, the provisions of section 14, art. III of the Constitution, were contravened. The constitutional provision referred to is as follows: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed."

Section 3746, Comp. St. 1922, was originally enacted as chapter 90, Laws 1917, with the following title: "An act to amend section 2 of chapter 143 of the Laws of 1913,

being section 4244 of the Revised Statutes of Nebraska for 1913, and to repeal said section as it now exists, and all acts and parts of acts in conflict with the provisions of this act." The first paragraph of said chapter 90 (now section 3746, Comp. St. 1922) is a repetition of the original section 4244, Rev. St. 1913. Said original section provides that metropolitan water districts should be bodies corporate and possess the powers of corporations for public purposes; that such districts might sue and be sued, purchase and sell personal and real property, and should have the sole management and control of the water plants, revenues and income, owned by the metropolitan city within the districts, and that they might exercise the powers granted to cities and villages by the general statutes of the state for the construction or extension of water plants. The new matter added to said section in the amendatory act is as follows:

"All claims against said metropolitan water district arising out of contracts, must be presented in writing with a full account of the items verified by the oath of claimant, his agent or attorney, that the same is correct, reasonable and just, and no such claim shall be audited or allowed, nor suit maintained on such claim unless it has been presented to the board of the metropolitan water district, to be audited as herein provided. All unliquidated claims, including actions for injuries or damages to the persons or property hereafter sustained, must be filed, duly verified by the party, his agent or attorney, within twenty days from the date of the injury or damage complained of. Such statement must contain the full name, the time, the place, the nature of the defect, the cause of the injury and the amount of damage claimed, and a failure to file shall bar any action against the metropolitan water district upon such claim: *Provided,* in all claims for injury to the person or persons claiming to have been injured, said person or persons shall at any time after giving notice of such injury, be subject to a personal examination by the city physician of the metropolitan city within said water dis-

trict, for the purpose of determining the character, cause and extent of the injury complained of; and a failure to submit to such examination shall prohibit the maintaining of any action against said metropolitan water district or recovery of any damage therefor. Said district may also produce and sell ice."

It is the contention of plaintiff that the new matter, particularly that part pertaining to the filing of claims for personal injuries and giving notice to the district within 20 days of the injury, was not germane to the original section amended, and that therefore the act was broader than its title and contravened the above quoted constitutional provision.

It may be here noted that, by subsequent legislation, the name of the Metropolitan Water District has been changed to Metropolitan Utilities District, and the powers have been enlarged so as to permit a district to operate public utilities other than water-works.

It is a rule, firmly established in this, and generally recognized in other, jurisdictions, that, when the title of a legislative act is to amend a particular section of an existing statute, the proposed amendment must be germane to the subject-matter of the section sought to be amended. *Miller v. Hurford,* 11 Neb. 377; *Trumble v. Trumble,* 37 Neb. 340; *State v. Tibbets,* 52 Neb. 228; *State v. Cornell,* 54 Neb. 72; *State v. Bowen,* 54 Neb. 211; *Armstrong v. Mayer,* 60 Neb. 423; *State v. Barton,* 91 Neb. 357; *State v. McShane,* 93 Neb. 46; 1 Lewis' Sutherland, Statutory Construction (2d ed.) sec. 137. The purpose of the constitutional provision was to prevent surreptitious legislation. The reason for the application of the rule is that the title expresses a purpose to deal only with the subject-matter contained in the section sought to be amended.

A careful examination of section 2, ch. 143, Laws 1913, being section 4244, Rev. St. 1913, discloses that the section deals only with the powers and duties of metropolitan water districts (now metropolitan public utilities districts). The matter sought to be incorporated by the amendatory

act of 1917, in so far as it deals with claims for injuries or damages to persons or property, and requiring that such claim be filed within 20 days from the date of injury or damage, deals with an entirely different subject. It relates to, and attempts to deal with, the duties of the person suffering an injury or damage for which the district may be liable. It is not germane to the original subject of the section sought to be amended and is, therefore, void because violating the constitutional provision above quoted. It follows that plaintiff was under no obligation to file claim and give the notice attempted to be prescribed by section 3746, Comp. St. 1922.

Defendant urges that it was the duty of the plaintiff, as motorman, to operate the street car at a rate of speed at which it could be stopped within the distance that an object could be seen upon the track by the aid of the headlight on the car, and that plaintiff evidently did not so operate his street car and was, therefore, guilty of such contributory negligence as would defeat his right of recovery. Many cases from other jurisdictions are cited which support, or tend to support, this proposition. However, we think they are not applicable to the situation existing in this case. There were, in fact, no objects upon the street railway track. The rays from the headlight on the street car no doubt were directed downward so as to show on the rails immediately in front of the car. The drag line, itself, was not upon the track, but only one corner of the platform projected out and over the track, some considerable distance above the rails, and it was only the edge of the platform that would be presented for view. It seems apparent that, until the street car was in close proximity to the drag line, the motorman, in the exercise of due care, might not have been able to see the obstruction or been aware of the danger of collision. The evidence on behalf of plaintiff tends to show that there was no light upon the rear end of the platform of the drag line, and that it was a rather dark night.

In an action for personal injuries, where the issues ten-

dered are negligence of the defendant and contributory negligence of the plaintiff, the duty to make the comparison provided by the statute rests with the jury, unless the evidence as to negligence is legally insufficient or contributory negligence is so clearly shown that it would be the duty of the trial court to set aside a verdict in favor of plaintiff. Ordinarily, where there is room for difference of opinion upon these questions, they must be submitted to the jury. *Disher v. Chicago, R. I. & P. R. Co.*, 93 Neb. 224. Applying this rule to the facts disclosed by the record in the instant case, it was for the jury to determine whether or not plaintiff could see, or should have seen, the obstruction in time to have prevented a collision. The question of negligence and contributory negligence, under the circumstances, was properly submitted to the jury. Moreover, contributory negligence of the plaintiff does not necessarily defeat his right to recover. If the negligence of defendant was gross and that of plaintiff slight in comparison therewith, he may recover, but the amount of his recovery would be diminished in proportion to the amount of contributory negligence attributable to him. Comp. St. 1922, sec. 8834.

We have carefully examined the entire evidence and are convinced that the questions of negligence and contributory negligence were questions for the consideration of the jury, and the jury's finding is conclusive upon such questions, provided the case was properly submitted for their consideration.

During the trial defendant offered in evidence a certified copy of findings and order made by the state compensation commissioner in a proceeding wherein the Omaha & Council Bluffs Street Railway Company was plaintiff and the plaintiff in this action was defendant, and this evidence was by the court, on objection of plaintiff, excluded. This is assigned as error. We are unable to perceive wherein this evidence was competent for any purpose. It was not an adjudication between the parties to this action, and what the compensation commissioner might

have found and determined upon the evidence then before him would certainly not be a guide for the determination of the jury in this action upon totally different evidence. We think the proffered exhibit was properly excluded.

It is asserted that the court erred in failing to give certain instructions requested by defendant. The first of the requested instructions which were refused, of which complaint is made, amounted to a direction of a verdict for defendant. It would have been error to have given the instruction. Complaint is made of other instructions, requested and refused, but an examination indicates that the principles of law involved were incorporated in the instructions which were given. Defendant complains of the fifth instruction, given by the court to the jury. That part of the instruction of which complaint is made is an exact copy of another instruction which was requested by defendant. If there was any error in the instruction, which we do not decide, it was invited by the defendant. A party will not be heard to complain of an error which he has invited.

No error prejudicial to the defendant has been pointed out or discovered. It follows that the judgment of the district court should be, and is,

AFFIRMED.

The following opinion on application to file amended and supplemental petition for rehearing was filed November 28, 1927. *Application denied.*

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

PER CURIAM.

This case was determined and opinion filed July 1, 1927. It is reported, *ante*, p. 711. A motion for rehearing, after due consideration, has been denied. It now comes again before this court upon application of appellant for leave to file amended and supplemental petition for rehearing.

It appears that this case, upon consideration of this application in connection with the facts and record of this appeal, was argued in open court, and was heard by the judges of this court then present and "sitting without division;" that it was determined by the concurrence of five of the judges thereof as provided by section 2, art. V of the Constitution of Nebraska; that, during the pendency of this case in this court, rule 22 (now 6*b*) of the rules of this court, then in force and effect, provided: "Counsel desiring oral argument to the full bench on constitutional questions or in homicide cases must file written request for same at the time of filing his brief, or the privilege of argument to the full bench will be considered waived, and the matter will be heard by the division of the court sitting when the case comes up for argument. All judges of the court, however, shall participate in all decisions of such questions, as if the case had been argued to the full bench, whether having heard oral argument or not."

The court finds as a fact that appellant wholly failed to file a written request for a hearing to the full bench, as required by the terms of said rule, and wholly failed to make any request whatever on said subject at or prior to the final submission of said cause to this court; that said cause, after submission, was considered and determined by this court strictly pursuant to, and in accordance with, the provisions of rule 22 (now 6*b*) and of section 2, art. V of the Constitution of Nebraska.

The application for permission to file an amended and supplemental petition for rehearing is therefore denied and mandate directed to issue forthwith.

APPLICATION DENIED.

STEPHEN E. AUKER, APPELLEE, V. EDWARD PERRY ET AL., APPELLEES: RICHARD RITZE ET AL., APPELLANTS.

FILED JULY 1, 1927. NO. 24978.

1. **Mortgages: ASSUMPTION BY PURCHASER.** Where a purchaser of land, in consideration thereof, assumes a mortgage thereon, which mortgage has been previously recorded, he is chargeable with notice, and becomes obligated thereby to pay the debt in accordance with the terms and conditions of such mortgage, and the note and coupons by it secured, including an acceleration clause in each or either thereof.
2. ———: ———. In such case the note, coupons, and the mortgage securing the same should be considered together, as they, thus combined, constitute the obligation assumed.
3. **Evidence** examined, and found that appellants' charge of fraud is not sustained, and that their answer and cross-petition is without equity.
4. **Cases Held Inapplicable.** *Miller v. Ruzicka*, 111 Neb. 815, and other cases cited by appellants, considered and held inapplicable.

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

Fay H. Pollock and *North & O'Reilly*, for appellants.

C. H. Hendrickson and *A. R. Davis, contra.*

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

THOMPSON, J.

In this action Stephen E. Auker, appellee, hereinafter called plaintiff, by way of a petition in usual form, sought to foreclose a mortgage on certain lands in Wayne county. The mortgagors, Edward Perry and Edward J. Auker, appellees herein, were made defendants, as were Richard Ritze and Carl L. Ritze, appellants herein, and hereinafter referred to as the Ritzes, vendees of such mortgagors; such Ritzes in the contract of purchase, as well as in the deed of conveyance to them, having assumed and agreed to pay the mortgage. After the issues were duly joined, trial was had, and decree rendered finding the amount due plaintiff

to be $50,000 on the principal note with interest thereon at 5 per cent. from March 19, 1925, and on the interest coupon due March 19, 1925, the sum of $2,500 with interest thereon at 10 per cent. from its due date, and ordering foreclosure and sale as prayed by plaintiff, and as prayed by the original mortgagors in their cross-petition, and holding the Ritzes primarily, and Perry and Auker secondarily, liable for any deficiency remaining after sale and application of proceeds. To reverse this judgment the Ritzes appeal, alleging as grounds for reversal, among others, fraud which they claim entered into the original written contract of sale from Perry and Auker to them of the land in question, which fraud, as alleged in their answer, in substance, consisted of the following alleged facts: That it was represented to them by Perry and Auker that the land referred to was mortgaged in the sum of $50,000 to secure a principal debt of that amount, bearing interest at 5 per cent. per annum from March 19, 1920, the date thereof, to March 19, 1930, at which time such note and mortgage matured; that the land had been purchased by defendants Perry and Auker from plaintiff for the sum of $80,000, and they had paid plaintiff therefor by executing and delivering to him such mortgage, and paying the balance in cash, when in fact they had not paid $80,000 for the land nor agreed to pay such amount, but had paid $74,000 therefor and no more; that such fraud consisted further in the intentional concealment from them at the time by Perry and Auker that such note and mortgage contained therein the acceleration clauses hereinafter set forth; that they entered into such written contract relying upon and believing that neither the note nor the mortgage contained acceleration clauses, and that Perry and Auker had paid $80,000 for the land; that they did not discover such fraud until the bringing of this action; and that, by reason thereof, the court erred in finding them liable for a deficiency judgment, and also erred in not canceling such contract and deed, and entering judgment in their favor against Perry and Auker for payments theretofore made by them on such purchase,

together with the value of such permanent improvements as they had in the meantime placed thereon, as prayed in their answer and cross-petition.

Upon examination of the record we conclude as follows: That the plaintiff was the owner of the lands in question; that he had sold the same to one Clark for $78,000, and Clark had paid thereon in cash $4,000, but upon his failure to comply with such contract, the same was canceled, and the land was purchased by Perry and Auker for $74,000, they thus receiving the benefit of the $4,000 payment by Clark; that Perry and Auker paid plaintiff $24,000 in cash, and gave him back a mortgage on the land for $50,000, such mortgage and the note it secured being the ones here in question; that the mortgage was duly recorded in the office of the county clerk of Wayne county; that at the time of entering into the contract the Ritzes were told of such sale of the land to Clark, and the cancelation of Clark's contract of purchase, the purchase by Perry and Auker, and their payment therefor as above indicated; that the Ritzes entered into possession of the land under this contract and made some valuable improvements thereon of a permanent nature; that in February, 1921, Perry and Auker furnished the Ritzes with an abstract of title to the land which showed the only mortgage on the tract was one for $50,000, together with the book and page where and when recorded, which abstract was examined by their attorney and returned with certain objections thereto, but without objection of any kind to such mortgage or note; that, on refusal of the Ritzes to comply with the contract of purchase, an action for specific performance was instituted against them by Perry and Auker, trial had, and a decree of performance on the part of the Ritzes was entered; that in such case the Ritzes did not specifically interpose the defense of fraud; that to reverse such judgment, appeal was had to this court, and the decree of the trial court was affirmed, which case is reported in *Perry v. Ritze*, 110 Neb. 286; that on entry of the mandate in the trial court on June 28, 1923, the balance of the purchase price was paid

by the Ritzes save the $50,000 mortgage, the receiver who had been appointed and acted during the interim was by mutual consent of the parties discharged, the balance of the money, net income received by such receiver, turned over to the Ritzes, as was also the deed and the possession of the land, which they have ever since retained, and do now; that the Ritzes paid the interest coupon which became due March 19, 1924, but failed to pay that which became due March 19, 1925, and the plaintiff elected to declare the whole amount due and payable, and instituted this suit; that the interest coupons due in 1922 and 1923 were paid partly by the receiver and partly by the Ritzes; that each and all of such coupons showed on its face that it drew interest after due at 10 per cent. per annum; that the note of $50,000 and the interest coupons were payable by their terms at the Citizens National Bank of Wayne, and for that purpose were by the plaintiff placed in the custody of such bank, as was well known by the Ritzes, and could have been inspected by them if desired, especially at the time of any interest payment.

Thus we conclude that in the conversation leading up to this contract, and the signing and execution thereof, there were no fraudulent statements made by Perry and Auker as to the matters in controversy herein; if fraud there was, it was solely by reason of the fact that no mention was made by Perry and Auker at the time of the acceleration clauses in such note and mortgage, except as indicated by the written contract in question.

Our consideration is thus directed to the contract, as evidenced by these different instruments. The provisions of the sale and purchase agreement, so far as material, are as follows: "The party of the second part (the Ritzes) agrees to pay the sum of eighty thousand dollars ($80,000) payable as follows: Cash in hand eleven thousand ($11,000) dollars, receipt whereof is hereby acknowledged. Balance $50,000 by assuming a mortgage of that amount with interest thereon from March 1, 1921, this mortgage being due March 1, 1930, and optional. $14,000 on March 1, 1921,

without interest. $5,000 on or before March 1, 1923, with interest at the rate of 5 per cent. per annum, interest to date from March 1, 1921, to be secured by a second mortgage on the above described property. The party of the second part further agrees to pay the taxes on said mortgage and the debt secured thereby, and to carry $———— insurance on said property, payable in case of loss to said first party. The party of the first part is to furnish to the party of the second part, or assigns, a warranty deed and a good and merchantable abstract of title, on or before March 1, 1921, assign all insurance on said buildings and pay interest at the rate of 4 per cent. on the $11,000 cash payment from April 7, 1920, to date, and also to pay interest at the rate of 5 per cent. on $5,000 of the cash payment from this date to March 1, 1921. On the $14,000 payment due March 1, 1921, parties of the first part agree to accept up to $3,000 in Liberty bonds, said bonds to be taken in at market value plus one-half the difference between market value and face value, pay all taxes assessed against said land, and if there is a mortgage on said property pay interest thereon up to March 1, 1921, and give possession by March 1, 1921."

The acceleration clause in the note is as follows: "Should any of said principal or interest not be paid when due, it shall bear interest at the rate of ten per cent. per annum from the time same becomes due until paid, and upon any failure to pay any of said interest within five days after due, the holder may elect to consider the whole note due and it may be collected at once."

The acceleration clause in the mortgage provides: "That a failure to pay any of said money, either principal or interest, when the same becomes due or a failure to comply with any of the foregoing agreements shall cause the whole sum of money herein secured to become due and collectable at once at the option of the mortgagee."

The provisions contained in the deed executed and delivered to the Ritzes by Perry and Auker in pursuance of the aforementioned contract, material for our considera-

tion, are as follows: "In consideration of the sum of eighty thousand and no/100 dollars, in hand paid, do hereby * * * convey * * * And we do herewith covenant with the said Richard Ritze and Carl Ritze, and their heirs and assigns, that we are lawfully seised of said premises, that they are free from incumbrance except for one mortgage of $50,000 which grantees assume and agree to pay with interest thereon at the rate of five per cent. from March 1, 1921."

Thus we approach the question of the legal effect of the contract entered into. We held in *Crawford v. Houser, ante,* p. 62: "A stipulation in a mortgage, authorizing the mortgagee to accelerate the maturity of the mortgage debt, if interest thereon is not paid when due, or if the taxes on the mortgaged premises are not paid at or before the time they became delinquent, is not forbidden by the statute, nor contrary to public policy, and may be enforced."

In *Moorehead v. Hungerford,* 110 Neb. 315, we said: "The coupon bonds, or principal notes, which are secured by the mortgage, provide that, 'upon any failure to pay any of said interest within five days after due, the holder may elect to consider the whole debt due and it may be collected at once.' The notes and the mortgage, taken together, constitute a valid and enforceable contract. Defendants as purchasers having assumed and agreed to pay the mortgage indebtedness as a part of the purchase price were bound by the terms of the instruments which constitute the contract. The mortgage having been recorded, defendants were chargeable with notice of its provisions."

It is elementary that "A party whose cause of action is founded upon a written contract is limited as to his rights by the terms of such contract, and a recovery contrary thereto cannot be sustained." *Patterson v. Murphy,* 41 Neb. 818.

As we have seen, in this case such contract is that of purchase which the parties reduced to writing and signed, the note, the coupons, and the mortgage securing the same, and the clause in the deed whereby the Ritzes assumed and

agreed to pay. There was but one $50,000 mortgage involved, and that was the one belonging to the plaintiff, as each well knew. It was recorded, hence the Ritzes were chargeable with notice of its provisions, which covered those of the note and coupons as well. The contract of purchase in no manner limits or describes such mortgage as to its provisions, except to frankly inform the Ritzes that it is "optional," and the record is without complaint as to this provision. After being informed of this optional nature of the mortgage contract, and that over their own signatures, they cannot be heard to say, under this record, that they did not know; and further such knowledge under our holding involved the note and coupons as well.

"The acceptance by the grantee of a deed poll containing a covenant that the land conveyed is free from incumbrances except a mortgage previously made by the grantor, 'which the grantee assumes and agrees to hold the grantor harmless from,' constitutes a contract by the grantee, not merely to indemnify the grantor, but to pay the mortgage debt" (and that according to the contract's legal terms). *Locke v. Homer,* 131 Mass. 93.

As succinctly stated in the course of the opinion in *Baldwin v. Munger,* 200 Ia. 32: "A mortgage imports a pecuniary obligation, and the assumption of a mortgage debt is clearly pecuniary. If a note secured by the mortgage gives the mortgagee the right to 'reasonable attorney's fees,' it is obligatory upon the promisor to pay same. This is a pecuniary obligation, and is within the indebtedness contemplated by an assumption contract of the purchaser of the land. It becomes a part of the mortgage debt assumed by the grantee. *Johnson v. Harder,* 45 Ia. 677. The assumption of a mortgage according to its terms includes a covenant to maintain insurance for the benefit of the mortgagee. This also is pecuniary in character. *Johnson v. Northern Minnesota Land & Investment Co.,* 168 Ia. 340. A stipulation in a note for the acceleration of the due date of the mortgage is binding upon a person who assumes and agrees to pay the mortgage, on the theory that the agreement to

pay the mortgage is an agreement to pay the debt secured by the mortgage according to the covenants of a pecuniary character. *Williams v. Moody*, 95 Ga. 8."

Our holding in *Miller v. Ruzicka*, 111 Neb. 815, is cited by the Ritzes as being in conflict with the views herein expressed. As we conclude, the facts in that case, as well as in the other cases by them cited, are so dissimilar to the facts herein as to render the law announced in each thereof inapplicable to the facts disclosed by this record.

Hence, it is concluded that as the transaction under consideration was without fraud on the part of Perry and Auker, and as the record fails to show a cross-appeal on the part of the plaintiff as to the trial court's allowance of 5 per cent. interest instead of 10 per cent. on the $50,000 debt after the same was declared due and payable, the decree entered by the trial court is a correct application of the law to the facts; and as the transaction is without fraud, and the cross-petition of the Ritzes is without equity, it is unnecessary to consider other alleged errors presented.

AFFIRMED.

AUGUST E. HOLMBERG, APPELLEE, V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLANT.

FILED JULY 1, 1927. No. 24917.

1. STATE RAILWAY COMMISSION: POWERS. The Nebraska state railway commission is free and vested with full power, in the absence of statutory or constitutional inhibition, to adopt and follow its own rules and course of procedure.
2. ———: MODIFICATION OF FORMER ORDER. In proceedings before such commission which involve either directly or as a necessary consequence the annulment, modification or alteration of a previous order by it entered, the doctrine of estoppel or *res judicata*, as usually applied to judgments of courts of record, is without any application whatever.
3. **Police Power.** "The essential quality of the police power as a governmental agency is that it imposes upon persons and prop-

erty burdens designed to promote the safety and welfare of the public at large." *Lindemann v. St. Joseph & G. I. R. Co.*, 113 Neb. 284.

4. **Railroads:** CONSTRUCTION OF FARM CROSSINGS. It appearing that the provision of section 106, ch. 25, Revised Statutes 1866, was in force at the time the defendant secured its right of way by condemmnation proceedings, it follows the defendant company is bound to construct and maintain farm crossings, as defined therein, or as said section may be amended by the state in proper exercise of its police power.
5. **Constitutional Law.** Section 5527, Comp. St. 1922, as amended by chapter 167, Laws 1923, construed, and *held* to be valid and enforceable, and not to contravene sections 3, 16, or 21, of art. I, Constitution of Nebraska; and that said section, as amended, does not deprive said plaintiff of its property without due process of law, or impair the obligations of contract; that it does not take property for private use in violation of the state Constitution, nor does it deprive plaintiff of its property without due process of law in violation of the federal Constitution.
6. **Railroads:** CONSTRUCTION OF SUBWAY: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* to support the order of the railway commission requiring the construction of an underground cattle pass provided in the order entered by it herein.

APPEAL from the State Railway Commission. *Affirmed.*

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

O. S. Spillman, Attorney General, Hugh LaMaster and *Peterson & Barta, contra.*

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

EBERLY, J.

August E. Holmberg, hereinafter referred to as plaintiff, owns and resides upon a quarter-section farm situated near Wausa, Nebraska. This farm is bisected by the right of way of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, hereinafter referred to as defendant. Situated north of defendant's right of way is a depression or low, wet valley which in a general way parallels the right

of way and is useful for pasturage only. It contains some eighteen acres of land and extends across the farm. A branch of this valley extends to the southward intersecting the defendant's line of railway about the center of the farm. At this point of intersection the grade of defendant's roadbed, as shown by the evidence, is approximately nine feet in height. In the present proceeding the plaintiff seeks, under the provisions of section 5527, Comp. St. 1922, as amended by chapter 167, Laws 1923, to compel the construction of an underground cattle pass of sufficient size for the passage of horses, cattle and hogs under the track of the defendant connecting the two halves of his farm. Heretofore there has been an ordinary surface or grade farm crossing maintained by the defendant on the northern part of the farm, but the findings of the commission, which are supported by the evidence, disclose that in its present location this crossing does not answer to the requirements of the farm, and is inadequate for the purpose for which it is constructed and has not been used ordinarily by the plaintiff because in its location it was impracticable. The record before us also discloses that in 1922 the plaintiff filed a petition before the state railway commission for an order requiring the defendant to construct an underground crossing through the right of way on this farm at the point above described, which was by the commission denied, and that no appeal was prosecuted from such denial. On September 16, 1924, the present proceeding was commenced before the Nebraska state railway commission. After hearing thereon, an order was entered requiring the defendant to construct an "underground cattle pass of sufficient size for the passage of horses, cattle and hogs," etc., and from this order the defendant has appealed.

The first assignment of error at the threshold of this case is that the railway commission erred in refusing to take notice of, or receive in evidence, the record of the former hearing of 1922. This record, duly authenticated, was offered in evidence by the defendant at the present hearing. The commission refused to admit it in evidence,

but the offer of proof embraces the complete record of proceeding referred to, and the transcript of same forms a part of the bill of exceptions in the present case. It was conceded on argument of the present case by the representatives of the commission who appeared in its behalf that the record offered should have been received in evidence. Without further consideration, for the purpose of this case only, we accept this view of the law. The record of the case, determined in 1922, will therefore be considered as before the court, and entitled to the same consideration as though formally received and considered by the commission at the time the order appealed from was made. It therefore follows that, assuming error to have been committed by the ruling complained of, it cannot be considered as prejudicial in this case.

In considering the previous determination of the Nebraska state railway commission of the matter now before us, when first presented to that commission by the same parties, it is to be remembered that this commission finds the source of its power in the Constitution. The limitations of its powers, and the proper manner of their exercise, must be determined by the terms of that instrument, and also, as expressed therein, "as the legislature may provide by law." In the exercise of its prerogatives the Nebraska state railway commission is not subject to direction or criticism by the courts, except as what transpires may be a proper subject of judicial review, as bearing upon its orders or "judgments." Also, the commission is free, in the absence of statutory or constitutional inhibition, to adopt and pursue its own rules and course of procedure. *Omaha & C. B. Street R. Co. v. Nebraska State Railway Commission*, 103 Neb. 695.

So, too, this court is committed to the doctrine that—"The state railway commission has independent legislative, judicial and executive or administrative powers so far as necessarily involved in the 'regulation of rates, service, and general control of common carriers;' and such exercise of

power may be controlled or limited by the legislature." *In re Lincoln Traction Co.*, 103 Neb. 229.

But the legal effect of orders entered in exercise of its judicial power has been "expressly controlled and limited by legislative action." By statute it is expressly provided that orders of the commission made upon hearing, such as is now before us, shall be "in force and effect from and after the date fixed by the commission, and shall so remain until annulled, modified, or reversed by the commission," etc. This language, in connection with the context and other provisions of the act, sustains the conclusion that in proceedings which involve either directly or as a necessary consequence the annulment, modification or alteration of a previous order entered by the commission, the doctrine of estoppel or *res judicata*, as usually applied to judicial decisions of courts of record, has no application whatever. The analogy between the control of orders by a court during the term in which they were entered, and the control by the commission of its orders at all times, would seem to be complete.

From what has already been set forth, it also follows that whether such proceedings to reverse, modify, or annul shall take the form of an application to reopen the original proceeding in which the order complained of was entered, or whether they shall take the form of an independent proceeding and formally wholly unconnected with the previous proceeding, is a matter of procedure strictly within the constitutional control and determination of the commission. The conclusions here announced seem to be in accord with the weight of authority. Comp. St. 1922, secs. 5496-5498, 5527; Laws 1923, ch. 167; *Lindemann v. St. Joseph & G. I. R. Co.*, 113 Neb. 284; *Board of R. R. Commissioners v. Atchison, T. & S. F. R. Co.*, 8 I. C. C. Rep. 304; *Cattle Raisers Ass'n v. Chicago, B. & Q. R. Co.*, 12 I. C. C. Rep. 507; *Goss v. Director General*, 73 I. C. C. Rep. 649; *Bell & Zoller Coal Co. v. Baltimore & O. S. W. R. Co.*, 74 I. C. C. Rep. 433; *Motor Transit Co. v. Railroad Commission*, 189 Cal. 573;

Stratton v. Railroad Commission, 186 Cal. 119; 2 Freeman, Judgments (5th ed.) secs. 712, 713.

It is the defendant's further contention that, the right of way having been condemned and paid for, the legislature is "without power thereafter to compel the railroad to expend substantial sums of money for the convenience of such landowner or his grantee." It would seem that the question suggested is not fully presented by the record in this case. It is, however, stated by the defendant in its brief that its right of way was obtained by the usual condemnation proceedings. This is tacitly conceded by plaintiff's failure to deny either in oral argument or written brief. If we take judicial notice of this fact, possibly it will not be disputed that this right of way was obtained prior to 1921 at a time when the following statute was in full force: "When any person owns land on both sides of any railroad, the corporation owning such railroad shall, when required so to do, make and keep in good repair one causeway or other adequate means of crossing the same." Rev. St. 1866, ch. 25, sec. 106.

Accepting the above assumptions as in accord with the facts in the instant case, then the damages for the land condemned were assessed in view of the provisions quoted, and the amount of recovery was necessarily diminished because of the terms of this statute. It follows that the railroad company is bound to construct and maintain a "farm crossing" defined by statute which, in terms at least, does not purport to describe a "grade crossing" nor preclude a further definition of "adequate means of crossing the same" by the state in proper exercise of its police power. *Lindemann v. St. Joseph & G. I. R. Co., supra*, would appear opposed to defendant's contention and controlling on this branch of the case.

However, the question under consideration naturally leads to and suggests the further contention made by the defendant that section 5527, Comp. St. 1922, as amended by chapter 167, Laws 1923, is unconstitutional and void, being in violation of sections 3, 16, and 21, art. I, Constitu-

tion of Nebraska, and being in violation of the Fourteenth amendment to the Constitution of the United States; that is, it deprives plaintiff of its property without due process of law; it impairs the obligations of contract; it takes private property for private use in violation of the state Constitution; and it deprives plaintiff of its property without due process of law in violation of the federal Constitution.

The application of the principles of constitutional law upon which the defendant bases its contention to the facts in this case discloses that the fundamental question involved here is the right of the state, by the exercise of its police power, to eliminate the perils of grade crossings. The principles themselves are well established. As applied in the precedents found in the court of controlling jurisdiction, it would seem that the validity of the statutes attacked must be sustained. Mr. Justice Hughes, in delivering the opinion of the supreme court of the United States in *Chicago, M. & St. P. R. Co. v. City of Minneapolis*, 232 U. S. 430, said: "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways." Other specific illustrations of the application of this established rule to the elimination of grade crossings are *Davis v. County Commissioners*, 153 Mass. 218; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556; *Selectmen of Norwood v. New York & N. E. R. Co*, 161 Mass. 259; *Illinois C. R. Co. v. Copiah County*, 81 Miss. 685; *City of Harriman v. Southern R. Co.*, 111 Tenn. 538; *St. Louis & S. F. R. Co. v. Fayetteville*, 75 Ark 534; *Chicago, B. & Q. R. Co. v. People*, 200 U. S. 561; *Cincinnati, I. & W. R. Co. v. Connersville*, 218 U. S. 336; *Missouri P. R. Co. v. City of Omaha*, 235 U. S. 121. See, also, *Denver & R. G. R. Co. v. City and County of Denver*, 250 U. S. 241; *Erie R. Co. v. Board of Public Utility Commissioners*, 254 U. S. 394; *Chicago, R. I. & P. R. Co. v. Public Service Commission*, 287 S. W. (Mo.) 617; *Richmond, F. & P. R. Co. v. City of Richmond*, 145 Va. 225.

In a later case, Justice Holmes, in delivering the opinion of the supreme court of the United States in *Erie R. Co. v. Board of Public Utility Commissioners*, 254 U. S. 394, made use of the following language: "Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited and that it necessarily frequents, the state, in the care of which this interest is and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power, or to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. *Denver & R. G. R. Co. v. City and County of Denver*, 250 U.S. 241. To engage in interstate commerce the railroad must get onto the land, and to get onto it must comply with the conditions imposed by the state for the safety of its citizens. Contracts made by the road are made subject to

the possible exercise of the sovereign right. *Denver & R. G. R. Co. v. City and County of Denver,* 250 U. S. 241; *Union Dry Goods Co v. Georgia Public Service Co.,* 248 U. S. 372; *Louisville & N. R. Co. v. Mottley,* 219 U. S. 467; *Northern P. R. Co. v. State,* 208 U. S. 583; *Manigault v. Springs,* 199 U. S. 473. If the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortunes the stopping may produce. *Brooks-Scanlon Co. v. Railroad Commission,* 251 U. S. 396. Intelligent self-interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty. In the opinion of the courts below the evidence justified the conclusion of the board that the expense would not be ruinous. Many details as to the particular situation of this road are disposed of without the need of further mention by what we have said thus far. The plaintiff in error discusses with considerable detail the effect of the changes upon private sidings. But its rights in respect of these are at least no greater than those in respect of the main line and are covered by the preceding discussion."

A consideration of cases above cited discloses that the source of the state's authority to adopt regulations for public safety at grade crossings is the police power of the state, and that the elimination of grade crossings is within the scope of that power. The fundamental fact upon which its existence is justified is that its exercise promotes the safety of either or both of two distinct classes: (1) The passengers transported by the railways; and (2) travelers proceeding over the "intersected way." These considerations apply to "farm grade crossings." It must be conceded that each of these, in greater or less degree, is a place of potential danger. Indeed, some farm crossings, because of peculiar situation, may impose greater perils upon the public there in course of transportation, as well as upon persons and property on the premises where situated, than such as are incidental to usual grade crossings upon public highways. The regulation and elimination of farm grade crossings must therefore be deemed properly within the

scope of the police power. The doctrine cannot be gainsaid that the police power of a state under federal and state Constitution, when exercised in the interest of public safety, is unlimited except by the requirement that the exercise be not capricious or wanton or unreasonable. The extent and conditions upon which this power will be exercised obviously is a matter of legislative discretion on part of the state. It follows that authorities set forth herein are applicable to the present case and controlling, and that section 5527, Comp. St. 1922, as amended, is valid and enforceable.

The last proposition for consideration is embraced in the question, "Is the order of the railway commission reasonable in view of the peculiar circumstances of the case?" The authorities upon the question here involved are not numerous. Elliott on Railroads makes use of the following language as applicable thereto: "Communication from one part of a landowner's property to another part, which has been cut off by a railroad right of way, is often provided for by passways and subways constructed under the tracks. As a rule, such passways and subways are more convenient for the landowner, and are at the same time much safer for the railway company, for collisions and injuries at such crossings are practically reduced to a minimum. There are but few adjudicated cases as to whether or not a company can be compelled to furnish a crossing by means of a passway or subway under the track. * * * It has, however, been held, and correctly, we think, that where a railroad company was required to construct farm crossings, and it appeared that the track was on a high embankment, and there was a natural depression through which a subway could be more conveniently constructed than a grade crossing, such subway would be ordered constructed." 3 Elliott, Railroads (3d ed.) 476. *Beardsley v. Lehigh Valley R. Co.*, 142 N. Y. 173; *Van Wagner v. Central N. E. & W. R. Co.*, 80 Hun (N. Y.) 278; *Jones v. Seligman*, 81 N. Y. 190; *Powell v. Atchison, T. & S. F. R. Co.*, 215 Mo. 339.

We are also convinced from a careful examination of the record that, in view of the circumstances therein set forth,

the order entered by the railway commission requiring the construction of the underground cattle pass is not unreasonable, and that the order of the Nebraska state railway commission so directing must be, and is, in all things,

AFFIRMED.

ROSE and GOOD, JJ., dissent.

FRANK E. SHARP V. STATE OF NEBRASKA

FILED JULY 1, 1927. NO. 25538.

1. **Criminal Law**: EVIDENCE: PHOTOGRAPHS. As a general rule, whenever it is relevant to describe a person, place, or thing, correct and accurate photographs or pictures thereof, properly identified, upon sufficient foundation laid, are admissible for that purpose.
2. ———: ———: ———. Where a paper, containing an original impression of the palm print of defendant's hand which would have been competent evidence upon the trial of the case, is shown to have been lost and its non-production properly accounted for, an accurate photograph thereof, properly identified, upon sufficient foundation laid, may be received in evidence in lieu of the original.
3. **Homicide**: MOTIVE: REBUTTAL. Where the state, in a criminal prosecution for uxoricide, as bearing upon the question of motive, introduces evidence covering a period of time prior to the alleged commission of the offense charged, as to the state of mind of the deceased toward the defendant, the frequent occurrence of quarrels and of feelings of hostility and ill will between them, the defendant, upon proper foundation laid, is entitled to have received in evidence letters written to him by deceased within the period of time covered by such evidence of the state, where the letters thus offered contain expressions of endearment, or where the contents thereof fairly support the inference that the relations between the deceased and defendant were good, and these tend to contradict the theory of the state. It is error to exclude such letters.
4. **Instruction** quoted in opinion disapproved.

ERROR to the district court for Lancaster county: MASON WHEELER, JUDGE. *Reversed.*

M. V. Beghtol and *Richard F. Stout,* for plaintiff in error.

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

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

EBERLY, J.

Plaintiff in error, hereinafter called the defendant, was convicted of murder in the first degree and sentenced to death by electrocution. He prosecutes error to have this court review the record of the trial and conviction. The information charges "that Frank E. Sharp * * * on or about the 16th day of March, A. D. 1926, * * * did * * * unlawfully, feloniously, purposely, and of his deliberate and premeditated malice, strike Harriet A. Sharp with a hammer, and as a result thereof she died March 16, 1926." Harriet A. Sharp, deceased, was the wife of the defendant.

Among the errors assigned will be considered only assignment No. 1, pertaining to the admission in evidence of exhibits 17 to 33, inclusive, assignment No. 3, based on the acts of the court in excluding from evidence exhibits 41 to 46a, inclusive, being letters written by Mrs. Sharp to the defendant, and assignment No. 4, predicated upon the giving by the court of certain instructions, on its own motion, relative to the imperative necessity for the jury's agreement on a verdict.

Facts of the record will be narrated only so far as may be necessary to understand the theory on which the objections discussed are urged. It may be said, however, that the body of Mrs. Sharp was found on the morning of March 17, 1926, in a two-seated Ford car owned by the defendant, on the public road two miles north of Havelock, Nebraska. The appearance of her body indicated that she had been murdered by a succession of heavy blows on her skull. On the night before her dead body was found, she left her home in this Ford car with the defendant, intending to go to a dance, pursuant to an arrangement mutually made by the defendant and his wife with certain of their friends. After

leaving the home and while en route to the dance, certain table scraps for use as chicken feed, and a borrowed rake, were left by deceased and defendant at the home of F. A. Wilson. At this time some conversation, unimportant in its nature, ensued at the Wilson home, and about 8 o'clock p. m. the defendant and his wife drove away in the Ford. From then until about 10:30 p. m. the statement of the defendant is the only evidence as to the movement of either Mr. or Mrs. Sharp. At the last-named hour the defendant appeared at the home of Mr. Carey in Bethany, four and four-tenths miles from where the body of his dead wife was subsequently discovered the following morning. In view of the disposition of the case hereinafter made, to here include a recital of all the evidence would serve no useful purpose.

A careful examination of the record before us, however, discloses that the defendant, upon the trial which followed the event narrated, was convicted of the crime charged in the information upon evidence wholly circumstantial in its nature. The nature of this evidence does not militate against the credit to which the proceedings before us are entitled, nor weaken the presumptions which surround them. It would indeed be injurious to the best interests of society if such proof could not avail in judicial proceedings. If it were necessary always to have positive evidence, the testimony of eye-witnesses, how many criminal acts committed in the community, destructive of its peace and subversive of its order and security, would go undetected and unpunished?

"Circumstantial evidence, therefore, is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the fact sought to be proved. The advantages are, that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh

the evidence of facts, but to draw just conclusions from them; in doing which, they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence." *Commonwealth v. Webster*, 5 Cush. (Mass.) 295.

This situation, indeed, in the present case, emphasizes the importance of the proper application of the rules of evidence, to the end that matters, improper for consideration by the jury, may be excluded, and that all facts which may shed light on the issues investigated may be received and given proper consideration by the triers of fact.

The first assignment of error made by the defendant is based on the reception in evidence, over the objection of defendant, of exhibits 17 to 33, inclusive. In explanation of these objections, it may be said that an imprint was found on the handle of a hammer, exhibit 14, which was found in the car in which the dead body of the wife of the defendant was discovered. An imprint of the palms of defendant's hands was thereafter secured while he was in custody, to the taking of which he made no objection. Exhibits 17 to 33, inclusive, constitute photographic reproductions and enlargements, made for the purpose of comparison, of the imprint on hammer, exhibit 14, and the palm print of defendant's hand. When these exhibits were offered in evidence, the original palm print of the defendant's hand, prepared by the representative of the state, after the accused was in custody, was not offered, but its loss and nonproduction were properly accounted for, and further evidence received as foundation for the introduction of certain exhibits disclosed that they were accurate and correct in all respects and truly represented the missing palm print.

In view of these facts the objection made to the reception in evidence of that portion of exhibits 17 to 33, inclusive, relating to the palm print of defendant's hand, wholly based on the nonproduction of the original palm print, was properly overruled. *Marion v. State*, 20 Neb. 233; 22 C. J. 913, sec. 1115; 22 C. J. 916, sec. 1118.

It would seem that the defendant could not have been prejudiced by the absence of this original palm print. If error or mistake had occurred in a photographic reproduction of that print, the controlling evidence which would disclose that fact was at all times the defendant's own hand. It may be said in passing that exhibit 14, found in the death car, on which a palm print appears, was received in evidence without objection, as were all photographs thereof.

As to the assignment of error based upon the refusal of the district court to require the county attorney at this trial, upon all applications of the defendant, then first made, to furnish the defendant with a copy of the notes of an oral statement of the defendant taken in shorthand by the employees of the county attorney's office, and by them extended in typewriting, and designated in the record as exhibit 49, it may be said that the question is now wholly moot. It will be seen the case is reversed. The document, exhibit 49, though not admitted in evidence, now forms a part of the bill of exceptions in this case. This bill of exceptions will be, in due time, returned to the clerk of the district court for Lancaster county, Nebraska, and will be preserved by him. The defendant will then be entitled to make such use of exhibit 49 as his judgment may determine and the rules of evidence permit. The question of the right of the defendant to compel the production of the said document in the manner attempted is, therefore, wholly immaterial at this time.

The next assignment of error for consideration is the refusal of the trial court to permit exhibits 41 to 46*a*, inclusive, to be read in evidence, after proper foundation therefor had been duly laid. These exhibits were letters written by Mrs. Sharp to her husband. They were offered to controvert the theory of the state as to motive. The trial court excluded them on objection of the state, and in this the defendant insists the district court erred.

The question in the form here presented is a new one in this jurisdiction. In view of our statutes relating to

prejudicial error, it naturally involves two elements: First, was the defendant entitled to have these letters, written by his wife, admitted and read to the jury? Second, if the letters were erroneously excluded, was the defendant prejudiced thereby?

The general rule seems to be that on trials involving the charge of uxoricide, letters of deceased, with proper foundation laid, are admissible in evidence on behalf of accused if their contents are such as tend to sustain his contention on the subject of motive.

"Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence." 1 Greenleaf, Evidence (16th ed.) sec. 162*a*. "On this principle, in actions for criminal conversation, it being material to ascertain upon what terms the husband and wife lived together before the seduction, or in any other case in which the feelings of either toward the other is material, their language and deportment toward each other, their correspondence together, and their conversations and correspondence with third persons, are original evidence. Such letters and other statements are admissible because credit is given to her for having acted with sincerity at the time." 1 Greenleaf, Evidence (16th ed.) sec. 162*d*.

"The existence of an emotion—hatred, malice, affection, fear, and the like— is usually evidenced by conduct or by utterances indirectly indicating the feeling that inspires them. * * * A special application is also found in actions for alienation of affections, criminal conversations, divorce, or wife-murder, where the state of affections of the wife to the husband, or of the husband to the wife, becomes material. Here, the declarations of the person as to her or his own state of affections are admissible under the present principle." 3 Wigmore, Evidence (2d ed.) sec. 1730, and cases cited.

"On the part of one accused of having killed his wife as a result of his loss of love and affection for her, and his infatuation for another woman, an affectionate letter

written by the wife to the husband is relevant to disprove motive for the crime." 2 Wharton, Criminal Evidence (10th ed.) sec. 904.

"That love or friendship was the animating motive for given conduct may be shown by the extrajudicial statements made by the person in question." 4 Chamberlayne, Modern Law of Evidence, sec. 2671.

Manifestly, evidence of motive, though admissible in all prosecutions for homicide, is of decided importance in cases where the evidence relied upon for conviction is wholly circumstantial. In the present case the state properly sought to establish criminal motive on part of the defendant. Its witnesses for this purpose were the four stepchildren of the defendant, and his brother-in-law. These, the sole source of this testimony, were the children of the murdered woman by a former husband whose place in the family home the defendant had supplanted, and a witness married to the deceased sister.

It may justly be said that the record fairly reflects the fact that none of these witnesses were friendly to the defendant. A number of them admit considerable animosity toward him. The home of Mrs. Sharp and the defendant was a rooming and boarding house conducted by the former. This business had been carried on at different locations in Lincoln. In this rooming and boarding house, it appears from the record that from ten to thirty persons were continuously cared for and entertained. None of these appear as witnesses for either the state or the defendant. The evidence relied upon by the state on the question of motive tends to prove that frequent and bitter quarrels occurred between Mrs. Sharp and defendant during the year 1925, and, indeed, up until the night of the murder. This evidence also disclosed the particulars and cause of the contention, and, if believed, tended to establish that Mrs. Sharp was of the settled, decided, and persistent opinion that her husband failed to properly contribute to her support, and was constantly reproaching him for this dereliction; that she frequently made threats that she would discontinue the

marital relations existing between herself and defendant, and exclude him from the home, if he did not do better in that regard.

One witness, the husband of a sister of deceased, also testified that while he and defendant were engaged in a paving job, in 1925, in Hebron, Nebraska, he roomed with the latter, and during that time, and at that place, in conversation with witness, defendant had repeatedly spoken of his wife in the most repulsive terms, called her vile names, and threatened to "knock her damn head off." If this testimony is to be implicitly believed, it would strongly support the contention of the state as to the existence of a criminal motive on the part of defendant. It would also justify the inference that the settled opinion of Mrs. Sharp on the subject of support, to which she was entitled from the husband, whether justified or not, and disagreements and quarrels resulting therefrom, were the cause of the complete loss of love and friendship between parties.

If the preceding paragraph reflects the true situation, it was an important element in the state's case. However, this attitude on part of defendant's wife the defendant expressly denied. He insists that no serious quarrels occurred between himself and wife, and expressly denied the charges made by the brother-in-law.

There is some corroboration in the evidence for defendant. There is no evidence in the record that any violence was ever offered by him to his wife prior to the night of the tragedy. The four childern, when testifying to the upbraiding of the defendant by the mother during the quarrels to which they testified, quite often conclude their testimony with the statement that at that time Sharp "never said a thing" in reply.

As evidence to rebut the effect of this testimony as to the existence of a criminal motive, and to corroborate his own denial of bad relations with his wife, and to establish the state of her mind toward him, the defendant offered in evidence exhibits 41 to 46a, which were letters written by his wife to him, all substantially within the scope of time

covered by the evidence of the state on the subject of motive. Each of these letters are started with the words "Dear Husband" or "Dear Frank," and each closes with the words "Loving Wife Harriet" or "Loving Wife." Their contents disclose that they were written by a woman uneducated who had toiled and was still working. She was 48 years old. The letters were not letters of a young girl 16. Still, the reading of them would tend to support the conclusion that they were not written by a woman who had no affection for her husband, or who believed her husband was not properly supporting her or had no affection for her. They mention no trouble between the parties, refer to no disputes, make no demands, the absence of all of which particulars might well lead to the conclusion that the relations between the parties were friendly, and that any serious trouble between the defendant and his wife at the time the letters were written, was nonexistent. These particulars, as well as the general tone of the letters, would so indicate.

Facts involving in some respects the identical principle presented in the instant case were before the supreme court of Indiana in the case of *Pettit v. State,* 135 Ind. 393. This was a prosecution of the husband for the murder of his wife, the state, as proof of criminal motive, relying on the loss of affection for her on part of the husband, and an infatuation for another woman. The Indiana court held that an affectionate letter written by the wife to the husband is admissible to disprove the existence of motive for killing his wife. In the opinion the court say, in part: "Another question arising upon the record is as to the alleged error of the court in rejecting, as evidence for the defendant, a letter from Mrs. Pettit to her husband, containing expressions of endearment. It is urged by appellant's counsel that the letter was admissible, both in rebuttal of the theory of the husband's loss of affection for his wife, and in contradiction of Hickman as to complaints of the wife heretofore given, and of Wilson, that Pettit was neglecting his wife in being from home days at a time without advising her of his whereabouts. * * * From our view

of the question, it was proper to have admitted in evidence the letter of the wife to the husband. The relations existing between the deceased and her husband were naturally and by the theory of the state's evidence necessarily, the foundation upon which the guilt of the defendant was to be determined. While indifference, or even ill treatment by the husband, does not necessarily destroy all the affection of the wife for him, yet the degree of that affection must, to a greater or less extent, depend upon his treatment of her. The relation of husband and wife is peculiar, in that all of the interests of life concern them alike, and are so inseparable from their thoughts of, and affections for, each other, that it cannot be said, as a matter of law, that the estrangement of the husband necessarily destroys the affection of the wife for him. It necessarily follows that the existence of affection for him does not, of itself, preclude the loss of affection by him. Where the relation is the subject of inquiry, and where it becomes proper to investigate the treatment of one toward the other, with a view of determining that relation, it is proper to canvas the treatment of the other toward that one. The treatment by each of the other casts a light into the otherwise dark recesses of the heart of each. The strength of that light is a subject for the jury, and may not be determined as a question of law. The letter of a wife, with whose murder her husband was charged, though written to a third person, was held admissible 'to disprove the existence of the motive to commit the murder, which the testimony for the state conduced to establish.' "

It would seem that the principles announced in the foregoing case were, in effect, approved, if not adopted, by this court in the case of *Sutter v. State*, 102 Neb. 321, wherein it was held: "Evidence of declarations by deceased of intention to commit suicide, or evidence consisting of the written statements of the deceased bearing upon the question of intention to commit suicide, is admissible in a murder case, if introduced solely to show the state of mind or intention of the one making them, at the time they were

made." And in that case, during the course of the opinion, the following observation was made, which certainly applies to the case at hand: "In such a case as this, where the life and liberty of the accused are at stake, no evidence, whether of declarations or written words of the deceased, which reasonably bears upon the issues should be excluded. Justice and humanity require its consideration."

In view of the issues of fact involved in the testimony before the district court in the instant case, and in the light of the authorities quoted, it would seem that the letters, exhibits 41 to 46a, should have been received in evidence, and that in excluding them the district court erred, which error must be deemed prejudicial.

The following language, contained in the instructions of the district court to the jury, was excepted to by the defendant: "Again, let me remind you gentlemen that it is your function to agree. All the evidence that the state and the defendant have procured has been presented to you. To recall these witnesses and to try this case again would be expensive in time and money. It is useless to try cases unless juries do agree. A failure to agree in this case would be quite unfortunate. Do not seek to avoid your duty by failing to agree and passing the buck to some other jury. Witnesses move away, die and forget. Exhibits are lost or damaged. Now is the time to decide this case. So, let me again urge upon you gentlemen, that unless you do return a verdict, you will fail to function as jurymen."

After a careful examination of the record, we are convinced that the above instruction invaded the proper province of the jury, and inevitably exerted too strong a pressure in favor of agreement. This attitude, obviously, was prejudicial to the defendant.

A verdict is the expression of concurrence of individual judgment. The proper functioning of a jury is to be determined wholly by the proper functioning of each individual juror. It involves that from the evidence each individual juror should be led independently and conscientiously to the same conclusion. This unanimous conclusion of

twelve different minds is the "certainty of fact sought in the law." If this required "certainty of fact" does not exist in such degree that twelve reasonable minds, independently and conscientiously, upon due consideration, arrive at the same conclusion, a disagreement is not only a full performance of duty and a complete exercise of a juror's proper function, but is imperative, if the fundamental basis of trial by jury is to be preserved.

So, too, no juror should be influenced to a verdict by fear of personal criticism, possible disgrace, or pecuniary injury. No juror should be induced to assent to a verdict by a fear that a failure to agree would be regarded by the public as reflecting upon either his intelligence or his integrity, or as a failure to properly perform a public duty. Personal consideration should never be permitted to influence a juror's conclusion.

It may also be said that the determination in every jury trial whether the required certainty of fact exists in the necessary degree to justify an agreement is exclusively a question of fact which is for the sole determination of the jury.

The instruction quoted, in effect, peremptorily directing an agreement, invaded and trespassed upon the province of the jury. It determined affirmatively, as a question of law, what it was the constitutional duty of the jury, as a question of fact, to determine, as the conscience of each of twelve reasonable jurors, on due consideration of all the evidence, might individually conclude and direct. Thereby, the defendant was deprived of the full benefit of his constitutional right to a speedy, public trial by an impartial jury.

That other jurisdictions have condemned instructions involving similar principles may be seen in the following cases: *People v. Engle*, 118 Mich. 287; *People v. DeMeaux*, 194 Mich. 18; *Mt. Hamill State Savings Bank v. Hughes*, 196 Ia. 861; *Freeby v. Town of Sibley*, 183 Ia. 827; *People v. Sheldon*, 156 N. Y. 268; *State v. Bybee*, 17 Kan. 462.

It follows, therefore, that, for the reasons given, the

judgment and sentence of the district court must be, and is, reversed, and the cause is remanded for further proceedings in accordance with this opinion.

REVERSED.

ROSE, J., dissenting.

In my opinion the jury in their deliberations and conclusions were influenced by circumstances that told their own story as inanimate witnesses that could not commit perjury or contradict each other or be prompted by passion or fear of consequences. With such evidence before the jury, relating as it did to the issue of guilt, I am unwilling to say they were influenced, or defendant prejudiced, by the instruction on their duty to agree or that their verdict might have been different had the rejected letters relating to the affection of the wife for the husband at earlier dates been admitted.

E. LAWRENCE MARTIN, APPELLEE, V. BROWNELL BUILDING COMPANY, APPELLANT.

FILED JULY 1, 1927. NO. 24341.

1. Trial: INSTRUCTIONS: NEGLIGENCE. It is not error to fail to instruct on the law of comparative negligence of the respective parties when no evidence of contributory negligence on the part of the plaintiff is offered.
2. Appeal: INSTRUCTIONS: NEGLIGENCE. Where the negligence charged against the defendant is that a railing of a fire escape landing fell because of negligent construction and maintenance, an instruction to the effect that, if you find from the evidence that the plaintiff climbed over the railing, and that it was thereby subjected to pressure and strain which could not have been foreseen by those constructing and maintaining it, and by reason whereof it fell and plaintiff was injured, then you will determine from the evidence whether such use of said fire escape by the plaintiff amounted to contributory negligence which was more than slight as compared with any gross negligence, if any, of the defendant building company, in the manner of maintaining said railing, is erroneous; but if there is no evidence that plaintiff climbed over said railing, causing a strain

which could not have been forseen by those constructing and maintaining it, it is error without prejudice to the rights of the defendant.

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

T. F. A. Williams and *Homer L. Kyle,* for appellant.

Bruce Fullerton, Woods, Woods & Aitken and *J. J. Ledwith, contra.*

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

LESLIE, District Judge.

This is an appeal from a verdict of a jury in favor of the plaintiff and against the defendant Brownell Building Company. The judgment of the trial court was affirmed in an opinion written by Commissioner Thompson, motion for rehearing was filed by defendant Brownell Building Company, and rehearing granted, confined, however, to a consideration of two questions only raised by the defendant, to wit: (1) Was it error for the court to refuse to give instruction No. 11, tendered by the defendant, and to give instruction No. 13 by the court on its own motion? (2) Was there sufficient evidence to sustain the verdict of the jury? These questions were argued before the commission, and reargued before the court. Instruction No. 13 given by the court on its own motion is as follows:

"If you find from the evidence that the plaintiff, Martin, after placing the ladder against the wall below the lower, or so-called underground, terminal, ascended the ladder, and attempted to climb from said ladder to the second story landing of the fire escape by climbing up over the railing of said fire escape landing, and that said railing was thereby subjected to a great and unusual pressure and strain, which could not reasonably have been foreseen by those constructing and maintaining said fire escape and railing, and by reason whereof said railing fell and plaintiff was injured, then you will determine from the evidence whether

such use of said fire escape by the plaintiff amounted to contributory negligence, which was more than slight as compared with any gross negligence, if any, of the defendant building company, in the manner of maintaining said fire escape and railing in question."

Instruction No. 11, tendered by the defendant Brownell Building Company, is the same as No. 13, given by the court, down to the word "you" in line 11 of No. 13. From there on the tendered instruction is as follows:

"You are instructed that such conduct on the part of the plaintiff would constitute negligence on the part of the plaintiff in more than a slight degree contributing to the injuries sustained by him, and, in such event, your verdict should be for the defendant Brownell Building Company, even though you may find from the evidence that the Brownell Building Company was negligent in its manner of constructing and maintaining said fire escape and railing."

The plaintiff, an employee of the telephone company, was sent to the Brownell Block to install a telephone, or move one from one part of the building to another. On the rear of the building the telephone company maintains an upper and lower terminal box for its wires entering the building. The lower box was 12 or 14 feet above the surface of the alley, and the second, or upper terminal, was about 25 feet above the surface of the alley. There was a fire escape landing on the building, which was about 18 feet above the surface of the alley, midway between the upper and lower terminals.

The plaintiff testified that it was necessary for him to gain access to both terminals, and that for the purpose of reaching the lower one he borrowed a ladder from the defendant building company, which he placed against the wall of the building. He then testified that it was advisable to go to the upper terminal first in order not to disturb the telephone service throughout the building, and that, for the purpose of reaching the upper terminal, where all the wires terminated, he ascended to the fire escape landing on the second story of the building by going up the stairway

leading thereto. That after he reached the landing, and had sorted over the wires to ascertain which one he wanted, he traced it down and stood on the landing of the fire escape and pulled the wire up from below so he could tell where it turned the corner and went to the north; that in doing so he stood four or five inches from the railing, and that he lost his balance and fell forward against the railing, striking it lightly, and that it and he went together to the pavement below. He further testified that the railing was constructed of one and one-half inch iron pipe, three feet high, badly rusted, and that all the attachments were rusted away.

No one, other than the plaintiff, knew of the accident until he and the railing together hit the pavement below. He testified that he had placed the ladder against the wall of the building, but had not used it. One of the defendant's witnesses testified that he drove into the alley as the plaintiff placed the ladder against the wall, and that he saw plaintiff start to ascend the ladder. There is no evidence from any person or source, other than the plaintiff himself, as to where he fell from, nor what caused him to fall.

It is the contention of the appellant, defendant building company, that the plaintiff ascended the ladder to the first, or lower, terminal box, and then attempted to reach the fire escape landing by climbing from the top of the ladder up over the railing, and that in doing so the railing was subjected to unusual strain and pressure which could not reasonably have been foreseen by those constructing and maintaining it. This is a mere theory of the defendant, however. There is no evidence whatever to sustain it. A study of the physical conditions discloses that it would have been practically impossible for the plaintiff to have reached the railing from the ladder. Instruction No. 13, given by the court on its own motion, does not correctly state the law.

The negligence charged against the appellant, defendant building company, is that the railing about the fire escape landing was improperly constructed, and that it was not maintained in a reasonably safe condition for use. If it

fell because it was subjected to a great and unusual pressure and strain, which could not reasonably have been foreseen by those constructing and maintaining it, then it can scarcely be said that it fell because it had been negligently constructed, or was being negligently maintained. One is required, in building a fire escape, to construct and maintain it in such manner as to make it reasonably safe for the purposes for which it is intended. The law does not demand that it shall be so constructed and maintained that it will withstand unusual strain and pressure that could not reasonably have been foreseen or anticipated.

The giving of instruction No. 13 was error, but without prejudice to the rights of the appellant, defendant building company, since there was no evidence to sustain the theory of the said defendant.

Instruction No. 11 tendered by the defendant correctly states the law, but for the reasons above stated, it was not error for the court to refuse to give this instruction. *Beauchamp v. Leypoldt,* 108 Neb. 510; *Wilson v. Morris & Co.,* 108 Neb. 255.

We have carefully considered the evidence, and reached the conclusion that it sustains the verdict.

The commissioners' opinion, affirming the judgment of the district court, heretofore filed and adopted, is therefore adhered to, except as modified herein, and the judgment of the trial court is

AFFIRMED.

ROSE, J., dissenting.

I am inclined to take the view that the parties tried the issue that plaintiff, while standing on the fire escape and leaning over the railing in the act of pulling up a wire, lost his balance and fell against the railing, thus subjecting it to an unusual strain under which it gave way, the loss of equilibrium causing the injuries of which he complains, and that there is evidence tending to support such a defense as to which an erroneous and prejudicial instruction was given.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, ET AL., APPELLANTS, V. FIRST NATIONAL BANK OF CARROLL ET AL., APPELLEES.

FILED JULY 1, 1927. No. 24924.

Depositaries: DEPOSIT OF STATE MONEYS: LIABILITY OF SURETIES. At the expiration of his term of office as state treasurer January 4, 1923, C. held four certificates of deposit in the sum of $1,000 each, issued to him September 29, 1922, by the First National Bank of Carroll on account of $4,000 deposited in said bank during his administration. In the settlement between retiring state treasurer and incoming state treasurer the retiring state treasurer retained said certificates as his own property, accounting to the incoming state treasurer for their value by delivering to him his personal check for $4,000. Ten days later C. had said certificates of deposit renewed by said bank, and subsequently delivered them to R. and received from him, as such state treasurer, his check for $4,000. *Held*, an investment by R., state treasurer, of $4,000 of state funds in certificates of deposit owned by C., and not a deposit of money in said bank by R. during his term of office, within the meaning of section 6186, Comp. St. 1922, and sureties on depository bond given to secure repayment of money deposited belonging to the state not liable for payment of said certificates of deposit.

APPEAL from the district court for Wayne county: DE WITT C. CHASE, JUDGE. *Affirmed in part, and reversed in part.*

O. S. Spillman, Attorney General, Lloyd Dort and *R. J. Shurtleff*, for appellants.

H. E. Siman, A. R. Davis and *C. H. Hendrickson, contra.*

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

LESLIE, District Judge.

This action is brought by the state of Nebraska, by the attorney general, and the then state treasurer, on four certificates of deposit, to secure payment of which it is alleged a depository bond was given by the First National Bank of Carroll as principal, and defendants D. R. Thomas, John

Davis, Alfred Thomas, and T. J, Thomas, as sureties in the sum of $15,000. The amount sought to be recovered in this action is $4,000 alleged to have been deposited by the then state treasurer in said defendant bank on the 15th day of January, 1923.

The bank's answer to the petition is made by Charles H. Randall, receiver, and admits that the state of Nebraska had on deposit in said bank $4,000, for which certificates of deposit were issued, but alleges that he has no further knowledge of the matters set forth in said petition, and, therefore, denies each and every allegation contained in plaintiff's petition.

The defendant sureties filed for their answer a general denial.

At the close of the plaintiff's evidence the defendants rested and plaintiff and defendants moved for a directed verdict. The jury were discharged and the court found in favor of all of the defendants and against the plaintiff.

Errors assigned are that the judgment of the trial court in favor of the bank is contrary to the law and the evidence.

There are few, if any, disputed questions of fact to consider. Prior to January 4, 1923, D. B. Cropsey was treasurer of the state of Nebraska. On June 30, 1921, as such, he deposited $12,000 in the First National Bank of Carroll. This deposit was secured by a depository bond signed by the Lion Bonding Company as surety. Subsequently the Lion Bonding Company went into the hands of a receiver. Cropsey, as state treasurer, made demand upon the bank for the $12,000. The bank being unable to make payment, or furnish surety bond, owing to its financial condition, Cropsey accepted a personal bond from the bank running directly to himself. Later the bank paid Cropsey the $12,000, and thereafter, on or about September 29, 1922, Cropsey deposited $4,000 in the bank and received from the bank four certificates of deposit of $1,000 each. The personal bond taken to secure the $12,000 previously deposited was allowed to remain as security for the $4,000 deposit.

On January 4, 1923, Cropsey's term of office as state treasurer expired, and Charles D. Robinson succeeded him in that office. On or about that date a settlement was had between the outgoing treasurer, Cropsey, and the incoming treasurer, Robinson. In this settlement Cropsey gave Robinson his personal check for $4,000, and retained the four certificates of deposit which had been previously issued to him by the defendant bank. In his testimony Cropsey states that these certificates of deposit and the bond given to secure the payment of the same then became his property. On January 15, 1923, 11 days after the expiration of his term as state treasurer, Cropsey went to the First National Bank of Carroll, and on that date the bank issued and delivered to him four new certificates of deposit in the sum of $1,000 each, ostensibly to take the place of the four certificates of deposit that had been issued to Cropsey September 29, 1922; and on or about the same time the bond sued upon herein was executed by the bank and the sureties above named. On January 19, 1923, Cropsey took the bond and the new certificates of deposit to the then state treasurer, Robinson, and delivered them to him, and the latter gave his check as state treasurer to Cropsey, which said check Cropsey retained and cashed.

The bond alleged to have been given to secure the payment of the certificates of deposit in controversy herein recites that it is given for state treasurer's term beginning on the 4th day of January, A. D. 1923, and, "in consideration of the deposit of certain moneys of the state of Nebraska, * * * in the First National Bank of Carroll."

The first, and perhaps the only, question for consideration in disposing of this case, so far as the sureties on the bond are concerned, is whether any moneys of the state of Nebraska were deposited in the First National Bank of Carroll during the administration of the state treasurer's term beginning on the 4th day of January, 1923. Appellee contends that not one cent was deposited in this bank by the state treasurer during his term beginning on the 4th day of January, 1923.

On January 4, 1923, Cropsey retired from office and Robinson succeeded him. At that time there was, theoretically at least, $4,000 on deposit in the First National Bank of Carroll to the credit of the state treasurer, for which Cropsey held four certificates of deposit of $1,000 each. The outgoing treasurer, Cropsey, retained the four certificates of deposit and paid their value over to the incoming treasurer, Robinson, giving him his personal check for $4,000. When this was accomplished, both Cropsey and Robinson concede in their testimony that the four certificates of deposit and the bond given to secure the payment (in which Cropsey, and not the state, was named as obligee) became the property of Cropsey to do with as he saw fit. The bank at this time was insolvent, and had been for months, though it had not gone into the hands of a receiver. Ten days after his retirement from office Cropsey had the bank issue new certificates of deposit to him in the name of the state treasurer, and had a depository bond executed as security for the payment of, not the specific certificates, but any and all moneys belonging to the state of Nebraska deposited in said bank during the state treasurer's term beginning January 4, 1923. After obtaining possession of the new certificates of deposit and the depository bond, Cropsey had the bond approved by the proper authorities and then delivered it and the certificates to the then state treasurer, Robinson, receiving from him as such state treasurer a check for $4,000 in payment therefor. Was this a deposit of $4,000 in cash belonging to the state of Nebraska by the then state treasurer, Robinson, or was it a purchase by Robinson from Cropsey of the four certificates of deposit that had been issued to Cropsey in extinguishment of the indebtedness owing by the bank on the four certificates of deposit that he retained as his own property when he retired from office? We are unable to see how, by any process of reasoning, it can be held to be a deposit by Robinson of $4,000 of the state's funds during his term of office. Robinson never deposited a dollar in the defendant bank during his administration. He invested $4,000 of the

state's funds in the certificates of deposit held by Cropsey and owned by him on account of moneys deposited in the defendant bank during Cropsey's administration. The bond was given to secure repayment to the state of moneys deposited by the state in the defendant bank during Robinson's administration, not to secure the payment of securities in the form of certificates issued to Cropsey in renewal of certificates of deposit held by him at the expiration of his term of office on account of deposits made during his administration.

As to the defendant bank, however, liability on its part is clearly established on the certificates of deposit. The only fact in issue between the plaintiff and the defendant bank raised by the bank's answer is whether demand of payment was made upon the bank by the plaintiff before the commencement of this action, and whether payment was made. The evidence establishes that demand was made, and payment refused.

The judgment of the trial court is affirmed as to the defendants D. R. Thomas, John Davis, Alfred Thomas, and T. J. Thomas, sureties, but said judgment is reversed as to the defendant First National Bank of Carroll and Charles H. Randall, receiver, and remanded to the trial court, with instructions to enter judgment for the plaintiff against said bank and receiver for the amount due on said certificates of deposit.

AFFIRMED IN PART, AND REVERSED IN PART.

A. E. JACKSON, APPELLEE, v. FORD MOTOR COMPANY, APPELLANT.

FILED JULY 1, 1927. NO. 25941.

1. **Master and Servant: WORKMEN'S COMPENSATION ACT: COMMUTATION.** In determining whether lump sum settlements shall be permitted in cases where the injury results in death or permanent disability, the final power lies in the district courts, subject only to exercise according to the terms of the statute, and to reversal or modification upon appeal.

2. ———: ———: PENALTIES. In this case, *held* that the appeal was upon reasonable grounds, and that the appellee should not be given attorney fees or the penalty for waiting time.

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

McGilton & Smith, for appellant.

Anson H. Bigelow, contra.

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

SHEPHERD, District Judge.

Though the compensation commissioner would not approve a lump sum settlement between the parties, even after the district court had found upon appeal that said settlement should be made, and had transmitted its finding in this particular to the said commissioner, the court proceeded to, and did, enter an order commuting the award and directing payment in a lump sum.

The appellee suffered a permanent partial disability as to eyesight and hearing. The commissioner so determined and awarded compensation at $15 a week for 45 weeks and $6 a week thereafter for the remainder of his natural life. Both parties appealed, and the district court found as did the commissioner in regard to the injury and the amount of the compensation. But the court further found, the parties agreeing and praying therefor, that commutation should be employed, and that the appellant should be permitted to pay the present worth of the judgment, or $5,010.53, in a lump sum.

Immediately the appellee took a transcript of the court's finding to the commissioner; the commissioner refused to approve; and thereupon the court, being fully advised, entered the order referred to.

The one assignment of error is that the district court erred in commuting the award for permanent disability and entering a judgment for a lump sum; the application

for commutation not having been approved by the compensation commissioner.

In the case of *Perry v. Huffman Automobile Co.*, 104 Neb. 215, in which a lump sum settlement had not been presented to the compensation commissioner for examination and approval, the decision of the lower court ordering the settlement was reversed on that account. The court said: "While the authority to approve a lump sum for a permanent disability has been committed to the district court, it seems to have been the intention of the legislature, as disclosed by the entire act, to require the parties to submit their agreement to the compensation commissioner before asking the district court to approve the commutation."

The statute requires the submission of an agreement of the parties for a lump sum settlement to the compensation commissioner before a judgment can be entered relieving the employer for liability. In the case cited the court took cognizance of the rule, and ruled accordingly; but it is not disposed to extend the doctrine further than the limit so prescribed by the statute and recognized in the said case. If the legislature had intended that the commissioner should have absolute power in this particular, it doubtless would have said so, as it did in the matter of lump sum settlements in cases of minor injuries. The statute is clear in regard to the latter. Section 3063, Comp. St. 1922.

It is contemplated by the employers' liability act that in the proper case a lump sum settlement may be made. It is a very important provision of the law, and to place the absolute power of permitting or refusing such a settlement in the hands of one man, without appeal from his decision, however arbitrary, is not to be thought of, unless the legislature had so provided beyond question.

The procedure in the case at bar followed the statute. The commissioner had opportunity to approve the settlement proposed. This was what the law requires. What he did was entirely within his function; it was his duty to approve or not to approve, as in his judgment seemed best. But the final authority, subject to review in this

court, was vested in the district court, and was exercised, as we find upon a careful examination of the record, without abuse of discretion.

Nor is this making nothing of the provision providing for such submission. The order was not entered by the district court until it had the advantage of the commissioner's judgment. Undoubtedly the court gave such judgment due consideration, as advisory.

It was probably contemplated by the legislature that the opinion of the compensation commissioner would be valuable to the courts to which these settlements are committed. Provision was made whereby the courts could be advised of such opinion. But the law goes no further. It is perhaps true, as said by the appellant in its brief, that the commissioner lives with his cases and has opportunity to keep in touch with the condition of the injured employee and is peculiarly qualified to judge of the lump sum settlement. But, by the statute, the power lies in the district court, subject only to exercise according to the statute's terms, and subject to reversal or modification upon appeal.

The appellee claims waiting time and attorney fees. But the question involved was one of reasonable difference of opinion, and the danger to the appellee in making a settlement that might be adjudged unlawful was obvious. The court is of opinion that, under the rule of court commonly invoked in such cases, the appellant should not be subjected to the penalty and should not be required to pay an attorney fee.

The decision of the lower court is in all things

AFFIRMED.

THEDA MARIA HANSEN, APPELLANT, V. MARY ROOS ET AL., APPELLANTS: GERDES J. BADBERG ET AL., APPELLEES.

FILED JULY 16, 1927. No. 24959.

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; *In re Guardianship of Wessel*, 114 Neb. 704.

2. ———: ———: UNDUE INFLUENCE: BURDEN OF PROOF. "Upon conveyance of real estate by a mother to her 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 undue influence. The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor." *In re Guardianship of Wessel*, 114 Neb. 704.

3. Affirmance. The record examined, discussed in the opinion, and *held* that the judgment is supported by the evidence and is therefore affirmed.

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

D. W. Livingston and *George H. Heinke*, for appellants.

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

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

GOSS, C. J.

This is a suit in equity to cancel and set aside a deed conveying 160 acres of land on the grounds that the grantor was incompetent and that its execution was procured by undue influence. From an adverse decree the plaintiff and certain defendants similarly affected appeal.

The land in question is the southwest quarter of section eight, township seven, range thirteen, in Otoe county, Nebraska. It was purchased by John G. Badberg in 1875 for $1,500 with a down payment of $400. Title was taken in his name and it became the family homestead for himself and H. Maria Badberg, his wife, and their two sons and three daughters. John G. Badberg died on May 5, 1883, leaving a will as follows:

"In the name of God, Amen. I, John G. Badberg, of the township of Rock Creek in the county of Otoe and

state of Nebraska, being of sound mind and memory do make and publish this my last will and testament. I give and bequeath unto my wife, H. Maria Badberg, my real and personal estate and do appoint C. W. Stahlhut and G. W. Montgomery to be my administrators. My will is that my wife shall have charge of with the consent of the above named administrators. In case my wife H. Maria Badberg marries again after my death she only receives the third part of all my personal and real estate. I give and bequeath unto Gerdes J. Badberg all my real and personal property under the following conditions. 1st. That the said Gerdes J. Badberg shall work and stay on the above named farm until after our death. 2d. I give and bequeath unto Harm W. Badberg my son the sum of $5. 3d. I give and bequeath unto Maria C. Badberg married to Hilke Julfs the sum of $5. 4th. I give and bequeath unto John H. Badberg the sum of $5. 5th. I give and bequeath unto Schwantie M. Julfs the sum of $5. 6th. I give and bequeath unto Stinje J. Badberg the sum of $200. 7th. I give and bequeath John G. Badberg, son of Stinje Badberg, the sum of $200 to be paid to him when he is of the age of 21 years. 8th. I will and bequeath unto Anke M. Badberg the sum of $400 when she arrives of age, or 21 years. 9th. I will and bequeath unto Herman H. Badberg the sum of $1,000 and one team of horses, on condition that he stays with his brother Gerdes J. Badberg until he is 21 years of age. Should the above named Herman H. Badberg not stay with the said Gerdes J. Badberg until he is 21 years of age he is only to receive $500 and one team of horses. 10th. I will and bequeath unto Theda Maria Badberg the sum of $400 when she arrives at the age of 21 years. In witness whereof I have hereunto set my hand this 30th day of June, 1882.

"(Signed) J. G. Badberg,
"Hilke Maria Badberg."

"Witnesses: G. W. Montgomery.
" C. W. Stahlhut."

This will was admitted to probate June 11, 1883. When

his father died, Gerdes J. Badberg was about 23 years old and was the oldest child. When the family moved to the land in suit Gerdes was about 15 years of age and he was 66 when the case was tried. His father had consumption and was not able to work much. Gerdes broke most of the virgin soil and did most of the manual labor on the farm up to the time of his father's death and spent the major portion of the next 43 years on the farm, until his marriage working for his mother, and most of the time renting a part or all of the farm from his mother. When Gerdes was 28 years old he married and from that time until 1910 the mother lived with her younger son or with plaintiff, either on the farm or elsewhere. In 1910, Theda, the plaintiff, moved to Kansas. From then until her death the mother lived with Gerdes on the farm, which she leased to him, but reserving a room for herself in the home. There is some dispute in the testimony as to whether or not the mother made all the improvements on the place or whether or not a considerable proportion of them were made by Gerdes. He claims in his testimony to have built two barns and to have made other improvements in the way of building fences and to have paid for these out of his own money without reimbursment from his mother. He testified that at one time he made more money by selling cream separators than he made out of farming and that it was out of the proceeds of this business that he paid for the improvements. It is not of very great significance, but it indicates in a way the relationship and filial feeling of the son to the mother. She, in turn, while collecting her rents from her son or looking after her share of crop rents with the care frequently shown in the woman trained in the hardships of the pioneer, nevertheless exhibited a fine ancestral sentiment by furnishing him the money when he was a young man to make a trip to Germany to see her family there. We recite these instances to show the relations of this fine old mother and her son, and to offset the single instance of discord we find in the record where the mother is testified to have said that the son did not freely

provide her with ready money. During a long life of dealings between mother and son, in domestic life and in business matters it would be strange if some fretful complaint would not be made. This record commends both mother and son and shows an utter lack of any attempt on the part of the son to overreach her or cause her to favor him above his kin more than the circumstances suggest he might well, as human experiences usually go, be favored.

On February 14, 1921, the mother, H. Maria Badberg, executed and delivered to Gerdes J. Badberg a warranty deed conveying to him the farm " in consideration of the sum of one dollar and an agreement to support and take care of the grantor during the balance of her life and love and affection." It was executed and acknowledged before a disinterested notary at the home of the grantor. She died intestate on June 10, 1924.

The appellants argue that H. Maria Badberg under the will of her husband took the absolute fee, that she was incompetent to make the deed, and that her execution of it was obtained by fraud and undue influence. The appellees claim that the will conveyed to the widow a life estate with a devise over in fee to Gerdes J. Badberg, attaching certain conditions to be performed by him, and that he is now the owner of the land.

The decree of the trial court found that the will of John G. Badberg devised the fee simple title to the widow; that she was competent and understood the nature of her act when she conveyed by warranty deed to Gerdes J. Badberg on February 14, 1921; that she was not influenced by him or any one else, and that he is now the owner under said deed.

It is not very important in this particular case whether the will conveyed to the wife the fee simple title to the farm with the power to dispose of it or whether it was the intention of the testator to devise the life estate to his widow and the remainder to his son, Gerdes. If the will were to be interpreted by us as showing the latter intention on the part of the testator, then the son, Gerdes, on the

death of his mother, took the entire title, subject possibly to the unpaid conditional bequests, if any yet remain unpaid. In either event, it is a moot question under the particular circumstances involved here and we do not consider it necessary to decide it. Assuming, however, under the terms of the will, that the fee simple title with the power of disposal went to the widow, then before plaintiff and those aligned with her can recover, they must show either that H. Maria Badberg was incompetent to deed the premises to Gerdes or that undue influence was brought to bear on her in his behalf.

"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; *In re Guardianship of Wessel*, 114 Neb. 704. Tested by this rule, the plaintiff has entirely failed to show that her mother was incompetent at the time she executed the deed. To go over the record and show the evidence of the competence of the mother would be a useless waste of time and space, particularly not justified in view of the fact that appellants, upon whom the burden rested, have failed in their briefs to point out any satisfying testimony that the mother failed to know what she was doing and the significance and effect of her act. On the other hand, the testimony of disinterested witnesses fully establishes in our minds that Mrs. Badberg was mentally competent and capable of making the deed. It appears that she had the capacity to understand what she was doing. She ordered it. She knew the extent of her property and she decided intelligently what she wanted to do with it. It cannot be said that she was incompetent or incapable of making the instrument.

Likewise, the burden rests on the one who attacks the conveyance to establish the fact of undue influence. *In re Guardianship of Wessel*, 114 Neb. 704. Especially is this proposition applicable here because ordinarily no influence is considered undue which arises out of affection, care, claims of kindred and family, or other intimate personal

relations. 31 C. J. 1184, sec. 3. There was no showing in the proofs in this case of any unlawful or fraudulent influence which controlled the will of the grantor. She was in command of her physical and mental faculties. She sent for the notary to come to her home, the deed was explained to her, she executed it knowingly and acknowledged it voluntarily. She lived with her son and grantee for more than three years thereafter, accepted the consideration named in the deed, and by no act indicated any dissatisfaction with his ownership of the land or any wish or intention to seek to cancel the deed or to make other disposition of the land. It is quite possible that she felt that she was, prior to her death, carrying out her husband's will as she understood its legal effect without waiting for her death to devolve the entire estate on her son.

For the reasons we have given, we are constrained to the opinion, upon examination of the entire record, that the judgment of the trial court was right and it ought to be and is, therefore,

AFFIRMED.

DUNCAN MCMILLAN, APPELLANT, V. CHADRON STATE BANK ET AL., APPELLEES.

FILED JULY 16, 1927. No. 25017.

1. **Pleading**: MOTION FOR JUDGMENT. A motion for judgment on the pleadings requires a consideration of what may be found in all the pleadings as the ultimate facts.
2. **Banks and Banking**: IMPAIRED CAPITAL: POWERS OF DIRECTORS. Section 8031, Comp. St. 1922, *held* to authorize the directors of a state bank to levy an assessment upon the stock to repair the depleted capital or to restore the reserve, only when first authorized to do so by the stockholders of such bank. *Citizens State Bank v. Strayer*, 114 Neb. 567.

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

E. D. Crites and *F. A. Crites*, for appellant.

George W. Ayres, T. J. McGuire, Samuel L. O'Brien and *Allen G. Fisher, contra.*

Heard before GOSS, C. J., ROSE, DAY and EBERLY, JJ., and LESLIE and SHEPHERD, District Judges.

GOSS, C. J.

Duncan McMillan and Vida McMillan appeal separately in two causes where they individually were denied injunctions and their actions were dismissed. By stipulation the cases were consolidated here, the issues being identical.

The pleadings show that Chadron State Bank, of Chadron, Nebraska, was capitalized at $100,000 and had outstanding 1,000 shares of $100 par value fully paid. Duncan McMillan, appellant, held 100 of these shares and Vida McMillan, his wife, the other appellant, held 10 shares. On July 14, 1925, each filed a petition against the bank and its directors, alleging that the bank was a going concern, that it had never been found or adjudicated by any lawful authority to be insolvent, and that the department of trade and commerce had not taken possession of the bank under the provisions of law or otherwise; that the directors were advertising the plaintiff's stock for sale, purporting to be acting under section 8031, Comp. St. 1922, to collect an assessment of 50 per centum of the par value thereof, and that said act is unconstitutional, and that the directors have no authority under the charter to make such assessment. The defendants filed answers in which they first incorporated demurrers and then proceed to plead over. Among other things, they pleaded, as a justification for their assessment, orders from the department asking that the directors be called together and ordering them to make the assessment complained of to repair the capital stock to the extent of 50 per cent. thereof; they further pleaded that all the stockholders except plaintiffs consented to the assessment, and that later there were negotiations with Duncan McMillan, one of the plaintiffs, and a qualified offer from him, to surrender his stock, but that some weeks later,

when his offer was accepted by resolution of the board and after all other stockholders, in reliance upon plaintiff's offer, acquiesced in the proposal, he notified them, after considering it a few hours, that he would not take any such action; whereupon the defendants, as a board of directors, instructed counsel to serve notice upon plaintiff and proceed to collect the assessments. They allege that it was within the power of the department of trade and commerce, and that section 8031 conferred the power upon the defendants, as a board of directors, to make the assessments against the stock. The defendants moved, successfully, to strike certain matters from the reply, and plaintiffs asked, and were granted, leave to withdraw the general denial pleaded in their replies. This action was apparently taken in order to submit the case to the court on such facts as were well pleaded by all parties, for, thereupon, the decree entered July 23, 1925, recites, each defendant moved for judgment on the pleadings and on the demurrers in the answers. The court sustained these motions, found that the defendants were entitled to judgment on the pleadings, entered orders denying temporary and permanent injunctions and dismissed the petitions and actions of plaintiffs.

The foregoing statement is gleaned from elaborate pleadings, but, though brief, contains every issuable fact stated in the pleadings and necessary to a discussion of the case. The petitions, answers, orders, decree and briefs show that the only questions in the minds of parties, counsel and trial court centered around section 8031, Comp. St. 1922. The decree specifically mentions that statute and finds that it is constitutional in the same sentence in which the court finds that the petition does not state a cause of action and finds that the defendants are entitled to judgment on the pleadings.

The motion for judgment on the pleadings requires a consideration of what may be found as the ultimate facts in all the pleadings. *Arendt v. North American Life Ins. Co.*, 107 Neb. 716; Comp. St. 1922, sec. 8606; Comp. St. 1922, sec. 8949; *Kime v. Jesse*, 52 Neb. 606; *Boldt v. First*

Nat. Bank, 59 Neb. 283; *State v. Lincoln Gas Co.*, 38 Neb. 33.

Since the cases were tried this court has disposed of the issues by its opinion in *Citizens State Bank v. Strayer*, 114 Neb. 567. It was there held that section 8031 authorized "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." Under the authority of the statute as interpreted in that case, the department of trade and commerce was without authority to order an assessment of the capital stock of the Chadron State Bank because the department had never taken possession of the bank and the stockholders had never authorized them to make such an order. If it so ordered, as alleged in the pleadings, its order was insufficient to justify the action of the directors herein complained of.

It follows that the directors had no authority to order the stock of the appellants sold nor to offer it for sale. The appellants had no adequate and efficient remedy at law and were quite within their rights when they invoked the aid of equity to enjoin the directors. The court erred in giving defendants judgment on the pleadings. It should have given judgment for the plaintiffs. Therefore the judgments and decrees of the district court are reversed, with directions to enter judgment and decree for each plaintiff.

REVERSED.

NEBRASKA NATIONAL BANK OF OMAHA ET AL., APPELLEES, V. CON PARSONS ET AL., APPELLANTS.

FILED JULY 16, 1927. No. 24915.

1. **Venue.** An action on a joint guaranty for the payment of discounted notes is transitory and may be brought in any county wherein the defendants reside or wherein one of them may be summoned. Comp. St. 1922, secs. 8563, 8570.
2. **Process: SUMMONS TO ANOTHER COUNTY.** Where one of several joint guarantors is properly sued and summoned in a county other than that of his residence, summons for the other guar-

antors may, in the same action, be issued to and served in another county wherein they reside. Comp. St. 1922, secs. 8563, 8570.

3. ———: ———. In a transitory action a defendant, in absence of fraud or collusion, is not necessarily immune from service of summons in a county other than that of his residence, while waiting at a railroad station for a train on his way home from another state.
4. Appeal: FINDINGS BY COURT. In an action at law a finding of the trial court on an issue of fact has the same effect as the verdict of a jury, if the parties waived a jury.
5. Guaranty: CONSIDERATION. The extending of credit pursuant to, and in reliance upon, a duly executed guaranty for the payment of discounted notes, may be sufficient consideration for the making of the guaranty.
6. Corporations: CONTRACTS. The contracting of a corporate indebtedness in excess of a statutory limit does not necessarily invalidate the contract in absence of invalidating legislation.
7. Guaranty for payment of discounted notes, copied in opinion, *held* to include renewals and existing transactions.

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

Allen G. Fisher, Samuel L. O'Brien and *A. L. Schnurr,* for appellants.

Morsman, Maxwell & Haggart, contra.

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

ROSE, J.

This is an action on a guaranty to recover the amount due on 19 promissory notes aggregating $142,455. The plaintiffs are the Nebraska National Bank of Omaha and its liquidating agent, Fred W. Clark. Defendants are the following named guarantors: Con Parsons, A. L. Schnurr, W. L. Hoyt and Theo Okerblade. The notes were sold to and discounted by the Nebraska National Bank of Omaha, plaintiff, by the First National Bank of Harrison, Nebraska, the Harrison Real Estate & Loan Company and A. L. Schnurr. The latter was president of the two corporations

transacting business at Harrison. A copy of the guaranty follows:

"Know all men by these presents: That I, the undersigned, a stockholder or otherwise interested in the First National Bank of Harrison, Nebraska, hereinafter called 'First National Bank,' a banking corporation; the Harrison Real Estate & Loan Company, hereinafter called the 'Company;' and A. L. Schnurr, do hereby request the Nebraska National Bank of Omaha, Nebraska, hereinafter called 'Nebraska National Bank,' to give and continue to give, from time to time as the said Nebraska National Bank may see fit, financial accommodations and credit to said First National Bank, said Company or said A. L. Schnurr; and in consideration of the sum of one dollar to me in hand paid, receipt of which is hereby acknowledged, and of financial accommodations heretofore given or which may hereafter be given by said Nebraska National Bank to said First National Bank, said Company or said A. L. Schnurr, I do hereby guarantee, and promise and agree to make prompt payment to said Nebraska National Bank, as they severally mature, all overdrafts of said First National Bank, said company, or said A. L. Schnurr, all loans made or which may be made by it to said First National Bank, said Company or said A. L. Schnurr, all moneys by it paid for the use and account of said First National Bank, said Company or said A. L. Schnurr, and all notes, acceptances or other paper which have been or may be discounted for or at the request of said First National Bank, said Company or said A. L. Schnurr, whether made, drawn, accepted, indorsed or not indorsed by said First National Bank, said Company or said A. L. Schnurr, and whether indorsed with or without recourse, and any of the personal notes of any of the signers hereto, and any and all other obligations of every kind and character, from said First National Bank, said Company or said A. L. Schnurr to said Nebraska National Bank, and, also, any and all renewals of any of the foregoing regardless of other collateral now held or which may hereafter be acquired by the said Nebraska National Bank as additional

security to any or all of the indebtedness of said First National Bank, said Company, or said A. L. Schnurr.

" It is understood that notice to me of the creation of any of said indebtedness shall be unnecessary, and that I will keep myself posted as to all matters pertaining to this guaranty without notice or information from the said Nebraska National Bank.

" When any such overdrafts, loans or paper or other obligation or any renewal thereof shall become and remain due and unpaid, the undersigned will, upon demand, pay the amount due thereon together with any and all expenses incurred by the said Nebraska National Bank incident to the collection thereof, including traveling expenses, attorneys' fees, costs, *et cetera.*

" Notice of the making or renewing of any such overdrafts, loans, paper or obligations, demand, protest and notice of nonpayment thereof and notice of acceptance hereof are hereby expressly waived.

" These presents constitute a continuing agreement applying to all future as well as existing transactions between said First National Bank, said Company or said A. L. Schnurr and said Nebraska National Bank. I may relieve myself from liability on obligations thereafter created by giving written notice, by registered mail, to the Nebraska National Bank that I will not be liable for obligations created after the receipt of such notice.

" Before proceeding against me hereunder, the said Nebraska National Bank need not resort to collateral security held for said indebtedness nor exhaust its remedy against said First National Bank, said Company and said A. L. Schnurr, above mentioned, nor against any other signer of this guaranty.

"Signed this 5th day of December, 1921.

" Con Parsons,
" W. L. Hoyt,
" A. L. Schnurr,
" Theo Okerblade."

This instrument was signed by defendants. The action was begun, tried and determined in the district court for Douglas county. Schnurr was summoned in that county and the other defendants were summoned in Sioux county, the summonses having been issued out of the district court for Douglas county.

The defenses pleaded were want of jurisdiction, defendants claiming that the district court for Sioux county was the exclusive forum; void service of summons in both counties, objections to jurisdiction being preserved throughout the proceedings; guaranty not completed or delivered, the omitted signature of plaintiff Clark being a condition of delivery; want of consideration; *ultra vires*, the notes exceeding in amount the contracting power of the corporations that sold them to the plaintiff bank; notes are renewals of previous notes to which the guaranty, operating prospectively, does not apply.

Upon a trial of the cause without a jury the district court found the issues generally in favor of plaintiff. Six of the 19 notes having been paid during litigation, judgment was rendered in favor of plaintiffs for $67,833.86, the amount due on the 13 notes remaining unpaid. Defendants appealed.

Should the objections to jurisdiction have been sustained? All defendants were residents of the state. They signed the same instrument, jointly and severally agreeing to perform identical terms of the same guaranty. All guarantors obligated themselves absolutely to pay the guaranteed notes. The action is based on the guaranty. The unpaid notes discounted are proofs of the amount due plaintiff. The following provision of statute seems applicable to venue:

"Every other action must be brought in the county in which the defendant, or some of the defendants, resides or may be summoned." Comp. St. 1922, sec. 8563.

The residence of defendants in Sioux county does not necessarily determine the forum. A further provision of statute reads thus:

"When the action is rightly brought in any county, ac-

cording to the provisions of this code, a summons shall be issued to any other county, against any one or more of the defendants at the plaintiff's request." Comp St. 1922, sec. 8570.

The action was transitory and was properly begun in Douglas county to enforce a joint liability of defendants. Schnurr was summoned therein. There was personal service on him. The return of the sheriff of Douglas county so shows and it was not successfully impeached. The service was made at a railroad station in Omaha while Schnurr, on his way home from another state, was waiting for a train. Jurisdiction was not defeated by fraud or collusion. Immunity from service on Schnurr in Douglas county was not shown. Service on the other defendants in Sioux county, therefore, was valid.

On the issue of delivery of a completed guaranty the trial court made a finding in favor of plaintiffs. That finding is supported by sufficient competent evidence and has the same effect as the verdict of a jury, the action being one at law.

Want of consideration, though pleaded, is not established as a defense. It is shown by a preponderance of the evidence and by a finding of the trial court that the plaintiff bank, relying on the guaranty, extended credit to the First National Bank of Harrison, the Harrison Real Estate & Loan Company and Schnurr, thus benefiting them. This was a sufficient consideration.

It is argued by defendants that the guaranty is void because the guaranteed notes exceed in amount an indebtedness beyond the power of the corporations to incur. The argument is based on the proposition that the indebtedness exceeds the statutory limit on corporate power. Excessive indebtedness does not necessarily invalidate contract obligations, unless the statute so declares, and legislation to that effect has not been pointed out. *Bank of College View v. Nelson,* 106 Neb. 129; *State v. Farmers State Bank,* 112 Neb. 597.

It is insisted further that the guaranty operates prospec-

tively only and that it does not cover the transactions in controversy. The guaranty itself is not open to this interpretation. It applies by its own terms "to all future as well as existing transactions," and includes "all renewals" of guaranteed paper and all notes without regard to renewals. These provisions were within the contracting power of the parties to the guaranty.

A review of the record fails to disclose any reversible error.

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLANT, V. CITIZENS STATE BANK OF CHADRON ET AL., APPELLANTS: CITIZENS HOLDING COMPANY ET AL., APPELLEES.

FILED JULY 16, 1927. No. 25955.

1. **Banks and Banking:** CAPITAL STOCK: ASSESSMENT. A statutory grant of power to subject fully paid capital stock of a state bank to assessments thereof for the recoupment of losses or for the restoration of depleted capital is a departure from the common law and should not be extended by judicial interpretation.
2. ———: ———: ———. Under a Nebraska statute, power to assess fully paid capital stock of a state bank to recoup losses or to restore depleted capital was committed to the directors of the bank upon authority from the stockholders.
3. ———: ———: ———: POWERS OF DEPARTMENT OF BANKING. The state department of banking may close a state bank for insolvency, but cannot compel the stockholders against their will to authorize the board of directors to make an assessment on fully paid capital stock.
4. ———: ———: ———. A fund voluntarily raised by stockholders of a state bank and used by a holding company organized by them to aid the bank in eliminating from its assets worthless or unbankable paper and to maintain a legal reserve, *held* not an assessment of fully paid capital stock of the bank.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

E. D. Crites, F. A. Crites and *C. M. Skiles*, for appellants.

Courtright, Sidner, Lee & Gunderson and *Crossman, Munger & Barton, contra.*

Heard before GOSS, C. J., ROSE, DAY, THOMPSON and EBERLY, JJ., LESLIE and SHEPHERD, District Judges.

ROSE, J.

This is a controversy between the receiver of the Citizens State Bank of Chadron, an insolvent corporation, and two of its depositors. The allowance of preferred claims against the bank guaranty fund and ownership of notes and securities in the hands of the receiver are the subjects of the ligitation.

In a proceeding by the state in the district court for Dawes county to wind up the affairs of the bank, a receiver was appointed. The Citizens Holding Company of Chadron intervened, presented a claim for unpaid deposits of $426.49 as a charge against the bank guaranty fund and demanded possession of a lock box, alleging that it contained notes and securities belonging to the Holding Company and that the box and its contents had been left with the bank for safe-keeping.

The Citizens Agricultural Credit Corporation of Chadron also appeared and presented a claim for unpaid deposits of $3,360.73 as a charge against the bank guaranty fund and demanded possession of a lock box, pleading that it contained notes and securities owned by the Credit Corporation and that the box and its contents had been left with the bank for safe-keeping.

The pleas of both intervening claimants were traversed by the receiver, who alleged facts showing in substance that the deposits, notes and securities in controversy were bank proceeds of a fully paid assessment of 100 per cent. on the par value of each share of the bank stock—a fund of $75,000 thus created for the purpose of maintaining a legal reserve and of eliminating worthless or unbankable paper. The position taken by the receiver is based on charges that the

stockholders, directors and executive officers of the bank and of the two intervening claimants were identical, and that the organization and transactions of the latter were mere devices of fraud to enable the stockholders of the bank to convert to their own use the bank fund created by assessments aggregating $75,000.

The theory of claimants is that there was no effective assessment of capital stock, the Holding Company having been voluntarily organized and conducted in good faith without profit for the purpose of keeping the bank open by eliminating from its assets worthless or unbankable paper and by restoring its exhausted reserve. With that end in view claimants insist that a sum approximating $50,000 of the fund voluntarily raised by the stockholders was invested in such paper at par and that the stock of the Credit Corporation was acquired by the Holding Company with about $25,000 from the same source.

Upon a trial of the issues, the district court found generally in favor of both intervening claimants, allowed the claims for deposits, made each a charge against the guaranty fund and directed the receiver to deliver to claimants the notes and securities in controversy. The receiver appealed.

If the evidence preponderates in favor of claimants on the controverted issues, the district court properly found that there was no consummated assessment of capital stock of the bank and also that the Holding Company and the Credit Corporation were organized and conducted in good faith as subsidiaries without profit for the purpose indicated. The appeal presents over 200 pages of evidence for consideration. There is testimony on both sides of the controverted issues. Representatives of the department of trade and commerce and of the guaranty fund commission testified in effect that the bank had been examined repeatedly; that the legal reserve had been wiped out; that there were uncollectable or worthless notes among the assets; that the officers of the bank and the stockholders had been ordered to assess the shares of capital stock at 100 per

cent., or at $75,000 in all; that the assessments were made and paid in full.

Some of the stockholders testified to the following effect: The organization of the Holding Company for the purpose of aiding the bank was discussed before the fund of $75,000 was created. Contributions were voluntarily made by the stockholders with the understanding that the Holding Company would use the money for the benefit of the bank. This plan was carried out in good faith by the stockholders. No profit was made either by the Holding Company or the Credit Corporation at the expense of the bank. The bank survived for several months while officials in control of the state departments knew how the two subsidiary organizations functioned. During a portion of that time the guaranty fund commission was in charge of the bank, conducting it as a commercial enterprise. This is intended as a partial outline and not as a statement of facts.

In view of the conflict in the evidence, the receiver calls attention to the following instrument offered by him and admitted on cross-examination of a witness for claimants:

"We the undersigned stockholders of the Citizens State Bank, Chadron, Nebraska, hereby agree to pay the amount set opposite our respective names, to the board of directors of the above bank for the purpose of eliminating any and all loss anticipated by them, from the assets of the above bank: Provided, however, that an amount equal to the capital stock of said bank be raised."

This document was signed by all stockholders of the bank. The par value of the stock held by each followed his signature in this order: E. M. Birdsall, $1,250; Mike Christensen, $3,700; Wm. Chaulk, $3,700; H. G. Gorr, $3,700; K. R. Klingaman, $1,250; B. Lowenthal, $3,700; H. F. Maika, $3,700; C. W. Mitchell, $5,000; C. S. Hawk, $3,700; Chas. W. Philpott, $3,700; Geo. A. Birdsall, $3,700; J. T. May, $18,750; O. J. Schweiger, $19,150. The subscriptions totaled $75,000, the amount of the capital stock at par. They were all paid, but the document on its face does not necessarily prove an assessment. While each stockholder

conditionally agreed to pay to the "board of directors" the amount subscribed by him, the fund was raised "for the purpose of eliminating any and all loss." For this purpose the Holding Company was organized and conducted—a purpose consistent with the terms of the subscriptions. The fund was never turned over to the bank as an assessment. It was deposited in the bank on checking accounts to the credit of the Holding Company or the Credit Corporation. The fund to the extent of $50,000 was used in eliminating from the assets of the bank worthless or unbankable notes. The directors of the bank never made a formal assessment. The record does not contain proof that representatives of the state made a formal written order on the bank directors or on the stockholders to make an assessment on peril of a receivership, though there is evidence of oral directions to that effect. If the receiver is right in his contention that the stockholders in the first instance intended to make an assessment, the intention was never carried into effect. The stockholders retained control of the fund created by them and proceeded to aid the bank in their own way, by means of the subsidiary organizations. In this condition of affairs the bank was permitted to remain open for some time.

The statutory grant of power to subject fully paid capital stock of a banking corporation to assessments for the recoupment of losses or for the restoration of depleted capital was a departure from the common law and should not be extended by judicial interpretation. Under the Nebraska statute, assessing power was committed to the board of directors upon authority from the stockholders. Comp. St. 1922, sec. 8031. Stockholders may withhold that authority and permit the bank to go to the wall. *Citizens State Bank v. Strayer*, 114 Neb. 567. The state department of banking may close an insolvent bank, but cannot compel stockholders against their will to authorize an assessment by the board of directors. In the present instance the record does not disclose a formal assessment by the directors. The money voluntarily raised did not reach the bank as an as-

sessment levied by the directors. While the fund was still in the control of the stockholders who voluntarily subscribed and paid it, it was used principally for the benefit of the bank through the Holding Company or the Credit Corporation. The better view of the evidence leads to the conclusion that the district court properly found that an assessment binding on the bank and its stockholders was not made, that the subsidiary organizations functioned in good faith, that the preferred claims for deposits were charges against the bank guaranty fund, and that the notes and other papers in controversy belonged to claimants and were not assets of the bank.

AFFIRMED.

JOHN G. ARTHUR, APPELLEE, V. MATTIE L. ARTHUR, APPELLANT.

FILED JULY 16, 1927. No. 24993.

1. **Husband and Wife: DEED: CONSTRUCTION.** A quitclaim deed conveyed the title to certain real estate in Nebraska to John G. Arthur and Mattie L. Arthur, then husband and wife. The deed is in usual form, other than that, in appropriate language, the granting clause provides for the conveyance of the land "unto the said parties of the second part (the Arthurs), and to the survivor of them, and his or her heirs and assigns, forever." The habendum clause reads: "To have and to hold the above described premises unto the said John G. Arthur and Mattie L. Arthur, husband and wife, and the survivor of them, and his or her heirs and assigns." On or about August 1, 1917, the Arthurs were divorced in Douglas county. Some time in March, 1926, John G. Arthur died leaving his former wife him surviving. *Held*, that, under the provisions of the deed, Mattie L. Arthur, the survivor, took the title to the real estate by right of survivorship.
2. **Partition.** "Where a cause is fairly within the law authorizing a partition, the right to partition is imperative and absolutely binding upon courts of equity. In such a case the right of partition is a matter of right and not of mere grace:" *Oliver v. Lansing*, 50 Neb. 828.
3. **Deeds: CONSTRUCTION.** Where a conveyance of land discloses a mutual agreement between the parties to create an estate of

survivorship, it becomes the duty of this court to apply the rule as evidenced by the conveyance.

4. **Joint Tenancy.** When a joint tenancy exists, each joint tenant is entitled to a partition of the estate that continues during the life of all the tenants, and if there are but two joint tenants, on the death of one, the entire estate goes to the survivor.

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

Benjamin S. Baker, J. H. Ready and *S. Arion Lewis, Jr.*, for appellant.

R. F. Wood and *C. T. Dickinson, contra.*

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

DEAN, J.

December 18, 1880, John G. Arthur, plaintiff, and Mattie L. Arthur, defendant, were married. No children were born to this marriage. On or about August 1, 1917, the parties were divorced in Douglas county. In October, 1920, plaintiff began a suit for partition of certain tracts of land and city property owned by plaintiff and defendant in Cheyenne, Kimball, and Douglas counties. The real estate in suit is numerically described in paragraph numbered two of the petition. Paragraph two follows:

"That the plaintiff and defendant are the owners of the following described real estate, situate in Douglas, Kimball, and Cheyenne counties, in the state of Nebraska, to wit: Lots one (1), two (2), three (3), and four (4), in section twenty-three (23), township fifteen (15), range fifty-nine (59), Kimball county, Nebraska; the southeast quarter of section seventeen (17), township sixteen (16), range fifty-two (52), Cheyenne county, Nebraska; the northeast quarter of section eleven (11), township fifteen (15), range forty-eight (48), Cheyenne county, Nebraska; all of section nineteen (19), township sixteen (16), range fifty-one (51), Cheyenne county, Nebraska; lots sixteen (16), seventeen (17), and eighteen (18), block five (5), Amber

Place, an addition to the city of Omaha, Douglas county, Nebraska; lots seven (7) and eight (8), block three (3), Eckerman Place, an addition to the city of Omaha, Douglas county, Nebraska; lots twenty-seven (27), twenty-eight (28), twenty-nine (29), and thirty (30), Hart's subdivision of block 2, Park Place, an addition to the city of Omaha, Douglas county, Nebraska; lots twenty-one (21) and twenty-two (22), block fourteen (14), Orchard Hill, an addition to the city of Omaha, Douglas county, Nebraska; lots three (3) and four (4), block eight (8), Lincoln Place, an addition to the city of Omaha, Douglas county, Nebraska; the west sixty (60) feet of lots twelve (12) and thirteen (13), and all of fourteen (14), block eight (8), Hanscom Place, an addition to the city of Omaha, Douglas county, Nebraska."

Plaintiff alleged that each of the parties hereto owned an "undivided one-half interest" in the real estate above described, and "that the plaintiff is entitled to and asks that said real estate * * * be partitioned between the plaintiff and defendant, each receiving one-half (½) of the same."

The defendant in her answer denied "that plaintiff and defendant each own an undivided one-half of said property or any part thereof, but alleged that plaintiff and defendant are joint owners of a life estate in all of said property except the west sixty (60) feet of lots twelve (12) and thirteen (13), and all of lot fourteen (14), block eight (8), Hanscom Place, an addition to the city of Omaha, Douglas county, Nebraska, and alleged that the survivor of the plaintiff and defendant is the owner in fee of all the property set forth in paragraph two of plaintiff's petition." The exception in the deed refers to the homestead property that was awarded to defendant in the divorce suit.

May 21, 1925, the court found and decreed that "the plaintiff and the defendant are each owners in fee simple of an undivided one-half of the following described real estate situate in Douglas, Kimball, and Cheyenne counties, in the state of Nebraska, to wit:" Here follows a description of the real estate in suit as above noted, which is de-

scribed in paragraph numbered two. In respect, however, of the "west sixty (60) feet of lots twelve (12) and thirteen (13), and all of lot fourteen (14), block eight (8), Hanscom Place, an addition to the city of Omaha, Douglas county, Nebraska," which is the property noted in the above exception, the court decreed this "was the homestead of said parties, and assigned to the defendant, Mattie L. Arthur, the use and occupancy of said property for and during her natural lifetime, and awarded to plaintiff herein compensation therefor, and the defendant herein is entitled to the use and occupancy of the same during her natural lifetime, and in case of the sale of said property or the same being assigned by the referee, to be herein appointed, to the plaintiff or the defendant, that said sale or assignment of said property shall be subject to the life interest of the defendant in said property." The court directed a partition of the real estate pursuant to plaintiff's prayer and ordered an accounting generally as between the parties. Defendant has appealed.

April 12, 1916, a quitclaim deed, under that date, which describes the real estate mentioned in paragraph number two of the petition, was executed by John G. Arthur and his then wife, Mattie L. Arthur, as grantors, and delivered to Henry A. McCord, who was named as grantee therein. One dollar is named as the consideration. Immediately following the numerical description of all the lands involved herein, the above deed of conveyance concludes with this language in the habendum clause, namely: "Together with all and singular the hereditaments thereunto belonging; to have and to hold the above described premises unto the said Henry A. McCord, his heirs and assigns, so that neither they, the said parties of the first part, nor any person in their name and behalf, shall or will thereafter claim or demand any right or title to the said premises, but they and every one of them shall by these presents be excluded and forever barred."

On the same day, namely, April 12, 1916, Henry A. McCord and Helen C. McCord, his wife, made, executed and

delivered to John G. Arthur and Mattie L. Arthur, grantees, then husband and wife, as above noted, all of the land involved herein, being the same land described in the conveyance from the Arthurs to the McCords. One dollar is the consideration named in this deed. In the granting clause the deed provides for the conveyance of the land "unto the said parties of the second part (the Arthurs), and to the survivor of them, and his or her heirs and assigns forever." The habendum clause concludes with this language, namely: "Together with all and singular the hereditaments thereunto belonging; to have and to hold the above described premises unto the said John G. Arthur and Mattie L. Arthur, husband and wife, and the survivor of them, and his or her heirs and assigns, so that neither they, the said parties of the first part, nor any person in their names and behalf, shall or will hereafter claim or demand any right or title to the said premises, or any part thereof, but they and every one of them shall by these presents be excluded and forever barred."

John G. Arthur, the plaintiff, died about ten years thereafter, namely, on or about March 31, 1926. His former wife survives him, so that the sole question now before us is to determine whether John G. and Mattie L. Arthur were joint tenants while plaintiff lived, and, if they bore this relation each to the other, does Mattie L. Arthur, under the law and the decisions, succeed to the title under the right of survivorship? What meaning shall be placed on the granting clause and the habendum clause under the deed of conveyance from the McCords to the Arthurs? What significance attaches to the language of the granting and the habendum clauses as they relate to the right of survivorship?

Section 58, ch. 43, Laws 1866, was enacted by our territorial legislature and was "in force July 1, 1866." The act follows:

"In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the

duty of the courts of justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law."

This territorial statute, except for a comma which makes no change in its meaning, is now section 5594, Comp. St. 1922.

With this statute as our guide, and under our decisions, it clearly appears to us that, John G. Arthur having died, the deed of conveyance from the McCords to the Arthurs contemplates a joint tenancy, with right of survivorship in Mattie L. Arthur. In *Sanderson v. Everson,* 93 Neb. 606, language very similar to that used in the present case was used in the deed of conveyance, and we there held that the right to create title in real estate by joint tenancy, with right of survivorship, when clearly and definitely expressed in the conveyance, has never been abridged in this state, and that where a deed was made to a husband and wife as joint tenants, with right of survivorship, we held that this clearly expressed the intention of the parties to the conveyance to create a joint tenancy wherein the survivor should take the full title conveyed upon the death of the other. It appears to us that in the present case, as pointed out in the cited *Sanderson* case, no reasonable doubt can remain that the intention of the parties to the deed before us was to create a joint tenancy, with the right of survivorship.

In *Albin v. Parmele,* 70 Neb. 740, Judge Ames, in the construction of a will, said: "The first thing to be done is to ascertain, if possible, and unvexed by legal technicalities, the intent of the testator, as expressed, or attempted so to be." And the rule is equally applicable, of course, in the construction of the conveyance in suit. Judge Sullivan, in *Weller v. Noffsinger,* 57 Neb. 455, gave expression to a like statement.

Section 5594, Comp. St. 1922, has often been cited by this court and commended for its beneficent intent. In *Benedict v. Minton,* 83 Neb. 782, in construing the act in ques-

tion, we said: "Acting in conformity with the liberal spirit of the statute, we have refused to be bound by highly technical rules of construction with reference to conveyances of real estate, but give to each word and sentence in those documents such significance as will carry into effect the true intent of the parties thereto."

In *Schulz v. Broht*, 116 Mich. 603, the court held: "Under a deed to two persons, 'to them and the survivor of them, parties of the second part,' the grantees take each a moiety for life, with remainder to the survivor in fee, although the grant, in terms, is 'to the parties of the second part, and to their heirs and assigns.' "

On this subject the following cases from other states, which fairly support our view, may be consulted with profit: *Lewis v. Baldwin*, 11 Ohio, 352; *Finch v. Haynes*, 144 Mich. 352.

"As a general proposition, estates given to two or more trustees will be held by them as joint tenants, and will go to the survivor, nor will the heirs of any but the survivor be entitled to hold any interest in the joint estate. * * * Thus deeds and devises are often made to two or more, and to the survivor of them and his heirs, the effect of which is to make them joint tenants for life, with a contingent remainder in fee to the one who survives." 1 Washburn, Real Property (6th ed.) sec. 866.

No inference can reasonably be drawn from the execution of the conveyances other than that it was the expressed intention of the Arthurs that the right of survivorship was the controlling consideration. True, we have a statute which forms a part of the chapter on partition of real estate which contains these provisions:

"When the object of the action is to effect the partition of real property among several joint owners, the petition must describe the property, and the several interests and estates of the several joint owners thereof, if known. All tenants in common, or joint tenants of any estate in land may be compelled to make or suffer partition of such estate

or estates in the manner hereinafter prescribed." Comp. St. 1922, sec. 9238.

This, however, is a suit in equity, and the course of the transfers herein brings the facts within a fundamental principle of equity that must be recognized by the courts. The conveyances disclose a mutual agreement between the parties to create an estate of survivorship. In view of the facts and the law, we therefore hold that the present case comes within the scope of the rule for which the statute appears plainly to provide, and to which we adhere. To hold otherwise would be to set aside the voluntary agreement entered into by the Arthurs as evidenced by the conveyances in suit. The defendant's prayer is solely for that which the law gives to her and to which she is clearly entitled.

Counsel for the beneficiaries, under the will of John G. Arthur, have submitted able arguments in support of their contention. But, under the act and by our decisions, and by the weight of authority, we decline to adopt their theory, and hold that it is not applicable to the facts before us.

"Where a cause is fairly within the law authorizing a partition, the right to partition is imperative and absolutely binding upon courts of equity. In such a case the right of partition is a matter of right and not of mere grace." *Oliver v. Lansing*, 50 Neb. 828.

When a joint tenancy exists, each joint tenant is entitled to a partition of the estate that continues during the life of all of the tenants, and if there are but two joint tenants, on the death of one, the entire estate goes to the survivor. The trial court erroneously ordered a partition of the fee. Since, pending the appeal, the plaintiff has departed this life and the fee has vested in defendant, it follows that there remains no estate to partition.

The judgment is reversed and the cause is remanded to the district court, with directions to dismiss the action.

REVERSED.

ALEX A. CAMPBELL ET AL., GUARDIANS, APPELLEES, V. DANIEL T. GALLENTINE, APPELLANT.

FILED JULY 16, 1927. No. 24922.

1. **Deeds**: COVENANT OF WARRANTY: BREACH. A covenant of warranty in a deed of conveyance, reading as follows: "That we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whatsoever," is one equivalent to quiet enjoyment, runs with the land, and is not breached until eviction either actual or constructive.
2. ———: ———: ———: MEASURE OF DAMAGES. The measure of damages for breach of covenant of warranty resulting in a total loss of the estate conveyed is the value of the land at time of conveyance estimated by the purchase price, with interest.
3. ———: ———: ———: ———. "Where the covenant is for a fee, and a life estate only passed by the deed, the damages are the consideration money less the value of the life estate." 15 C. J. 1321, sec. 224.
4. **Limitation of Actions.** An action for damages, based on the breach of covenants in a warranty deed, is one upon a specialty, and under section 8510, Comp. St. 1922, is barred if not commenced within five years from date of such breach, unless other facts suspend the running of the statute.
5. **Evidence** examined, and found sufficient to support a constructive eviction.

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

J. H. Grosvenor and *Horth, Cleary & Suhr,* for appellant.

Hainer, Craft, Edgerton & Frazier, contra.

Heard before GOSS, C. J., ROSE, DAY, THOMPSON and EBERLY, JJ., LESLIE and SHEPHERD, District Judges.

THOMPSON, J.

The appellees, hereinafter called plaintiffs, as guardians for Samuel Campbell, instituted this action in the district court for Hamilton county to recover $10,057.12 as damages for an alleged breach of the covenants in a warranty deed, dated May 5, 1902, covering an 80-acre tract, based on a consideration of $2,800 paid by Campbell to appellant, hereinafter called defendant, on such date, at which time

possession by the latter was surrendered to the former. The case was tried to a jury, verdict and judgment for plaintiffs for $2,800 with interest from March 12, 1910, the date when Campbell was, in order to protect his title and possession, compelled to and did purchase of those holding a superior title their interests in such land, which holding was of and prior to May 5, 1902. Defendant appeals. The errors relied on for reversal will be indicated as herein considered.

The record reflects the following facts: That on and prior to March 15, 1890, William W. Lewis was the owner of the land, the title to which is in dispute; that on such date he died intestate, a resident of Hamilton county, leaving surviving him, as his sole and only heirs at law, his widow, Jennie P. Lewis, and five minor children; that immediately thereafter due administration of his estate was had in the county court of such county, at which time it was by it determined, under what was known as the Baker decedent act, to wit, chapter 57, Laws 1889, that such lands were the homestead of such widow, and as such descended to her in fee, and that there were no outstanding debts; that on appeal to the district court the finding of the county court was affirmed; that on October 8, 1891, the widow married the defendant, who at once became a member of such household, and shortly thereafter his wife sold and conveyed the land to him by quitclaim deed, and he thereby became the owner and possessed of her entire right, title and interest in and to the land, including that of possession, dower and homestead; that defendant and family continued to reside upon such tract and make their home thereon until May 5, 1902, when, upon a sufficient consideration, defendant, his wife joining, sold and conveyed the tract by the warranty deed in question to Samuel Campbell, and surrendered possession thereof to him; that in June, 1893, in *Trumble v. Trumble*, 37 Neb. 340, the Baker decedent act was held to be unconstitutional and void, and thus, under this record, on the death of Lewis, his property descended as per the statute sought to be amended and repealed by

such Baker decedent act, to wit, the homestead, not exceeding 160 acres, to the widow for life, and upon her death to the children in fee, share and share alike, also the widow became possessed of, as dower, a life interest in one-third of all the real estate of which the husband died seised; that such Campbell has improved the premises, and held the exclusive possession thereof ever since, save as qualified by the constructive eviction hereinafter referred to; that on or about March 12, 1910, when and after the children of Lewis had for two years been asserting their ownership to the fee title of such tract, subject, however, to the afore-mentioned homestead and dower interest of their mother, which they each conceded and do now, it was conveyed by the deed in question, a contract was entered into between such children and Campbell and his guardian, by the terms of which Campbell was compelled to and did recognize the superior title to the land held by the children, and did, in order to protect his title, purchase of them their respective interests therein, paying therefor the sum of $3,710; that Campbell thereby became possessed of the fee title to, and undisputed possession of, the property; that on the 23d day of January, 1922, this action was instituted by Campbell, through his guardians, as hereinbefore indicated.

The only clause contained in the covenant of the deed material for our consideration, as well stated by defendant in his brief, is: "That we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whatsoever." We will first consider the legal effect of such a warranty.

In *Cheney v. Straube*, 35 Neb. 521, we considered the covenant, "And I covenant to warrant and defend the said premises against lawful claims of all persons whomsoever," and held: "This covenant is considered to be tantamount to that for quiet enjoyment and what will amount to a breach of the latter is also a breach of the former." That is, that which breaches the right to quiet enjoyment breaches the covenant above quoted.

In *Webb v. Wheeler*, 80 Neb. 438, in construing a covenant identical in terms with the one here being considered, we said: "The last promise is undoubtedly the form of covenant in the cases of *Real v. Hollister*, 20 Neb. 112, *Hampton v. Webster*, 56 Neb. 628, and *Troxell v. Stevens*, 57 Neb. 329. Such a covenant is not broken until the covenantor fails to defend the premises against the lawful claims of other persons, and there is some reason for saying, as was said by Judge Cobb in *Real v. Hollister, supra*, that such a covenant is construed to be a covenant for quiet enjoyment."

The note under *Webb v. Wheeler*, 80 Neb. 438, as reported in 17 L. R. A. n. s. 1178, is very comprehensive, and many of the questions involved in the instant case are discussed and authorities cited.

We further held in *Troxell v. Stevens*, 57 Neb. 329, in substance, that such a covenant was one not broken when made, but passed with the title; that is, it is one which runs with the land.

In *Cheney v. Straube, supra*, we further held: "A cause of action on a covenant of warranty, or for a quiet enjoyment, does not accrue in favor of the covenantee until eviction or surrender by reason of a paramount title." And: "One who voluntarily surrenders to a third party asserting an adverse title must, in an action against his covenantor for a breach of warranty, establish the validity of the title he has recognized."

The reason that the cause of action does not accrue before eviction, where the covenant of warranty is as to quiet enjoyment of the premises, is that "the grantee may never be dispossessed, and possession may ripen into a perfect title" before a superior title is asserted. *Troxell v. Stevens, supra*. Hence, we conclude that the warranty in question is one which was equivalent to that of quiet enjoyment, that it ran with the land, and that a cause of action did not arise until eviction.

This brings us to the question of whether or not the evidence in this case supports the plea of eviction. Applying

the law to the foregoing facts, we must conclude that Campbell was clearly within his rights in purchasing the title possessed by the Lewis heirs, and that while in so doing he was not and had not been actually evicted from the land, such challenge by the heirs to Campbell's title, and his purchase of the outstanding title, was in effect an eviction, and that sufficient to form a basis for this action, as an eviction may be either actual or constructive. *Cummins v. Kennedy,* 3 Litt. (Ky.) 118, 14 Am. Dec. 53, and note; 7 R. C. L. 1149, sec. 62, and cases cited. We are not unmindful that in *Troxell v. Stevens, supra,* we held: "An action cannot be maintained on a covenant of warranty of title, where it appears there has been no actual eviction or surrender of possession of the granted premises by reason of a paramount title." However, it must be remembered that in the course of the opinion in the *Troxell* case, we used the following language at page 336: "Had the owner of the Englebert title elected to accept the value of the land as found by the appraisers and approved by the court, and Stevens had paid the same, then these might be ground for an argument that there had been a technical eviction by the paramount title, although he remained in the physical possession of the premises." Thus, a technical or constructive eviction was even in that case recognized as being the equivalent of an actual eviction.

As to the measure of damages, it is well stated in 15 C. J. 1318, sec. 223: "As a general rule the measure of damages for a breach of the usual covenants of title resulting in a total loss of the estate conveyed is the purchase money paid, or the value of the consideration with interest thereon from the time of the conveyance, or as otherwise stated in some cases the value of the land at the time of the conveyance estimated by the purchase price." The rule thus announced is in harmony with our holding in *Cheney v. Straube, supra.* However, as Campbell obtained from the defendant, by virtue of his original purchase, the right to the possession, use, and usufruct of the land of and during the natural life of the widow of Lewis, and had so used

and operated such land, there should be deducted from the amount of such recovery the value of that which he actually obtained from defendant, to wit, the life interest and use held by Mrs. Gallentine, and by her transferred to her husband, and by her husband transferred to Campbell, ascertained as of the date of May 5, 1902, and applied as of the date of the purchase of the outstanding title, to wit, March 12, 1910; and the plaintiffs' recovery is the remainder with 7 per cent. interest thereon from the last-named date to the date of judgment; for, as stated in 11 Cyc. 1163: "Where the breach is only as to an aliquot and undivided part of the land attempted to be conveyed, the damages are in proportion to the whole consideration paid as that aliquot part of the land is to the whole thereof." While this rule is applied to parts of a whole tract, we can see no good reason why it should not with equal force apply to the aliquot parts of the title to the tract. In this conclusion we are supported by 15 C. J. 1321, sec. 224, wherein it is stated: "Where the covenant is for a fee, and a life estate only passed by the deed, the damages are the consideration money less the value of the life estate."

As to instruction No. 5, complained of by defendant, an action for damages, based on the breach of covenants in a warranty deed, is one upon a specialty, and under section 8510, Comp. St. 1922, is barred if not commenced within five years from the date of such breach, unless other facts suspend the running of the statute. As heretofore indicated, this cause of action arose March 12, 1910, and the present action was instituted January 23, 1922; thus, more than ten years had elapsed from the time the cause of action arose to the bringing of this action. To overcome such plea on the part of the defense, it is claimed by the plaintiffs that all during such interim their ward, Samuel Campbell, was mentally incompetent, hence the statute of limitations did not run. This question was submitted to the jury under proper instructions, and on competent evidence acutely conflicting, and their finding being in favor of plaintiffs, the same will not be disturbed on appeal, under

our repeated holdings. Hence, the giving of such instruction was not error.

Defendant further insists that the court erred in giving instruction No. 12, on its own motion, as to the measure of damages. This instruction is as follows: "You are instructed that, if you find from the evidence and these instructions for the plaintiffs, then in that case the plaintiffs would be entitled to damages in the sum of $2,800 with interest thereon at 7 per cent. per annum from March 12, 1910, to this 20th day of November, 1924, amounting in all to the sum of $5,679.94, and this amount you will so assess as the amount of plaintiffs' recovery herein." As the court failed to permit the jury to consider and determine the value of the life estate of the widow, Mrs. Lewis, now the wife of the defendant, and deduct the amount so found by them from the $2,800, original purchase price of such land, the error thus committed was of such a prejudicial nature as to require a reversal of the judgment rendered.

The conclusions herein reached render it unnecessary for us to consider other alleged errors presented.

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

REVERSED.

SUSIE L. SOWLE, APPELLEE, V. BENJAMIN G. SOWLE, APPELLANT.

FILED JULY 16, 1927. No. 24888.

1. **Husband and Wife:** ACTION FOR ALIENATION OF AFFECTIONS: MEASURE OF DAMAGES. In an alienation case brought by a wife against the husband's father, the measure of plaintiff's recovery, if any, is the damage which she may have sustained by loss of comfort, society, love, and protection, usually expressed by the word "consortium."
2. **Trial:** REFUSAL OF INSTRUCTIONS. Action of district court in refusing to give certain instructions requested, examined and approved.

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

William E. Shuman and *N. P. McDonald,* for appellant.

Beeler, Crosby & Baskins, contra.

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

EBERLY, J.

The plaintiff recovered a judgment of $10,833 against the defendant, her father-in-law, in an action for damages for alienation of affections of plaintiff's husband, Irl J. Sowle. Defendant appealed.

Without setting forth the petition *in extenso,* it may be said that it alleges, in appropriate language, that after the marriage of plaintiff and Irl J. Sowle, and before interference on part of the defendant, plaintiff and her husband lived happily together, the latter "bestowing upon plaintiff all * * * support that could be desired;" that after said "Benjamin G. Sowle moved to the home of said plaintiff and her husband, Irl J. Sowle, he maliciously and wickedly contrived and intended to injure this plaintiff, and to destroy her peace of mind and happiness, and to deprive her of the comfort, society, and support of her husband, Irl J. Sowle, * * * did solely, because of his malice and ill-will toward the plaintiff (here follows recital of words made use of and description of acts and conduct of defendant upon which plaintiff relied to sustain her cause of action)." The petition also alleges that, after the estrangement had been thus effected, plaintiff sought a reconciliation to the end that her husband might "again come and live with her and maintain and support her and her minor children," but that due to the unlawful influence of the defendant over said Irl J. Sowle, maliciously exerted as above set forth, her husband refused so to do, all to her damage in the sum of $50,000.

The defendant in his answer, after admitting the marriage of plaintiff, the relation of the parties, and certain

unimportant details, then denied generally the allegations of plaintiff's petition.

The errors assigned by the defendant, both in motion for a new trial in the district court and in the brief filed herein, are numerous, but may be discussed under two heads: (1) Error in including as an element of recovery, loss of support; (2) failure of the trial court to instruct as to "malice."

In instruction No. 2, given by the court on its own motion, the trial court recited substantially the allegations of the plaintiff's petition, including those quoted herein. In instruction No. 4, also given by the court on its own motion, the jury were told that the statements contained in instruction No. 2 must not be considered as evidence, but that it was given "merely for the purpose of giving an idea of the nature of the case." It is thus obvious from reading instructions Nos. 2 and 4 together that the "nature of the case," as thus defined to the jury, included as a necessary element damages for "loss of support."

In instruction No. 7, given by the court on its own motion, the jury were further instructed, in the event they found for plaintiff, to fix the damages at such sum as they may believe from the evidence "will fairly and reasonably compensate the plaintiff for the loss of her husband's society, assistance, affection, and companionship, and for any mental suffering you may believe from the evidence the plaintiff endured thereby." In this connection it may be noted that Webster's International Dictionary defines the word "assistance" as "act of assisting, help, aid, furtherance, succor, support."

Thus, it plainly appears that "loss of support and maintenance" which the plaintiff expressly made a part of her petition as grounds for recovery was, as such, submitted to the jury by the court's instructions. In this the trial court erred.

The undisputed facts of the record disclose that Irl J. Sowle is a young man, strong and vigorous, and has ample property to answer to the lawful demands of the plaintiff for support and maintenance for herself and the minor

children of their union. It also appears affirmatively that these rights of support of the plaintiff and her minor children are fully protected in a decree of divorce duly entered in a suit brought in a court of competent jurisdiction between the plaintiff and said Irl J. Sowle in which both parties had appeared and submitted the merits of their respective controversies, and from which decree no appeal has been perfected.

On this point this case is on all fours with the case of *Larsen v. Larsen, ante*, p. 601, where Thompson, J., in delivering the opinion of the court, used the following language: "As the uncontradicted evidence in this case shows, the husband was a stout, able-bodied man, 39 years of age, and possessed of at least $2,400 worth of personal property, and that he personally, as well as his property, was within the jurisdiction of the court at all times, and as the law clothes the wife with the right to require him to contribute to her support—a right of which she was not deprived by defendants—there would be no liability on their part for such support in this alienation case, even if the evidence otherwise sustained the charges of the petition, which we do not decide. Under such a state of facts, the recovery, if any, must be for loss of comfort, society, love, and protection, usually expressed by the word 'consortium.' Hence, as this instruction failed to eliminate such husband's primary liability, it did not correctly announce the law of the case, and as this defect was not cured by any other instruction, the giving thereof was error. *Sohl v. Sohl*, 114 Neb. 353."

The defendant further contends that the trial court erred in refusing to instruct on the question of malice, and in refusing to give, as applicable thereto, instructions Nos. 9, 12, and 13, requested by the defendant, and cites *Phelps v. Bergers*, 92 Neb. 851, as sustaining his contention.

A careful examination of the instructions of the court, given on its own motion, discloses the fact that instructions Nos. 9 and 12 are substantially covered therein. As to instruction No. 13 referred to, in cases wherein the relation

of the parties is as in the instant case, it may be conceded that the well-established rule is: "The existence of malice must be affirmatively proved, for a parent who advises his son or daughter to leave the marital home is presumed to have done so out of parental affection and solicitude for the welfare of the child, and he cannot be held liable unless the plaintiff, who has the burden of proof, establishes that his advice or conduct is actuated by malicious motives." See *Hossfeld v. Hossfeld,* 188 Fed. 61, 110 C. C. A. 131; *Jonas v. Hirshburg,* 18 Ind. App. 581; *Workman v. Workman,* 43 Ind. App. 382; *Heisler v. Heisler,* 151 Ia. 503; *Corrick v. Dunham,* 147 Ia. 320; *Busenbark v. Busenbark,* 150 Ia. 7; *Miller v. Miller,* 154 Ia. 344; *Cornelius v. Cornelius,* 233 Mo. 1; *Miller v. Miller,* 122 Mo. App. 693; *Fronk v. Fronk,* 159 Mo. App. 543; *Allen v. Forsythe,* 160 Mo. App. 262; *Greuneich v. Greuneich,* 23 N. Dak. 368; *Beisel v. Gerlach,* 221 Pa. St. 232, 18 L. R. A. n. s. 516; *Gross v. Gross,* 70 W. Va. 317, 39 L. R. A. n. s. 261; *Jones v. Monson,* 137 Wis. 478, 129 Am. St. Rep. 1082. This doctrine has been substantially accepted by this court. *Trumbull v. Trumbull,* 71 Neb. 186.

Conceding then, for the purpose of discussion only, that that portion of defendant's instruction No. 13, wherein the jury are instructed "that there is a presumption that parents act for the best interest and welfare of their children," is a correct statement of the law, it does not follow that that portion of instruction No. 13 in which the trial court was asked to instruct, "and in any action such as this, by a wife against the parent of her husband, the law requires a much greater degree of proof, particularly of malice and improper motive, than is necessary in a similar action against a stranger," is in accord with the views of this court. In fact, we cannot assent to it.

"Degree of proof" does not refer to "medium by which truth is established," but rather to the effect of evidence. In this sense we speak of degree of proof required as "the preponderance of evidence" or "proof beyond a reasonable doubt." While facts which comprise the transactions involved in charges of alienation of affections might, in dif-

ferent cases, be accorded different evidentiary values in view of different relations of parties concerned therein, still in all cases the "degree of proof required" to establish the affirmative of the issues, including questions of malice and improper motive, could be no more nor no less than to require them to be established by a "preponderance of the evidence." For a court to instruct that a greater degree than preponderance of evidence was necessary would be the commission of error.

It therefore follows that, no proper instruction having been tendered by the defendant on the subject of "malice," considered in connection with the relation of the parties, the mere failure of the court to instruct thereon does not constitute reversible error.

In view of a new trial being necessitated by this reversal, it is thought best, without further discussion of errors assigned, to suggest that this court is committed to the doctrine that, while "undoubtedly it is a good defense on the part of a parent or guardian, in an action of this nature, to show that advice given was with honest motives and a sincere belief that it was for the moral and social welfare of the child, or ward; but, to be available, both the relationship as well as the good motives must be pleaded." *Ruhs v. Ruhs*, 105 Neb. 663. See, also, *Harvey v. Harvey*, 75 Neb. 557; *Rath v. Rath*, 2 Neb. (Unof.) 600.

If, therefore, it is desired to take advantage of the defense suggested, prudence would indicate that the rule as to pleading be complied with.

Because of errors discussed in this opinion, the judgment of the trial court is reversed and the cause is remanded for further proceedings.

REVERSED.

JOHN P. LEININGER, APPELLEE, V. NORTH AMERICAN NATIONAL LIFE INSURANCE COMPANY, APPELLANT.

FILED JULY 16, 1927. NO. 25866.

1. **Constitutional Law:** ACT AUTHORIZING CHANGE OF PLAN OF INSURANCE COMPANY. Legislative authority conferred by section 7828, Comp. St. 1922, to amend articles of incorporation so as to change the plan of business done by a life insurance company from the mutual or assessment plan to a stock basis, does not work a violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, nor of section 3, art. 1, of the Constitution of Nebraska, that no person shall be deprived of property without due process of law, where the right to make such an amendment was expressly reserved in the articles of incorporation, and such statute also provides: "Such change shall in no way prejudice or impair any pending action or right previously acquired, or annul or change any existing contract of such company."
2. **Insurance:** CHANGE OF PLAN. The transformation of a life insurance company organized and doing business on a mutual or assessment plan to a stock basis under the provisions of section 7828, Comp. St. 1922, *held*, not to be such a fundamental departure from the business for which the company was organized as to prevent the change being made without the consent of all the members, where by the articles of incorporation the right to make just such an amendment was expressly reserved.
3. **Constitutional Law:** DUE PROCESS OF LAW. "Due process of law" within the meaning of the Fourteenth Amendment of the Constitution of the United States, and section 3, art. 1, of the Constitution of Nebraska, is not intended to control the power of the state to determine by what process or on what manner of service rights may be asserted or determined, provided such procedure will afford reasonable notice and fair opportunity to be heard before the courts at some stage of the proceedings prior to final determination; and *held*, that the service of notice of the time and place of meeting and of the proposition to be submitted provided by said section 7828, Comp. St. 1922, to be sent to each person entitled to vote, through the mail, directed to his last known address, was a reasonable and practicable one and suited to the nature of the proceedings.
4. **Insurance:** LACHES. Applicant, a policyholder in a life insurance company, instituted this action to set aside and annul proceedings theretofore had transforming such insurance company, which was organized and doing business on the mutual plan,

to a stock basis. It appears that the instant case was not instituted for about four years after the transformation proceedings had been entirely completed. Applicant received the notice of the time and place of meeting for voting on the proposed change and copy of plan of transformation which included statement of assets and proposed distribution thereof. He accepted and retained his portion of the surplus to which he became entitled on such transformation and knew that the remainder of the surplus was being distributed to other participating members of the mutual company; that the company had commenced and was operating as a stock company; and that stock therein was being sold and a surplus created. He failed, without excuse, to exercise the right of appeal from order of department of trade and commerce permitting the change, paid premiums to and dealt with the company as a stock company, and apparently acquiesced in the transformation until about the time of the commencement of these proceedings without objection or protest. In the meantime the company entered into business in new states, writing new risks as a stock company to the extent of seven million dollars, collected a large amount of premium from parties who dealt with the company as a stock company, and paid losses accruing. *Held*, applicant is estopped by laches from maintaining this action.

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

Frank S. Howell and *Jackson B. Chase*, for appellant.

John M. Priest, contra.

Gaines, Van Orsdel & Gaines, Gurley, Fitch & West and *Wright & Thummel, amici curiæ.*

Heard before ROSE, DEAN, DAY, GOOD and THOMPSON, JJ., ELDRED and L. S. HASTINGS, District Judges.

ELDRED, District Judge.

In 1922, proceedings were had for the transformation of the appellant, a mutual life insurance company, to a stock company, under the provisions of section 7828, Comp. St. 1922. The publication of the amended articles of incorporation was completed June 3, 1922, at which time, under the statute, the transformation became effective. On July 12,

1926, the appellee, Leininger, filed an application with the department of trade and commerce, seeking to have such transformation declared void and annulled. On an *ex parte* hearing the application was denied by the department of trade and commerce, and the applicant, Leininger, appealed to the district court. On July 20, 1926, the North American National Life Insurance Company, hereinafter called the company, intervened and was permitted to answer, and from an adverse judgment entered December 13, 1926, by the district court, the company files this appeal.

The company was organized in 1906, as a mutual life insurance company, authorized to do a life insurance business on the stipulated premium plan, "but its members reserve the right to accept any provision of law now in force, or which may hereafter be enacted for changing from the stipulated premium plan to the mutual legal reserve, or joint stock plan." While some amendments were made to the articles of incorporation, the provision quoted was at all times a part thereof, up to and including the time of its transformation involved herein.

On July 23, 1907, the company issued to the appellee a policy for $4,000, known as a special profit sharing, limited payment, life increasing policy.

The pleadings filed in the district court are of such length that space will not permit the setting out of the issues in detail; but, briefly stated, the propositions urged by appellee for setting that aside and annulling the transformation are that the proceedings for the transformation of the company from a mutual company to a stock company were not had in substantial compliance with law, but were conducted in an irregular and unauthorized manner, in the particulars hereinafter referred to, and were fraudulent; and that section 7828, Comp. St. 1922, under which said transformation was attempted, is unconstitutional.

The appellant not only controverts the foregoing propositions, but contends that the applicant has no capacity or standing to maintain this proceeding; and, further, that he is estopped at this time to assert either that the trans-

formation proceedings were void or that said law is unconstitutional.

Except as to the allegations of intentional fraud, the trial court found generally for the applicant (appellee) on his application; that the law under which the transformation was sought to be effected was unconstitutional; that the transformation proceedings were irregular and constructively fraudulent, and it was decreed that the proceedings be set aside as to the applicant and those similarly situated, so that they may, upon maturity of their policies, or before, if their rights become endangered, demand and receive of the company all that they would be entitled to had the transformation not been had.

The statute provides that an appeal from the department of trade and commerce should be heard as in equity. Section 7895, Comp. St. 1922.

It is contended that section 7828, Comp. St. 1922, violates the constitutional rights of the appellee as guaranteed by the Fourteenth Amendment of the Constitution of the United States, and section 3, art. I, of the Constitution of Nebraska, that no person shall be deprived of property without due process of law.

By the provisions of section 1, art. XII, of our present Constitution, and section 1, art. XIb, Consttiution of Nebraska, 1875, in force at the time said section 7828 was enacted, it is provided that all general laws relating to corporations may be altered from time to time, or repealed. While the transformation statute was not enacted until after the appellee's policy was written, appellee was bound to know that the legislature was authorized by the Constitution to amend or alter the law under which the company was organized; and the articles of incorporation of the company reserve the right to make just such a change as was made.

In *Polk v. Mutual Reserve Fund Life Ass'n*, 207 U. S., 310, which involved the constitutionality of a New York statute relating to the reorganization of insurance companies as against the charge that it violated the provisions

of the federal Constitution against the impairment of an obligation of a contract, and also the due process of law provision, it was held that such constitutional provisions were not violated by the law under consideration in that case, in which the insurance company had incorporated in 1883, under a law then in force, and subsequently complainant became a member. As organized, the company was to do business on a cooperative plan. In 1892 a new law was enacted, under which the charter was amended and the company reorganized as a mutual level premium company. The reorganization proceedings in that case provided: "This reincorporation while insuring the stability of the company makes no change in your policy."

The transformation proceedings in the instant case provide that they shall in no way annul or change any existing contract of the company; while the statute provides such change shall in no way prejudice or impair any pending action or right previously acquired, or annul or change any existing contract of the company. Comp. St. 1922, sec. 7828.

The Constitution of New York providing that laws affecting corporations may be altered from time to time is identical, in substance, with the provisions of our Constitution above cited. Neither in the *Polk* case nor in the instant case, was there any legislative authority for the transformation at the time of the issuance of the insurance contract. In the opinion in that case it is stated: "It is immaterial whether the power to alter the charter is reserved in the original act of incorporation, or in the articles of association under a general law, or in a Constitution in force when the incorporation under a general law is made, as in the case at bar." As controlling on the question at issue in that case, the court, in the opinion, referred to the case of *Wright v. Minnesota Mutual Life Ins. Co.*, 193 U. S. 657, which dealt with an act of the legislature of Minnesota, and the amendment of the articles of incorporation of a mutual insurance association to an "old line" flat premium plan; the act was adopted and amendment made after the com-

plainants became members of the association, and it is there stated:

"Where the right of amendment is reserved in the statute or articles of association, it is because the right to make changes which the business may require is recognized, and the exercise of the privilege may be vested in the controlling body of the corporation. In such cases, where there is an exercise of the power in good faith, which does not change the essential character of the business, but authorizes its extension upon a modified plan, both reason and authority support the corporation in the exercise of the right."

The constitutional power of the legislature to amend or repeal the law under which the company was operating was a condition, subject to which not only the company accepted its corporate existence, but also subject to which the appellee accepted his insurance contract. The insured must have contemplated the possibility of an amendment or repeal of any law affecting his rights. *Illinois Life Ins. Co. v. Tully*, 174 Fed. 355; *Chicago Life Ins. Co v. Needles*, 113 U. S. 574; *Iversen v. Minnesota Mutual Life Ins. Co.*, 137 Fed. 268; *Looker v. Maynard*, 179 U. S. 46.

The constitutionality of the law is further challenged because it permits the nonparticipating members to have equal rights with the participating members to purchase stock in the company as transformed. The plan adopted does so provide, in substance. Section 7828, Comp. St. 1922, says "each member shall have the full right to subscribe," but does not define who are members. We must look to some other source for a definition of that term. It appears to be clearly defined by the law in force at the time the company was organized, which provides: "Every person whose life is insured by any such company shall be a member thereof as long as his policy is in force." Comp. St. 1905, sec. 4089. Section 7819, Comp. St. 1922, provides: "The articles of a mutual company * * * shall provide that every person * * * insured shall be a member thereof and have one vote." The articles of incorporation prior to the transformation appear to treat the terms pol-

icyholders and members as synonymous. Section 1, art. 6, of such articles, provides for the annual and special meetings of "policyholders" without indicating any particular kind of policy, and section 2 of said article 6, which has reference to such annual and special meetings, provides that "each member present whose policy is in force shall be entitled to cast one vote."

In harmony with the provisions of the statute and articles of incorporation, it is evident that all policyholders, whether participating or nonparticipating, were treated as members by the company, and as such entitled to share in its management; and they were so treated in the comprehensive plan. If both the participating and nonparticipating policyholders were entitled to participate in the election held to adopt or reject the proposed plan of transformation, then the action of the majority of those then present in approving the plan did not violate any of the constitutional rights of the appellee, nor did the fact that the law in question may not have specifically defined the term "member" it having been sufficiently defined in other portions of such insurance law, make it inimical to the Constitution.

The exact standing of participating and nonparticipating policyholders, as between themselves, we do not find to be a question at issue herein; they by their actions placed a construction upon the law as to the rights of both classes of policyholders to vote as well as participate in the purchase of stock, and acted thereon. If any individual member felt aggrieved at the time of the action taken, he should have promptly sought judicial determination of his rights.

The validity of section 7828, Comp. St. 1922, is further challenged for the reason that the only provision for notice to stockholders is by sending notice of time and place of meeting, with proposition to be submitted, "through the mail, directed to the last known address;" it being contended that a change from a mutual to a stock company was such a fundamental change as to effect a radical departure from the original purpose for which the company

was organized. It will be borne in mind that the change made is the identical change or amendment which they reserve the right to make in the articles of incorporation. In *Lord v. Equitable Life Assurance Society*, 194 N. Y. 212, it was held that a change from a stock company to a mutual company was not such a fundamental change in the business of the organization as to prevent such change being made without the consent of all of the members. The court said:

"Thus the charter carried in its soil the seeds of mutualization, planted by the founders of the company in readiness to sprout at the will of three-fourths of the directors, regardless of the wishes of the stockholders, as such. They took their stock subject to the right thus reserved to the directors and were bound to abide by the result, for the reservation in a certificate of incorporation of the right to amend the charter in any manner permitted by law is as binding on the stockholders as any other part of the certificate. * * * Even if the result would place the policyholders in control of the affairs of the company, the stockholders took their stock subject to that contingency, and cannot now lawfully complain of what they or their predecessors consented to when they invested in the capital stock. * * * The principle established by the authorities seems to be that the legislature under its reserved power may amend any charter in any respect that is not fundamental when the object of the corporation and property acquired by it are considered. Granting that it may not convert a corporation into something entirely foreign to the object for which it was created, such as turning an insurance company into a railroad company for instance, still it can regulate investments, methods of administration and details of procedure in the interest of the public and all concerned. The public is interested in the proper management of a company with such enormous assets as the defendant possesses, because, if for no other reason, those assets were mainly derived from the public. The statute before us authorized no change in principle, for the old charter per-

mitted mutualization, but it simply allowed an object contemplated by the charter to be effected by a method varying in unessential details from that provided by the charter itself. Mutualization in any form would necessarily affect to some extent the power of the stockholders to elect directors." See *Picard v. Hughey*, 58 Ohio St. 577.

"Due process of law," within the meaning of the constitutional provisions, is not intended to control the power of the state to determine by what process or on what manner of service rights may be asserted or determined, provided such procedure will afford reasonable notice and a fair opportunity to be heard before the courts, at some stage of the proceedings, prior to final determination. *Hacker v. Howe*, 72 Neb. 385; *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549; *Pearson v. Yewdall*, 95 U. S. 294; *Ballard v. Hunter*, 204 U. S. 241; *Campbell v. State*, 171 Ind. 702.

Personal service is not necessary to constitute due process of law. The legislature may prescribe "a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him." *Hurley v. Olcott*, 198 N. Y. 132, 28 L. R. A. n. s. 238.

"If we hold, as we must, in order to sustain this legislation, that the Constitution does not positively require personal notice in order to constitute a legal proceeding due process of law, it then belongs to the legislature to determine in the particular instance whether the case calls for this kind of exceptional legislation and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which are taken against him. * * *

" A law must be framed and judged of in consideration of the practical affairs of man. The law cannot give personal notice of its provisions or proceedings to every one." *American Land Company v. Zeiss*, 219 U. S. 47.

See *Ballard v Hunter*, 204 U. S. 241, and *Falender v. Atkins*, 186 Ind. 455.

A letter, "properly addressed and mailed, is presumed, as a matter of evidence, to have reached the addressee in

the usual course of mails; common experience indicating the regularity and certainty with which mail is carried and delivered in the exercise of governmental functions." *Heyen v. State*, 114 Neb. 783, 794.

At the time of the transformation there were about 5,427 members. Personal service of notice, which appellee contends should have been made upon every stockholder, would probably not have been possible; at least it would have been impracticable, and the expense of such service would probably have been prohibitive; that number of members must necessarily have been scattered through many jurisdictions. The mode of service provided by the statute and followed in this case was a practical one, and was suited to the nature of the proceeding; and it was effective, at least so far as the appellee was concerned. There was no exception here to the general rule that a letter properly addressed and mailed or transmitted is presumed to have reached the addressee, as appellee testifies that he received the notice and read it carefully. Had he not been satisfied with the proceedings had before the board of trade and commerce, redress could then have been had by appeal to the courts under section 7895, Comp. St. 1922. We conclude that the notice provided by the transformation law and given by the company was sufficient.

The case of *Huber v. Martin*, 127 Wis. 412, which is the principal case cited by appellee, and one on which he appears chiefly to rely, covers more nearly the questions involved in the instant case than the other cases cited in his brief; but, both the laws under consideration and the facts involved in that case differ in so many particulars from the case at bar as to make it readily distinguishable. We have carefully examined, but do not take the space to review here, all of the authorities cited by counsel for appellee; and while a number of these bear somewhat upon the questions under consideration, yet, when the facts involved in the different cases are weighed in the light of the different statutory provisions, we conclude they do not stand in the way of the conclusions here announced.

It is contended that there were irregularities and defects in the comprehensive plan adopted and in the proceedings followed, and that the distribution of assets provided for in the plan was unfair, for which the transformation should be annulled. If the plan adopted contained provisions which appeared unfair, that was a defect in the plan itself, subject to correction by the department of trade and commerce, and the law in question may not be declared void on account of an inequitable plan being adopted under it. With reference to some of the irregularities, had the questions been raised at the time, either before the department, or by an appeal from the department to the courts, amendments might have been required and the defects remedied, or the proceedings defeated.

It is evident that, in making up the schedule of assets included in the comprehensive plan, the company omitted therefrom certain items which appeared in the annual report of December 31, 1921, as rejected assets, consisting of agents' debit balances, $33,036.76; furniture and fixtures, $12,378.57; supplies, $4,500; rejected notes, $4,243.94; automobile account, $2,226.32. The assets shown in the comprehensive plan were itemized and disclosed no items of the character omitted. The plan recites that the statement of assets included were the assets of the company at the close of business on December 31, 1921. The report of that date was a matter of record. The report discloses these same items as "assets not admitted" and they were there deducted from the gross assets. The notice which the appellee admits he received contained a copy of the statements of assets embodied in the comprehensive plan; he could then have protected himself if he had thought there were other items of value omitted. The evidence discloses that the items omitted were all nonadmitted assets and practically valueless; the agents' debit balances were never collected; the supplies were supplies for the mutual company, and of no value for distribution or use by the stock company; and the furniture and fixtures were needed for use in order to continue business. While the

items omitted might better have been included in the schedule, yet there appears no attempt to conceal the fact that they were omitted. The department of trade and commerce had knowledge of the omitted items by the report of December 31, 1921. If there was an error in the excluding of these items from the schedule of assets in the comprehensive plan, both the company and the department were mistaken. A mistake or omission of this character in the transformation proceedings ought not to be construed as constructive fraud, nor be permitted to vitiate the completed transformation of the company.

The reason for placing the selling price of the capital stock at $125 a share, which is also complained of, was explained in both the comprehensive plan and the notice. By said section 7828, it is provided that members may subscribe for stock at par; but it is also provided by section 7822, Comp. St. 1922, that such stock company should have a surplus equal to one-fourth of its capital stock. The insurance department had held that a compliance with that provision was necessary before a certificate would issue authorizing a stock company to commence business. The fixing of the price of stock at $125 was, as explained to the members, the method adopted to provide for the capital and surplus. Though it may not have been the most appropriate course to pursue to accomplish the desired result, it was clear what the intention and desire was, and the method adopted met with the approval of the department of trade and commerce, and it was not shown that there was any objection thereto prior to the commencement of this proceeding. At most, this was a mere irregularity; the parties appear to have acted in good faith, without fraud, either actual or constructive.

By the comprehensive plan of transformation the nonparticipating members and participating members were given equal rights to purchase stock, after such of the participating members as wished to do so converted their share of the surplus into stock, and it is now urged that this was erroneous; that the rights of the participating

members in this particular were superior to the rights of the nonparticipating members. What was previously stated herein bearing upon the rights of participating and nonparticipating members in considering the constitutionality of the law in question might be considered as disposing of this assignment; but, in addition, the appellee was a participating member, and the notice he received advised him fully of the facts of which he now complains. He read the notice, and until the commencement of these proceedings made no complaint that he was not given all the rights his classification entitled him to.

Complaint is further made that the department of trade and commerce failed to make an order for the distribution of the existing and future surplus of the company. Subdivisions 1, 2, and 3, of said section 7828, relate to the changing of method of doing business by a company operating upon a mutual or assessment plan, and set forth the duties of the department of trade and commerce with reference thereto, which includes the making of an equitable order for the distribution of existing and future surplus, with the provision that a copy thereof should be sent to the stockholders with the notice of the meeting. Subdivision 4 of that section provides that, if such company desires to change to a stock company, it shall, in addition to the requirements of the first three subdivisions, also comply with the fourth subdivision; it does not make any similar requirement of the department of trade and commerce, but sets out a new line of duties to be performed by the department in case of such a change, and this does not include the making of any order for distribution of existing or future surplus, although it does require that an order of approval of the plan be made.

With reference to the notice provided for by the fourth subdivision, it requires that notice of the time and place of the meeting and approval of the department shall be sent members, but no mention is made of including a copy of the order of distribution of any surplus, as is required when the proceedings are had under subdivisions 1, 2, and

3. In the instant case such an order appears not to have been required.

Criticism is made of certain transactions of the former officers, and proceedings had in connection with the management of the company before the transformation proceedings were instituted, and also with the management of the company subsequent to the transformation becoming effective, but in no manner connected with such proceedings. While the matters referred to might be the subject of attention by the insurance department, they would not affect the validity of the proceedings involved in this action.

It is also urged that the company prior to the transformation was on a sound basis and that there was no necessity for a change. The motive for the change does not appear to be material under the law; that the company shall "desire" to make the change is sufficient. While the motive might be considered in determining the good faith of the transaction, the trial court found there was no intentional fraud, and with that finding this court is satisfied.

It is further urged that the proxies of members used at the election were not legal. Appellee Leininger contends that his proxy was given only for ordinary business. He had warning of the construction that was being placed upon the proxies signed, which was included in the application, by the officers of the company, as the notice he received provided: "At this meeting you may be represented in person or by proxy. If you have not already given a proxy in your policy or application you should sign the inclosed blank policy and write in the name of the officer or any other person you wish to represent you and send it to him at once." He did not appear and did not object to using the proxy he had given. Both the law and the articles of incorporation provided that proxies could be used. The vote of members present and represented was unanimous. The vote of appellee and other dissatisfied members testifying could not have changed the result. In the absence of evidence regarding other proxies given by the membership sufficient to have changed the result, the court will

not assume that those proxies were given for a special purpose, or that the signers did not intend them to be used at an election of the character in question. The great majority of the members whose votes were so cast have not attempted to repudiate their proxies. The burden of proof rested upon the appellee to show that a sufficient number of the proxies so used were void, to have changed the results.

It will be noted that these proceedings were not instituted for about four years after the transformation had been entirely completed. On the transformation, Leininger, the appellee, became entitled to a share of the surplus which he received and accepted; he paid premiums and dealt with the company as a stock company from that time until about the time of the commencement of these proceedings; he received and read the notice advising what was being done, and knew that the remainder of the surplus not distributed to him was paid to other participating stockholders. He knew that the company commenced and was continuing to operate as a stock company after the time of the transformation; that stock in said company was being purchased and surplus created. The company in the meantime has extended its business to new states, written new risks to the extent of several million dollars; collected large amounts of premiums on new business written for persons who must have presumed they were dealing with a stock company, and paid losses occurring; hence, the transformation should not be set aside unless reasons therefor are imperative. Where the parties, as in this case, were apparently acting in good faith in attempting to perfect such a transformation, mere irregularities in the proceedings or errors due to a misconstruction of the law as to duties of the officers of the company or public officers ought not to be permitted to vitiate the completed transformation. The complainant had an appellate remedy, but it was not pursued. The evidence discloses no excuse for failure to appeal. There appears to have been a general acquiescence in the transformation proceedings. The doctrine of estop-

pel should prevail in this case. *Frohnen v. Sanitary Sewer District, ante,* p. 84; *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.,* 45 Neb. 798; *Enterprise Irrigation District v. Tri-State Land Co.,* 92 Neb. 121; *Bennett v. Baum,* 90 Neb. 320; *St. John v. Iowa Business Men's Building & Loan Ass'n,* 136 Ia. 448; *In re Mutual Benefit Co.,* 190 Pa. St. 355.

As against the application of the doctrine of estoppel, it is urged that the appellee had no notice that his rights would be affected until the year 1925, when he made inquiry regarding the amount of surplus provisionally ascertained and held awaiting distribution at the expiration of the deferred dividend period. Some misunderstanding arose as to the information desired, and appellee urges that this was the first information he had that he was being defrauded. At that time there was nothing due appellee from the company in the way of surplus. At the proper time he may be entitled to an accounting; but so far he has sustained no injuries; his wrongs are anticipatory. As stated in *Iversen v. Minnesota Mutual Life Ins. Co.,* 137 Fed. 268: "It would be remarkable if the complainant were entitled to have this association wound up and its purposes defeated by reason, not of injuries suffered, but of injuries anticipated."

By the information furnished with the notice, appellee was advised of every fact, or was furnished information through which, if followed up, or if he had made a reasonable inquiry, he would have learned all of the facts bearing upon the transformation that he had at the time of the commencement of this proceeding. Under such circumstances he is estopped by laches from complaining at this time. *Talich v. Marvel, ante,* p. 255.

It is suggested that the time allowed for taking an appeal by appellee, after he received notice of the order of the department of trade and commerce, was not sufficient in which to perfect an appeal. Had appellee actually made an effort to perfect an appeal and failed on account of some reason other than his own fault or neglect, and had then

promptly instituted this proceeding, his position would have been more tenable.

Under the circumstances disclosed by the record in this case, it would be contrary to the plainest principles of equity if appellee might stand by and accept his share of the surplus, deal with and recognize the company as a stock company, with full knowledge of its extending its business into new territory and writing insurance as a stock company; permit it to collect premiums on new risks and pay claims to the extent that it has for a period of about four years, without objection or assertion of the claims he now makes, which if successful, would be manifestly unjust, not only to the stockholders, but to the new policyholders whose rights and interests would be seriously interfered with. Although the stockholders and new policyholders are not parties to this suit, their interests will not be overlooked. As said by Judge Wade in a case involving a similar question:

"We are dealing with conditions. The change has been made. It is now more than a year since the change to a capital stock company was effected. This case has been pending about seven months. I must assume that all the members of the association have long ago had full knowledge of what was done, * * * that many of the members have had knowledge of the pendency of this proceeding; but at no time up to the present has there been any suggestion brought to the notice of the court that any other member, except the plaintiff, is dissatisfied with what was done. * * *

"This court of equity cannot shut its eyes to the interests of some 25,000 members, all of whom are free agents, and none of whom are seeking relief: nor can the court be oblivious to the fact that, by granting the relief asked by the plaintiff, it would be almost certain that the association would ultimately reach insolvency and dissolution. * * * This court cannot consider the equities of the plaintiff alone; it must consider the equities of all persons interested in the result of this suit. Plaintiff is interested only to the

extent of his insurance under his $2,000 policy, and to the extent of his equity in the existing funds of the association. Whatever damage he has sustained can be recovered by him in an action at law." *Shera v. Merchants Life Ins. Co.*, 237 Fed. 484. See, also, *Freemeyer v. Industrial Mutual Indemnity Co.*, 101 Ark. 61, and *Equitable Life Assurance Society v. Brown*, 213 U. S. 25.

All possible rights and interests of the appellee herein appear to be fully protected by the reservations in the transformation proceedings, and by the transformation law that "such change shall in no way impair any pending action or right previously acquired, or annul or change any existing contract of such company." Comp. St. 1922, sec. 7828.

Upon a complete examination of the record, the conclusion is that the findings and judgment should be in favor of the North American National Insurance Company, intervener, and against John P. Leininger, applicant. The decree of the district court is therefore reversed, the application of John P. Leininger dismissed at his costs, and the ruling of the department of trade and commerce and of the bureau of insurance sustained.

REVERSED, AND PROCEEDING DISMISSED.

CHARLES H. HULBERT, APPELLEE V. WILLIAM T. FENTON, WARDEN, APPELLANT.

FILED JULY 20, 1927. NO. 26129.

1. **Habeas Corpus.** The writ of habeas corpus cannot be used as a substitute for proceedings in error.
2. ———: IRREGULARITIES. Where the trial court has jurisdiction of the offense and of the person of the defendant and has power to render the particular judgment or sentence in a proper case, habeas corpus will not lie upon the ground of mere irregularities in the judgment or sentence. "To obtain release by such a proceeding, the judgment or sentence must be more than merely erroneous; it must be an absolute nullity." *Michaelson v. Beemer*, 72 Neb. 761.

3. ———: COLLATERAL ATTACK: EXTRINSIC EVIDENCE. Habeas corpus is a collateral, and not a direct, proceeding, when regarded as a means of attack upon a judgment sentencing a defendant; and when the judgment is regular upon its face and was given in an action in which the court had jurisdiction of the offense and of the person of the defendant, no extrinsic evidence is admissible in a habeas corpus proceeding to show its invalidity.
4. **Criminal Law:** INDETERMINATE SENTENCE. Under section 10248, Comp. St. 1922, when a court, in pronouncing an indeterminate sentence on a defendant, fixes the minimum at not less than the minimum and the maximum at not more than the maximum provided for the substantive offense of which the defendant stands convicted, and the defendant is committed under such sentence, he is required to serve the maximum unless sooner released from custody by the board of pardons and paroles under provisions of law guiding the actions of that board or unless such sentence is corrected or changed by virtue of proper error proceedings.
5. **Bail:** HABEAS CORPUS: APPEAL. In a habeas corpus proceeding, when, under section 10281, Comp St. 1922, the judge in the exercise of his discretion orders the discharge of a prisoner, who has been convicted and committed to confinement by proceedings regular on their face, but the offense for which he was committed is clearly a bailable offense, and the respondent gives timely notice of appeal while the prisoner is still in court and before his discharge, the judge should require the prisoner to enter into a reasonable recognizance conditioned for his appearance upon a review in the appellate court.
6. **Habeas Corpus:** REVERSAL: REMAND TO CUSTODY. "A prisoner set at liberty by habeas corpus may, upon reversal of the order by an appellate court, be remanded to the custody from which he was freed." *State v. Shrader*, 73 Neb. 618.

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

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

Dale P. Stough, contra.

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

GOSS, C. J.

Charles H. Hulbert, the relator in a habeas corpus application, was discharged from the custody of the respondent, William T. Fenton, warden of the state penitentiary, by order of the district court for Lancaster county. The respondent appealed.

The relator alleged that in Lincoln county, Nebraska, he was charged with grand larceny committed June 23, 1924, and, when arraigned, pleaded guilty; that on January 19, 1925, the trial court imposed on him an indeterminate sentence of not less than three nor more than seven years in the state penitentiary, notwithstanding the trial judge knew the relator had previously served a term of one year in the state penitentiary and so was not a first offender; and that any detention beyond the term of three years in the case in which relator pleaded guilty is illegal; and that the state board of pardons and paroles, with which he filed a petition for commutation, refused to entertain jurisdiction, but orally denied any action thereon, leaving him no remedy available except habeas corpus. Issues were joined by a return filed by the respondent, a trial was had, and on June 30, 1927, the relator was ordered discharged. On the same day a motion for new trial was filed by the respondent, was overruled by the court, appeal was taken to this court, the cause was advanced, owing to its public importance, by special agreement of the parties, arguments were had, and the case was submitted on July 6, 1927.

Section 9599, Comp. St 1922, defining grand larceny, provides a penalty of imprisonment for not less than one nor more than seven years.

Section 10248, Comp. St. 1922, provides: "Every person over the age of eighteen years convicted of a felony or other crime punishable by imprisonment in the penitentiary excepting treason and crimes of violence or attempts at crimes of violence against the person of another shall if judgment be not suspended or a new trial granted be sentenced to the penitentiary, but the court imposing such

sentence may in its discretion and providing such person has not previously been confined in any penitentiary impose on such person an indeterminate sentence. In passing such indeterminate sentence upon any such person so convicted, the court may fix the terms of any indeterminate sentence which it desires, provided the minimum term fixed by the court shall not be less than the minimum term provided by law for the crime for which the person was convicted, nor the maximum term be greater than the maximum term provided by law for the crime for which the person was convicted. The release of any person sentenced to an indeterminate sentence is to be determined as hereinafter provided."

The respondent argues that habeas corpus does not lie in a case like this because the district court for Lincoln county has jurisdiction of the offense and of the defendant; that it imposed a sentence in conformity with the statute, and, if that court erred in the qualifications of relator for an indeterminaate sentence, it is not the office of habeas corpus to cure such errors but that of the trial court or, on its refusal, of the supreme court on proceedings in error; and that these proceedings constitute a collateral attack on the judgment of the trial court and so are not maintainable.

The writ of habeas corpus cannot be used as a substitute for a writ of error. It is the general rule that, where the trial court has jurisdiction of the offense and of the person of the defendant and power to render the particular judgment or sentence in proper cases, habeas corpus will not lie upon the ground of mere errors and irregularities in the judgment or sentence rendering it not void, but only voidable. 29 C. J. 51, sec. 46. In a recent habeas corpus case, where the trial court sentenced a defendant for from three to twenty years, when the statute under which he was convicted provided for punishment of one to ten years, we held that the fixing of the sentence at more than ten years was erroneous, but did not render the judgment void; that such error could and would have been corrected

by proper error proceedings; and that habeas corpus would not lie in such instance. *McElhaney v. Fenton, ante*, p. 299. In that case we quoted *In re Fenton*, 55 Neb. 703, to the effect that—"On an application for a writ of habeas corpus, errors or irregularities in the criminal trial, not jurisdictional, will not be considered." In *Michaelson v. Beemer*, 72 Neb. 761, it was held that—"The writ of habeas corpus cannot operate as a proceeding in error. * * * To obtain release by such a proceeding, the judgment or sentence must be more than merely erroneous; it must be an absolute nullity." This was cited and followed in *In re Application of Cole*, 103 Neb. 802, and the refusal of the district court to discharge the prisoner was affirmed. Examining the facts in the light of the foregoing principles, we find it admitted that the court had jurisdiction of the grand larceny case and of the person of the defendant, that the defendant pleaded guilty, and the mittimus, in that case, attached to the respondent's return in this, shows that the court sentenced the defendant to the penitentiary for a period of not less than three years nor more than seven years. The record imports verity and indicates jurisdiction and freedom from errors on the face of it. There has been shown on the hearing of this case no error or lack of jurisdiction in the original criminal action, unless (1) it be considered proper to impeach the record of that case by oral testimony that the defendant was not a first offender, and unless (2) the imposition of the indeterminate sentence of three to seven years is in legal effect equivalent to a flat sentence of the minimum imposed.

The relator was permitted by the trial court in this habeas corpus case to testify, over the objections of the respondent, that the judge who sentenced him said certain things to him from the bench before sentencing him indicating that the judge knew that he had been in the penitentiary before and therefore was not eligible as a first offender to an indeterminate sentence. It was improper to receive this evidence. The sentence was the final judgment and record of the court, and the record of the court

acting within its legitimate powers must be considered as speaking the truth and as conclusive until it has been in some way set aside or vacated. No evidence can be received collaterally to contradict it. Habeas corpus is a collateral, and not a direct, proceeding, when regarded as a means of attack upon the judgment, and so long as the judgment is regular upon its face and was given in an action of which the court had jurisdiction, no extrinsic evidence is admissible here to show its invalidity. *Ex parte Stephen,* 114 Cal. 278.

Section 10248, heretofore quoted, expressly gives the trial court the power to fix the minimum and the maximum within the minimum and maximum found in the statute on which the prosecution is based. The defendant convicted of grand larceny was eligible to a sentence of one to seven years. When the judge pronounced a sentence not in conflict with the statute and made a record of it, his jurisdiction ceased, save for the correction of errors. Thereupon, if the record was regular and no proceedings in error were taken, the last words of the indeterminate sentence law charted the course to be followed if the prisoner was to be released before the expiration of the maximum number of years stated in the sentence fixed by the court. The last sentence of section 10248 reads thus: "The release of any person sentenced to an indeterminate sentence is to be determined as hereinafter provided." The legislature has provided, in the same chapter, a board of pardons and paroles, and following the indeterminate sentence section it has provided for the parole of persons generally under rules and regulations to be established by the board. It is significant that the statute (section 10251) provides that—"No such parole shall be granted in any case unless the minimum term fixed by law for the offense has expired." This expression negatives any idea that a prisoner's sentence is the minimum pronounced by the court or expressed in the law, but affirms the conclusion that in all indeterminate sentences the maximum named defines the period of confinement unless reduced by clemency of the board of pardons

and paroles under the law and under rules established, not in conflict with the law.

In the state of the record as shown by the application for the writ and the return made by the respondent, we are clearly of the opinion that the court erred in entertaining the application, in admitting oral testimony to impeach the judgment and sentence of the Lincoln county district court, in finding for the relator and in discharging him from the custody of the warden. This leaves for consideration but two things: First, the refusal of the court to require his order discharging the relator to be subject to the relator giving bail; second, what is the present status of the thus discharged relator under his sentence which we have held was effective until changed by proper error proceedings? In other words, as he should have been left in custody of the warden, should he now be remanded to that custody from which he was erroneously freed?

In the present case it may not be so vital whether the relator should have been held or whether he be apprehended and be required to continue to serve the sentence lawfully imposed until and unless discharged as provided by law; for this particular individual has already, with good time off as allowed by law, served the minimum time contemplated by the court pronouncing his sentence. But, as the criminal laws should be administered without favor and as a rule of conduct of future cases where an erroneous release may be fraught with more serious consequences and some vicious criminal convicted of a heinous crime might go unwhipped of justice, we deem it advisable to consider and lay down a proper rule to guide and control in this as well as in such cases as may hereafter arise. It would be a strange weakness of the law if it were possible for us to say, as we have in effect said in this case, that the trial court erred in releasing a convict from the custody of the law, and yet to be compelled to admit that the law was powerless to make effective correction of that error.

Section 10281, Comp. St. 1922, under the title "Habeas Corpus," says: "In case the person or persons applying

for such writ shall be confined or detained in a legal manner, on a charge of having committed any crime or offense, the said judge shall, at his discretion, commit, discharge or let to bail such person or persons, and if the said judge shall deem the offense bailable, on the principles of law, he shall cause the person charged as aforesaid to enter into recognizance, with one or more sufficient sureties, in such sum as the judge shall think reasonable, the circumstances of the prisoner and the nature of the offense charged considered, conditioned for his appearance at the next court where the offense is cognizable."

Counsel for the respondent made timely application that bail be required from the prisoner under the provisions of this section and the court refused it. The case was clearly one, as we have seen, where it was an " offense bailable, on the principles of law," as described in the statute. Moreover, at the same time, the court had notice that his judgment was to be taken up for review, "the prisoner still being in the courtroom and under the control and jurisdiction of the court" when the application was made. The only way in which the refusal of the court can be sustained in the circumstances and facts of this case is to say that his discretion was absolute. But we think it is not so. We are of the opinion that the legislature in the use of this word intended to clothe the court with the use of a reasonable "discretion." To say that the decision of the court not to admit the prisoner to bail, because his was not an "offense bailable, on the principles of law," as the quality of discretion usable is limited in the statute, was proper exercise of discretion as contemplated by the legislature is, we are of the opinion, going to a length that we cannot indorse. We think the prisoner should have been required to give bail pending the contemplated review in this court, and that the trial court erred in discharging the prisoner unconditionally.

Under the order of the district court the prisoner discharged under the habeas corpus proceedings is now at large. By force of this opinion his application under the

writ should have been denied and he should have been remanded to prison. And, even if the writ had been granted, as it was, he should have been required to give bail to abide the decision here. Because the trial court erred in releasing him and, failing in that respect, also erred in not requiring him to give bail to respond to the judgment of this court on review, can it be said that this court is impotent to order him back to prison where by the course of law and according to its principles he would have remained but for the erroneous result of his habeas corpus action in the district court? It seems to us that the discussion already had provides a sufficient answer in the negative to that question. But we are not without a precedent in our own court. "A prisoner set at liberty by habeas corpus may, upon reversal of the order by an appellate court, be remanded to the custody from which he was freed." *State v. Shrader*, 73 Neb. 618. There the writ of habeas corpus was sued out in the county court. It was based on an attack on the complaint for variance. On hearing the defendant was discharged and freed from custody of the sheriff. The sheriff prosecuted error to the district court, which reversed the county court and ordered the defendant remanded to the custody of the sheriff. The defendant prosecuted error in the habeas corpus proceeding to this court with the result indicated. On principle we approve this precedent and apply it to this case.

For the reasons given, the judgment of the district court is reversed, with directions to enter an order refusing a discharge of the relator and remanding the relator to the custody of the respondent. And the respondent is hereby directed to recapture the prisoner and to continue to hold him under the mittimus by virtue of which he held him when deprived of his custody by order of the court.

REVERSED.

MICHAEL L. ENDRES, APPELLEE, V. HENRY S. MCDONALD ET AL., APPELLANTS.

FILED JULY 20, 1927. NO. 25078.

Statutes: AMENDMENT: CONSTITUTIONALITY. Chapter 86, Laws 1925, while it purports by its title to amend only section 3006, Comp St. 1922, attempts to amend another section of the statute without referring to it either in the title or in the act. For this reason, the act is broader than its title and is void, because it violates section 14, art. III of the Constitution.

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

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

Arthur F. Mullen, John P. Breen and *Herman Aye, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, and EBERLY, JJ., ELDRED and L. S. HASTINGS, District Judges.

GOOD, J.

This action was brought by the plaintiff, a taxpayer and sheriff of Douglas county, against the defendants, as county commissioners of said county, to enjoin them from enforcing the provisions of chapter 86, Laws 1925, upon the ground that said act violates sections 14 and 18, art. III of the Constitution. George S. Collins, a taxpayer of said county, filed a petition in intervention and joined in the prayer of plaintiff's petition. Defendants filed a general demurrer to the petitions of the plaintiff and intervener. The demurrer was overruled and, defendants refusing to further plead, judgment was entered for plaintiff, enjoining the enforcement of said chapter 86. The defendants have appealed.

The defendants allege error of the trial court in overruling their demurrer; in decreeing that chapter 86, Laws 1925, was void, and in enjoining the enforcement of said chapter.

Prior to the 1925 session of the legislature, there existed

two distinct statutory provisions relating to fees or charges of sheriffs for boarding prisoners in county jails. Section 2381, Comp. St. 1922, under the chapter relating to fees of county officers, provides the schedule of fees or charges to which the sheriff is entitled for performing the several duties enjoined upon him by law. That part of said section relating to the charges for boarding prisoners is as follows: "For boarding prisoners, seventy-five cents per day in all counties where there is an average of less than one hundred prisoners per day, and fifty cents per day where there is an average of more than one hundred prisoners per day." Section 3006, Comp. St. 1922, in the chapter on jails also relates to the charges for boarding prisoners, and is in the following language:

"The sheriffs or jailers of the several counties, who have the custody of the state or other prisoners confined in the jails of such counties, shall receive for boarding such prisoners the sum of seventy cents per day; and such sheriffs or jailers are hereby authorized to provide such fuel, lights, washing and clothing as may be necessary for the comfort of such prisoners while in their custody; and such sheriffs or jailers shall, on the first day of January, April, July and October of each year, make a report in writing to the state auditor of the number of state prisoners in his custody for the last three months before making his report, when committed, and for what time, and the amount due him for boarding such prisoners; the amount of clothing furnished each prisoner and the cost of the same; also the amount expended by him for washing, lights, and fuel, for that quarter; which account shall be sworn to by the sheriff or jailer before the clerk of the county of which he is sheriff or jailer, and certified to under his seal. Thereupon the state auditor shall draw his warrant upon the state treasurer for the amount due such officer, payable to him; and when the condition of the jails in this state requires a constant guard to be kept, to prevent the escape of prisoners confined therein, the sheriff shall be allowed the sum of three dollars per day for guarding or procuring

guard for such prisoners, which shall be paid him quarterly, with the amount paid him for board, washing, fuel, lights, and clothing."

Plaintiff in his petition alleges that for many years, throughout the entire state, as well as in Douglas county, officers charged with the duty of interpreting, applying and enforcing the provisions of said sections of the statute have construed and applied them so as to give force and effect to section 3006 as fixing only the amount or price to be paid sheriffs by the state for keeping or boarding state prisoners; that the amount to be paid to sheriffs by the counties for keeping all other classes of prisoners was controlled and fixed by section 2381, Comp. St. 1922, and that all sheriffs of the state have, for many years, been paid for boarding prisoners, other than state prisoners, the amount or price provided by section 2381, or the amount fixed by the section of which section 2381 is an amendment. The demurrer admits the truth of these allegations. Aside from that, the question of sheriff's fees for boarding prisoners, other than state prisoners, has been frequently before this court, and the numerous decisions of this court show conclusively that section 2381, Comp. St. 1922, or the sections of which it is an amendment, have been applied and construed as determining the rate of pay that sheriffs should receive for boarding and caring for prisoners, other than state prisoners.

In 1925 the legislature enacted chapter 86, Laws 1925, under the following title: "A bill for an act to amend section 3006, Compiled Statutes of Nebraska for 1922, relating to jails; providing for the care of prisoners in counties having a population exceeding one hundred twenty-five thousand (125,000); providing that fees for the care of prisoners in such counties shall inure to the county, shall be paid to the county treasurer and shall be credited to the general fund; and to repeal said original section." The act substantially reenacted section 3006, Comp. St. 1922, as it existed, and then added thereto the following: "Provided, further, that in counties having a population exceed-

ing one hundred twenty-five thousand (125, 000) the county board shall provide proper quarters and adequate equipment for the preparation and serving of all meals furnished to all prisoners confined in the county jail. The county sheriff shall have full charge and control of said quarters and service. All supplies of every name and nature entering into the furnishing of meals, washing, fuel, lights, and clothing to the prisoners as above provided for shall be purchased and provided under the direction of the county board by a person other than the county sheriff, or any of his deputies, as may be designated by the county board. Payment for all said purchases shall be made by the county board on the original invoices only; and then only on the sworn affidavit of the person designated to make said purchases attached to each and every separate invoice of goods and supplies, setting forth, under oath, that the invoice correctly describes the goods as to quality and quantity; that the same have been received and are in the custody of the affiant; that the same have been or will be devoted exclusively to the purposes authorized in this section and that the price charged is just and reasonable."

Plaintiff contends that chapter 86, Laws 1925, cannot have any effect or operate to change, modify or nullify the provisions of section 2381, Comp. St. 1922, for the reason that the act, by its title, recitation and substance, is a strictly amendatory act and attempts only to amend section 3006, Comp. St. 1922. Defendants contend that the matter of boarding and caring for prisoners and the charges therefor properly belong in the chapter on jails, and not in the chapter on fees of county officers; that the act is complete on the subject of which it treats, and therefore, by implication, repeals section 2381, and entirely supersedes said section.

It appears that in the Revised Statutes of 1866, chapter 19, entitled "Fees" (referring to all county officers), section 5 thereof provided a fee of 75 cents a day for boarding prisoners. This section was amended in 1871, again in 1875, and in 1877. It thus stood from 1877 to 1907 without any change. In the last named year an attempt was made

to again amend the section in a radical manner, but the attempted amendment was declared void. See *State v. McShane*, 93 Neb. 46, and *McShane v. Douglas County*, 95 Neb. 699, on rehearing, 96 Neb. 664. The section was again amended in 1915 and in 1921, and since that date has remained unchanged. As early as 1866, the chapter of the statutes relating to jails contained one section relating to the boarding of prisoners. This section was amended in 1869. Again, in 1873, an attempt was made to amend this section of the statute. The words "or other" were inserted immediately after the words "state prisoners," apparently so as to make it apply to all prisoners. This attempted amendment was declared ineffectual by this court in *Lancaster County v. Hoagland*, 8 Neb. 36, and thus the statute was left as it existed in 1869, which related only to the boarding of state prisoners. In 1911 commissioners were appointed to "bring together all statutes and parts of statutes relating to the same subject-matter, omitting obsolete or repealed matter and such as has been declared to be invalid, * * * supply apparent omissions, reconcile contradictions and note imperfections in general." Laws 1911, ch. 166, sec. 2. This commission for revision of the statutes interpolated into the opening clause of this section the words "or other" between the words "state" and "prisoners." Whether this statute ever became operative by reason of the adoption by the legislature of the report of the commission, it is unnecessary to determine. It is apparent that the section did not provide by whom the boarding of and expense of keeping prisoners, other than state prisoners, should be paid, and it is evident that that section, which, as amended, is now section 3006, Comp. St. 1922, was intended only to apply to the boarding of state prisoners, and that to determine the rate of pay that the sheriff should receive for boarding prisoners, other than state prisoners, reference must necessarily be had to section 2381, Comp St. 1922.

Section 14, art. III of the Constitution, provides, *inter alia*: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law

shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed."

"Under the provisions of section 11 (now section 14), art. III of the Constitution, the title to an act must fairly express the subject of the legislation. * * * An act not complete in itself, but which is clearly amendatory in its nature and scope, must set forth the section or sections as amended, and repeal the original section or sections." *State v. Tibbets*, 52 Neb. 228. In *Trumble v. Trumble*, 37 Neb. 340, chapter 57, Laws 1889, was held unconstitutional and void because its object was not expressed in its title, and because it was, in effect, amendatory of other acts which the title did not contain. In the opinion in the last cited case, on page 347, it was said: "Nor can the legislature in an act purporting to merely amend one law enact measures which in effect amend or repeal other laws not referred to in the title or in the act itself. To do so violates the constitutional provision that the amending act shall 'contain' the section or sections so amended." To the same effect are *State v. Majors*, 85 Neb. 375, and *Minier v. Burt County*, 95 Neb. 473.

It seems plain that chapter 86, Laws 1925, which purports only to amend section 3006, Comp. St. 1922, clearly violates the provision of the Constitution above quoted unless, as contended by defendants, the amendatory act is complete in itself. Section 3006, as attempted to be amended in 1925, does not pretend to fix the rate of pay that the sheriff shall receive in counties having less than 125,000 population, so that it is not, in itself, a complete act relating to the boarding of prisoners. Section 2381, Comp. St. 1922, must be looked to, to find the rate of pay that the sheriffs shall receive for boarding prisoners in counties having less than 125,000 population. Section 2381, is not, therefore, repealed. It still remains in full force and effect. It seems very plain that the attempted amendment to section 3006, while it attempts to amend section 2381, does not, by its title or otherwise, refer to that section and

falls within the condemnation of the constitutional provision above quoted. Chapter 86, Laws 1925, is therefore, unconstitutional and void.

The judgment of the district court, in enjoining the enforcement of this void statute, is right and is

AFFIRMED.

STATE OF NEBRASKA V. SAM GIRT ET AL.

FILED JULY 20, 1927. NO. 25916.

1. **Criminal Law**: ACCESSORIES. "Section 9541, Comp. St. 1922, as amended by chapter 89, Laws 1923, which provides that an aider, abettor, or procurer, whether present or not, shall be subject to the same prosecution and punishment as his principal, construed to mean: That the same rule as to the information, conduct of the case, and punishment, heretofore applicable to a principal, should thereafter govern his aider, abettor, or procurer, and that no additional facts need be alleged in an information against such accessory before the fact, than are required against his principal." *Scharman v. State*, *ante*, p. 109.
2. **Indictment and Information**: ACCESSORIES. "The abrogation of the distinction between principal and accessory as contained in section 9541, Comp. St. 1922, as amended by chapter 89, Laws 1923, does not contravene section 11, art. 1 of our Constitution, affording the defendant in a criminal case 'the right * * * to demand the nature and cause of accusation.'" *Scharman v. State* *ante*, p. 109.
3. ———: CONSTRUCTION. An information which in ordinary terms directly charges four persons jointly with setting fire to and burning, as part of one transaction, insured real property of the value of $50, and insured personal property of the value of $50, belonging to one only of such accused persons, with intent to prejudice the insurer, states but one offense, under section 9591, Comp. St. 1922, and section 9541, Comp. St. 1922, as amended by chapter 89, Laws 1923.

ERROR to the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Exceptions sustained.*

Henry J. Beall, Irvin Stalmaster and *J. W. Yeager*, for plaintiff in error.

David A. Fitch, contra.

Heard before GOSS, C. J., GOOD, THOMPSON and EBERLY, JJ., ELDRED and L. S. HASTINGS, District Judges.

ELDRED, District Judge.

This is a proceeding by the state, under section 10192, Comp. St. 1922, on exceptions taken by the county attorney, to secure a review of the ruling of the district court for Douglas county, sustaining motions to quash an information filed in said court, which, excluding formal portions, in substance, charges: That on or about the 24th day of June, 1926, in Douglas county, Nebraska, the said Sam Girt, being then and there the owner of certain goods and chattels of the value of more than $50, to wit, $300; and also of a certain dwelling-house of the value of more than $50, to wit, $800; the location of each being specifically given; that the personal property was insured against loss by fire, in the Twin City Fire Insurance Company, in the sum of $600, and said dwelling-house was insured against loss by fire in the company named, in the sum of $1,400; and that said Sam Girt, Carl Sebastian, Walter Headley, and Clarence Headley, in said city, county, and state, did wilfully, maliciously and feloniously set fire to and did burn said goods and chattels and said dwelling-house, with the intent of said Sam Girt, Carl Sebastian, Walter Headley, and Clarence Headley to burn and destroy the same, and with the intent of said Sam Girt, Carl Sebastian, Walter Headley, and Clarence Headley to prejudice the said Twin City Fire Insurance Company, the insurer thereof.

The defendant Sam Girt and Carl Sebastian filed separate motions to quash the information, "for the reason that said information is in one count and charges said defendants named with separate and distinct offenses." The motions were severally sustained by the trial court and the information quashed as to said defendants.

The information appears to have been filed under section 9591, Comp. St. 1922, and section 9541, Comp St. 1922, as amended by chapter 89, Laws 1923.

Section 9589, Comp. St. 1922, makes it a felony for one to wilfully and maliciously burn or cause to be burned the property of any other person, of the value of $50; while section 9591, Comp. St. 1922, makes it a felony for the owner to burn or cause to be burned his own property which he shall have insured against loss or damage by fire, with intent to prejudice the insurer.

It is the contention of the defendants that the information charges an offense against the defendant Sam Girt, the owner of the property, under section 9591, Comp. St. 1922, which is one offense, but as to all other defendants, if any offense was charged, it was under section 9589, Comp. St. 1922, which is another offense. Prior to 1923, such motions may have been properly sustained; but, section 9541, Comp. St. 1922, as amended by chapter 89, Laws 1923, provides:

"Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender."

Defendants cite a number of cases from this court in support of their position, but they were all rendered prior to the amendment of section 9541 in 1923, and are therefore not conclusive. Since the amendment, above referred to, the sufficiency of an information filed against one prosecuted as an aider or abettor of a felony has been several times before the court.

In *Northey v. State*, 114 Neb. 543, an information jointly charged plaintiff in error, Northey, and one Bruner with murder by administering poison; it being the theory of the state that Bruner administered the poison, and that Northey aided, abetted, and counseled the commission of the offense, although the information directly charged Northey with the commission thereof. The information against Northey was held sufficient by reason of chapter 89, Laws 1923.

In *Scharman v. State, ante*, p. 109, the defendant was charged directly with stealing cattle, with the further allegation in the information that the theft was committed

by defendant by reason of his having procured others to perpetrate the act. The sufficiency of the information was raised, and the same defect urged as in the instant case. In the opinion it is there said:

"We conclude that * * * it was the intention of the legislature by such enactment to abrogate all distinctions heretofore existing between such aider, abettor, or procurer and the one committing the act, and to provide that each should be prosecuted and punished as principals; that is, the words 'prosecuted and punished,' as used in such section, mean that the same rule as to the information, conduct of the case, as well as the punishment heretofore applicable to principals, should thereafter govern such aiders, abettors, or procurers, and that no additional facts need be alleged in an information against an accused before the fact than are required against his principal."

And it was further stated in that opinion that, while the information described the manner in which the theft charged was committed, such descriptive allegations, while proper, were not necessary under the statutes as they now exist.

The case of *Scharman v. State, supra,* was followed and approved in *Ex parte Resler, ante,* p. 335.

The claim made by counsel for defendants in their brief that "the accused has the constitutional right to be fully informed of the crime he is charged with" has likewise been disposed of by the case of *Scharman v. State, supra,* wherein it is held that section 9541, Comp. St. 1922, as amended by chapter 89, Laws 1923, does not contravene section 11, art. I of the Constitution, which provides, among other things: "The accused shall have the right * * * to demand the nature and cause of accusation."

We conclude that the information in the instant case was not vulnerable to the charge of duplicity, and that the motions to quash should have been overruled.

EXCEPTIONS SUSTAINED.

STATE OF NEBRASKA V. MIKE TOTH ET AL.

FILED JULY 20, 1927. NO. 25917.

ERROR to the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Exceptions sustained.*

Henry J. Beal, Irvin Stalmaster and *J. W. Yeager,* for plaintiff in error.

David A. Fitch, contra.

Heard before GOSS, C. J., GOOD, THOMPSON and EBERLY, JJ., ELDRED and L. S. HASTINGS, District Judges.

ELDRED, District Judge.

The issues presented before the trial court and the legal question presented by this proceeding, are identical with those involved in *State v. Girt, ante,* p. 833. Upon the authority of that case, the exceptions of the state in this action are sustained.

EXCEPTIONS SUSTAINED.

STATE OF NEBRASKA V. WILLIAM BARTLETT ET AL.

FILED JULY 20, 1927. NO. 25918.

ERROR to the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Exceptions sustained.*

Henry J. Beall, Irvin Stalmaster and *J. W. Yeager,* for plaintiff in error.

David A. Fitch, contra.

Heard before GOSS, C. J., GOOD, THOMPSON and EBERLY, JJ., ELDRED and L. S. HASTINGS, District Judges.

ELDRED, District Judge.

The issues presented before the trial court and the legal questions presented by this proceeding, are identical with those involved in *State v. Girt, ante,* p. 833. Upon the authority of that case, the exceptions of the state in this action are sustained.

EXCEPTIONS SUSTAINED.

NICK SALISTEAN V. STATE OF NEBRASKA.

FILED JULY 20, 1927. NO. 25550.

1. **Criminal Law:** DISCHARGE OF JURY: JEOPARDY. The order of the trial court discharging the jury without prejudice to the prosecution, as set out in the opinion, *held* to state sufficient reasons under section 10151, Comp. St. 1922, to warrant the discharge of the jury, and the defendant is not thereby acquitted.
2. ———: ———: PRESUMPTION. "All presumptions exist in favor of the regularity of the judgments of courts of general jurisdiction, and he who asserts the contrary is required to establish the alleged error by an exhibition of the record." *Wright v. State*, 45 Neb. 44. Where it is claimed that error was committed by discharging the jury in a criminal case without first judicially determining from evidence adduced the necessity therefor, we must presume, in the absence of a bill of exceptions showing otherwise, that the proceedings leading up to the making of the order discharging the jury were regular, and that such evidence as was necessary to establish the necessity therefor was before the court at the time the order was made.
3. ———: INSTRUCTIONS: LIMITATION OF EVIDENCE. Where evidence in a case is not admissible for the general purpose of the suit, but only for a particular purpose, the court may, by an instruction, limit such evidence to the particular purpose for which it was admissible. *Held*, that the giving of an instruction by the court, wherein evidence admissible only for a particular purpose was limited to the particular purpose for which it was admissible, was proper.
4. ———: SECONDARY EVIDENCE. Secondary evidence of a fact in issue received without objection is thereby, in law, evidence tending to prove such fact and may be considered as such.
5. **Arson:** INSURANCE: SUFFICIENCY OF EVIDENCE. In a prosecution under section 9592, Comp. St. 1922, it is not necessary to prove that the insurer was a corporation, the statute not making same an element of the crime. It is sufficient if the evidence establishes its *de facto* existence. Evidence examined, and *held* sufficient to establish that the insurance companies named as insurers in the information had a *de facto* existence at the time charged therein.
6. **Evidence** examined, and *held* sufficient to sustain the verdict of the jury.

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

J. E. Bednar, for plaintiff in error.

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

Heard before GOOD, THOMPSON and EBERLY, JJ., ELDRED and L. S. HASTINGS, District Judges.

L. S. HASTINGS, District Judge.

The plaintiff in error, hereinafter designated as the defendant, was tried on an information filed by the county attorney of Douglas county in the district court for that county, charging him with a violation of section 9592, Comp. St. 1922.

The information contained five counts charging the defendant with setting fire to a building and certain fixtures and furniture therein, owned by the defendant, which were insured against loss or damage by fire, with intent to burn and destroy the same, and with the intent to prejudice the insurers.

Counts 1 and 2 referred to the buildings covered by insurance in two different companies, counts 3, 4, and 5 referred to fixtures and furniture covered by insurance in three separate companies. To said information the defendant entered a plea of not guilty. On a trial defendant was found guilty on all five counts and sentenced to five years imprisonment on each count, sentences to run concurrently.

For a reversal of the judgment of conviction, defendant relies upon three assignments of error, which will be considered in the order presented in his brief.

It is the contention of counsel for defendant, under the first assignment of error, that defendant has twice been put in jeopardy for the same alleged offense.

At the beginning of the trial, after a jury had been impaneled and sworn and a witness for the state sworn, but before any evidence had been taken, the defendant, without withdrawing his plea of not guilty, objected, orally, to

the introduction of any testimony, and moved for a dismissal and discharge on the ground that on a former occasion he had been put on trial for the same offense charged in the information.

It appears from the transcript that the defendant was placed upon trial on December 7, 1925, a jury impaneled and sworn, evidence adduced, and trial continued to December 8, 1925, at which time the trial proceeded, and was postponed to 2 o'clock p. m. of said day, because the wife of one of the jurors was being confined at the Nicholas Senn Hospital. Thereafter at 2 o'clock p. m. of said day the court entered the following order declaring a mistrial, to wit:

"Thereafter, at 2 o'clock p. m., it appearing that said juror's wife gave birth to a baby daughter at 10 o'clock a. m., that said child has since died, and Mrs. Sanders is seriously ill, and said juror incapacitated mentally to continue to sit as a juror in this case, it is therefore ordered, under authority of law, and particularly under authority of section 10151, Comp. St. 1922, defendant and his counsel being present in court, and making no objection thereto, that the trial of this case so far proceeding be, and is hereby declared to be a mistrial, and the present jury is discharged, and the case left for trial at a later date before a jury selected from a subsequent panel.

"It is further ordered that the above reasons for discharge of the jury be spread upon the journal of this court, and that the prosecution shall not be prejudiced thereby."

The motion is invalid as a plea in bar and cannot be considered as such, but will be treated as a motion to be discharged, grounded upon the proceedings had at the time the defendant was placed upon trial the first time. *Davis v. State*, 51 Neb. 301.

The argument of counsel that the defendant has twice been placed in jeopardy for the same offense is predicated upon two grounds: (1) That the reasons assigned in the order declaring a mistrial and discharging the jury were insufficient under section 10151, Comp. St. 1922, to warrant

the making of the order. (2) That the trial court arbitrarily discharged the jury without hearing and determining by judicial methods the necessity therefor.

As to the first ground, the argument is that the reasons relied upon for warranting a discharge of the jury are not made a specific ground for discharging the jury in a criminal case by section 10151. Section 10151, Comp. St. 1922, provides:

"In case a jury shall be discharged on account of sickness of a juror, or other accident or calamity requiring their discharge, or after they have been kept so long together that there is no probability of agreeing, the court shall, upon directing the discharge, order that the reasons for such discharge shall be entered upon the journal; and such discharge shall be without prejudice to the prosecution."

Construing that section, this court has held: "That the insanity of a juror was an 'accident' or 'calamity' authorizing the discharging of the jury." *Davis v. State,* 51 Neb. 301.

That the words "accident" or "calamity," as used in the statute, "include as well a case where a biased juror is discovered during the progress of the trial." *Quinton v. State,* 112 Neb. 684.

The reasons given in the order for discharging the jury and declaring a mistrial are clearly within the meaning of the words "accident" or "calamity" as used in the statute. The serious illness of the wife of the juror and the death of his child would, as a matter of common knowledge, have caused him distress of mind and incapacitated him from giving the case any consideration. To have continued with the trial under such conditions would have been inhuman. It would have been equivalent to trying the case to eleven jurors. Furthermore, the sympathy of the other jurors would naturally have been with him in his misfortune and tend to render them anxious to dispose of the case as quickly as possible. Under such circumstances the jury would not give the case the careful consideration which the im-

portance of the issue merited. The reasons given in the order were sufficient in law to warrant the trial court declaring a mistrial and discharging the jury.

In support of the second ground, the argument of counsel is that, even though the reasons given in the order are sufficient in law, the trial court could not arbitrarily discharge the jury without judicially determining from evidence adduced the necessity for such discharge. The general rule seems to be that, where the necessity for declaring a mistrial and discharging the jury in a criminal case does not occur in open court in the immediate presence of the judge, the facts showing the existence of such necessity must be heard and determined by judicial methods, and if the jury be discharged without that being done the defendant stands acquitted. 8 R. C. L. 156, sec. 146; *State v. Smith*, 44 Kan. 75; *State v. Reed*, 53 Kan. 767; *State v. Allen*, 59 Kan. 758; *State v. Nelson*, 19 R. I. 467, 33 L. R. A. 559; *State v. Jefferson*, 66 N. Car. 309; *Upchurch v. State*, 36 Tex. Cr. Rep. 624, 44 L. R. A. 694; *People v. Parker*, 145 Mich. 488. Upon the record before us, defendant is not in a position to raise the question that the necessity for the discharge of the jury was not judicially determined from evidence adduced.

The rule is: "All presumptions exist in favor of the regularity of the judgments of courts of general jurisdiction, and he who asserts the contrary is required to establish the alleged error by an exhibition of the record." *Wright v. State*, 45 Neb. 44. Also *Saxon v. Cain*, 19 Neb. 488; *Lovelace v. Boatsman*, 113 Neb. 145.

In absence of a bill of exceptions showing otherwise, we must presume the proceedings leading up to the making of the order were regular, and that such evidence as was necessary to establish the necessity for the discharge of the jury and the making of the order was before the trial court at the time it was made. The record before us fails to show that the defendant has been twice placed in jeopardy.

Under the second assignment of error it is urged that the trial court erred in admitting evidence of a former fire

and in giving instruction No. 12 in relation thereto. The argument is that such evidence was not admissible on any theory and its admission prejudicial to the defendant.

It appears from the record that the defendant, while testifying in his own behalf on his direct examination, testified as to the value of the buildings, household goods, furniture and fixtures covered by insurance in the companies named in the information on or about the date on which he was charged with setting fire to the same. This evidence was offered presumably for the purpose of showing that his property was not over-insured at the time of the fire. On cross-examination he was asked the questions complained of in regard to the damage done by the fire to the same property in February, 1925. These and other questions along the same line elicited the information that he had received $600 for the damage done by that fire, that the building had been damaged to the amount of $1,900 and that it had not been repaired at the time of the fire on June 1, 1925. The defendant having testified as to the value of the insured property as of about June 1, 1925, it was entirely within the range of legitimate cross-examination to interrogate him as to the damage done to the property by the February fire and thereby tend to discredit the valuation he had placed upon the property in his direct examination. No questions were asked on cross-examination that would indicate that the fire of February, 1925, was of incendiary origin, but such cross-examination was directed solely to an attempt to discredit his testimony given on direct examination as to the value he had placed upon the property. The trial judge, with that careful regard for the rights of the defendant shown throughout the trial as evidenced by the record, gave instruction No. 12 limiting the application of such evidence to the particular purpose for which it was admissible, and told the jury that the fact that there may have been a former fire on the premises in question in February, 1925, was not to be considered by them as any evidence whatever of defendant's guilt. The rule is, where evidence in a case is not admissible for the

general purposes of the suit, but only for a particular purpose, the court may, by an instruction, limit such evidence to the particular purpose for which it was admissible. Randall, Instructions to Juries, sec. 45, and cases there cited. There was no error in the admission of the evidence complained of or the giving of the instruction.

It is claimed the verdict is not sustained by sufficient evidence. It is contended there is no competent proof the property was insured or that the policies were valid. The record does not sustain such contention. Mr. Young, the adjuster for the companies named in the information as carrying the insurance testified as to the amount of insurance each company carried upon the property of the defendant, the property covered, the date when such policies were issued, and that the same were in force on June 1, at the time of the fire, and also to an unsuccessful attempt to adjust the losses thereunder with the defendant. The defendant, while testifying as a witness in his own behalf, also testified that he took out most of the policies on May 25, 1925, and that he made claim for the damages sustained by the fire in the sum of $4,600, and was only offered $278 by Mr. Young. The evidence is amply sufficient to show that the property was insured as charged in the information and that such insurance was in force at the time of the fire.

The further argument advanced in this connection is that the policies were the best evidence of insurance, and that no proper foundation was laid for the introduction of secondary evidence, and that secondary evidence without such foundation was incompetent and should not be considered as proof of such matters. No objection was made to such testimony of Mr. Young upon any ground. It is to be presumed that if timely objection had been made the trial court would have required either the policies to have been offered or sufficient foundation laid for the introduction of secondary evidence. Such evidence having been admitted without objection, it will be considered as competent proof that the property was insured and the insurance was in force at the time of the fire.

"The rule excluding secondary evidence when that which is primary is attainable is not so rigid as to be enforced if no objection is made by the party against whom the inferior evidence is offered. It frequently happens that secondary evidence is admitted, and thus becomes primary when it might have been excluded if proper objection had been taken. If the opponent is lax and permits secondary evidence to be given when he might have insisted upon the primary evidence or none at all, an appellate court will not come to his assistance." 2 Jones, Commentaries on Evidence (2d ed.) sec. 774.

It is contended there is no proof that the various companies, alleged to have carried insurance on the building and contents, were corporations or even *de facto* corporations. The gist of the crime denounced by the statute under which this prosecution is brought is the intent with which the person sets fire to his own insured property; it must be with the intent to burn or destroy the same and with the intent to prejudice the insurer, and whether the insurer is a corporation or otherwise is not an element of the crime, and, not being made so, it is not necessary to charge and prove that the insurer was a corporation. *State v. Steinkraus*, 244 Mo. 152. In this case the information avers that the different companies named therein were corporations, and it is shown by the evidence that the companies named in the information were engaged in insuring property; their names indicate such to be their business, that they insured the property of the defendant, that he recognized their identity and existence by claiming indemnity under the policies issued by them and in trying to settle with their authorized adjuster. This establishes their *de facto* existence as such insurance companies, which is sufficient. *Bloom v. State*, 95 Neb. 710.

It is further contended that, "stripped of technicalities," the evidence falls short of showing the guilt of the defendant. The evidence shows that the defendant at the time of the fire had his building and the contents insured in the

companies named in the information for about $15,250 and, while the same may not have been over-insured, it was, to say the least, well covered by insurance. The building was a three-story building with basement, with a restaurant in part of the basement, the first floor was used as an office and as living rooms for the defendant and his wife, the second and third stories were used as a hotel and rooming house. The hotel was closed as a hotel and rooming house about the 26th day of May, 1925. After closing his hotel to roomers the defendant continued to operate the restaurant in the basement. On the night of the fire he closed his restaurant between 9 and 10 o'clock, and after closing the restaurant and his hotel he retired. He was the only person, so far as the evidence shows, in the building that night. At about 3 o'clock the morning of June 1, a patrolman near the building and a man and his wife standing upon a crossing about 50 feet away heard an explosion in the basement of the building and saw smoke issuing therefrom. The man went to the door of the hotel, pounded on the door, and finally succeeeded in getting the defendant to the door. At that time he was dressed in his underclothing, and, when told that the hotel was on fire, made no comment. In the meantime the patrolman had turned in the fire alarm and in a few minutes the fire company was there. An immediate investigation disclosed that the fire covered a space about 15 feet square, a mattress leaning up against the stairway leading from the basement to the first floor was on fire and seemed to be in about the center of the fire. A gas meter had apparently been pulled from its connection and was lying upon the floor with gas escaping from the broken connection and with fire burning about the same. Along the side of the stairway opening on the first floor, on a shelf directly under the stairway leading to the second floor, was a large open roasting pan, said to contain about four gallons of kerosene, with paper wrapped around the handles and with stringers running therefrom into the contents of the pan. The place where the pan was found was about two feet above the broken gas connection. While

one of the firemen was carrying the pan and its contents from the place where it was found for the purpose of keeping it as evidence, the pan was kicked loose from one of his hands and one end dropped down and the contents were spilled on the floor. The defendant was about three feet from the pan at the time it was kicked, and the fair inference is that he kicked the pan for the purpose of spilling its contents and destroying same as evidence against him. As soon as the pan had been kicked out of the fireman's hands, the defendant grabbed a mop and wiped up the contents. It appears that the rags in the mop after being so used had the odor of kerosene. Several witnesses for the state testify that they were able to tell the contents of the pan by the odor and that same was kerosene. The defendant testifying in his own behalf admits that the pan belonged to him, that he placed it where it was found, but denies that he put kerosene in it or the paper around it, and says that he does not know whether the pan contained kerosene or not. He admits putting the mattress in the basement where it was found on fire. A chemist called as a witness in behalf of defendant testified that in his opinion, under the circumstances existing at the time of the fire, it would be impossible to distinguish the odor of kerosene from the other odors, and if the pan contained water that the escaping gas would impregnate it so that it would be impossible for a person to tell by the odor that it contained kerosene. As to whether the pan contained kerosene or not was a question for the jury. The evidence, while circumstantial, as it must necessarily be in this class of cases, is nevertheless convincing as to the truth of the charge.

The defendant had a fair and impartial trial, the evidence is sufficient to sustain the verdict, and the judgment of conviction should be affirmed and the same is hereby

AFFIRMED.

O. O. THOMAS, APPELLEE, V. WILL J. SCOUTT ET AL., APPELLANTS.

FILED JULY 26, 1927. No. 24069.

1. **Corporations:** CAPITAL STOCK: LIABILITY FOR SUBSCRIPTIONS. Liability for unpaid subscriptions for capital stock of a corporation is based on the subscriber's contract, of which the provision of the Constitution relating to that subject is an integral part.
2. ———: ———: ———. Where an original subscriber for shares of capital stock in a corporation pays therefor in full, neither he nor subsequent holders of the same shares through mesne transfers are liable to subsequent judgment creditors of the corporation for unpaid subscriptions.
3. ———: ———: SUBSCRIPTIONS: SUIT TO ENFORCE: BURDEN OF PROOF. In a suit by a judgment creditor of a corporation to enforce the liabilty of stockholders on account of unpaid subscriptions, the burden is on plaintiff to prove by a preponderance of the evidence that the whole or some part of the amount subscribed remains unpaid.
4. ———: ———: ———: ———: ———. In a suit by a judgment creditor of a corporation to recover from stockholders the amounts due from them for unpaid subscriptions on the ground that property fraudulently overvalued was exchanged for capital stock, proof of excessive values at the time of the exchange is essential to a recovery.
5. ———: ———: PAYMENT IN PROPERTY. The constitutional provisions relating to liability for unpaid subscriptions to capital stock of a corporation do not forbid payment in property instead of money.
6. ———: ———: ———. In the exercise of good faith and in the absence of any intention to defraud a corporation or its creditors, property needed for corporate purposes may be sold and received for capital stock.
7. **Constitutional Law:** JUDICIAL INTERPRETATIONS. The supreme court's interpretation of a constitutional provision is a part of the Constitution itself and is binding on suitors seeking the enforcement of liabilities created by that instrument.
8. **Corporations:** CREDIT. Corporate records showing payment for capital stock in property are available to a prospective creditor and he may make disclosure a condition of extending credit to the corporation.
9. **Evidence:** VALUE OF PERSONALTY. As a general rule the owner

of personal property is a competent witness to testify to its value.

10. Corporations:. FRAUD: SUFFICIENCY OF EVIDENCE. Evidence discussed in the opinion *held* insufficient to show actionable fraud or overvaluation in the exchange of property for capital stock of a corporation.
11. Appeal: AMENDMENT OF PLEADING. In the supreme court a motion by plaintiff to amend his petition to conform to the proofs is unavailing, where the evidence is insufficient to support a judgment in his favor.
12. Corporations: STOCKHOLDERS: LIABILITY: NOTICE OF INDEBTEDNESS. The statutory liability of stockholders for failure of the corporation to publish annual notice of its debts is penal in its nature and should not be enlarged by construction or enforced by presumption of facts not proved.
13. ———: NOTICE OF INDEBTEDNESS: PRESUMPTION. It will be presumed that officers of a corporation performed their statutory duty to publish annual notice of corporate debts in absence of evidence to the contrary.
14. ———: ———: FAILURE TO PUBLISH: PROOF. In making a *prima facie* case against stockholders for failure of the corporation to publish annual notice of its debts, it is incumbent on a judgment creditor to prove by a preponderance of evidence the date on which the corporate debt owing to him was created and default in the publication of notice at that time.
15. ———: ———: ———: INSUFFICIENCY OF EVIDENCE. Evidence discussed in the opinion *held* insufficient to show statutory liability of stockholders for failure to publish annual notice of corporate debts.

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

Peterson & Devoe and *Brown & Dibble,* for appellants.

Sterling F. Mutts and *Edward C. Fisher, contra.*

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

ROSE J.

This is a suit in equity to recover from the Western Publishing & Engraving Company, hereinafter called the "corporation," and its stockholders, the amount due on a judgment against it for $3,018.63. O. O. Thomas is plaintiff.

In a former action at law in the district court for Lancaster county, he recovered a judgment against the corporation November 28, 1922, on a promissory note for $2,600, dated March 31, 1921. The note was executed by the corporation, was payable to L. A. Berge, was transferred by him to the Farmers & Merchants Bank of Walton and by the latter to plaintiff. It was for the unpaid debt evidenced by this note that the judgment for $3,018.63 was entered in the former action at law. Execution thereon was issued and returned unsatisfied. The defendants in the present suit in equity are the corporation and its stockholders. The grounds of equitable relief pleaded by plaintiff are failure of the stockholders to pay their subscriptions for capital stock and noncompliance with the statute requiring published notice of corporate debts. The facts pleaded by plaintiff to charge the stockholders with liability for the debt of the corporation were put in issue by answers to the petition in equity. Upon a trial of the cause the district court in determining the liability of stockholders for unpaid subscriptions found the issues in favor of plaintiff and rendered a decree in his favor for $3,194.40, the amount of his former judgment against the corporation with interest, less a partial payment. The cause was presented to the supreme court by an appeal of stockholders.

A motion by appellee to dismiss the appeal for want of necessary parties in the appellate court was overruled and will not be reconsidered.

The first question for trial *de novo* is: Are the stockholders or any of them liable for unpaid subscriptions to the capital stock of the corporation? Liability for an unpaid subscription is based on the subscriber's contract, of which the following constitutional provision is by construction an integral part:

"In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscrip-

tion, and the liability for the unpaid subscription shall follow the stock." Const., art. XII, sec. 4.

The corporation was in existence long before the debt in controversy was incurred. The publication of a history of Nebraska was an undertaking performed at least in part by the corporation. Daniel Webster Clendenan formerly owned the stock and in a corporate capacity published historical works, using data and writings of his own and also of others. In the midst of this work he died. At the time of his death his corporate holdings were represented by the capital stock of the Western Publishing & Engraving Company in the form of shares aggregating $20,400. These passed to his wife, Ida N. Clendenan, who later became the wife of James H. Scoutt. Afterward, January 9, 1918, amended articles of incorporation were regularly adopted. Under the new organization the capital stock was increased to $100,000. For this entire issue Ida N. Scoutt subscribed, exchanging her old stock, $20,400, for the same amount of the new, both at par, and for the other shares aggregating $79,600, transferring for the latter to the corporation in lieu of money historical manuscripts and other property desired by the directors and executive officers for the purposes of the publishing enterprise then in contemplation. In connnection with the transactions indicated she reassigned to the corporation gratuitously, as treasury stock, new shares amounting to $15,000 for the purpose of creating, when resold, a working fund for the transaction of corporate business. Within the meaning of the constitutional provision relating to individual liability for unpaid subscriptions she was the "original" subscriber for the entire new issue of stock. She was the principal defendant herein. The other stockholders, sued as defendants, acquired their stock by mesne transfers from Ida N. Scoutt, some through sheriff's sales of her shares and others by purchase. It follows, therefore, if, as the original suscriber, she paid for all the new stock, within the meaning of the constitutional provision, neither she nor her mesne transferees are liable for unpaid subscriptions.

In the situation outlined plaintiff takes the position that the property exchanged for the corporate stock was overvalued to such an extent as to show bad faith and reckless disregard of values amounting to fraud upon creditors. Plaintiff did not plead fraud, but asserted by motion in the supreme court the right to amend his pleadings to conform to proofs that the property exchanged for the stock was fraudulently overvalued. The right of amendment in the appellate court does not exist unless fraud was shown by a preponderance of the evidence. The motion to amend, like the resort of plaintiff to unpaid subscriptions for payment of his judgment, required evidence of the fraudulent overvaluation of the property exchanged for stock. On both issues the burden of proof was on plaintiff. The decision depends on what is disclosed by the evidence.

The transactions under consideration import on their face formality, honesty and fair dealing on the part of the executive officers of the corporation and the stockholders. The exchange prices were fixed at a time when inflation exaggerated values. Fraud in stipulated prices is not necessarily shown by the economic mirage thus created nor by subsequent events. What was originally in the minds of the contracting parties should not be determined by estimates of values and conditions at the time of the trial years later after a destructive fall in prices followed deflation. The test of overvaluation and fraud in the present instance properly relates to conditions in 1918, when the new stock was issued. The property exchanged for stock in lieu of money consisted of data, manuscripts and other materials essential to the identical purposes for which the publishing enterprise was reincorporated.

The Constitution does not require payment for stock in money as a condition of immunity from liability for unpaid subscriptions. In the exercise of good faith and in the absence of any intention to defraud the corporation or its creditors, property needed for corporate purposes may be sold and received for shares of capital stock. This is the rule adopted in Nebraska in construing and applying the

constitutional provision creating liability for unpaid subscriptions. *Troup v. Horbach,* 53 Neb. 795; *Penfield v. Dawson Town & Gas Co.,* 57 Neb. 231. This view is sustained by authority, though some courts take the view that payments in property for shares of capital stock require values equivalent to money. The interpretation of the supreme court is part of the Constitution itself and is binding on litigants seeking the enforcement of liabilities created by that instrument. Corporate records showing payment for stock in property instead of money are available to a prospective creditor and he may make disclosure a condition of extending credit to the corporation.

There is no proof that the old issue for $20,400, when exchanged for new stock and surrendered to the corporation, was not worth face value. Most of the shares comprising the item of $15,000 returned as treasury stock were resold at par. Ida N. Scoutt said she had an experience of 17 years in the identical work for which her property was sold to and accepted by the corporation. As owner of the property exchanged for stock to the extent of $79,600, she testified to items and values as follows: Contracts for the purchase of books, $33,000; capital stock of the old corporation, $24,400; plates for historical publications, $35,000; manuscripts, $25,000. She testified also that all items of property sold by her to the corporation exceeded in value the purchase price of the stock—$79,600. There was testimony of a similar import by another witness. Evidence of this character was not disproved. There is, however, testimony of an appraiser formerly appointed by the county court of Lancaster county that the interest of Daniel Webster Clendenan in the old stock owned by him at the time of his death had no value. This appraisement related alone to decedent's interest which then, in the opinion of the appraisers, amounted to nothing, owing to existing incumbrances for debts. It does not contradict or weaken testimony refuting the charge of overvaluation.

When the times, circumstances and conditions are considered, plaintiff did not prove overvaluation. In logic and

reason inferences of excessive prices amounting to fraud or bad faith cannot be drawn from the evidential facts. After Ida N. Scoutt offered her property to the corporation for $79,600 in stock, the board of directors appointed a committee of three to investigate and report values. The resulting report fixed at $79,600 the value of the "manuscripts and rights" offered for sale and recommended the acceptance of the offer. The transactions implied mutual faith in the success of the corporation with stipulated values in mind. Realization of the sale price of the property in money depended on corporate profits. There was evidence of subsequent rascality in corporate management, but dishonesty or fraud or bad faith was not traced to any stockholder within the jurisdiction of the district court in the present suit. The corporation went to the wall, but, in the light of subsequent events, the unwise sale and acceptance of property for stock, poor judgment and mismanagement did not prove overvaluation or fraud or bad faith in the initial transactions. Amazing profits may result from the exchange of property for stock. Corporate failure may follow cash payments for stock subscriptions. On this phase of the case the conclusion is that plaintiff failed to prove overvaluation or fraud or bad faith in the exchange of property for capital stock. As already stated Ida N. Scoutt was the original subscriber for all the stock of the new corporation. Evidence that she did not pay for it within the meaning of the constitutional provision invoked by plaintiff was not adduced. It follows that he was not entitled to amend in the supreme court his petition to charge fraud. It is equally clear that he was not entitled to recover judgment against any stockholder for an unpaid subscription.

Was the corporation in default of the annual notice of its debts when the debt to plaintiff was created? This is the remaining issue for trial *de novo*. The statute provides:

"Every corporation hereafter created shall give notice annually in some newspaper * * * of the amount of all existing debts of the corporation, * * * and if any corpo-

ration shall fail to do so, after the assets of the corporation are first exhausted, then all the stockholders of the corporation, shall be jointly and severally liable for all debts of the corporation then existing, and for all that shall be contracted before such notice is given, to the extent of the unpaid subscription of any stockholder to the capital stock of such corporation, and in addition thereto the amount of capital stock owned by such individuals." Comp. St. 1922, sec. 470.

Failure to publish the annual notice thus required creates a liability in the form of a penalty. *Singhaus v. Piper*, 103 Neb. 493; *Bourne v. Baer*, 107 Neb. 255. There is a presumption that the proper officers of the corporation performed their duty and published the required notice, unless the contrary is shown by evidence. There is no presumption of neglect in that particular. Plaintiff pleaded failure to comply with the statutory provision. The burden was on him to prove what he charged. In making a *prima facie* case he was required to prove the date on which the corporation incurred the debt evidenced by the unpaid judgment in his favor and to prove also default in the publication of notice at that time. Did he prove when the debt was incurred? The date of the note on which he recovered his judgment for $3,018.63 was March 31, 1921, but the debt was previously created. The evidence so shows. L. A. Berge was the payee named in the note. It was executed by the corporation and delivered to him pursuant to a decree rendered by the district court for Lancaster county in a prior suit involving other notes and debts owing to him by the corporation. In settlement of the controversies in that litigation the note of March 31, 1921, was given under an order of court. Plaintiff asserts that the decree was rendered March 3, 1921, and argues that the debt was then created. The position is untenable. The decree directing the corporation to give the note is in the record and shows on its face a judicial purpose to make it represent a previous indebtedness. The date on which that indebtedness was created is not shown by any evidence.

Plaintiff concedes that notice was given in April, 1920, but he did not prove that the debt due him from the corporation was not incurred during the period covered by that publication, nor that the corporation was in default when the debt was created. He did not, therefore, make a *prima facie* case against any stockholder for the statutory penalty.

The entire cause was presented to the supreme court for trial *de novo* without regard to the findings of the district court. Though the record fails to show that Ida N. Scoutt appealed from the judgment, her rights and immunity were disclosed by other stockholders who did appeal. The judgment against her for unpaid subscriptions is outside of the pleadings and proofs. It would be inequitable under the peculiar circumstances disclosed to allow it to stand, while other stockholders joined with her in the litigation and judgment escaped the liability for which all were sued.

The appeal was twice presented to a division of the supreme court commission with the following results: June 2, 1926, the judgment of the district court was reversed in part and affirmed in part; December 21, 1926, the judgment of the district court was affirmed. Both former decisions on appeal are set aside. The judgment of the district court is reversed in its entirety and the action dismissed at the costs of plaintiff.

REVERSED AND DISMISSED.

MISSOURI PACIFIC RAILROAD CORPORATION, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.

FILED JULY 26, 1927. No. 24463.

State Railway Commission: FINDINGS: REVIEW. Ordinarily, this court will not interfere with findings of fact of the state railway commission when it has jurisdiction and there is sufficient evidence before it to sustain its findings.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

J. A. C. Kennedy and *Charles F. McLaughlin*, for appellant.

O. S. Spillman, Attorney General, and *Hugh La Master, contra.*

Brogan, Ellick & Raymond, for interveners.

Trenmore Cone, amicus curiæ.

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

DEAN, J.

This is a proceeding which had its beginning in the Nebraska state railway commission wherein the Missouri Pacific Railroad Corporation in Nebraska made an application to the commission as to whether a certain order complained of should be upheld or rescinded requiring the corporation to open its team tracks to the use of other companies on its belt line in Omaha. E. P. Boyer Lumber & Coal Company and 14 wholesale business concerns and corporations doing business in Omaha severally joined the plaintiff railroad company in a petition of intervention. From an adverse ruling by the commission, the railroad corporation has appealed.

In this action the corporation states the issues in its brief, from its viewpoint, in this language:

"The question involved in this appeal is whether or not the order of the Nebraska state railway commission requiring the Missouri Pacific Railroad Corporation in Nebraska to open its team tracks on what is known as the 'Belt Line' in the city of Omaha to the public should be upheld, or, in other words, whether the order of the Nebraska state railway commission should be sustained whereby the Missouri Pacific Railroad Corporation in Nebraska is required to switch cars that have arrived in Omaha in the course of intrastate railroad transportation upon a railroad other than the Missouri Pacific to a team track owned by the Missouri Pacific Railroad Corporation in Nebraska, for a switching charge."

The argument on which the corporation relies for a reversal of the order is that the railway commission should have sustained a certain order of May 2, 1923, wherein the commission held that team tracks of the corporation are for its sole use and that switching service from and to such tracks should not be performed for connecting carriers. And this, it is argued, is on the ground that the team tracks of the corporation are its private property, and, besides, it is argued that it is the uniform custom of carriers to use team tracks for handling the business of their own lines exclusively. It is further argued that to compel the railroad company to place upon its team tracks cars arriving in Omaha on foreign lines, and upon which cars the Missouri Pacific has not had the line haul, is a discrimination in favor of other common carriers. And it is also contended that to compel the railroad company to allow foreign line cars to be placed on its team tracks would result in congestion upon its belt line and impair its ability to properly handle its own business on the belt line. And, besides, the argument continues, there is no provision in the charter of the belt line company which requires the opening of the team tracks to the public or to switch cars from other roads to its team tracks for a switching charge. It is also urged that public interest is not concerned in the application for the revocation of the order of the railway commission of May 2, 1923, nor is there any demand by the public for such revocation.

On the part of the railway commission, and Trenmore Cone, intervener and *amicus curiæ*, the argument in substance is that on May 2, 1923, the railway commission approved an application filed by the corporation to publish the following item in its freight tariff, namely:

"Team tracks of the Missouri Pacific Railroad Corporation in Nebraska are for its sole use, and switching service from or to such tracks will not be performed for connecting railroads."

The order also contained the following condition:

"It should be understood that this conclusion is with-

out prejudice to any cause of action which may hereafter arise concerning the reasonableness of this or any similar tariff ruling."

But on September 27, 1923, the railway commission entered the following order:

"Whereas, on the second day of May, 1923, this commission issued an order, effective upon thirty days' notice, authorizing the Missouri Pacific Railroad Corporation in Nebraska to publish a new and additional item in its freight tariff, Nebraska No. 7, said item reading as follows:

" 'Team tracks of the Missouri Pacific Railroad Corporation in Nebraska are for its sole use, and switching service from or to such tracks will not be performed for connecting railroads;' and

"Whereas, order of approval was issued upon *ex parte* showing of said Missouri Pacific Railroad Corporation in Nebraska and upon condition that it was without prejudice to any cause of action which might arise concerning the unreasonableness of this or any similar tariff ruling; and

"Whereas, complaint has been lodged with this commission as to the unreasonableness of said rule, and it appearing to the commission that good and sufficient cause exists for further investigation into the propriety and reasonableness of said rule:

"Therefore, be it resolved, that the said Missouri Pacific Railroad Corporation in Nebraska be, and it hereby is, ordered to appear in the office of the commission at Lincoln, Nebraska, at 10 o'clock a. m., on the 23d day of October, 1923, to show cause why such order should not be revoked or modified, and that due notice of such hearing be given to all interested parties."

The corporation argues that the belt line congestion is so great that its facilities are not sufficient to properly perform the required services. From this it appears that it was its duty to enlarge the facilities. Complaint is made that the switching rates are not compensatory, but the commission points out that no application was made for an order to fix compensatory rates. And the commission

directs our attention to the fact that the corporation's predecessor operated the belt line for about 40 years without a complaint. This, of course, is not of itself conclusive. But the commission explicitly held that there is not sufficient ground to support the plea of inadequacy of compensation. The argument is that the legislature is the body to whom application should be made for such relief, if any, as the corporation may be entitled to in the premises.

We think the question before us turns on the question of the power of the railway commission, and it appears to us that the railway commission acted within its powers and that the remedy of the railway corporation lies with the legislature.

It may be observed that a dealer had 50 cars of sand and gravel for delivery at one of the corporation's team tracks in Omaha, and he testified that he was informed that the corporation had some "new rules" in effect that very day and that there would be no more team track deliveries unless the dealer would pay the new switching charge of $6.30 a car. This, he testified, was a prohibitive rate on this class of shipment. The result was that he lost about thirty customers and retained only four. The "new rules" put this shipper out of business without fault on his part. The same situation prevails in respect of hay, grain, and other shipments.

There is evidence tending to prove that out of 39,781 cars that were "switched" in 1922, only 1,375 of these were from other roads and they were set out at team tracks at the rate of only 4 cars a day. The commission granted a rehearing upon application of the corporation and at this hearing it was shown that during the periods of the heaviest freight movement the largest number of cars handled in August, June, July, and September, each day was, in the average of the respective months, 12½ plus, 5 plus, 7 plus, and 9 plus, and this calculation was based on 26 working days to the month.

In *Grand Trunk R. Co. v. Michigan Railway Commission*, 231 U. S. 457, the court said that the judiciary will only

interfere with a state railway commission when it appears that it has clearly transcended its powers. And in the same case this appears: "Transportation is the business of railroads and when, and to what extent, that business may be regulated so depends upon circumstances that no inflexible rule can be laid down"—citing *Wisconsin R. Co. v. Jacobson*, 179 U. S. 287.

"This court cannot substitute its judgment for that of the interstate commerce commission upon matters of fact within the province of the commission." *Los Angeles Switching Case*, 234 U. S. 294.

Ordinarily, this court will not interfere with findings of fact of the state railway commission when it has jurisdiction and there is sufficient evidence before it to sustain its findings.

Reversible error does not appear in the record. It follows that the findings and order of the state railway commission must be, and they are hereby, approved.

AFFIRMED.

GUSTAVE A. SANDELL ET AL., APPELLEES, V. CITY OF OMAHA, APPELLANT.

FILED JULY 26, 1927. No. 26028.

1. **Municipal Corporations:** CHARTERS. "The purpose of the constitutional provision (section 2, art. XI) is to render cities independent of state legislation as to all subjects which are of strictly municipal concern; therefore as to such matters general laws applicable to cities yield to the charter." *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51.
2. ———: ———: AMENDMENT: PUBLICATION. Publication March 7, April 21, and May 5, of the full text of a proposed municipal home rule charter amendment to be voted on by the qualified electors at a general election to be held May 6 is a substantial compliance with section 4, art. XI of the Constitution, relating to that subject.

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

Dana B. Van Dusen, John F. Moriarty and *Thomas J. O'Brien,* for appellant.

Hasselquist & Chew, contra.

H. M. Baldridge and *L. J. Te Poel, amici curiæ.*

Heard before ROSE, DEAN, DAY, GOOD, THOMPSON and EBERLY, JJ., and L. S. HASTINGS, District Judge.

DEAN, J.

The city of Omaha has a population of more than 200,000 inhabitants and is governed by a home rule charter pursuant to the provisions of article XI of the Nebraska Constitution.

Gustave A. Sandell and 87 others joined as plaintiffs in this suit in the district court for Douglas county to enjoin the city of Omaha, and Otto Bauman as city treasurer, from collecting or attempting to collect certain taxes which were levied and assessed by the mayor and city council "upon their property and upon the property of all others similarly situated" for the cost of "paving and curbing Lincoln boulevard, between Dodge street and Burt street, and Turner boulevard, between Dodge street and Farnam street," adjoining certain city real estate which is individually and severally owned by plaintiffs. The contention is that the levy is unconstitutional. A judgment was rendered in favor of plaintiffs. The city has appealed.

In their petition, plaintiffs pleaded the following:

"Plaintiffs aver that the acts and proceedings of defendant are void, unlawful, unenforceable, the confiscation of plaintiffs' property, the taking of plaintiffs' property without due process of law and * * * without just compensation, in violation of the Constitution of the state of Nebraska and of the United States of America, and the assessment of taxes disproportionate to benefits, *ultra vires,* and without authority of law, and especially as follows: (a) That the defendant, the city of Omaha, pursuant to an ordinance No. 12,041, which was presented to the city council on February 13, 1924, and passed by that body on March

4, 1924, attempted to amend the charter of the city of Omaha as provided and set forth in said ordinance No. 12,041. * * * In this connection plaintiffs aver that defendant, the city of Omaha, pursuant to ordinance No. 11,310, at an election held July 18, 1922, and pursuant to authority granted by the Constitution of the state of Nebraska, the city of Omaha adopted the charter of the city of Omaha as a home rule charter of such city and thereafter, and on the date above referred to, attempted to amend said city charter. Plaintiffs aver that it is provided by the Constitution of the state of Nebraska, being section 5 of art. XI: 'The charter of any city having a population of more than one hundred thousand inhabitants may be adopted as the home rule charter of such city by a majority vote of the qualified electors of such city voting upon the question, and when so adopted may thereafter be changed or amended as provided in section 4 of this article, subject to the Constitution and laws of the state.' "

Section 4 of the article above referred to provides: "The city clerk of said city shall publish with his official certification, for three times, a week apart in the official paper of said city, if there be one, and if there be no official paper, then in at least one newspaper published and in general circulation in said city, the full text of any charter or charter amendment to be voted on at any general or special election."

The record shows that the charter amendment was not published "three times, a week apart," and from this fact plaintiffs argue that the amendment and, of course, the assessment of taxes made thereunder are void. It is, however, agreed that "the full text" of the proposed charter amendment was published in the official newspaper, the Omaha Evening Bee, "on March 7, 1924, April 21, 1924, and May 5, 1924, and at no other time."

State v. Winnett, 78 Neb. 379, is an original proceeding in *quo warranto* wherein the state challenged the right of the respondent claimants, under an amendment to the Constitution, to hold the office of state railway commissioners,

an office which was subsequently held by this court to have been created by the adoption of a duly submitted constitutional amendment by the votes of the required number of electors. In the *Winnett* case, section 1, art. XV of the Constitution (now art. XVI) is cited, which, so far as applicable here, provides:

"Either branch of the legislature may propose amendments to this Constitution, and if the same be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and published once each week in at least one newspaper in each county, where a newspaper is published, for three months immediately preceding the next election of senators and representatives."

The *Winnett* case points out that "the proposed amendment was not 'published once each week in at least one newspaper in each county where a newspaper is published, for three months immediately preceding' the election at which it was submitted to the voters as required by section 1, art. XV (now art. XVI), of the Constitution." It appears that the parties in that case had entered into a stipulation of facts, and the court, continuing, said:

"The facts above quoted from the stipulation show that there has not been a literal compliance with this clause of the Constitution. The election was held on the 6th day of November. The three months named in the Constitution are three calendar months and would include the period of time commencing with the beginning of the 6th day of August (*McGinn v. State*, 46 Neb. 427), and to comply literally with this provision the first publication must be before that day. There was but one paper published in Logan county, and it appears that the proposed amendment was not published in that county until August 9, four days later than the limit prescribed by the Constitution. This is the most serious irregularity disclosed in the matter of the publication. It is therefore unnecessary to discuss other irregularities because, unless this failure in Logan county to comply with the letter of the Constitu-

tion requires us to conclude that the amendment is invalid, the other specified irregularities, which are of a less serious nature, are not sufficient to require such conclusion."

It may be observed that in the *Winnett* case several instances are pointed out wherein the proposed amendment was not published in some of the newspapers as the Constitution required. Nevertheless, we there held, as above noted, that the publication was a substantial compliance with the constitutional requirement.

Counsel for the defendant city also cite and rely on the rule announced in *Baker v. Moorhead*, 103 Neb. 811, wherein we held that a construction of a provision of the Constitution which would make difficult or impossible any fair and just method of revising the Constitution will not be adopted by the courts. And in *People v. Sours*, 31 Colo. 369, in respect of an attack upon a Constitutional amendment, the court held that, where an amendment to such Constitution is attacked after its ratification by the people, every reasonable presumption, both of law and fact, is to be indulged in favor of its validity. And Judge Dillon said: "Provisions of the freeholders' charter which are purely municipal in their character supersede provisions of the general laws which are inconsistent therewith." 1 Dillon, Municipal Corporations (5th ed.) sec. 63, p. 116. On principle the same rule applies here that is pointed out in the *Moorhead* and the *Sours* cases, above cited, and in the cases following.

The case entitled *Constitutional Prohibitory Amendment*, 24 Kan. 700, is relied on by the city. This is one of the leading cases on the subject now before us. The opinion was written by Judge Brewer, afterward a justice of the United States supreme court. The case involved the validity of a proposed amendment to the state Constitution of Kansas. In respect of certain alleged irregularities in the matter of the adoption of constitutional amendments, the learned judge observed: "Those omissions and errors which work no wrong to substantial rights are to be disregarded. * * * The central idea

of Kansas law, as of Kansas history, is that substance of right is grander and more potent than methods and forms. The two important, vital elements in any constitutional amendment are the assent of two-thirds of the legislature, and a majority of the popular vote. Beyond these, other provisions are mere machinery and forms. They may not be disregarded, because, by them, certainty as to the essentials is secured. But they are not themselves the essentials. Take a strong illustration: The Constitution requires that the 'secretary of state shall cause the same to be published in at least one newspaper in each county of the state where a newspaper is published, for three months preceding,' etc. Suppose a unanimous vote of both houses of the legislature, and a unanimous vote of the people in favor of a constitutional amendment, but that the secretary had omitted to publish in one county in which a newspaper was published, would it not be simply an insult to common sense to hold that thereby the will of the legislature and people had been defeated? Is it within the power of the secretary, either through ignorance or design, to thwart the popular decision? Is he given a veto, or can he create one? This may be an extreme case, but it only illustrates the principle. The records of the proceedings of the two houses are made, not by the houses themselves, but by clerical officers. True, they are under the control of the respective houses, but in fact the records are made by clerks. May they defeat the legislative will? The Constitution does not make amendments dependent upon their approval or their action. To insure certainty and guard against mistake, journal evidence of the amendment and votes is prescribed, but this is mere matter of evidence, and not the substantial condition of constitutional change."

Counsel for plaintiffs contend that under section 3, art. III of the city charter, the council has jurisdiction to pave all streets "except boulevards." But, in one of the briefs for the defendant city, its author points out that section 3 was lawfully amended by substituting the words,

"including improvements upon boulevards," for the words, "except boulevards," and that this amendment and "three other proposed amendments to the city charter (were submitted), all of which received the necessary vote," and all were adopted by the electors.

In *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51, in an opinion by Redick, D. J., this timely observation is made, in respect of the power of a city council to adopt a home rule charter for the government of the city: "The purpose of the constitutional provision is to render cities independent of state legislation as to all subjects which are of strictly municipal concern; therefore, as to such matters general laws applicable to cities yield to the charter." And in the body of the opinion this is said: "We hold that the city may by its charter under the Constitution provide for the exercise by the council of every power connected with the proper and efficient government of the municipality, including those powers so connected, which might lawfully be delegated to it by the legislature, without waiting for such delegation. It may provide for the exercise of power on subjects, connected with municipal concerns, which are also proper for state legislation, but upon which the state has not spoken, *until* it speaks. *City of Spokane v. Spokane & I. E. R. Co.,* 75 Wash. 651. Its position in this regard being analogous to that of the state with reference to matters of national cognizance, *e. g.,* regulation of commerce." And in the same case, this is said: "It is not easy in all cases to distinguish between municipal powers and state powers. * * * We must therefore content ourselves with the consideration of each case as it arises, applying those principles which precedent and logic approve."

It may be noted that the above *Consumers Coal Company* case exhaustively discussed the subject under consideration here and cites from the Constitution, and many leading authorities, in respect of the powers conferred by the fundamental law upon the people of a municipality for self-government.

The trend of judicial pronouncement appears to sanction an enlargement of the powers of the municipality for self-government, within constitutional limits, rather than a curtailment of such powers. And this on the broad and reasonable assumption that the city, in the formation of its charter, knows better than the legislature how to anticipate and to enact needful city ordinances. The following cases fairly appear to support the rule announced in the *Winnett* and *Consumers Coal Company* cases and we adhere to the rule so announced. *Standard Oil Co. v. City of Lincoln,* 114 Neb. 243, and cases there cited at pages 249, 250, and 252; *Mitchell v. Carter,* 31 Okla. 592; *City of St. Louis v. Gleason,* 15 Mo. App. 25; *Meier v. City of St. Louis,* 180 Mo. 391; *State v. Telephone Co.,* 189 Mo. 83; *State v. O'Connor,* 81 Minn. 79.

There is some contention between the parties in respect of the condition of the boulevards before the new paving was laid. On the part of the defendant city the argument, and a preponderance of the evidence, discloses that the streets were then bumpy, and that, in the language of some of the witnesses, the surface "feathered out" and cracked in the vicinity of the gutters, and that the boulevards had been so frequently repaired that in many places the concrete might be from 8 to 12 inches in thickness and yet be very thin and ready to break through in the immediate vicinity.

Other questions are raised and discusssed at some length, but, upon a review of the facts and the law applicable thereto, it clearly appears to us that both the amendment and the assessment of the taxes complained of constituted a valid exercise of councilmanic power, and they do not therefore offend against the fundamental law. The weight of the evidence clearly appears to support this view.

Publication March 7, April 21, and May 5, of the full text of a proposed municipal home rule charter amendment to be voted on by the qualified electors at a general election to be held May 6 is a substantial compliance with

section 4, art. XI of the Constitution, relating to that subject.

The judgment of the district court is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED.

JOSEPH PICKUS, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

FILED JULY 26, 1927. No. 25331.

1. States: DISALLOWANCE OF CLAIMS: APPEAL. Where it is sought to review the decision of the auditor and secretary of state, in the allowance or disallowance of a claim against the state, the aggrieved party must appeal from such decision to the district court in the manner provided by section 6218, Comp. St. 1922.
2. ———: ———: ———. In such case, to confer jurisdiction on the district court, a certified transcript of the proceedings had before the auditor and secretary of state must be filed in such district court within the time prescribed by section 6218, Comp. St. 1922, and in the manner provided by sections regulating appeals from county courts to district courts.

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

Burkett, Wilson, Brown & Wilson, for appellant.

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

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

DAY, J.

The plaintiff, appellant herein, brought this action in the district court for Lancaster county against the state of Nebraska to recover $3,824.39 with interest, on a claim arising, as alleged in the petition, "out of a contract in writing" between the plaintiff and the defendant. At the conclusion of the testimony the trial court instructed the jury to return a verdict for the defendant, which was

done, and thereupon judgment was rendered dismissing plaintiff's cause of action. Plaintiff appeals.

It appears that the defendant, through its department of public works, advertised for bids for the construction of two cement bridges in Boyd county, Nebraska, and referred to as numbers 1 and 2, federal aid project, 110 A. Plans and specifications for the bridges were on file in the department of public works for inspection and examination by persons interested in bidding on the proposed improvement. On the date the bids were to be received, an officer in charge of the department made an announcement to the prospective bidders that there was local gravel in the vicinity where the work was to be done suitable for use in the construction of the bridges. The plaintiff bid upon the work on a blank form furnished by the department, but incorporated therein a clause in writing, as follows: "This bid is based on information given that local gravel of good quality will be used." Plaintiff's bid was accepted by the department. Work was begun by the plaintiff upon the project, and after expending a considerable sum in preliminary work plaintiff hauled a large quantity of local gravel for use in the construction of the bridges. This gravel was rejected by the project engineer in charge of the work for the state because it failed to comply with the specifications. After considerable controversy the plaintiff, not desiring to abandon his contract, shipped gravel from Columbus and Fremont, Nebraska; these being the nearest points at which suitable gravel could be obtained to meet the requirements of the project engineer. The excess cost between the gravel thus obtained, including freight, and local gravel sought to be used by plaintiff was $3,824.39, for which amount, with interest, the plaintiff seeks to recover in this action.

The bridges were completed by plaintiff, accepted by the state, and the price of construction named in the contract paid. Thereafter on November 15, 1923, the plaintiff filed a claim with the auditor of the state of Nebraska for the amount and items of account set out in the present cause

of action. The claim was disallowed by the auditor on the ground that it had not been approved by the department of public works and finance, and plaintiff was so notified on November 16, 1923. An appeal was taken from this action by filing the petition in the present case on November 21, 1923. Attached to the petition and made a part thereof is what purports to be a copy of the proceedings before the auditor. The proceedings do not appear to be certified by the auditor or any one else. In fact, the purported copy of the claim, attached to the petition, does not bear the signature of the claimant or any one else, and is not verified.

So far as the record discloses, no certified transcript was filed in the district court of the proceedings before the auditor.

At the outset the state contends that the district court had no jurisdiction to hear and determine the merits of plaintiff's claim because no certified transcript of the proceedings before the auditor was ever filed in the district court. It is argued by the state that the order of the auditor and secretary of state, in allowing or disallowing a claim, can be reviewed only by an appeal from such order, and that the appeal must be taken in the manner prescribed by statute. The Constitution of 1875, article VI, sec. 22, now carried as article V, sec. 22, reads as follows: "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought." The Constitution of 1875, article IX, sec. 9, now carried as article VIII, sec. 9, also provides: "The legislature shall provide by law that all claims upon the treasury, shall be examined and adjusted by the auditor and approved by the secretary of state, before any warrant for the amount allowed shall be drawn: Provided, that a party aggrieved by the decision of the auditor and secretary of state may appeal to the district court."

The legislature of 1877, apparently having these provisions of the Constitution in mind, passed two separate acts which, with slight amendments, are found in our

statutes today. One of the acts is entitled "An act to provide in what courts the state may sue and be sued." This act comprises 17 sections, and was approved February 14, 1877. The act as originally passed is found on page 19 *et seq.*, Laws 1877, and with some slight modifications is now carried as sections 1100 to 1114, inclusive, Comp. St. 1922. It is unecessary to set out the general features embodied in these several sections. Section 1 of the act, being section 1100, Comp. St. 1922, provides, in substance, that the several district courts of the state, as now existing, and such as may hereafter be established, shall have jurisdiction to determine the following matters: (1) "All claims against the state filed therein, which have previously been presented to the auditor of public accounts, and have been in whole or in part rejected or disallowed." (2) "All claims or petitions for relief that may be presented to the legislature, and which may be by any law, or by any rule or resolution of the legislature, or either house thereof, referred to either of said courts for adjudication." (3) "Of all set-offs, counterclaims, claims for damages, liquidated or unliquidated, on the part of the state, against any person making a claim against the state, or against the person in whose favor such claim arose."

Section 6 of the act, being section 1105, Comp. St. 1922, provides, in part: "The state may be sued in the district court of the county where the capitol is situate, in any matter founded upon or growing out of a contract, expressed or implied, originally authorized or subsequently ratified by the legislature, or founded upon any law of the state."

The other act passed by the legislature of 1877 was passed with an emergency clause, approved February 17, 1877. The title to the act was "An act to provide for examination and adjustment of claims upon the state treasury in accordance with the provisions of section nine (9) of article nine (9) of the Constitution." Laws 1877, p. 202.

Section 1 of the act, now section 6217, Comp St. 1922, reads as follows: "All claims of whatever nature upon

the treasury of this state, before any warrant shall be drawn for the payment of the same, shall be examined and adjusted by the auditor of public accounts and approved by the secretary of state: Provided, however, no warrant shall be drawn for any claim until an appropriation shall have been made therefor."

Section 2 of the act, now section 6218, Comp. St. 1922, provides: "The auditor of public accounts shall keep a record of all claims presented to him for examination and adjustment and shall therein note the amount of such claims as shall be allowed or disallowed, and in case of the disallowance of all such claims, or any part thereof, the party aggrieved by the decision of the auditor and secretary of state may appeal therefrom to the district court of the county where the capitol is located within twenty days after receiving official notice. Such appeal may be taken in the manner provided by law in relation to appeals from county courts to such district courts, and shall be prosecuted to effect as in such cases: Provided, however, the party taking such appeal shall give bond to the state of Nebraska in the sum of two-hundred dollars, with sufficient surety, to be approved by the clerk of the court to which such appeal may be taken, conditioned to pay all costs which may accrue to the auditor of public accounts by reason of taking such appeal. No other bond shall be required."

It is the contention of the state that an appeal from the disallowance of plaintiff's claim could be made only in the manner prescribed in the foregoing section of the statute.

In *State v. Stout*, 7 Neb. 89, this court considered the two acts of the legislature of 1877, hereinbefore referred to, and outlined the procedure to be taken to perfect appeals in cases similar to the one now before us. In the course of the opinion it is said: "In our discussion of the case thus far, we have proceeded upon the theory that, upon claims which the auditor could adjust and settle, original actions might be brought thereon in case of their

total or partial rejection. And if we look alone to the act of February 14, under which this proceeding was instituted, this theory is doubtless the true one. But we are of the opinion that, by a subsequent act, 'To provide for the adjustment of claims upon the state treasury,' etc., approved February 17, 1877, the right to bring an original action against the state is denied, and that the only mode of procedure by which the court can acquire jurisdiction is by an appeal from the decision of the auditor and secretary of state, whose joint action is now required in the approval of claims." In the syllabus, the rule is stated as follows: "By the act approved February 17, 1877, 'To provide for the adjustment of claims upon the state treasury,' etc., the right to bring an original action against the state is denied, and the only mode by which the courts can acquire jurisdiction in such cases is by appeal, as provided in section 2 of said act." Section 2 above referred to is now section 6218, Comp. St. 1922, and provides in part, in substance, that in case of the disallowance of a claim or any part thereof the aggrieved party may appeal to the district court of the county where the capitol is situated within 20 days after receiving official notice. And, further, such appeal may be taken in the manner provided by law in relation to appeals from county courts to such district courts. One of the jurisdictional steps in taking an appeal from the county court to the district court is the filing of a certified transcript of the county court proceedings in the district court within the time prescribed by law.

The principle announced in *State v. Stout, supra,* was recognized in *State v. Cornell,* 54 Neb. 158, although that was a mandamus action. In *Peterson v. State* 113 Neb. 546, while it does not clearly appear in the opinion that the action was an appeal from the ruling of the auditor and the secretary of state, such was the fact.

As before indicated, so far as the record in the instant case shows, no certified transcript of the proceedings before the auditor and secretary of state was filed in the

district court. The case was not brought by permission of the legislature, or one branch thereof, as was the case in *Commonwealth Power Co. v. State,* 104 Neb. 439, and in *Benda v. State,* 109 Neb. 132.

From what has been said, it seems clear that no proper appeal was taken from the disallowance of the claim by the auditor and secretary of state, and therefore the district court was without jurisdiction to hear and determine the merits of plaintiff's cause of action.

Other questions are argued in appellant's brief, but with the question of jurisdiction determined adversely to appellant, it is unnecessary to discuss them.

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

AFFIRMED.

CITIZENS NATIONAL BANK OF NORFOLK, APPELLEE, V. ERNEST A. SPORN, APPELLANT.

FILED JULY 26, 1927. No. 24794.

1. Contracts: FRAUDULENT REPRESENTATIONS: PROOF. In an action upon a contract, where the defense relied on is that the execution of the contract was induced through fraudulent misrepresentation of fact, defendant, to establish such defense, if it be denied by the plaintiff, must prove that the representations were made; that they were material; that he relied upon them; that they were false; and that he was injured thereby.
2. Appeal: INSTRUCTIONS. Ordinarily, the trial court should, by its instructions to the jury, submit only such issues as are raised by the pleadings and supported by evidence.
3. ———: ———: MATTERS NOT IN ISSUE. Generally, it is error for the trial court, by its instructions, to submit to the jury an issue not raised by the pleadings, if the submission of such issue is likely to prejudice the rights of one of the litigants.

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

Fay H. Pollock and *M. F. Harrington,* for appellant.

Charles H. Stewart, Charles H. Kelsey and *W. P. Cowan, contra.*

Heard before ROSE, DAY, GOOD and THOMPSON, JJ., ELDRED and HASTINGS, District Judges.

GOOD, J.

This is an action upon three promissory notes by the payee against the maker of said notes. For a defense defendant alleged that the notes, of which the ones in controversy are renewals, were obtained and procured from defendant by fraudulent misrepresentations, and that by reason of the facts alleged the notes, of which the ones in controversy are renewals, had been paid, and that there was, therefore, no consideration for the notes on which the action was founded. The trial resulted in a verdict and judgment for plaintiff, and the defendant has appealed.

The record discloses the following pertinent facts: Martin Sporn, a brother of the defendant, was engaged in selling automobiles and in operating a garage in the city of Norfolk. The garage building was owned by the wife of Martin. Martin Sporn was indebted to the plaintiff bank to the full limit which the bank could lawfully lend to one person. Mrs. Sporn was also indebted to the bank in a considerable sum.

In March, 1920, Martin Sporn was in need of $4,500 to pay for a consignment of automobiles. He applied to plaintiff for a loan and was refused because his line of credit with the bank was exhausted. A note for $4,500 was prepared by the plaintiff, which Martin Sporn took to his brother, the defendant, who resided on a farm a few miles distant, and procured his signature thereto. This note he delivered to the plaintiff and it gave him credit for the $4,500, which he checked out and used in his business. Defendant alleged in his answer that, prior to the note being brought to him to sign, he had been interviewed by officers of the bank and told of Martin's needs and requested to sign a note, so that the money might be advanced to Martin; that he was then informed by the officers

of the bank of Martin's indebtedness to the bank, that they knew Martin's indebtedness and knew the extent and value of his property; that he was worth from $40,000 to $45,000; that Mrs. Martin Sporn was not indebted to the bank, and that defendant would incur no risk in signing the note. Defendant alleged that he relied upon these representations and that all of them were false, and this constitutes the fraud charged in the making of the first note. This note was renewed from time to time. The last of such renewals is dated October 15, 1921, and is one of the notes involved in this controversy. At the time of each renewal, with one exception, the interest was paid; whether by Martin Sporn or by defendant is a matter on which the evidence is in conflict. On one occasion, when the note was renewed, the interest was not paid, and a separate note for the interest, amounting to $150.75, was executed by defendant. This is another of the notes in controversy in this action.

In August, 1920, Martin Sporn had entered into an agreement with Stevens and Lynch, whereby he was to exchange his garage and personal property therein for a farm in Antelope county. In order to perfect this deal, he required the sum of $4,541.50 to pay for an automobile which was involved in the exchange transaction. On the 9th of August, 1920, an officer of the plaintiff and Martin Sporn visited the defendant in the country, and defendant was then informed of the proposed exchange by Martin with Stevens and Lynch, and he then executed a note to the bank for $4,541.50. The proceeds of this loan were placed to the credit of and used by Martin Sporn. From time to time partial payments were made upon this note, which was at intervals renewed for the unpaid balance. The last renewal, dated December 19, 1921, being for $2,400, is the third note involved in this action.

Defendant in his answer alleged that, when he was asked to sign this note, the officers of the bank represented to him that in the exchange of properties between Martin Sporn and Stevens and Lynch there would be approxi-

mately $18,000 in cash owing Martin, which would come into the possession of the plaintiff; that if defendant would sign the note for $4,541.50 this note and the previous notes, which he then owed the bank, would be paid and discharged out of the moneys so coming into the possession of plaintiff for Martin Sporn, and that Martin assented to this arrangement. It was further represented at said time that Martin was then worth from $40,000 to $45,000, and that the exchange transaction would be to his benefit and would increase his net worth. Defendant alleged that he believed and relied upon these representations and promises; that they were false; that the officers of the bank at the time did not intend to use the $18,000, or any part thereof, to pay the notes then held by plaintiff against defendant and also the one about to be executed, but intended to apply the money, when so received, to other obligations of Martin Sporn and his wife, which were held by the bank, and that this constitutes a fraud upon the defendant. Defendant further alleged that, in fact, the plaintiff did afterwards receive the sum of $18,000 for Martin Sporn from the exchange of his property to Stevens and Lynch, and that plaintiff did not apply the same in the payment and extinguishment of the notes signed by defendant, but applied the amount to the payment of other obligations held by it against Martin Sporn and his wife; that defendant had no knowledge that the money had been so paid and applied, and that, on the occasion of each renewal of the notes, plaintiff informed him that the deal had not been completed and the money had not been received.

The trial court refused to submit to the jury any defense based upon alleged misrepresentations by plaintiff concerning the amount and value of property owned by Martin Sporn, and the indebtedness of Martin and his wife. The refusal of the court to submit this issue constitutes the basis of a number of defendant's assignments of error.

It is a well-recognized rule that, in an action upon a

contract, where the defense relied on is that the execution of the contract was induced through fraudulent misrepresentations of fact, to establish such defense, the defendant must prove that the representations were made; that they were material; that he relied upon them; that they were false; and that he was injured thereby.

The evidence in this case tends to prove that the representations were made; that they were relied upon, and that they were false; but it does not very clearly appear that they were material, or that the defendant was injured thereby. The record fails to disclose whether Martin Sporn ever agreed to pay the notes or hold defendant harmless by reason of his execution of the notes in controversy, or the ones of which they are renewals. It does not satisfactorily appear that Martin Sporn was insolvent or that he has not reimbursed the defendant or indemnified him against loss. Under the facts as disclosed by the record, we are of the view that the district court properly refused to submit this issue to the jury.

The only defense submitted by the trial court to the jury was whether plaintiff entered into an agreement with defendant, Martin Sporn assenting thereto, that the notes, executed by defendant, should be paid and discharged out of the $18,000, to be received by plaintiff for Martin in the exchange of the latter's property with Stevens and Lynch. The evidence discloses, without dispute, that at least $12,653 of the money did come into the possession of plaintiff, and that it was not applied to the payment of the notes executed by defendant, but was applied to the payment of other obligations held by the plaintiff against Martin Sporn and wife. In submitting this issue to the jury, the court qualified it by informing the jury that such defense would be valid if established by the evidence, provided the defendant did not know, at the time he executed the renewal notes, that the money belonging to Martin Sporn had come into the possession of plaintiff and had been used for other purposes than the payment of the notes executed by defendant; and the court further

instructed the jury that the undisputed evidence showed that plaintiff had received $12,653 of the money belonging to Martin Sporn, and that, if, prior to the execution of the renewal notes, defendant had knowledge thereof and that such money had been applied for other purposes, then defendant had ratified such application of the funds, and he would still be liable upon the notes. The giving of this instruction is assigned as error.

The question of ratification by defendant of plaintiff's use of Martin Sporn's money for the purpose of paying other obligations than those on which the defendant was liable was not presented by the pleadings. Plaintiff, by its denial, put in issue the question of making the agreement to apply the funds to the payment of defendant's notes. Plaintiff did not plead ratification or waiver, nor could it do so when denying the making of the agreement. The trial court submitted to the jury, and gave plaintiff the benefit of, an issue which was not raised by the pleadings. Ordinarily, the trial court should, by its instructions to the jury, submit only such issues as are raised by the pleadings and supported by evidence. And, generally, it is error for the trial court, by its instructions, to submit to the jury an issue not raised by the pleadings, if the submission of such issue is likely to prejudice the rights of one of the litigants.

In this case the submission of this issue tended strongly to prejudice the rights of the defendant. The giving of this instruction constitutes prejudicial error. Under the issues as presented by the pleadings, and where the undisputed evidence shows that plaintiff received upwards of $12,000 of Martin Sporn's money, the only question which should have been submitted to the jury is: Was there an agreement to apply that fund, when received, to the payment of defendant's notes? If such an agreement was established by the evidence, then the notes were, in fact, paid, and there was thereafter no indebtedness owing by defendant to the plaintiff and no consideration for the renewal notes, thereafter given.

Defendant complains because the trial court refused to give instructions Nos. 1, 2, and 3, requested by him. Instructions 1 and 2, so requested, are incorrect statements of the law, because they authorized the jury to make a finding without requiring it to be based upon the evidence. Instruction No. 3, tendered by defendant, is, we think, a correct statement of the law, and it, or one similar to it, should have been given, instead of the instruction herein discussed and found erroneous.

Defendant complains because the trial court failed to instruct the jury that, if plaintiff made the promise to discharge defendant's notes out of the $18,000, to be received for Martin Sporn, and did not intend, at the time the promise was made, to perform it, but intended to apply the money, when received, for other purposes, such promise and intention constituted a fraud upon defendant.

Defendant's contention in this respect is well founded. Such promise, if made with the intention, at the time, that it would not be performed, would constitute fraud and would be a defense to the note then executed. However, we do not consider this error of much consequence. Since the undisputed evidence shows that plaintiff did receive of the money belonging to Martin Sporn the sum of $12,653, under the pleading, if it is established that plaintiff made the promise and agreement to pay and discharge the notes then held by plaintiff against defendant, in consideration of his signing a new note for $4,541.50, and that all of the notes would be paid and satisfied from said fund, then, in fact, all of the notes were paid and discharged when plaintiff received the $12,653, and there would no longer exist any indebtedness from defendant to plaintiff.

Since the court erroneously instructed the jury to the prejudice of the defendant, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

THERESA STAHL, APPELLANT, V. MICHAEL STAHE ET AL., APPELLEES.

FILED JULY 26, 1927. No. 25026.

1. **Husband and Wife:** ANTENUPTIAL CONTRACTS: VALIDITY: BURDEN OF PROOF. "The burden is upon the husband, or his representatives, to show that an antenuptial contract apparently unjust to the wife was fairly procured." *In re Estate of Enyart*, 100 Neb. 337.
2. ———: ———: ———. "In view of the close and confidential relation existing between affianced persons, it is the duty of the prospective husband to make a full and fair disclosure of all material facts relating to the amount, character and value of his property, so that the prospective wife may have sufficient knowledge upon which she may exercise her judgment whether she will enter into such a contract." *In re Estate of Enyart*, 100 Neb. 337.
3. ———: ———: ———: BURDEN OF PROOF. "Where the provision made for the intended wife by an antenuptial contract is grossly disproportionate to the interest in the prospective husband's estate which the intended wife would acquire by operation of law in case a marriage took place, the burden rests upon those claiming the validity of the contract to show that a full and fair disclosure was made to her before she signed it of the extent and value of the property, or that she was aware to all intents and purposes of the nature, character and value of the estate which she was relinquishing if the marriage took place." *In re Estate of Enyart*, 100 Neb. 337.
4. ———: ———: ———. The mere fact that an intended wife, who signs an antenuptial contract, knows in a general way that the husband is reputed to be wealthy and to own a farm of 560 acres, and also other personal property, but without any information or knowledge of the value of the real estate or of the amount and value of the personal property, is not sufficient to meet the requirements of the equitable rule of fair disclosure, or charge the wife with knowledge of the nature and value of his property so as to render an unfair contract binding, especially when such intended wife had been, prior to the making of such contract, continuously a resident of a distant city and state, wholly without knowledge of such farm real estate and such personal property values, and a total stranger to the community and state wherein such property was situated.

5. ———: ———: ———. Under the facts in this case, *held* that the antenuptial contract in question is invalid for the reasons set forth in the opinion.

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

W. L. Kirkpatrick, for appellant.

Sloans, Keenan & Corbitt, contra.

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

EBERLY, J.

This is an action in partition. It is brought by plaintiff as a widow and statutory heir of Christian Stahl, deceased, against the defendants named, who are the children of deceased by his first wife. Judgment in district court for defendants, denying partition, and adjudging plaintiff by terms of antenuptial contract with deceased, dated and entered into May 1, 1902, entitled to receive the sum of $2,000, and no more, and to be barred by virtue of the agreement from any inheritance in or further claim against the estate of the deceased. Plaintiff appeals.

Partition in this state is deemed a proceeding in equity, and the case is here therefore for trial *de novo*. *Oliver v. Lansing*, 50 Neb. 828; *Arthur v. Arthur, ante*, p. 781.

A careful consideration of the pleadings and the evidence convinces us that this case is ruled by the doctrine announced by this court in *In re Estate of Enyart*, 100 Neb. 337. It is our view that the controlling contract in this case, when considered in connection with all the circumstances of its execution, furnishes sufficient data wherewith to test its validity.

Most of the following facts appear as undisputed in the record, at least so far as defendants are concerned: That Christian Stahl was 54 and plaintiff 44 on the day of their marriage, which was the date of signing the contract in suit; that Christian Stahl, then a widower, was

the father of nine children; that plaintiff, a widow, was the mother of four.

That plaintiff had emigrated to this country from Germany when 24 years of age; that she thereafter made her home in "Greater New York" until she came west to marry the deceased in 1902; that two years after her arrival in this country she became the wife of one Keller, and thereafter continued to live in Greater New York; that her then husband was an employee of a brewery, and later a saloonkeeper; the last statement may fairly be said to be conceded by appellees' brief. So far as shown by the record, the only real estate in which the Keller family had any interest was some city lots situated in that part of Greater New York known as Brooklyn. Later Keller died. The plaintiff then supported herself and children by conducting a boarding house. Up to the time of her trip to Omaha in 1902, which resulted in her marriage, there is no evidence of her ever having visited the rural districts of New York state, or indeed of her ever leaving the precincts of the city of her home.

The evidence also discloses that Christian Stahl came to Nebraska from Germany in an early day. He was married and nine children were born in his family. He had accumulated practically all the property in controversy in this action prior to the death of his first wife. After her death he continued to reside on his land in the vicinity of Grafton, Nebraska.

Decedent had relatives in Greater New York who were acquainted with plaintiff, and upon a visit there he was introduced to appellant. These two, in the two or three visits Stahl made to that city, manifested interest in each other, through which visiting and correspondence which took place ripened into an engagement to be married. This occurred in or about January, 1902. During this time it is claimed by the defendants that the separate stations and responsibilities of the then Mrs. Keller and of Christian Stahl were the subject of discussion; that the Nebraska property of the latter was described to the former;

and that particular inquiries were made by Mrs. Keller of Agnes Stahl (the deceased's daughter), who gave her detailed replies, and that none of the answers given were evasive or untruthful. Conceding this, a careful search of the record discloses that the following was substantially all the information imparted by any one to Mrs. Keller: That Christian Stahl was a rich man; that he owned 560 acres of land in Fillmore county, near Grafton; that he lived in a large new house situated on a half section belonging to the farm in question; that a quarter section of this farm was situated some two miles distant from the home place; that an additional 80 acres adjoined it; that there were substantially three sets of improvements on the place; that there was a large and valuable orchard on the tract; that in his home he had no piano, but owned an organ; that he did not use rugs, but employed rag carpets in lieu thereof; that he owned horses, cattle, and hogs, and also farm implements, but the number and kind and value of the personal property is not disclosed to her, neither is it shown that Mrs. Stahl was informed as to the actual value of the real estate, nor was she given any estimate as to the same.

It does not affirmatively appear that the subject of an antenuptial agreement had been discussed and agreed upon prior to the arrival of plaintiff in Omaha in 1902. There was an agreement for marriage. Decedent sent appellant $125 to pay the railroad fare of her and her children from Greater New York to Omaha, Nebraska. He evidently consulted his lawyer and had a form of antenuptial contract provided before the arrival of his intended wife. He went to Omaha accompanied by a daughter, where he met plaintiff and her children on her arrival from her former home. The party repaired to the Drexel Hotel. Plaintiff and deceased, unaccompanied, went to the Douglas county courthouse, and en route they stopped at a jewelry store, where a wedding ring was selected. From there they proceeded to the courthouse, where a marriage license was secured. The antenuptial contract was presented to his wife,

and she signed and acknowledged the same. It should be said that there is a serious conflict in the evidence as to whether the wife was advised of the nature of the instrument which she signed, whether she could then read it in the language in which it appears to be at the present time, and whether it was executed knowingly by her. But, for the purpose of this opinion, we assume, but do not decide, the facts with reference thereto to be as defendants contend. Following this the marriage ceremony was performed, and the marriage party proceeded to Grafton, near which the home of decedent was then situated.

The pleadings in the instant case do not present any questions of ratification by plaintiff of the contract of May 1, 1902, subsequent to the date thereof. Therefore, that question is eliminated from consideration. Maxwell, Code Pleading, 406; *Erickson v. First Nat. Bank of Oakland,* 44 Neb. 622; *Hosler v. Beard,* 54 Ohio St. 398; *Elston v. Jasper,* 45 Tex. 409. Neither is an estoppel alleged on behalf of the defendants. *Burlington & M. R. R. Co. v. Harris,* 8 Neb. 140; *International Building & Loan Ass'n v. Watson,* 158 Ind. 508.

We therefore recur to the contract as executed on the 1st day of May, 1902, to be considered in the light of the circumstances which surrounded its execution, as the just measure with which the rights of the parties to this action must be determined. "Whether an antenuptial contract, by virtue of which one party to an intended marriage, for a legal consideration, parts with marital rights in the property of the other, may be valid and a bar to dower has been settled in this state. *Rieger v. Schaible,* 81 Neb. 33. In fact, most courts now support antenuptial contracts if fairly made. Such instruments frequently tend to peace and happiness by settling questions concerning rights of property which, especially in the case of marriage of people in later life having children of a former marriage, often furnish grounds of irritation and friction which may defeat the very purpose of the union." *In re Estate of Enyart,* 100 Neb. 337, 343. Considering the facts properly in evidence,

was the antenuptial contract entered into by and between Christian Stahl and plaintiff, at the time it was made, fair, just, and reasonable, and such as the court, in view of all the circumstances of both parties at the time, should recognize and enforce?

It is a well-established rule that—"In view of the close and confidential relation existing between affianced persons, it is the duty of the prospective husband to make a full and fair disclosure of all material facts relating to the amount, character and value of his property, so that the prospective wife may have sufficient knowledge upon which she may exercise her judgment whether she will enter into such a contract. The general principal was laid down in *Kline v. Kline,* 57 Pa. St. 120, 98 Am. Dec. 206, by Judge Sharswood, and has been adopted and applied in many cases. *Pierce v. Pierce,* 71 N. Y. 154; *Lamb v. Lamb,* 130 Ind. 273; *Murdock v. Murdock,* 219 Ill. 123; *Warner v. Warner,* 235 Ill. 448; *Simpson v. Simpson's Ex'rs,* 94 Ky. 586; *Slingerland v. Slingerland,* 115 Minn. 270; *Rankin v. Schiereck,* 166 Ia. 10.

"Where the provision made for the intended wife by an antenuptial contract is grossly disproportionate to the interest in the prospective husband's estate which the intended wife would acquire by operation of law in case the marriage took place, the burden rests upon those claiming the validity of the contract to show that a full and fair disclosure was made to her before she signed it of the extent and value of the property, or that she was aware to all intents and purposes of the nature, character and value of the estate which she was relinquishing if the marriage took place. *Murdock v. Murdock, supra; Warner v. Warner, supra; Mines v. Phee,* 254 Ill. 60; *Warner's Estate,* 207 Pa. St. 580. These principles, though not universally accepted, seem to us to be based upon sound reason, and to be most consonant with the trend of judicial thought, more particularly in the western states. 14 Cyc. 940; 21, Cyc. 1250." *In re Estate of Enyart,* 100 Neb. 337, 345.

The evidence is convincing that Mrs. Stahl knew before

her marriage that Christian Stahl was a wealthy man owning farm real estate and farm personal property in the state of Nebraska. She was not informed with any degree of definiteness as to his actual possessions of personal property and its value. She was wholly uninformed as to the value of the real estate. No information as to its estimated market value was given her. She was a nonresident of the state, wholly unacquainted with farm values. Her previous life had been passed in the metropolis of the new world. She had never been beyond its boundaries. She was a total stranger to Nebraska, to Nebraska property, and to Nebraska values. As reflected by the record, she had no knowledge of the extent of the interest to which she was entitled upon marriage in her husband's property, nor was the value of that property known to her. As a stranger in a strange land, without friends save her husband and his family, far from her former home, she signed the agreement of May 1, 1902, without being accorded an opportunity for consultation with one who might advise her, and as a preliminary to receiving her wedding ring. These circumstances, in our opinion, are not sufficient to meet the requirements of the equitable rule of fair disclosure, or to charge the wife with such knowledge of the nature and value of his property as to render the contract binding upon her. On this point the appellees have not sustained the burden of proof. *Murdock v. Murdock, supra; Warner v. Warner, supra; Mines v. Phee, supra; In re Estate of Enyart,* 100 Neb. 337, 346.

This contract of May 1, 1902, provides: "In the event said Theresa Keller shall survive Christian Stahl, she shall receive the sum of $2,000, and no more, which shall be in lieu of all estate of dower, homestead, or other interest or estate, and of all other claims for allowance, maintenance or other claims against the property of Christian Stahl, * * * to which she might be entitled by reason of her marriage." The value of Christian Stahl's properties, real and personal, owned by him at the time of his death, is not set forth in the record with the required definiteness.

We feel, however, that a finding that he was worth at the time of the marriage from $18,000 to $20,000 is fairly supported by the record. It is to be remembered that, though this property was situated in a western state which was then in course of settlement and development, subject to fluctuations, the curve of value was ever upward, and this fact should not be forgotten in considering the evidence in this case. In light of the evidence in the record, therefore, the provision of $2,000 contained in said contract for the benefit of his intended wife was so grossly disproportionate to the wealth of Stahl as to require those asserting the validity of the contract to sustain the burden of proof that it was entered into with full knowledge on part of the plaintiff of the nature, extent, character, and value of the Stahl estate. Without this knowledge she could form no adequate idea of the problem before her, whether it was better to marry for a home and a pittance, or refuse to marry unless provision were made appropriate to her condition in life, as the wife of a man of wealth and standing in the community in which they resided. We are satisfied that this burden has not been met, and for the reasons stated the contract of May 1, 1902, must be held to be invalid and of no force and effect. *In re Estate of Enyart,* 100 Neb. 337.

As the defense tendered by the defendants to plaintiff's petition was wholly based upon the validity of this contract, it follows that plaintiff's petition for partition should have been sustained by the district court, and decree entered therein as prayed. The district court therefore erred in sustaining the validity of the antenuptial contract of May 1, 1902, and in entering the judgment dismissing plaintiff's action.

It is therefore ordered that the decree thus entered by the district court in this case be reversed and the cause be remanded, with directions to enter decree of partition as prayed for by plaintiff.

REVERSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. CITIZENS STATE BANK OF POTTER: VAN E. PETERSON, RECEIVER, APPELLEE: STATE BANK OF OMAHA, APPELLANT.

FILED JULY 26, 1927. NO. 25058.

1. **Banks and Banking**: GUARANTY FUND: PRIORITIES: PURPOSE OF STATUTE. "One of the purposes of the legislature, in enacting section 8033, Comp. St. 1922, was to deny to a stockholder of a state bank the right of priority upon a claim, based upon evidence of indebtedness, which represents money obtained by such stockholder from himself or others for the purpose of effecting a loan of funds to such bank; but it was not the design, in enacting such statute, to prevent a stockholder of a state bank from becoming a depositor therein." *State v. Farmers State Bank*, 113 Neb. 82.
2. ———: DEPOSITORS. When a party becomes, in good faith, a depositor in a bank by issuance to him of a certificate of deposit, in terms as provided by law, in consideration of cash or the equivalent actually received by such bank, he is not deprived of that character by reason of renewals which do not transgress the guaranty fund law. The new certificate is evidence of his continued relation to the bank as depositor.

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

Gaines, Van Orsdel & Gaines, Warren M. Howard and *Smith, Schall, Howell & Sheehan*, for appellant.

C. M. Skiles and *Roland V. Rodman, contra.*

Heard before GOSS, C. J., ROSE, DAY, THOMPSON and EBERLY, JJ., LESLIE and SHEPHERD, District Judges.

EBERLY, J.

In this action the State Bank of Omaha, as holder in due course, seeks the allowance against the state depositary fund of a claim based on three certificates of deposit, bearing numbers 1638, 1639, and 1640, respectively, issued by the Citizens State Bank of Potter, now insolvent and in the hands of a receiver duly appointed. The trial in

district court resulted in a finding and judgment allowing the claim as to each certificate against the bank, but disallowing claim against the guaranty fund. State Bank of Omaha appeals.

These certificates in suit were renewals of previous ones. Certificates of deposit Nos. 1638 and 1639 had their inception in a transaction occurring March 9, 1921. At that time the total deposits of the Citizens State Bank of Potter were $158,685.58, and total "reserve" $47,643.99. This bank on that day collected a note aggregating $7,000 for George A. Roberts, the owner thereof, receiving the cash, and in accordance with the usual course of business issued to him certificate of deposit number 938 for that amount. Certificate No. 1640 had its inception in a transaction had between this bank and George A. Roberts on the 3d day of October, 1921, when certificate of deposit No. 893 was issued to the latter for cash or the equivalent received by the bank. George A. Roberts was, at all times covered by the record, the president of the bank in question and one of the stockholders thereof. The validity of the original deposits when made does not appear to be seriously questioned by the receiver. But it is his contention that the circumstances disclosed by the evidence in the record, which surrounded and entered into the transactions by which the original certificates were from time to time renewed, operated to deprive the originally valid deposits of their character as such and converted them into transactions not having the protection of the guaranty fund. A careful consideration of the facts of the record convinces us that this contention is not sustained by the evidence. Indeed, this case is controlled by the principles announced in *State v. Farmers State Bank*, 113 Neb. 82.

It follows that the judgment of the district court should be, and is, reversed and the cause remanded, with directions to order the payment of the claim of the State Bank of Omaha out of the depositors' guaranty fund.

REVERSED.

DAVID I. PARKER ET AL., APPELLEES, V. CITY OF GRAND ISLAND ET AL., APPELLEES: R. E. DAVIS ET AL., INTERVENERS, APPELLANTS.

FILED JULY 26, 1927. No. 25907.

1. **Parties: INTERVENTION.** Sections 8552-8554, Comp. St. 1922, providing for intervention, are to be liberally construed; but the statute must be substantially complied with and the applicant must bring himself within the provisions thereof, otherwise he is a mere interloper.
2. ———: ———: PLEADING. "An intervener must plead some interest in the subject-matter of the litigation; a mere denial of plaintiff's right is insufficient to give him a standing in court." *Moline, Milburn & Stoddard Co. v. Hamilton*, 56 Neb. 132.
3. ———: ———: ———. An interest in the intervener is a traversable fact, and its actual existence is indispensable to his standing in court; and the mere fact that in preliminary proceedings a claim of such interest in behalf of such intervener may appear does not excuse failure to plead it as part of the issues tendered by intervener for determination on trial of the merits of the action in the district court.

APPEAL from the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Horth, Cleary & Suhr, for appellants.

R. J. Cunningham and *Paul C. Holmberg, contra.*

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

EBERLY, J.

Action in equity to enjoin the paving of "District No. 69" of the city of Grand Island. Trial had in the district court for Hall county on issues formed by "amended petition of plaintiffs," filed September 10, 1926, the "amended answer of the city of Grand Island" and codefendants, filed October 1, 1926, the amended answer of R. E. Davis et al., intervening defendants, filed September 28, 1926, and reply thereto. Decree entered March 4, 1927, in part as follows: "Now on this 2d day of February,

1927, being one of the days of the January, 1927, term of the district court of Hall county, Nebraska, this cause came on for further hearing, and the court, being duly advised in the premises, finds: * * * That the notice given to property owners in said district of the creation of said district was defective in substance and for that reason the proceedings thereafter had were not binding upon the plaintiffs herein and are null and void and plaintiffs are entitled to an injunction as prayed in their amended petition. It is, therefore, considered and adjudged that the defendants, the city of Grand Island, a Corporation of Hall county, Nebraska, M. W. Jenkins, mayor of the city of Grand Island, Henry E. Clifford, city clerk of the city of Grand Island, and Kenneth Y. Craig, city engineer of the city of Grand Island, be and hereby are enjoined and restrained from any further proceeding to pave the streets of said paving district No. 69, until proper notice to parties interested of the formation of said district has been given in accordance with the law, and a determination of the number of persons objecting has been had."

The city of Grand Island and codefendants do not appeal, or further contest the issues of the suit. Appeal lodged here solely in behalf of "interveners," or, as designated in præcipe, "R. E. Davis et al., appellants."

The case is for trial *de novo*. The preliminary question before us is, as between the plaintiffs and the interveners, the right of the latter in the present case to challenge the right of the former to maintain their action.

Intervention was unknown at common law and equity, and is a creature of statute. *Shepard v. New Jersey C. W. & L. Co.*, 73 N. J. Eq. 578; *Stretch v. Stretch*, 2 Tenn. Ch. 140; *Delaney v. Sheehan*, 138 Ga. 510; *Fischer v. Hanna*, 8 Colo. App. 471; *Potlatch Lumber Co. v. Runkel*, 16 Idaho, 192; *Faricy v. St. Paul Investment & Savings Society*, 110 Minn. 311; *Dent v. Ross*, 35 Pa. St. 337; *Cross, Petitioner*, 17 R. I. 568; *Speak v. Ransom*, 2 Tenn. Ch. 210; *Whitman v. Willis & Bro.*, 51 Tex. 421. In this state sec-

tions 8552-8554, Comp. St. 1922, create and regulate that right. These provisions are to be liberally construed. However, they must be substantially followed, and the applicant must bring himself within their provisions, otherwise he is a mere interloper.

An examination of the "amended answer" of the interveners discloses that it is exclusively made up of admissions and denials of the allegations contained in the amended petition of plaintiffs, above referred to. It wholly omits to set forth in traversable form any interest whatsoever which the interveners have, or claim to have, in the matter in litigation.

The announced doctrine of this court is: "The allegation of an interest in the intervener was a traversable averment, and the intervener should, by appropriate pleadings, have made the averment in the district court, and so tendered an issue." Without such averment of the ultimate facts evidencing his interest in the matter in litigation, he is regarded as a mere interloper, and wholly incompetent to challenge the contentions of the opposing parties. Such allegation on part of the interveners is a prerequisite to stating a cause of action or tendering a valid defense. As this case stood in the district court, the plaintiffs were upon the pleadings entitled to a judgment against the interveners. *Moline, Milburn & Stoddard Co. v. Hamilton,* 56 Neb. 132. See, also, *Steltzer v. Compton,* 164 Ia. 465; *Des Moines Ins. Co. v. Lent,* 75 Ia. 522; *Smith v. Gale,* 144 U. S. 509.

The result of a hearing *de novo* can be no different. The judgment of the district court is, therefore,

AFFIRMED.

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3. A county agricultural society is not a governmental agency exempt from liability for torts, nor can it be sued in the name of the county. *Wilson v. Thayer County Agricultural Society* 579

Animals. SEE STATUTES, 5, 6.

1. The proclamation declaring ch. 7, Laws 1925, the bovine tuberculosis act, in operation in Saunders county, based on an unconstitutional section thereof, *held* a nullity. *State v. Heldt* 435
2. The legislature may require examination and testing of cattle for tuberculosis, and provide for the summary destruction of diseased animals. *State v. Heldt* 435

Appeal and Error. SEE CRIMINAL LAW. TRIAL.

1. Where the supreme court directed the district to enter judgment for plaintiff, and defendants filed a motion for a new trial, the order granting a new trial is not a final order. *Ward v. Geary* 58
2. Where a decree is reversed and the cause remanded generally, pleadings may be amended and the issues tried *de novo*. *State v. American State Bank* 81
3. Pending appeal from a decree confirming a judicial sale and prior to issuance of mandate, the supreme court may determine an application for and fix the amount of redemption. *Lincoln Savings & Loan Ass'n v. Anderson* 199
4. A party seeking satisfaction of a decree of foreclosure in the supreme court must file therein a certificate of the district clerk showing compliance with conditions necessary to redemption. *Lincoln Savings & Loan Ass'n v. Anderson* 199
5. Errors of law, to be considered on appeal, must be presented to the trial court in a motion for new trial. *State v. Citizens State Bank* 271

6. Time for perfecting an appeal does not commence to run until the judgment or decree is entered on the journal. *Union Central Life Ins. Co. v. Saathoff* 385
7. "Entered of record" and "spread upon the journal" in decisions construing the statute limiting time for appeal mean "entered on the journal." *Union Central Life Ins. Co. v. Saathoff* 385
8. The theory adopted at the trial as to issues will be followed on appeal. *Norton v. Bankers Fire Ins. Co* 490
9. On dismissal by the trial court after admitting proof by each party, the appellate court will assume the existence of every material fact which plaintiff's evidence establishes or tends to prove and give him the benefit of proper inferences therefrom. *Kimble v. Roeder* 589
10. Where a judgment for a defendant is reversed on appeal, another judgment for defendant may also be reversed, if at variance with rulings on the first appeal. *State v. Bone Creek Township* 633
11. A finding that shows the result of a judicial inspection of premises may be considered on appeal, if applicable to the issues determined. *Davis v. Beem* 697
12. A motion for a new trial is not requisite to an appeal in equity. *State v. Farmers State Bank* 702
13. On appeal in equity suits, the supreme court, in determining the weight of evidence, will consider the fact that the trial court observed the witnesses and their manner of testiyfing. *McDonald v. McDonald* 708
14. Findings of fact by the court have the effect of a verdict. *Nebraska Nat. Bank v. Parsons* 770
15. A motion by plaintiff in the supreme court to amend his petition to conform to the evidence is unavailing, if the evidence would not support a judgment in his favor. *Thomas v. Scoutt* 848
16. Instructions which are inapplicable to the proved facts and probably misleading constitute reversible error. *Jessup v. Davis* 1
17. Ordinarily, it is error to assume in an instruction the existence of a material fact based on conflicting evidence. *Jessup v. Davis* 1
18. Where the verdict rendered is the only one warranted by the evidence, error in instructions cannot be prejudicial. *Hashberger v. City of Schuyler* 639
19. A party requesting an improper instruction may not base error thereon. *Day v. Metropolitan Utilities District* 711
20. Instruction as to comparative negligence *held* not prejudicial. *Martin v. Brownell Building Co* 749
21. Ordinarily, instructions should submit only issues raised

by the pleadings and supported by evidence. *Citizens Nat. Bank v. Sporn* 875
22. Generally, it is error to submit to the jury an issue not raised by the pleadings, if likely to prejudice the rights of one of the litigants. *Citizens Nat. Bank v. Sporn* 875

Appearance.
1. Objection to jurisdiction over the person is waived by joining with it objection to jurisdiction over the subject-matter. *Bodge v. Skinner Packing Co* 41
2. One objecting to jurisdiction enters a general appearance by asking affirmative relief. *Pollard v. Larson* 136

Arson.
1. Evidence *held* to establish that insurance companies had a *de facto* existence. *Salistean v. State* 838
2. Evidence *held* to sustain conviction for burning insured property. *Salistean v. State* 838

Assault and Battery.
Evidence *held* sufficient to submit question of guilt of accused. *Vanderpool v. State* 94

Associations.
1. An unincorporated labor union may adopt rules of government and provide tribunals to determine controversies between members or local divisions. *Crisler v. Crum* 375
2. Members of an unincorporated labor union must exhaust remedies provided by its laws before appealing to the courts. *Crisler v. Crum* 375
3. Injunction will not lie to restrain acts of officers of an unincorporated association until remedies provided by the laws of the association have been exhausted. *Crisler v. Crum* 375

Bail.
One convicted of a bailable offense, and released on habeas corpus, should be required to give bail pending appeal. *Hulbert v. Fenton* 818

Bankruptcy.
A decree foreclosing a mortgage, order of sale, and right of redemption are not affected by the mortgagor's discharge in bankruptcy. *Lincoln Savings & Loan Ass'n v. Anderson* 199

Banks and Banking.
1. Deposits *held* payable out of guaranty fund. *State v. Farmers State Bank* 46

2. Sureties *held* liable for county treasurer's deposits, although in excess of legal limitation. *Scotts Bluff County v. First Nat. Bank* 273
3. Where a bank gives a depositor credit in his pass-book for a check drawn by another depositor having funds to pay the check, it constitutes payment of the check, and a deposit by the payee. *Scotts Bluff County v. First Nat. Bank* 273
4. Interest will be reckoned on matured certificates of deposit only until date of maturity. *State v. Monowi State Bank* 396
State v. Monowi State Bank 398
5. One seeking preference of a trust fund against an insolvent bank has the burden of proving the fund in possession of the receiver, or invested in specific property in the hands of the receiver. *Central Nat. Bank v. First Nat. Bank* 444
6. The assignee of a certificate of deposit holds the same relation to the guaranty fund as the payee therein. *State v. Farmers State Bank of Dix* 574
7. Whether a transaction constitutes a deposit within the depositors' guaranty law depends on the facts and circumstances of the particular transaction. *State v. Farmers State Bank of Dix* 574
8. Courts will ascertain whether a transaction constitutes a *bona fide* deposit, and, if not, the guaranty fund will not protect it. *State v. Farmers State Bank of Dix* 574
State v. Citizens State Bank 593
9. Where a stockholder of an insolvent bank secured money to enable it to meet a pressing obligation, *held* that the transaction did not constitute a deposit. *State v. Farmers State Bank of Dix* 574
10. Transaction *held* not a deposit. *State v. Citizens State Bank* 593
11. A judgment against a bank founded on tort is not protected by the guaranty fund. *State v. Citizens State Bank* 593
12. A judgment on a deposit protected by the guaranty fund is protected by the fund. *State v. Citizens State Bank* 593
13. The assignee of a judgment protected by the guaranty fund is entitled to the same relief as the judgment creditor. *State v. Citizens State Bank* 593
14. That a judgment on a deposit protected by the guaranty fund draws 7 per cent. interest does not deprive it of protection. *State v. Citizens State Bank* 593
15. The rule that a debt is merged in a judgment thereon has limitations. *State v. Citizens State Bank* 593
16. Deposit in a bank permitted to run by the banking depart-

ment *held* protected by the guaranty law. *State v. Macy State Bank* 606
State v. Citizens State Bank 611
17. To hold the guaranty fund liable, depositor must show facts making it liable. *Kuhle v. Farmers State Bank* 648
18. Guaranty fund liability is one fixed by statute alone. *Kuhle v. Farmers State Bank* 648
19. Transaction *held* not a "deposit" protected by the guaranty act. *State v. Security State Bank* 667
20. Money paid out by a bank pursuant to check is no longer subject to the depositor's control. *State v. Farmers State Bank* 702
21. Moneys paid on stock assessments cannot be repaid out of the guaranty fund. *State v. Farmers State Bank* 702
22. Money deposited on any collateral agreement except length of time to maturity and rate of interest is not protected by the guaranty fund. *State v. Farmers State Bank* 702
23. A bank officer cannot take from nor add to the statute regulating guaranty of deposits. *State v. Farmers State Bank* 702
24. Custodians of the guaranty fund may order payments to depositors only pursuant to statute. *State v. Farmers State Bank* 702
25. The directors of a state bank may levy an assessment to repair the capital or restore the reserve only when authorized by the stockholders. *McMillan v. Chadron State Bank* .. 767
26. Statutory power to subject fully paid state bank stock to assessments to recoup losses or to restore capital should not be extended by judicial interpretation. *State v. Citizens State Bank* 776
27. Statutory power to assess fully paid state bank stock to recoup losses or to restore capital is committed to the directors on authority from the stockholders. *State v. Citizens State Bank* 776
28. The state department of banking cannot compel the stockholders of an insolvent bank to authorize the directors to assess fully paid capital stock. *State v. Citizens State Bank* 776
29. A fund raised by stockholders of a state bank to aid the bank *held* not an assessment on stock. *State v. Citizens State Bank* 776
30. A stockholder of a state bank may become a depositor therein. *State v. Citizens State Bank* 890
31. A depositor in good faith is not deprived of that character by reason of renewals which do not transgress the guaranty fund law. *State v. Citizens State Bank* 890

Bastardy.

1. An illegitimate child may be legitimated and inherit from his father, if the latter acknowledges him in writing, signed in the presence of a competent witness. *In re Estate of Winslow* 553
2. Acknowledgment of an illegitimate child need not be in a formal paper. *In re Estate of Winslow* 553
3. The signature to acknowledgment of an illegitimate child is sufficient if the father directs another to sign his name thereto. *In re Estate of Winslow* 553

Bills and Notes.

A note made in one state to be performed in another is governed by the law of the place of performance, unless a contrary intention clearly appears. *United Bank & Trust Co. v. McCullough* 327

Burglary.

Evidence *held* to sustain conviction for burglary. *Browne v. State* 225

Carriers.

Ordinarily, the supreme court will not interfere with findings of fact by the state railway commission. *Missouri P. R. Corporation v. Nebraska State Railway Commission* .. 856

Commerce.

1. Whether the federal employers' liability act applies depends on whether the employee was engaged in interestate transportation or work practically a part of it. *James v. Chicago & N. W. R. Co* 164
2. The test of whether the federal employers' liability act applies in repair cases is whether the rolling stock is withdrawn from service. *James v. Chicago & N. W. R. Co.* 164
3. A machinist's helper injured while making repairs in the roundhouse to an engine used in hauling intrastate and interstate freight held not employed in interstate commerce, within the federal employers' liability act. *James v. Chicago & N. W. R. Co* 164

Conspiracy.

A charge of conspiracy may be sustained by proof of surrounding facts and circumstances. *Talich v. Marvel* 255

Constitutional Law. SEE STATUTES.

1. That the bovine tuberculosis act provides only for partial indemnity for cattle destroyed does not render the act unconstitutional. *State v. Heldt* 435

2. The police power may be exercised in aid of what is sanctioned by usage or held by prevailing morality or strong opinion to be immediately necessary to public welfare. *Pettis v. Alpha Alpha Chapter of Phi Beta Pi* 525
3. The police power will be upheld, though it affects adversely property rights of an individual. *Pettis v. Alpha Alpha Chapter of Phi Beta Pi* 525
4. Constitutional guaranties may expand or contract to meet new conditions. *Pettis v. Alpha Alpha Chapter of Phi Beta Pi* 525
5. The police power develops to meet changed conditions. *Pettis v. Alpha Alpha Chapter of Phi Beta Pi* 525
6. "Public welfare" includes regulations for promotion of economic welfare and public convenience. *Pettis v. Alpha Alpha Chapter of Phi Beta Pi* 525
7. The provisions of sec. 3746, Comp. St. 1922, relating to giving notice to metropolitan water districts of claims for damages, *held* unconstitutional. *Day v. Metropolitan Utilities District* 711
8. The essential quality of the police power is to promote the safety and welfare of the public. *Holmberg v. Chicago, St. P., M. & O. R. Co* 727
9. Sec. 5527, Comp. St. 1922, as amended by ch. 167, Laws 1923, abolishing grade crossings on farms, *held* constitutional. *Holmberg v. Chicago, St. P., M. & O. R. Co* 727
10. Due process of law does not control the state's power to determine process or service if the procedure affords reasonable notice and fair opportunity to be heard; and notice by mail to members of a proposed change of plan of insurance *held* sufficient. *Leininger v. North American Nat. Life Ins. Co* 801
11. Sec. 7828, Comp. St. 1922, authorizing amendment of articles of incorporation to change the plan of business of a life insurance company from an assessment to a stock basis, *held* constitutional. *Leininger v. North American Nat. Life Ins. Co* 801
12. Statute relating to boarding prisoners *held* void. *Endres v. McDonald* 827
13. The supreme court's interpretation of the Constitution is binding on suitors seeking to enforce liabilities created thereby. *Thomas v. Scoutt* 848

Contracts.

1. Instruments executed by the same parties, at the same time, for the same purpose, will be construed together. *Nebraska Wheat Growers Ass'n v. Smith* 177

2. Not every breach will warrant rescission of a contract. *Nebraska Wheat Growers Ass'n v. Smith* 177
3. Whether breach of a marketing contract justifies suit for rescission or for damages must be determined by the terms of the contract and circumstances. *Nebraska Wheat Growers Ass'n v. Smith* 177
4. Courts cannot make a contract for parties. *Mercer v. Payne & Sons Co* 420
5. In absence of a provision making time for completion essential, a contract is to be completed within a reasonable time. *Mercer v. Payne & Sons Co* 420
6. One suing to reform a contract has the burden of proof. *Paine-Fishburn Granite Co. v. Reynoldson* 520
7. Evidence to reform a written instrument must be clear, convincing, and satisfactory. *Paine-Fishburn Granite Co. v. Reynoldson* 520
8. A mistake for which a written instrument will be reformed must be mutual. *Paine-Fishburn Granite Co. v. Reynoldson* 520
9. A mutual mistake is one common to both parties. *Paine-Fishburn Granite Co. v. Reynoldson* 520
10. Evidence *held* insufficient to establish a mutual mistake warranting reformation of a written instrument. *Paine-Fishburn Granite Co. v. Reynoldson* 520
11. Proof required to show fraud in execution of a contract. *Citizens Nat. Bank v. Sporn* 875

Conversion.

1. "Conversion" defined. *Talich v. Marvel* 255
2. All knowingly participating in or benefiting by conversion are principals. *Talich v. Marvel* 255

Corporations.

1. The title of a foreign corporation to land taken in settlement of a debt secured by a mortgage on part of the land can be challenged only by the state. *Lord v. Shultz* 33
2. A *bona fide* purchaser of land of a foreign corporation subject to escheat, *held* to take good title. *Lord v. Shultz* .. 33
3. Members of a corporation cannot complain because of the incompetency or inattention of officers whom they have chosen. *Nebraska Wheat Growers Ass'n v. Smith* 177
4. Mismanagement of the affairs of a corporation by its officers or agents does not warrant withdrawal of members or repudiation of their obligations. *Nebraska Wheat Growers Ass'n v. Smith* 177
5. Contracting corporate indebtedness beyond the statutory limit does not necessarily invalidate the contract, in absence of invalidating legislation. *Nebraska Nat. Bank v.*

Parsons 770
6. The liability of stockholders for failure of the corporation to publish annual notice of debts will not be enlarged by construction nor enforced by presumption of facts not proved. *Thomas v. Scoutt* 848
7. It is presumed that officers of a corporation published annual notice of debts, in absence of evidence to the contrary. *Thomas v. Scoutt* 848
8. One alleging failure to publish annual notice of corporate debts must prove by a preponderance of evidence the date when his debt was created and default in publication of notice at that time. *Thomas v. Scoutt* 848
9. Liability for unpaid subscriptions for stock is based on the subscriber's contract, of which the constitutional provision is a part. *Thomas v. Scoutt* 848
10. Holders of paid-up stock are not liable to subsequent judgment creditors for unpaid subscriptions. *Thomas v. Scoutt* 848
11. One suing to enforce liability for unpaid stock subscriptions must prove by a preponderance of evidence that the whole or part thereof remains unpaid. *Thomas v. Scoutt* 848
12. One alleging overvaluation of property exchanged for capital stock must prove it. *Thomas v. Scoutt* 848
13. The Constitution does not forbid payment in property for corporate stock. *Thomas v. Scoutt* 848
14. Property may be received for corporate stock. *Thomas v. Scoutt* 848
15. A prospective creditor may make disclosure of stock transactions a condition of extending credit to the corporation. *Thomas v. Scoutt* 848
16. In a creditor's suit for unpaid stock subscriptions, evidence *held* insufficient to show actionable fraud or overvaluation in exchange of property for stock. *Thomas v. Scoutt* 848

Counties and County Officers.

A county cannot evade liability for damages from an obstruction in a highway because repairs had been delegated to another. *Frickel v. Lancaster County* 506

Criminal Law. SEE ARSON. BURGLARY. FORGERY. GAMING. HOMICIDE. INCEST. INDICTMENT AND INFORMATION. INTOXICATING LIQUORS. RAPE. RECEIVING STOLEN GOODS. ROBBERY. WITNESSES.

1. District courts have original jurisdiction of misdemeanors. *Nelson v. State* 26

2. Where an information was duly served and defendant, personally present, by counsel attacked the validity of the charges therein, he may be required to plead thereto without previous issuance and service of warrant. *Nelson v. State* 26
3. The court should instruct as to general rules of law, and so as not to withdraw from the jury an essential issue. *Osborne v. State* 65
4. One desiring an instruction to guide the jury in weighing certain features of evidence must make request therefor at the conclusion of the evidence, and submit in writing the instruction desired. *Osborne v. State* 65
5. In a criminal case, no matter how strong the proof, whether or not a fact has been established is a question for the jury. *Osborne v. State* 65
6. It is the court's duty, without request, to instruct as to the law of the case. *Bailey v. State* 77
7. A statement in instructions of material allegations to be proved must embody every material fact. *Bailey v. State* 77
8. Inquiry into details or introduction of the record after accused admitted previous conviction of felony *held* prejudicial error. *Vanderpool v. State* 94
9. The court should instruct that evidence of previous conviction of accused of felony is to be considered only as affecting his credibility. *Vanderpool v. State* 94
10. The rules as to the information, conduct of the case, and punishment, applying to a principal apply to an aider, abettor, or procurer. *Scharman v. State* 109
State v. Girt 833
11. Ch. 106, Laws 1925, *held* to provide penalties for first, second, and subsequent convictions for bootlegging, and its penalties limited thereto. *Knothe v. State* 119
12. Sentence of fine and imprisonment for sale of liquor *held* void. *Knothe v. State* 119
13. Where sentence was void, the court on remand may make a legal sentence. *Knothe v. State* 119
14. Misconduct of prosecutor in argument and misconduct of a juror, disapproved. *Whitehead v. State* 143
15. Evidence that accused attempted to escape from peace officers is relevant. *Bartlett v. State* 148
16. A conviction may rest on the uncorroborated evidence of an accomplice, considered with all the testimony. *Bartlett v. State* 148
17. Credibility of witnesses is for the jury and a reviewing court can only inquire whether there is evidence warranting conviction. *Bartlett v. State* 148
18. Admission of evidence that accused while awaiting trial

attempted to escape from jail *held* proper. *Bartlett v. State* 148
19. Evidence of flight or concealment of accused is for the jury. *Mathews v. State* 158
20. Weight of evidence being for the jury, conviction of incest, supported by sufficient evidence, will not be disturbed. *Mathews v. State* 158
21. Newly discovered evidence as to alibi *held* not to warrant new trial. *Browne v. State* 225
22. Instruction as to inference of guilt from possession of recently stolen goods *held* not prejudicial, in view of other instructions. *Browne v. State* 225
23. Refusal to give a requested instruction covered by an instruction given is not error. *Browne v. State* 225
24. Association of juror with witness before trial *held* not misconduct of juror. *Browne v. State* 225
25. The supreme court will not interfere with a conviction based on conflicting evidence, unless, as a matter of law, it is insufficient. *Williams v. State* 277
26. Whether instructions correctly state the law must be determined from examination of the entire charge. *Williams v. State* 277
27. Instruction as to mental status approved. *Williams v. State* 277
28. Ruling on application for a new trial for misconduct of the jury will not be disturbed, in absence of abuse of discretion. *Williams v. State* 277
29. Misconduct of the jury, or of the bailiff, unless prejudicial, is not ground for reversal. *Williams v. State* 277
30. Opinions of physicians as to mental capacity of accused, in response to hypothetical questions, may be rebutted by evidence of nonexpert witnesses as to facts and circumstances. *Williams v. State* 277
31. In a prosecution for robbery of a messenger of a corporation, proof that it is a *de facto* corporation by showing that it was doing business as such is sufficient proof of corporate capacity. *Peterson v. State* 302
32. In a robbery case, anything tending to connect the accused with the crime may be shown. *Peterson v. State* 302
33. Instructions should be considered as a whole. *Peterson v. State* 302
34. The supreme court will not often reduce the sentence, especially where the moral turpitude was great and the crime was one of violence. *Peterson v. State* 302
35. The test of insanity, stated. *Carter v. State* 320
36. Misconduct of counsel in addressing the jury cannot be

reviewed, unless excepted to and a ruling had thereon. *Carter v. State* 320
37. Complaint on which petitioner for habeas corpus was being detained *held* to charge poisoning with intent to take life of person of whose murder petitioner had been acquitted. *In re Resler* 335
38. On an indictment for an offense, an accused may be convicted of an attempt to commit same, where such attempt is an offense. *In re Resler* 335
39. Where a person was previously acquitted of murder by poison, defense of previous acquittal should have been sustained. *In re Resler* 335
40. The rules as to the information, conduct of the case, and punishment, applying to a principal apply to an aider, abettor, or procurer. *In re Resler* 335
41. In a prosecution for embezzlement, where voluminous books of account are present, an expert accountant may testify as to the result of his examination. *Hankins v. State* 350
42. In a prosecution of a bookkeeper for embezzlement, records for whose inspection and keeping he is responsible are admissible against him. *Hankins v. State* 350
43. A juror may not state a fact in relation to the case which is not in evidence, but he may use experience by way of illustration. *Hankins v. State* 350
44. Separate violations of the liquor laws may be set out in distinct counts of a complaint, and, on conviction on separate counts, a justice of the peace may impose a penalty within his jurisdiction on each count. *Brown v. State* 366
45. "In a criminal case," in the Constitution, defining the jurisdiction of a justice of the peace, refers to a single violation of law. *Brown v. State* 366
46. Probative value of evidence of impeached witness is for the jury. *Hynes v. State* 391
47. Failure to charge the jury on a given point, without a request therefor, is not error, unless a statute or positive rule of law requires an instruction. *Hynes v. State* 391
48. Test of identity of offenses stated. *Crommett v. State* 399
49. An instruction based on the maxim, "*Falsus in uno, falsus in omnibus*," should be given only where the jury may believe a witness has corruptly testified to a falsehood, and has testified to another material issue than that on which he is directly impeached. *Drawbridge v. State* 535
50. To predicate error on refusal of an instruction based on the maxim, "*Falsus in uno, falsus in omnibus*," accused

must point out the condition in the record and the testimony warranting it. *Drawbridge v. State* 535
51. Where a sentence exceeds the court's power, the judgment may be set aside and the cause remanded for a legal sentence. *Drawbridge v. State* 535
52. No consequences follow conviction of felony except those declared by Constitution or statute. *Bosteder v. Duling* 557
53. Extent of cross-examination is largely in the court's discretion, and, in a prosecution for rape, *held* that no prejudicial abuse thereof was shown. *Swogger v. State* 621
54. In a prosecution for rape, evidence that accused had criminal relations with prosecutrix closely related in time to the principal offense *held* admissible on the question of intent. *Swogger v. State* 621
55. In a prosecution for rape, testimony as to improper conduct of accused with prosecutrix of the same character as that charged is admissible. *Swogger v. State* 621
56. In a prosecution for rape, the credibility of prosecutrix and defendant are questions for the jury. *Swogger v. State* 621
57. Complaint *held* to charge an offense under sec. 3238, Comp. St. 1922, and not under the "bootlegging" statute. *Coxbill v. State* 634
58. Objection to introduction in evidence of prosecutrix' clothing that no sufficient foundation was laid is insufficient to raise the question as to whether the clothing was in the same condition as immediately following the assault. *Lewis v. State* 659
59. Photographs are admissible to describe a person, place, or thing. *Sharp v. State* 737
60. Photograph of impression of a palm print *held* admissible, on showing of loss of original. *Sharp v. State* 737
61. Instruction urging jury to agree on verdict disapproved. *Sharp v. State* 737
62. Accused sentenced not less than the minimum nor more than the maximum penalty must serve the maximum, unless released by the board of pardons and paroles, or the sentence is changed on error proceedings. *Hulbert v. Fenton* 818
63. An information charging four persons jointly with burning insured property belonging to one of them, *held* to state but one offense. *State v. Girt* 833
64. Sickness *held* to warrant discharge of jury, and that accused was not thereby acquitted. *Salistean v. State* 838
65. It is presumed, in absence of a bill of exceptions showing otherwise, that the necessity for discharging a jury was established by sufficient evidence. *Salistean v. State* 838

66. Instruction limiting evidence to the particular purpose for which it was admissible *held* proper. *Salistean v. State*.... 838
67. Secondary evidence received without objection may be considered. *Salistean v. State*.... 838

Damages.

Liquidated damages of 25 cents a bushel for wheat sold contrary to members' contract with wheat growers' association allowed as not disproportionate to probable damages. *Nebraska Wheat Growers Ass'n v. Smith*.... 177

Deeds.

1. The burden of proof is on one alleging mental incapacity. *Hansen v. Roos*.... 761
2. Where a deed from mother to son was executed and delivered for a sufficient consideration, the burden of establishing undue influence rests on one who attacks it. *Hansen v. Roos*.... 761
3. Where a conveyance creates an estate of survivorship, courts will enforce it. *Arthur v. Arthur*.... 781
4. Covenant of warranty to defend title *held* equivalent to one of quiet enjoyment running with the land, and not breached until actual or constructive eviction. *Campbell v. Gallentine*.... 789
5. The measure of damages for breach of covenant of warranty resulting in total loss of the estate is the purchase price of the land, with interest. *Campbell v. Gallentine*.... 789
6. Where the covenant of warranty was for a fee, and a life estate only passed, the damages are the consideration less the value of the life estate. *Campbell v. Gallentine*.... 789
7. Evidence *held* to sustain constructive eviction. *Campbell v. Gallentine*.... 789

Depositaries.

Certificates of deposit retained by a retiring state treasurer, who gave his check therefor, but later renewed and delivered to his successor, receiving a check therefor, *held* not a state deposit for which sureties on depository bond were liable. *State v. First Nat. Bank*.... 754

Dismissal.

A dismissal after final submission of a case, to be effective, must be by order of court entered on the journal. *Knaak v. Brown*.... 260

Divorce.

1. In a divorce suit, it is not the interlocutory decree but

the final decree on appeal that controls. *Westphalen v. Westphalen* 217
2. An appeal suspends a decree of divorce, and the marital relations continue until final determination of the appeal. *Westphalen v. Westphalen* 217
3. A suit for divorce abates on the death of either party before final decree, and is not subject to revivor. *Westphalen v. Westphalen* 217
4. Custody of child awarded to its father, rather than to its grandparents, with whom its mother, who is found unfit to have its custody, makes her home. *Voboril v. Voboril* 615
5. In awarding custody of a child of tender years, the law looks to the welfare of the child. *Voboril v. Voboril* 615
6. Essential of abandonment, stated. *Ellis v. Ellis* 685
7. Refusal to allow deserting spouse to return tolls running of statute. *Ellis v. Ellis* 685
8. During pendency of divorce suit, the parties must live apart, and such separation cannot constitute abandonment. *Ellis v. Ellis* 685
9. Evidence *held* not to sustain divorce on ground of abandonment, but sufficient to sustain it on ground of extreme cruelty. *Ellis v. Ellis* 685
10. Evidence held to sustain decree. *McDonald v. McDonald* .. 708

Election of Remedies.

A party may not pursue inconsistent remedies. *Deleski v. Peters Trust Co* 547

Elections.

1. Statutes providing for the details of election are directory. *State v. Grimm* 230
2. Refusal of a canvassing board to count certain votes will not be permitted to disfranchise the voters. *State v. Grimm* 230
3. The duties of an election canvassing board are ministerial. *State v. Grimm* 230
4. An election canvassing board has no judicial power. *State v. Grimm* 230
5. The duties of election officers in counting ballots are purely ministerial. *Shaw v. Stewart* 315
6. Election officers are not clothed with judicial power. *Shaw v. Stewart* 315
7. Statutes are to be construed liberally in favor of the voter's exercise of suffrage. *Shaw v. Stewart* 315
8. Technical rules of statutory construction in an election contest will not be permitted to disfranchise the voter. *Shaw v. Stewart* 315

9. Rejection of ballots in which the name of a candidate was written in and properly marked with "X" *held* improper. *Shaw v. Stewart* 315
10. The intent of the voter governs if it can be determined from the ballot. *Shaw v. Stewart* 315

Equity.
1. Where one of two innocent parties must suffer a loss, he whose negligence caused the injury should bear the loss. *Deleski v. Peters Trust Co* 547
2. Equity will not take jurisdiction of an action on notes given as a pledge to pay an assessment on bank stock, on the ground of avoiding multiplicity of suits, there being no question of accounting. *Hill v. May* 690

Estoppel.
One knowingly permitting a mortgagee to transfer a mortgage to an innocent purchaser is estopped to claim an interest therein. *Deleski v. Peters Trust Co* 547

Evidence. SEE TRIAL, 2.
1. The grantee may deny by parol evidence a recital in his deed that he assumed and agreed to pay certain mortgages. *Peters Trust Co. v. Miskimins* 88
2. Defendant's failure to testify to defensive matters peculiarly within his knowledge may be considered by the jury. *Talich v. Marvel* 255
3. Extent of exhibiting evidence of injuries to the jury is largely within the court's discretion. *Wilson v. Thayer County Agricultural Society* 579
4. The owner of personalty is competent to testify to its value. *Thomas v. Scoutt* 848

Fixtures.
1. Fixtures attached by a tenant may be removed during tenancy, if done without injury to the freehold. *Moran v. Otoe County Nat. Bank* 515
2. The landlord cannot object to removal of mortgaged movable fixtures, where the mortgagor consented to the removal. *Moran v. Otoe County Nat. Bank* 515

Forgery.
To prove forgery, the state must show that accused signed the name of another without authority. *Brown v. State* 325

Fraud.
1. Elements of false representation, stated. *Myers v. Union Nat. Bank* 49
2. Evidence of false representations in sale of a debenture

held insufficient on motion to direct a verdict. *Myers v. Union Nat. Bank* 49

Fraudulent Conveyances.

1. A debtor may prefer a creditor if the value of the property transferred is reasonably proportionate to the debt secured. *Bank of Plymouth v. Ritchey* 493
2. A conveyance of land, though absolute on its face, with a secret understanding that it is a mortgage, *held* not fraudulent as to the other creditors as a matter of law. *Bank of Plymouth v. Ritchey* 493
3. A stipulation in a mortgage or similar instrument, reserving surplus proceeds after payment of the debt secured, does not vitiate the instrument. *Bank of Plymouth v. Ritchey* 493
4. Evidence *held* to sustain decree denying relief to plaintiff, and establishing right of subrogation in defendants. *Bank of Plymouth v. Ritchey* 493
5. In a suit to annul a conveyance of realty, evidence *held* to entitle defendants to notes given on subsequent sale of realty. *Bank of Plymouth v. Ritchey* 493

Gaming.

It is not essential in an information for gaming to charge that defendant gambled on the device with others, or permitted others to gamble thereon. *State v. Halbert* 194

Guaranty.

1. Extending credit may be sufficient consideration for a guaranty of discounted notes. *Nebraska Nat. Bank v. Parsons* 770
2. Guaranty of discounted notes *held* to include renewals and existing transactions. *Nebraska Nat. Bank v. Parsons* 770

Habeas Corpus.

1. On an application for a writ of habeas corpus, errors or irregularities in the criminal trial, not jurisdictional, will not be considered. *McElhaney v. Fenton* 299
2. Habeas corpus will not lie on the ground that a sentence is excessive, such a sentence being erroneous, and not void. *McElhaney v. Fenton* 299
3. Habeas corpus is a proper remedy where one is deprived of liberty by a void judgment. *In re Resler* 335
4. Petitioner *held* entitled to discharge on ground of former acquittal. *In re Resler* 335
5. Habeas corpus will not lie on the ground of irregularities in a judgment or sentence. *Hulbert v. Fenton* 818
6. Habeas corpus is a collateral proceeding as an attack on

a judgment, and extrinsic evidence is inadmissible to show its invalidity, if regular on its face, and rendered by a court having jurisdiction of the offense and the person. *Hulbert v. Fenton* 818
7. Habeas corpus cannot be used as a substitute for proceedings in error. *Hulbert v. Fenton* 818
8. A prisoner liberated by habeas corpus may, on reversal on appeal, be remanded to custody. *Hulbert v. Fenton* 818

Highways.

1. A county is not an insurer of users of highways being repaired, but must use reasonable and ordinary care to maintain highways reasonably safe for travelers exercising reasonable and ordinary care. *Frickel v. Lancaster County* 506
2. A city maintains water pipes beneath county roads subject to public use, and on change of grade must change the pipe lines at its own expense. *City of Chadron v. State* 650
3. Persons grading public roads may not destroy city water pipes laid thereunder without giving reasonable notice and opportunity to change the pipes, and if the pipes are destroyed without notice the state is liable. *City of Chadron v. State* 650
4. A city may recover the reasonable value of water pipes destroyed by grading a public road, as of the date of their destruction. *City of Chadron v. State* 650

Homestead.

1. An unacknowledged written contract to convey a homestead is void. *Anderson v. Cusack* 643
2. A mortgagee of a homestead may ordinarily take advantage of the invalidity of a prior mortgage not properly acknowledged. *Anderson v. Cusack* 643

Homicide.

1. A purpose to kill and malice are material elements of murder in the second degree and must be proved. *Whitehead v. State* 143
2. Where the evidence sustains only manslaughter, submitting the issue of murder in the second degree *held* error, though accused is convicted of manslaughter. *Whitehead v. State* 143
3. Where eye-witnesses testify to the circumstances surrounding a homicide, it is error to instruct that there is a presumption of malice from the homicidal act. *Whitehead v. State* 143

4. Verdict of murder in the first degree, based on some evidence of deliberation and premeditation, is conclusive. *Bartlett v. State* 148
5. Evidence *held* to warrant finding that at the time of committing the crime accused was mentally responsible. *Williams v. State* 277
6. In a prosecution for uxoricide, as bearing on motive, exclusion of letters by deceased to accused, showing good relations between them, to contradict the state's evidence of ill will, *held* error. *Sharp v. State* 737

Husband and Wife.

1. A judgment on a contract of a married woman, not made with reference to her own business, can be enforced only against property she possessed at the date of contract. *Giltner State Bank v. Talich* 236
2. Property acquired by a married woman after the making of a contract cannot be subjected to payment of a judgment thereon in general form. *Giltner State Bank v. Talich* 236
3. Judgments in general form on contracts of a married woman, approved. *Giltner State Bank v. Talich* 236
4. Procedure pointed out, where property of a married woman not liable therefor is seized on execution or garnishment. *Giltner State Bank v. Talich* 236
5. Damages in an action for alienation of affections are confined ordinarily to loss of comfort, society, love and protection. *Larsen v. Larsen* 601
6. Deed *held* to vest title in divorced surviving wife. *Arthur v. Arthur* 781
7. Measure of damages for alienation of affections, stated. *Sowle v. Sowle* 795
8. The burden is on the husband or his representatives to show that an antenuptial contract, apparently unjust to the wife, was fairly procured. *Stahl v. Stahl* 882
9. In making an antenuptial contract, the prospective husband must make full disclosure as to the amount and value of his property. *Stahl v. Stahl* 882
10. Where the provision for the intended wife by an antenuptial contract is grossly disproportionate to the interest she would acquire by law, the burden is on those claiming the validity of the contract to show full disclosure to her, before she signed it, of the extent and value of the property. *Stahl v. Stahl* 882
11. Wife *held* not bound by antenuptial contract. *Stahl v. Stahl* 882

Incest.

"Licentiously cohabit" in incest statute *held* to contemplate one or more acts of sexual intercourse by a father with his daughter. *Mathews v. State* 158

Indictment and Information.

1. Under a statute providing increased punishment for a second or subsequent conviction for violation of the liquor laws, prior convictions must be alleged and proved. *Osborne v. State* 65
2. An information must charge each essential element of the crime. *Knothe v. State* 119
   State v. Halbert 194
3. Information *held* not to charge "bootlegging." *Knothe v. State* 119
4. "Contrary to the form and provisions of chapter 106, Laws 1925," in a complaint, *held* a conclusion, not curing defects in a complaint for bootlegging. *Knothe v. State* 119
5. Abrogation of the distinction between principal and accessory *held* not to deny accused the right to demand the nature and cause of accusation. *Scharman v. State* 109
   State v. Girt 833
6. An information charging theft and stating that it was committed by others through defendant's procurement alleges only one offense. *Scharman v. State* 109
7. An information must charge each essential element of the crime. *State v. Halbert* 194
8. Where a statute contains an exception, an express negation is not necessary where the charge preferred conclusively imports a negation. *State v. Halbert* 194
9. Information on which petitioner was tried and acquitted *held* to properly charge petitioner as principal with murder by poison. *In re Resler* 335

Injunction.

1. Dismissal of an action in which a temporary injunction was issued gives rise to a cause of action on the bond. *Beatty v. Casselman* 104
2. Dismissal without prejudice of an action to enjoin removal of sand and gravel, in which a temporary injunction was issued, does not adjudicate the right to remove sand and gravel. *Beatty v. Casselman* 104
3. In an action on a bond for an injunction against removal of sand and gravel, defendant may counterclaim for damages by reason of wrongful removal. *Beatty v. Casselman* 104
4. Where issuance of an injunction is ancillary, damages for

its wrongful issuance are limited to the expenses incurred in securing its dissolution. *Beatty v. Casselman* 104
5. Equity will not ordinarily enjoin acts which by statute are punishable by fine; but, if they threaten public welfare and the criminal laws do not afford adequate remedy, they may be enjoined. *State v. Heldt* 435

Insurance.
1. A life insurance company operating under a state charter is affected with a public interest. *Strand v. Bankers Life Ins. Co* 357
2. A life insurance company exacting a premium in advance is liable for failure to act on the application in a reasonable time. *Strand v. Bankers Life Ins. Co* 357
3. Failure of a life insurance company to act on an application for two weeks, while seeking an omitted answer to a question in the medical report, *held* not actionable negligence. *Strand v. Bankers Life Ins. Co* 357
4. Two weeks' delay on part of the medical examiner *held* not chargeable to the insurance company sued for failure to issue a policy. *Strand v. Bankers Life Ins. Co* 357
5. It is the duty of a life insurance company taking a premium in advance without assuming any obligation for insurance to act on the application in a reasonable time. *Strand v. Bankers Life Ins. Co* 357
6. A life insurance company taking a premium in advance is trustee to return the premium if the application is rejected, and for its unconditional acceptance if the application is approved and the policy delivered. *Strand v. Bankers Life Ins. Co* 357
7. Changing a life insurance company from an assessment to a stock basis *held* not to require consent of all the members, where the articles of incorporation reserved the right to make the change. *Leininger v. North American Nat. Life Ins. Co* 801
8. Plaintiff *held* estopped by laches to maintain an action to annul a change of plan of business of a life insurance company. *Leininger v. North American Nat. Life Ins. Co* ... 801

Interest.
1. A state statute fixing interest rates on loans does not contravene the federal Constitution vesting congress with power to coin money and regulate the value thereof. *Phillips v. Hunt* 395
2. The court may include interest in a judgment against the state. *City of Chadron v. State* 657

Intoxicating Liquors.

1. Under sec. 3288, Comp. St. 1922, accused may be acquitted of felony, but convicted as for a first or second offense, and instructions should be given on that theory. *Osborne v. State* 65
2. Sec. 3241, Comp. St. 1922, is complete within itself, both as to the misdemeanor and the punishment therefor, and sec. 3288 is without application. *Osborne v. State* 65
3. Penalty for illegal sale of intoxicating liquors considered. *State v. Dineen* 174
4. Former conviction *held* a bar. *Crommett v. State* 399
5. Information *held* to charge an offense under sec. 3238, Comp. St. 1922, punishable under sec. 3288, Comp. St. 1922, to which may be added conditions prescribed in sec. 10169, Comp. St. 1922. *Drawbridge v. State* 535
6. Court *held* without jurisdiction, under sec. 3288, Comp. St. 1922, to impose a penalty of both fine and imprisonment. *Coxbill v. State* 634

Joint Tenancy.

Each joint tenant is entitled to partition of the estate during the life of all the tenants; and if there are but two, on the death of one, the entire estate goes to the survivor. *Arthur v. Arthur* 781

Judges.

An acting county judge appointed by the county board is not entitled to the salary of the office during disability of the incumbent. *Frasier v. Dundy County* 372

Judgment.

1. The rule of the law of the case does not apply, when there is substantial change in testimony. *State v. American State Bank* 81
2. Transcript and collection of judgment *held* proper, though debtor has sufficient realty in county where judgment is rendered to satisfy it. *Talich v. Marvel* 246
3. A judgment lien on realty attaches only to the judgment debtor's actual interest, and is subject to existing equities. *Knaak v. Brown* 260
4. Intervener not having changed its position in reliance on entry of satisfaction, decree of foreclosure *held* properly reinstated. *Knaak v. Brown* 260
5. A satisfaction of judgment may be avoided by evidence that payment was not made, or that it has become inoperative. *Knaak v. Brown* 260
6. Evidence *held* insufficient to sustain decree vacating a judgment for perjury. *Gutru v. Johnson* 309

7. Newly discovered cumulative evidence will not warrant a new trial, nor justify vacating a judgment. *Gutru v. Johnson* 309
8. Evidence of perjury which by reasonable diligence could have been produced to defeat a judgment may not be used in a suit to vacate the judgment. *Gutru v. Johnson* 309
9. The law of merger as applied to judgments does not deprive the prevailing party of privileges under his contract. *State v. Citizens State Bank* 593
10. Though a debt may be merged in a judgment as to certain property, it may remain an effective cause of action against other property. *State v. Citizens State Bank* 593
11. The doctrine of merger will not be applied to destroy protection of the guaranty fund to a depositor who has reduced his claim for deposit to judgment. *State v. Citizens State Bank* 593

Judicial Sales.

1. Judicial sale of land by undivided halves and manner of distribution of the proceeds *held* proper. *Sibbernsen v. Peterson* 131
2. "Plaintiff," as used in statute relating to redemption from judicial sale, means a party granted affirmative relief. *Lincoln Savings & Loan Ass'n v. Anderson* 199

Jury.

1. The list from which the jury is drawn should not be selected by officers having an interest in the litigation. *Nelson v. State* 26
2. Where officers who provided the jury list were members of a secret society which employed a detective to assist in conviction of defendant, *held* error to refuse to quash the panel. *Nelson v. State* 26

Libel and Slander.

1. Words are not ordinarily actionable *per se*, unless they impute crime, or subject one to public ridicule, ignominy, or disgrace. *Davis v. Meyer* 251
2. Statement that one is a half-breed Mexican is not actionable *per se*. *Davis v. Meyer* 251
3. In an action for slander, admission of rumors not attributable to defendant *held* error. *Davis v. Meyer* 251

Limitation of Actions.

An action for breach of covenant of warranty is barred in five years from date of breach, unless limitations are suspended. *Campbell v. Gallentine* 789

Mandamus.

Mandamus does not lie to compel a railroad company to provide a larger train crew than the law prescribes. *State v. Chicago, St. P., M. & O. R. Co.* 306

Master and Servant.

1. Findings of fact in compensation case on sufficient evidence will not be reversed unless clearly wrong. *City of Fremont v. Lea* 565
2. Evidence *held* to show that injury to a city fireman was not due to his wilful negligence. *City of Fremont v. Lea* 565
3. Where compensation award is substantially reduced on appeal, attorney's fees are not allowable. *City of Fremont v. Lea* 565
4. Where work is likely to result in injury unless preventive measures are adopted, the employer cannot relieve himself of liability by employing a contractor. *Wilson v. Thayer County Agricultural Society* 579
5. A principal is liable to third persons for misfeasances, negligence, and omissions of duty of his agent; but the agent is not ordinarily liable to third persons for his own nonfeasances or omissions of duty in the course of his employment. *Wilson v. Thayer County Agricultural Society* 579
6. Final authority to award a lump sum settlement for death or permanent disability lies in the district courts, subject to review by appeal. *Jackson v. Ford Motor Co.* 758
7. Attorney's fees as penalty for waiting time disallowed. *Jackson v. Ford Motor Co.* 758
8. In an action for personal injuries, exclusion of order in compensation proceedings *held* proper. *Day v. Metropolitan Utilities District* 711

Mortgages.

1. A stipulation in a mortgage authorizing acceleration of the debt for failure to pay interest or taxes may be enforced. *Crawford v. Houser* 62
2. Suit to foreclose a mortgage for default in payment of interest and taxes will not abate by payment into court of the interest and taxes. *Crawford v. Houser* 62
3. Evidence *held* to show that grantee did not assume and agree to pay a certain mortgage, notwithstanding the deed so recited. *Peters Trust Co. v. Miskimins* 88
4. One seeking to redeem from foreclosure sale must satisfy the decree and prior liens, and the court should direct return of purchaser's money. *Lincoln Savings & Loan Ass'n v. Anderson* 199

5. Duty of party seeking to redeem stated, where the property is bid in by a third party. *Lincoln Savings & Loan Ass'n v. Anderson* 199
6. In a mortgage foreclosure, plaintiff is required to plead and, if denied, must prove that no proceeding at law to recover the debt has been instituted. *McMonies v. Lindgren* 207
7. Necessary issues to be determined by decree of foreclosure, stated. *Union Central Life Ins. Co. v. Saathoff* 385
8. Findings of fact in a foreclosure decree are not reviewable on objections to a deficiency judgment. *Union Central Life Ins. Co. v. Saathoff* 385
9. A decree of foreclosure showing liability for deficiency precludes defendant, on application for deficiency judgment, from presenting any defense available prior to announcement of the decree. *Union Central Life Ins. Co. v. Saathoff* 385
10. Equity will not cancel the release of a mortgage to the prejudice of an innocent purchaser for value. *Deleski v. Peters Trust Co* 547
11. A purchaser of land is charged with notice of the terms of an assumed mortgage, including an acceleration clause. *Auker v. Perry* 720
12. The note, coupons, and the mortgage securing them should be considered together. *Auker v. Perry* 720

Municipal Corporations.

1. A suit to enjoin collection of sewer assessments *held* barred by laches. *Frohnen v. Sanitary Sewer District* 84
2. A city is not liable for negligent injuries to members of a volunteer fire department. *Thompson v. City of Albion* .. 208
3. A city council acts judicially in determining the sufficiency of objections to paving, and its decision is final, unless appeal is taken. *Hiddleson v. City of Grand Island* 287
4. Objections to paving must be filed within the statutory time. *Hiddleson v. City of Grand Island* 287
5. Where abutting property owners file sufficient objections to paving, the council should repeal the ordinance creating the district, though the district ceases to legally exist without formal repeal. *Hiddleson v. City of Grand Island* .. 287
6. "Forthwith" in statute relating to paving defined. *Hiddleson v. City of Grand Island* 287
7. Failure to proceed with paving for a period of years, neither repeals the ordinance creating the district, nor destroys the right to pave. *Hiddleson v. City of Grand Island* 287

8. Petition for improvement district and paving a street *held* to authorize paving, without petition therefor after creating improvement district. *Gall v. Beckett* 347
9. Charter of South Omaha *held* to authorize creation of paving district more extensive than lots abutting on a street, on petition of lot owners representing a majority of the foot-frontage. *Gall v. Beckett* 347
10. The right of the legislature to give a city power to adopt zoning ordinances is derived from the police power. *Pettis v. Alpha Alpha Chapter of Phi Beta Pi* 525
11. If the validity of legislative classification for zoning purposes is fairly debatable, the legislative judgment controls. *Pettis v. Alpha Alpha Chapter of Phi Beta Pi* 525
12. Zoning law will not be held invalid because individual cases may be innocuous. *Pettis v. Alpha Alpha Chapter of Phi Beta Pi* 525
13. If public health, safety, comfort, or general welfare could have justified zoning ordinance, courts must assume they justified it. *Pettis v. Alpha Alpha Chapter of Phi Beta Pi* 525
14. Evidence *held* insufficient to show actionable negligence in maintaining a manhole in a sidewalk. *Hashberger v. City of Schuyler* 639
15. A taxpayer, without showing injury peculiar to himself, may enjoin illegal expenditures by a public board or officer. *Neumann v. Knox* 679
16. A contract for the purchase of appliances for repairing a municipal lighting plant at a cost of more than $500 contemplates an "improvement", within sec. 4180, Comp. St. 1922, as amended by ch. 51, Laws 1925. *Neumann v. Knox* 679
17. The council of a city of the second class must advertise for bids for appliances for repairing the lighting plant, where the cost exceeds $500. *Neumann v. Knox* 679
18. Evidence *held* sufficient to require submission of issues of negligence and contributory negligence to the jury. *Day v. Metropolitan Utilities District* 711
19. General laws applicable to cities yield to charter provisions framed pursuant to the Constitution. *Sandell v. City of Omaha* 861
20. Publication of a home rule charter amendment *held* sufficient. *Sandell v. City of Omaha* 861

Negligence.

1. The owner of an automobile gratuitously carrying a passenger owes him the duty of exercising ordinary care. *Jessup v. Davis* 1

2. Parties are not engaged in a joint enterprise, within the law of negligence, unless there is a community of interest and an equal right to govern each other's conduct. *Jessup v. Davis* 1
3. Negligence of driver of automobile colliding with train *held* more than slight as compared with railroad's negligence, and to preclude recovery. *Allen v. Omaha & S. I. R. Co* 221
4. Where the facts show beyond reasonable dispute that plaintiff's negligence was more than slight as compared with defendant's, the court should direct a verdict for defendant. *Allen v. Omaha & S. I. R. Co* 221
5. Where from the facts and circumstances proved reasonable minds might draw different conclusions concerning negligence or lack of negligence, it is error to direct a verdict. *Boomer v. Lancaster County* 295
6. Evidence that an injury was the proximate cause of appendicitis *held* insufficient. *Frickel v. Lancaster County* 506
7. Evidence of subsequent repairs is not admissible to prove antecedent negligence. *Frickel v. Lancaster County* 506
8. Negligence of a parent *held* not imputable to child. *Wilson v. Thayer County Agricultural Society* 579
9. Comparison of negligence is a question for the jury. *Day v. Metropolitan Utilities District* 711

New Trial.

Lack of diligence in producing evidence in mortgage foreclosure *held* to justify denial of a new trial in an independent suit in equity. *Avery Co. v. Hanks* 662

Notice.

One put on inquiry will be charged with notice of facts which he would have ascertained by reasonable inquiry. *Talich v. Marvel* 255

Officers.

One holding a statutory office must perform every legal service and must look to the statute for compensation. *Frasier v. Dundy County* 372

Parent and Child.

The court may not deprive parents of custody of a child, unless it be shown that the parents are unfit or have forfeited the right. *Voboril v. Voboril* 615

Parties.

1. Assignor of contract to purchase land *held* not a necessary party to action for failure to convey. *Pollard v. Larson* 136

2. Though statutes providing for intervention will be liberally construed, an intervener must substantially comply with them. *Parker v. City of Grand Island* 892
3. An intervener must plead some interest in the subject-matter of the litigation; a mere denial of plaintiff's right is insufficient. *Parker v. City of Grand Island* 892
4. An interest in the intervener is a traversable fact, is indispensable, and must be pleaded. *Parker v. City of Grand Island* 892

Partition.

A statutory right to partition is binding on courts of equity. *Arthur v. Arthur* 781

Physicians and Surgeons.

1. Dismissal of action for malpractice held improper in view of evidence. *Kimble v. Roeder* 589
2. Petition *held* to state a cause of action for surgeon's negligence in operating and subsequent treatment, and not for negligence in determining on necessity for operation. *McDaniel v. Wolcott* 675
3. In an action for malpractice, the acts charged as negligence *held* to require expert testimony; the doctrine *res ipsa loquitur* having no application. *McDaniel v. Wolcott* .. 675
4. Evidence *held* insufficient to require submission of question of surgeon's negligence to the jury. *McDaniel v. Wolcott* 675

Pleading.

1. Where a party answers over after an adverse ruling on a demurrer and goes to trial on the merits, he waives the error, if any, in such ruling. *Davis v. Meyer* 251
2. A general denial in an answer is modified and supplanted by what follows. *Norton v. Bankers Fire Ins. Co.* 490
3. A general denial may be supplanted by what precedes as well as by what follows it. *Bosteder v. Duling* 557
4. Admission in answer in action for alienation of affections *held* not an admission of wrongdoing. *Larsen v. Larsen* 601
5. A motion for judgment on the pleadings requires a consideration of all the pleadings for ultimate facts. *McMillan v. Chadron State Bank* 767

Pledges.

A party holding different collateral securities for a debt need not exhaust one before proceeding against the other. *Phelps v. Williams* 101

Principal and Agent.

An agent will be presumed to have disclosed to his principal material facts gained by him pertaining to his agency. *Talich v. Marvel* 255

Process.

1. Where one of several joint guarantors is properly sued and summoned in a county not his residence, summons for others may be issued to and served in another county in which they reside. *Nebraska Nat. Bank v. Parsons* 770
2. Service of summons on defendant in a county not his residence, while waiting for a train on his way home from another state, *held* valid. *Nebraska Nat. Bank v. Parsons* .. 770

Railroads.

1. A traveler failing, without reasonable excuse, to look and listen for the approach of trains is guilty of negligence. *Allen v. Omaha & S. I. R. Co* 221
2. Except in the case of main line freight trains carrying both passengers and freight, mixed trains are not required to use two brakemen. *State v. Chicago, St. P., M. & O. R. Co* 306
3. Railroad *held* required to construct and maintain farm crossings. *Holmberg v. Chicago, St. P., M. & O. R. Co* 727

Rape.

1. Sufficient corroboration of prosecutrix is shown, if opportunity and inclination on part of the defendant and corroborative circumstances were shown. *Lewis v. State* 659
2. Corroboration of prosecutrix may consist of circumstances, and is not limited to the principal fact. *Swogger v. State* .. 621
3. Evidence of opportunity and inclination *held* to sufficiently corroborate prosecutrix' direct and positive evidence that accused ravished her. *Swogger v. State* 621

Receivers.

1. An intervener cannot object to jurisdiction over the defendant. *Bodge v. Skinner Packing Co* 41
2. A foreign receiver may be given permission to sue in the courts of Nebraska. *Bodge v. Skinner Packing Co* 41
3. A foreign receiver may sue for the appointment of an ancillary receiver. *Bodge v. Skinner Packing Co* 41
4. Appointment of a receiver is ancillary, and ordinarily will be made only in aid of the main case; but, where a general receiver for a foreign corporation has been appointed by a court of its domicile, the courts of Nebraska may appoint ancillary receivers. *Bodge v. Skinner Packing Co* ... 41

5. Pendency of a cause in a foreign state, in which a receiver has been appointed, will authorize appointment of an ancillary receiver in Nebraska. *Bodge v. Skinner Packing Co.* 41

Receiving Stolen Goods.

"Conceal," in statute relating to poultry stealing, means to secrete with intent to deprive the owner of his property. *Bailey v. State* 77

Religious Societies.

1. A majority of the members of a church which is nonsynodical and independent have control of its property and the right to discharge its pastor. *St. Paul English Lutheran Church v. Stein* 114
2. Ordinarily, courts will not inquire into ecclesiastical teachings of a pastor or congregation to determine which of two church factions is entitled to church property. *Reichert v. Saremba* 404
3. Mandatory injunction against use of church property denied. *Reichert v. Saremba* 404

Replevin.

In replevin, damages for detention of the property only are recoverable on a return; if not returned, the measure of damages is its value, with interest from date of taking. *Oak Creek Valley Bank v. Hudkins* 628

Robbery.

Evidence *held* to sustain conviction. *Hynes v. State* 391

Signatures.

Where a person directs another to sign his name, the signature becomes his own. *In re Estate of Winslow* 553

Specific Performance.

1. Right to specific performance *held* not lost by vendor's failure to tender a warranty deed and abstract. *Pollard v. Larson* 136
2. A school site on a half-section of land *held* insufficient to prevent specific performance of contract of sale. *Pollard v. Larson* 136
3. Petition to require performance of a co-operative marketing contract *held* not to state a cause of action, by failure to allege notice of acceptance of application for membership. *Nebraska Wheat Growers Ass'n v. Roach* 412
4. Substantial performance or tender of substantial performance is a prerequisite to a suit for specific performance.
   Bank of Plymouth v. Ritchey 493

5. Equity will not enforce a contract, unless it is complete and certain in all essential elements. *Mercer v. Payne & Sons Co*..... 420
6. Specific performance of a contract will not be decreed, unless it has been concluded. *Mercer v. Payne & Sons Co*... 420
7. To entitle a party to specific performance of a contract, there must be a clear, mutual understanding and a positive assent thereto by each party. *Mercer v. Payne & Sons Co*..... 420
8. Mutuality of obligation is an essential element of right to specific performance. *Mercer v. Payne & Sons Co*..... 420
9. Contract *held* not sufficiently definite to be susceptible of specific performance. *Mercer v. Payne & Sons Co*..... 420

State Railway Commission.

1. The state railway commission has power, in absence of statutory or constitutional inhibition, to adopt rules and course of procedure. *Holmberg v. Chicago, St. P., M. & O. R. Co*..... 727
2. In proceedings before the state railway commission involving annulment, modification, or alteration of a previous order, the doctrine of estoppel or *res judicata* does not apply. *Holmberg v. Chicago, St. P., M. & O. R. Co*..... 727

States.

1. Review of a decision of the auditor and secretary of state on a claim against the state is by appeal to the district court as provided by sec. 6218, Comp. St. 1922. *Pickus v. State*..... 869
2. Manner of appeal from decision of the auditor and secretary of state on a claim against the state pointed out. *Pickus v. State*..... 869

Statutes.

1. Ch. 106, Laws 1925, the bootlegging act, *held* amendatory and consistent with its title. *Knothe v. State*..... 119
2. The word "bootlegging" in the title of the statute (Laws 1925, ch. 106), in connection with the provision as to penalties for first, second, and subsequent convictions, *held* not to invalidate the statute. *Knothe v. State*..... 119
3. A statute requiring return of election ballots by a given day *held* to be directory. *State v. Grimm*..... 230
4. Where, by amendment and repeal, words of a former statute are changed, but it is intended that the statute shall continue to operate, it is not a repeal of the former law as amended. *Hiddleson v. City of Grand Island*..... 287
5. The provisions of sec. 9, ch. 7, Laws 1925, the bovine

tuberculosis act, *held* unconstitutional, as not within the title of the act. *State v. Heldt* 435
6. Sec. 9, ch. 7, Laws 1925, the bovine tuberculosis act, not being an inducement to passage of the act, the remaining sections are constitutional. *State v. Heldt* 435
7. A proposed amendment of a statute must be germane to the subject-matter of the act sought to be amended. *Day v. Metropolitan Utilities District* 711

Torts.

An act wrongfully done by the co-operation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally. *Bosteder v. Duling* 557

Trial. SEE APPEAL AND ERROR. CRIMINAL LAW.
1. Litigants are entitled to have the issues submitted without the introduction of extraneous evidence tending to mislead the jury. *Jessup v. Davis* 1
2. Evidence as to whether defendant carried indemnity insurance is admissible. *Jessup v. Davis* 1
3. Questions as to terms and interpretation of laws of a sister state are questions of fact. *United Bank & Trust Co. v. McCullough* 327
4. The credibility of witnesses and weight of evidence are questions for the jury. *Kimble v. Roeder* 589
5. Where the evidence is sufficient to sustain a verdict, it is error to dismiss the action. *Kimble v. Roeder* 589
6. An instruction should not limit the jury to consideration of facts enumerated therein, when other evidential facts bear on the questions involved. *Norton v. Bankers Fire Ins. Co* 490
7. It is error to include in an instruction an assumption of a material fact not proved, and base a right of recovery thereon. *Norton v. Bankers Fire Ins. Co* 490
8. Instruction *held* erroneous for failure to properly state the issues. *Larsen v. Larsen* 601
9. It is not error to fail to instruct on comparative negligence, when no evidence of contributory negligence is offered. *Martin v. Brownell Building Co* 749

Trusts.
1. Accountability of a trustee must accord with principles of justice. *Baird v. Lane* 413
2. A trustee of money for safe-keeping and investment must account for investments and income, report transactions to the beneficiary, and surrender the trust funds on termination of the trust. *Baird v. Lane* 413

3. Trustee *held* liable for principal, and interest at 7 per cent. *Baird v. Lane* 413
4. Trustee *held* not entitled to compensation on account of neglect of duty. *Baird v. Lane* 413
5. A trust fund may be followed in equity, only when it can be traced to and identified in some specific fund or property. *Central Nat. Bank v. First Nat. Bank* 444
6. A bank accepting a note for collection and remittance is a trustee. *Central Nat. Bank v. First Nat. Bank* 472
7. Mere change in the form of property converted by a trustee does not change the ownership. *Central Nat. Bank v. First Nat. Bank* 472
8. Where a fiduciary changes the form of and wrongfully mingles trust property with his insolvent estate, the beneficiary may resort to the mass for redress, if augmented by the trust property. *Central Nat. Bank v. First Nat. Bank* 472
9. Proceeds of commercial paper received by a bank as trustee and wrongfully credited to the owner, if equivalent to money for banking purposes, may, in equity, be treated as money. *Central Nat. Bank v. First Nat. Bank* 472
10. Where proceeds of a note are converted by a bank as trustee, a credit to the beneficiary therefor may be evidence of a credit equivalent to money. *Central Nat. Bank v. First Nat. Bank* 472
11. Conversion of trust property by a bank and credit to the beneficiary therefor, contrary to instructions, without the beneficiary's knowledge, do not necessarily create the relation of banker and depositor. *Central Nat. Bank v. First Nat. Bank* 472
12. Proceeds of a note entrusted to a bank for collection and remittance may be traced as trust funds into the general assets of an insolvent bank, and may be the basis of a preferred claim. *Central Nat. Bank v. First Nat. Bank* 472
13. Where trust funds through conversion of the bank are traced into the mass of assets of an insolvent bank, the receiver has the burden to prove the defense that the assets were not augmented. *Central Nat. Bank v. First Nat. Bank* 472

Usury.

1. A mortgage which requires payment of maximum legal interest and taxes on the mortgagee's interest in the mortgaged premises is usurious. *Stuart v. Durland* 211
2. Where the petition shows that a mortgage is usurious, defendant may avail himself of that defense without pleading same. *Stuart v. Durland* 211

Vendor and Purchaser.

1. Assignor of a land contract is liable on obligations of the contract. *Pollard v. Larson* 136
2. Purchaser in possession *held* not entitled to sue for rescission and for damages for failure to furnish a warranty deed and abstract. *Pollard v. Larson* 136
3. Evidence *held* to show breach of contract by vendor, entitling purchaser to rescission and to recover the amount paid. *Bank of Plymouth v. Ritchey* 493
4. Where a mortgagor records a fraudulent release of a mortgage, an innocent purchaser for value may convey a good title. *Deleski v. Peters Trust Co* 547

Venue.

1. The word "may" in the statute fixing the venue of suits for specific performance *held* not used in the sense of "must." *Pollard v. Larson* 136
2. Where a purchaser sued for breach of contract to convey land in county of vendor's residence, the court had jurisdiction to decree specific performance on vendee's cross-petition. *Pollard v. Larson* 136
3. Suit for specific performance may be brought in any county where service may be had. *Pollard v. Larson* 136
4. An action on a joint guaranty of discounted notes is transitory. *Nebraska Nat. Bank v. Parsons* 770

Waters.

1. A riparian owner is liable for embanking against the ordinary overflow of a stream, increasing water on the land of another to his injury. *Hofeldt v. Elkhorn Valley Drainage District* 539
2. The principle that a landowner may accelerate surface water in the natural course of drainage is inapplicable to the water of a permanent lake in a semi-arid region. *Davis v. Beem* 697
3. The draining of a lake *held* properly enjoined. *Davis v. Beem* 697

Witnesses.

1. A witness cross-examined on a matter collateral to the issue cannot, as to his answer, be contradicted by the cross-examiner. *Vanderpool v. State* 94
2. The test of whether matter is collateral is, would the cross-examining party be entitled to prove it as part of his case. *Vanderpool v. State* 94
3. Accused may be asked on cross-examination whether he has previously been convicted of felony, and if he answers

in the affirmative further questioning thereon should cease; if he answers in the negative, he may be impeached only by the record of conviction. *Vanderpool v. State*..... 94

4. If accused admits previous conviction of felony, it is error to permit, over objections, inquiry as to the character of the offense or to admit the record of conviction. *Vanderpool v. State*..... 94
5. Where a witness, on cross-examination, admits previous conviction of a felony, it is error to allow further inquiry on the subject or to permit the record of conviction to be introduced. *Bosteder v. Duling*..... 557
6. A person is not incompetent to testify to independent acts performed for one since deceased. *Bosteder v. Duling*..... 557
7. In an action for alienating husband's affections, statements made by husband to wife, out of defendant's presence, are competent to show his state of mind. *Larsen v. Larsen*..... 601
8. Evidence directly tending to disprove facts to which a witness has testified is admissible in contradiction. *Swogger v. State*..... 621
9. A witness may not be interrogated as to a previous conviction for a misdemeanor. *Coxbill v. State*..... 634